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THE BILL OF RIGHTS AND THE FREE SOCIETY: AN INDIVIDUAL VIEW*

WILLIAM O. DOUGLAS

MANY have been concerned in recent years over the lack of understanding of the Bill of Rights and the role it is designed to play in a Free Society.

One of several groups organized to promote this educational effort is the Civil Liberties Educational Foundation, of which Frank P. Graham is the President, and whose board contains such outstanding people as Nicholas Kelley, Minna Post Peyser, and Irving Dilliard.

In 1963 it prepared a document some 150 pages in length entitled *Civil Rights and Civil Liberties in the United States*, an annotated bibliography. As stated in the introduction, "While CLEF has enjoyed the cooperation, encouragement and guidance of the personnel of the New York City Board of Education, it makes no claim that this volume or any part of its contents have been approved by the Board."

Nevertheless, in February 1963, the Acting Superintendent of Schools, Bernard E. Donovan, sent a notice to principals of all day schools in the City of New York: "Heads of schools are advised that these lists do *not* have the approval of the Board of Education and the suggested use of the lists and the implementation of 'instructions' contained in the accompanying letter are to be disregarded. Books on these lists, unless they are also found on Approved Lists, may *not* be accepted by librarians either as gifts or for purchase of such books from funds provided by the Parent Teachers Associations and similar sources."

One might think that this notice possibly could have been sent out of an abundance of caution lest the bibliography be thought by some to be a *must*. But that theory is dispelled by other episodes of the same character. In 1952 the *Nation* was barred from New York City's schools because it ran an article by Paul Blanshard critical of the influence of the Catholic Church in various phases of community life, including education. In January of this year the *Nation* was restored to the list. But the Board, as if to offset the *Nation's* deleterious influence, added to the list at the same time the *National Review* which is hardly revolutionary in any sense of the word.

In California last month a school board banned from its libraries Walter Millis, *A World Without War* and *The Community of Fear* by Harrison Brown and James Real. Millis has attempted to show how a viable world system could exist if swords were turned into ploughshares and the armies, navies, and air forces disbanded. *The Community of Fear*—the product of the thinking of our leading nuclear physicists—tells in calm terms, in a non-dramatic way the actualities of the hell that would be produced by nuclear war.

* An address given at the National Civil Liberties Clearing House Fifteenth Annual Conference, Washington, D.C., March 28, 1963.

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Also banned was a brochure, *The Rule of Law in World Affairs*, by a Justice Douglas.

A youngster reading these three books or pamphlets might be disturbed at the complacency of the American people; he might indeed be roused to action. Or he might be so saturated with the tranquilizers of our times to think that the *status quo* was the rosiest of all possible regimes and remain oblivious of the great dangers inherent in our conformity.

The Censors and the Schools by Nelson and Roberts gives a national account of this passion for sifting books in school libraries to find ideological strays. Many groups would restrict education to those materials which reflect that image of America they espouse. The profit motive and the role of the private and public sectors in the economy make up one controversial area. The Anthony Comstocks bring puritannical standards to the field of the arts and literature. Religious groups with an eye to their dogmas and creeds bear down hard on books like *The Dead Sea Scrolls* by A. Powell Davies. The censor whose world is built around *laissez faire* ferrets out trains of thought that lead to socialism. The isolationist opposed to the United Nations sees the rule of law in world affairs as part of the Communist conspiracy. Those who espouse segregation, those who oppose Negro membership in trade unions, those who view with alarm Negro voting have easy standards for determining what books have un-American overtones or contents.

Education by those standards is largely propaganda for one point of view or one school of thought. That is indeed precisely the Communist approach to sociology, political science, history and art. One who visits the art galleries in Moscow that display contemporary drawings and paintings has indeed the distinct impression that he is in the billboard department of the Politburo.

Education in a Free Society should be radically different. It is education in the Dialogue—a concept that was put in classical form by Dr. Robert M. Hutchins:

Education is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view.

The civilization which I work and which I am sure, every American is working toward, could be called a civilization of the dialogue, where instead of shooting one another when you differ, you reason things out together.

In this dialogue, then, you cannot assume that you are going to have everybody thinking the same way or feeling the same way. It would be unprogressive if that happened. The hope of eventual development would be gone. More than that, of course, it would be very boring.

A university, then, is a kind of continuing Socratic conversation on the highest level for the very best people you can think of, you can bring together, about the most important questions, and the thing that you must do to the uttermost possible limits is to guarantee those men the freedom to think and to express themselves.

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Now, the limits on this freedom, cannot be merely prejudice, because although our prejudices might be perfectly satisfactory, the prejudices of our successors or of those who are in a position to bring pressure to bear on the institution, might be subversive in the real sense, subverting the American doctrine of free thought and free speech.

What Dr. Hutchins said about universities is of course equally applicable to all our public schools. For the cause of full and free inquiry is damaged, wherever and whenever it is limited.

If we are to have the strength of men unafraid of ideas, we must be alert guardians of our school libraries. This means vigilant and vocal local groups who insist that school libraries cover the spectrum.

