FREEDOM IN CONTEMPORARY SOCIETY

SAMUEL ELIOT MORISON

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FREEDOM
in Contemporary Society

Introduction

MY three subjects are Political Freedom, which I regard as the most important and inclusive; Economic Freedom, which has been more subject to erosion than any other in the last half-century; and Academic Freedom, youngest of the family, still struggling for general recognition. Religious Freedom has been omitted, although I do consider it vital, because it is now relatively secure in Western countries.

Since I do not feel competent to speak on the institutions of Canada, most of what I have to say applies only to the United States; but I hope that, none the less, it may interest the people of the British Commonwealth of Nations.[1]

Canada's attitude toward the United States in recent years resembles that of an elderly and respectable spectator at a rough-and-tumble game of schoolboy hockey. She is partly amused, partly horrified at what goes on, yet apprehensive of what may happen to her if one of the tangles of boys and hockey sticks spills over the edge. Conversely, Canada offers an example to the United States of a nation where freedom is respected without many constitutional provisions safeguarding it, thus illustrating the point made by philosophers and publicists that a deep-seated disposition of a peo-

[1] For readers in the United States I have added a brief appendix to the Political Freedom chapter on the safeguards to civil rights in Canada.

ple in favor of freedom is more important than formal guarantees. To which I would answer that in a country where historical memories are regrettably short, and where evil forces, strong pressures and autocratic traditions hostile to freedom exist, it is well to hoist civil rights to the masthead and at least require that they be saluted.

Political Freedom

THE theme of freedom and liberty is not only a noble one but expansive – almost indefinitely so. My grandfather, after whom I was named, began to write a *History of Liberty* upon graduating from Harvard over a century ago, but gave it up after working through the ancients and the early Christians. Hardly an encouragement for me to cover freedom in three lectures! I have, however, accepted the challenge, not from filial piety but because freedom is a subject of perennial interest. The Greeks coined the first word for it, ἐλευθερία, and the Athenians first practiced it. The funeral speech of Pericles, in the words of Thucydides, is the classic description of the relation of political freedom to the good life. Poignant as well as significant is the story, or fable, told by at least two Greek poets. Xerxes, victor of Thermopylae, spreads a purple cloak over the body of his vanquished enemy Leonidas, out of admiration for his valor. Leonidas, from the other world, rejects it; he wants no favor from the Persians. "But thou art dead, Leonidas," says the poet; "and why hate the Persians even in death?" To which Leonidas answers, "Οὐ θνάσκει ζῶλος ἐλευθερίας" "The passion for freedom dieth not." [1]

My grandfather, paraphrasing Byron's famous apostrophe

[1] *The Greek Anthology* No. 194 (Loeb edition III) pp. 157–159.

to the "broken now and dying" trumpet voice of Freedom, thus concluded his *History of Liberty:* "To that trumpet voice the world will never shut its ears." [2] And I think that prophecy has proved to be truer than most of those that have weathered a century.

I have been asked to place the emphasis in these lectures on freedom in the contemporary world. That I shall try to do. In various eras, freedom has been subjected to great peril, and we are now living in one of those eras. There is peril of subjection by the Persians of today – by whom I do not mean the Iranians; and there is peril of subversion from within at the hands of foolish and wicked Americans – by whom I do not mean those commonly called "fellow travelers." In the past, some particular form of government, such as benevolent despotism, constitutional monarchy, or democracy, has been supposed to be the perfect guarantee of human freedom. Experience has proved the fallacy of this expectation. And some countries like ours that are dedicated to government by the people are not free from the danger that the people themselves, in times of insecurity, will forget their basic principles and override all historic rights and immunities.

You cannot expect an historian to approach this subject any other way than historically. First, however, we need a few definitions. *Freedom* and *liberty* are used interchangeably, but with many variations of meaning. They are used (1) for national independence – as the freedom of Ireland from England; (2) for democracy or representative government within a country, as against an autocratic or ol-

[2] Samuel Eliot *Passages from the History of Liberty* (1847) p. 275.

igarchical form; (3) for civil rights, the freedom of the individual against any government, democratic or otherwise.

Finally there is the communist interpretation of the Russian word for liberty, *svoboda*, which attaches a meaning to liberty and freedom that is the complete reverse of any Western concept: a social right to share in such benefits and privileges as the state may deem proper to confer. While we cannot brush off Soviet notions of liberty as inconsequential, since they are now officially upheld by almost half the world and the manner of dealing with them is a pressing problem of our day, I intend to confine myself to the concepts and practices of political freedom in the Western world.