There is, I fear, more propaganda in our education than we appreciate. Many texts subtly downgrade the Negroes in favor of the whites. Some, as a recent report by the B'nai B'rith emphasizes, proclaims Protestantism over Catholicism and Christianity over Judaism by failing to describe the history of religious liberty in a fair way. I remember how misinformed I was on the Crusades. It was my first trip to Jerusalem as an adult that made me realize that we the Christians had been the great wrongdoers. When we took Jerusalem we beheaded thousands—because they did not believe as we did. Saladin, the Kurdish leader of the Arabs who retook Jerusalem a century later, was more Christian than the Christians. For he beheaded no one.

Teaching communism is becoming a fad. But we found that in spite of our preoccupation in denouncing it we had few teachers qualified to teach it. Moreover, the tendency has been to serve a political rather than an educational need. Those who travel Communist lands or who live there know how depressing life in that society is to those who have known the heady atmosphere of the Free Society. Yet they also know that a Communist regime is not all black, while we are all white. The intermediate shades are numerous. Is there enough courage and independence left to disclose what features of the Soviet system are not evil?

There is often a failure in our education to acquaint the students with the world as it is.

Americanism is often taught as a brief for whatever American foreign policy may be in effect, no matter how defeating it may be.

The bulldozer is the symbol of American power; and the American ideal emerges as one who levels the wilderness. Yet with our vanishing forests and our mounting population, education on conservation is sorely needed, starting with the primary schools.

I do not suggest that books be burned that do not meet the test. Nor do I join the ranks of those who censor books. My plea is different. We need task forces which make as sure as possible that the literature in our schools is adequate for the multi-racial, multi-religious, and multi-ideological groups that make up our nation.

Alert community groups cognizant of the values of the Bill of Rights are

needed on many fronts. Lecturers visiting a locality are often the main source of enlightenment, as the degeneration of the press has left many areas largely devoid of insight into the forces at loose in the world. Censorship at some universities has endeavored to fence the campus off from the world of controversy. Ohio State University, under the hammering of local newspapers, has been rocked by issues of that kind.

The presence of Gus Hall, Communist official, on the campus of the University of Oregon created quite a storm—not from inside the campus but outside. Irving Brant recently reported the episode in the *Northwest Review*:

Hundreds of students heard Mr. Hall speak. What did he tell them about communism? Nothing. Did he advocate the dictatorship of the proletariat? No. Did he call for the nationalization of industry or land? Not a word. Did he tell them that every signer of a Communist Party card is expected to do, say or think whatever the party bigwigs tell him to do, say or think? Of course he did not. Instead, Gus Hall made a respectable speech in support of social reforms and the constitutional rights of everybody. He came out for the Welfare State and the Bill of Rights. In other words, he talked like John F. Kennedy trying to live up to the future and Richard M. Nixon trying to live down the past.

Now what does this Communist tactic signify? It means that the present purpose of the Communist Party in the United States is to prove the respectability of its leaders and suggest the harmlessness of party intentions. That won't rebuild the party. Selling water in a red bottle does not create a market for vermouth. The fact is that Communist propagandists are in a box of their own making. They have the choice of stagnating party growth either by revealing the governing principles of communism or by concealing them.

Mr. Brant went on to say:

If somebody is seen meandering around the campus dressed in a barrel, it should not be concluded that he lost his pants in Typhoon Freda. It will be Diogenes, looking for one university student who was converted to communism by Gus Hall.

The Communists are such miserable merchants of dreary ideas that they have difficulty getting recruits. Their lack of success under parliamentary regimes where the platform and press are open to them is notorious. They thrive under suppression, not in exposure. In Israel, where parties are freely formed, the Communists are weaker than in any Middle East nation. In India where the illiteracy rate is seventy-eight percent and where grievances pile high, the Communists have only forty-one members in a National parliament of 745, or less than six percent. I have often thought that their greatest strength as a political party inside any country comes from fear of them. As Livy said, "The less there is to fear the less there is of danger."

When the Communists are judged as advocates or as purveyors of ideas, they turn out to be quite shabby. Better that they be forced into open debate and exposed than driven underground. American youth is highly critical and

discerning. It does our youth an injustice to assume that many of their minds can be corrupted by blandishments either from the extreme Left or extreme Right.

Community groups interested in promoting debates of unorthodox ideas need not be booking agents either for the Left or the Right. Yet those who promote the society of the Dialogue need defend the right of anyone peaceably to assemble and to advocate ideological as well as religious ideas across the entire spectrum. This takes courage beyond the capacity of Madison Avenue. For it writes its slogans to fit the public mood. Promoters of the Dialogue undertake to reshape that mood, raise the sights of the people, and help create a tradition that honors courage and the independence of thought.

Discussion and debate are often finer badges of bravery than battle itself. Pericles said, "The great impediment to action is, in our opinion, not discussion, but the want of that knowledge which is gained by discussion preparatory to action. For we have a peculiar power of thinking before we act, and of acting too; whereas other men are courageous from ignorance but hesitate upon reflection."

The difficulty of living up to Pericles' standards is exceedingly difficult these days. For information is sometimes classified as secret merely because disclosure would expose the agency to criticism. And the complexity of the affairs of government make it difficult to ferret out the facts on one's own. Yet the need has never been greater.

We had Committees of Correspondence in the days of our Revolution and they were important in creating unity and cohesion in that effort. We need comparable task forces today. They need to remind the people over and again of the words of Charles Evans Hughes, "Our institutions were not devised to bring about uniformity of opinion."

There is more to the Free Society than the maintenance of free and open discussion. Our philosophy has been that sovereignty unless restrained builds itself into tyranny. The Bill of Rights—as well as parts of the Constitution itself—places restraints on each of the three branches of government. With the increase in size and complexity of government, additional procedural safeguards of individuals have been provided by Acts of Congress, by Executive orders, and by court decisions. Yet as time passes, the power of government becomes more and more awesome and the capability of the individual to stand his own against it becomes more and more dubious. The multiplication of laws and of regulations makes every proceeding more and more of a maze. The power of the bureaucracy is crushing. Only the expert can find his way. One not flanked by lawyers has little chance to enjoy his rights. The lone individual without a spokesman loses his rights by default. That problem promises to get more serious whether it be thought of in terms of fairness of procedures in loyalty and security hearings or of procedures in qualifying businessmen as contractors or subcontractors.

A recent Report to the Administrative Conference states, "Some 340 busi-

ness firms are now barred from participating directly or indirectly in some or all government procurement or surplus-disposal contracts, and about sixty of these are also excluded from contracts for most federally assisted construction work throughout the United States. Except for a small percentage, this government action is taken without opportunity for an adversary hearing and if based on suspected criminal conduct is generally without being officially notified or informed of meaningful reasons, or opportunity to learn why."

The District of Columbia on March 15, 1963, put an end to "arrests for investigation"—a practice that had resulted in the arrest of several thousands of persons annually. Arrests for suspicion fit the Communist society but they do not fit ours. Our Fourth Amendment—applicable to state and federal governments alike—allows only arrests for "probable cause." Our Fourth Amendment was designed to curb the police—to require them to use brains rather than brawn in solving the mysteries of crime. Yet "arrests for investigation" are still common in some areas of the country. The persons arrested are not sons and daughters of the upper or middle classes. They come from the lower strata or from minority groups who do not know how to protect themselves and who do not have the prestige, courage, or resources to vindicate their rights through suits for false arrest.

Recent studies of vagrancy show that being poor and looking for a job is a crime in many of our localities. Our magistrates courts touch the lives of the people more intimately than any other. Some are still on the fee system—the judge being paid if he convicts and not being paid if he acquits. Lawyers seldom appear for clients in those courts. Bar Associations that assign lawyers to represent indigents seldom assign members of the Bar to cases in the magistrates courts; and legal aid societies are not equipped to render service there. Vagrants, whose only crime is poverty, are convicted by the thousands and no Bar Association Committee concerns itself with the matter.

The poor who are accused of felonies often cannot raise bail prior to trial and therefore wait in jail months on end. In New York City Louis Schweitzer and his Vera Foundation found that the accused who were unable to raise bail were held as long as one year in jail awaiting trial. For some, that is the equivalent of a graduate degree in crime. As a result of Mr. Schweitzer's efforts the Manhattan Bail Project is now flourishing under the auspices of New York University Law School. Of the first 200 defendants released on personal recognition only two failed to respond. In Manhattan the fate of indigent defendants is no longer in the hands of the bondsman. Yet in most large centers the indigent feels only the rough hand of the law and is wholly subject to the mercy of the bondsman. There are those who could, if they would, duplicate Mr. Schweitzer's efforts in their own bailiwick.

Some cities—and I speak principally of northern ones—have a widening river of hate between the races. Some are doing something about it; others are not. We know that when racial bias is indoctrinated into the police or when

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the police are allowed to treat a Negro or the member of another minority as a second-class citizen, the river of hate widens.

Task forces are needed north and south, east and west, to concern themselves with problems of the Bill of Rights in the modern setting. Churches, unions, business groups, professional societies, school boards, parent-teachers associations, the pulpit and the press all have important stakes in the enterprise.

It is the Bill of Rights and all other protective features of our system of law that put us above the crowd. Other nations share the secret of science and technology and will soon be as far along the road of economic development as we are. But there are not many who have enshrined the ideas of liberty and equality and dignity of man in the manner of which we are proud. It is in those ideas that we find our real distinction. It is those ideas that set our civilization apart, not our automobiles, television sets, air conditioners, or the other earmarks of high standard of living.

We profess to be anti-totalitarian and we spend much of our time denouncing the Communists. Yet once we substitute propaganda for the Dialogue, once we enthrone the police, once we make one group dominant in our multi-party, multi-racial, multi-religious, multi-ideological society, once we deny the poor rights that the rich enjoy, we forsake the tradition of the Bill of Rights. We need continuous education in its values, and only the task forces that are active in a community can turn the tides of intolerance, conformity, and ignorance that often engulf us.