The Compact Theory

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

Thus states the Declaration of Independence, a document which has probably done more to advance human freedom in the three non-Soviet meanings of the word than any other document since Magna Carta.

The basic concept is phrased a little differently in the Virginia Bill of Rights, which antedates the Declaration of Independence by about six weeks:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

There you have in a nutshell the entire theory of natural rights and social compact upon which all governments in the Western world are based – principles to which we constantly recur. Let it not be said that the compact theory of government is only a conceit of Jean-Jacques Rousseau. The Calvinists of the Continent of Europe and the English and Scots Puritans were accustomed to forming church compacts, or covenants, as they preferred to call them, when gathering a church. The Pilgrim Fathers, finding themselves outside any recognized jurisdiction, and threatened by some of their less godly shipmates with raising hell as soon as they landed, formed the Mayflower Compact on the basis of their earlier church compact:

> We whose names are underwritten, the loyal subjects of our dread Sovereign Lord King James . . . do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation; . . . and by virtue hereof to enact, constitute and frame such just and equal Laws from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.

In the eighteenth century, as Americans pushed settlement across the Alleghenies into territory beyond the long

arm of the law, they frequently formed compacts for their self-government until such time as the King, State or Congress extended jurisdiction beyond the mountains. The compact theory of government, therefore, was an experienced reality to North Americans who had never heard of Jean-Jacques Rousseau.

Political Freedom First

Political freedom, i.e., liberty in the ordinary unsophisticated meaning of the word, is the prerequisite and framework alike for all other freedoms and liberties – religious, social, economic, academic, artistic and musical. One needs only to contemplate the recent history of Germany and Russia to realize that once political freedom goes, all freedoms are in danger. The economist F. A. Hayek, in curious agreement with Karl Marx, has been urging the converse – that economic freedom came first and political freedom is its child. Hayek of course is arguing for the preservation of free enterprise; but it is certainly not true, historically speaking, that political freedom is the offspring of economic freedom. In the seventeenth century, when England began her successful career as a colonizing power, she had already achieved a large measure of political freedom. Pym, Eliot, and "my lord Coke" were already reading new meanings of freedom into ancient documents like Magna Carta; the phrase "a freeborn Englishman" was already one to conjure with; Parliament had progressed from an advisory and law-finding body to a representative, lawmaking body, and Englishmen were prepared to fight to keep it so. But com-

merce was still in chains. No Englishman could trade abroad except as a member of a chartered company; internal trade was subject to myriad regulations; freedom of occupation was denied by the monopolistic gilds. Commerce and industry were eventually freed, and the laissez faire system inaugurated, by successive acts of representative Parliaments. But for the Reform Act of 1832, there would have been no repeal of the Corn Laws and Navigation Acts in the 1840s. There has been much interplay during the centuries among all these freedoms, especially between the religious and the political; but their common parent, which begat them all and protects them all, is political freedom.

Natural Law

Whence, then, came political freedom? From the natural law concept of antiquity: the idea that there is an abstract right and justice to which even the gods are subject; that Nature herself, the mother of all things animate and inanimate, dictated principles of human dignity and the fundamental decencies of human behavior. One of the finest expressions of this concept of natural law is in Sophocles' *Antigone*. The heroine has disobeyed an edict of the tyrant Creon ordering that his political rivals be killed and their bodies dismembered and thrown to the dogs. In defiance of Creon's edict, Antigone has salvaged the remains of one of his victims, her brother Polyneices, and given them decent burial. Brought before Creon, she is accused of violating the law, to which she replies:

Yea, for *thy* laws were not ordained of Zeus,
And Justice, who sits high amongst the gods
Hath naught to do with unjust laws of men.
Nor did I think that thou, a mortal man,
Hadst power to declare both null and void
The unchangeable, unwritten laws of Heaven.
They were not born today, nor yesterday;
They die not, and none knoweth whence they sprang.[3]

And that concept never has died. The German poet Schiller well expressed it under the despotism of the first Napoleon, in his romantic drama *William Tell:*

Nein, eine Gränze hat Tyrannenmacht
Wenn der Gedruckte nirgends Recht kann finden,
Wenn unerträglich wird die Last – greifter
Hinauf, getroften Muthes, in den Himmel
Und holt herunter seine ew'gen Rechte,
Die droben hangen unverausserlich
Und unzerbrechlich, wie die Sterne selbst.

No! a tyrant's power hath limits! When the oppressed can find justice nowhere else, when the burden becomes unsupportable, man reaches up to the Heavens and there grasps his eternal Rights, immutable, indestructible as the very stars.[4]

No wonder *William Tell* was banned in Nazi Germany!

How far the concept of natural rights entered into Roman law, we may judge from the Acts of the Apostles. One may even relate the adventures of Saint Paul in terms of civil rights.

[3] Sophocles *Antigone* lines 450–458; my translation.
[4] Schiller *Wilhelm Tell* (1804); Stauffacher's speech in Act II.

Colonel Claudius, commanding the Roman garrison at Jerusalem, and hoping to extract some intelligence useful to the government, orders Paul's memory to be stimulated by a scourging; but Paul says to the centurion, "Is it lawful for you to scourge a man that is a Roman, and uncondemned?" The centurion reports this to his superior officer and says in effect, "Watch your step, Colonel; this fellow is a Roman and knows his rights!" Claudius, fearing a civil rights suit, sets him free. Paul is seized by would-be lynchers; the Colonel has him rescued, and for safekeeping sends him to Caesarea to Governor Felix, who keeps him in "protective custody" for two years. Felix's successor, Porcius Festus, revives the case, and decides to send Paul to Rome to be tried – but for what? And in his famous speech to King Agrippa, Festus says in effect, "It is not the manner of the Romans to deliver any man to die before he be informed of the nature and cause of the accusation, and be confronted with the witnesses against him." A hearing is held before Agrippa, who is so favorably impressed by the man that he declares, with admirable irony, "I would have set you at liberty if you hadn't been so imprudent as to appeal from my jurisdiction to Rome; now to Rome you must go, and take the consequences!"

It is clear to me that King Agrippa had been trained at whatever, in Palestine, corresponded to the Harvard Law School; so eager was he to dodge the main issue, yet retain the comfortable feeling that justice had been done, and place the responsibility for any unfortunate consequences on the defendant's lawyer.

It was not, however, as a man that Paul was accorded his

civil rights, nor yet as a Jew, but as a Roman citizen. He was not saved by equal rights to all, but by favor to some. This concept of the Roman's privilege received the impact of Christianity and came out as the right of a Christian. All Christians are equal in the sight of God because Christ has set them free. So strong was this concept of the equality of all Christians before the law that centuries ago many jurists, both English and Continental, had to excuse slavery on the ground that only pagans were enslaved.

The Stuart Kings and Freedom

And now I shall leap a few centuries to the Stuart kings, who, quite unconsciously and against their intention, aided and abetted the development of political freedom, "precept upon precept; line upon line . . . here a little, and there a little," [8] by so frequently and stubbornly trying to check it. The attempts of the Stuart kings to deny traditional English liberties and render themselves independent of Parliament in financial and other matters gave birth to our first bills of rights. And, what is more important, those Englishmen who faced up to them so firmly established the tradition of political freedom in all English-speaking countries that wars and depressions and all manner of foreign 'isms have failed to still the "trumpet voice of freedom."

During the seventeenth century England underwent no fewer than three revolutions and five authoritarian régimes: the absolutism of Charles I, governing for eleven years

[8] Isaiah xxviii.13.

without a Parliament; the republican revolution, followed by the absolutism of Cromwell; the Shaftesbury régime; Charles II's attempt at absolutism; that of James II; and finally the Glorious Revolution of 1688. By the time the eighteenth century dawned, Englishmen had thoroughly, once and for all, learned the lesson that authoritarian régimes *stink*. They wanted no more of them; they wanted liberty – security against absolutism. And so strong and universal was this conviction in all classes of English society that the need of a written constitution, headed by a formal bill of rights, was never felt. Magna Carta, the Petition of Right, the Habeas Corpus Act of 1679 and the Bill of Rights of 1689 were enough. The last three were merely Parliamentary statutes, yet they acquired a status equal to that of fundamental law.

Although this evolution of the English mind toward an almost universal consent to political freedom was not completed when the English colonies were founded, it had gone so far that the political climate was immediately transmitted to the colonies. "We began with Freedom," said Emerson in his famous lecture on *The Fortunes of the Republic*, delivered almost a century ago. . . . "In the planters of this country, in the seventeenth century, the conditions of the country, combined with the impatience of arbitrary power which they brought from England, forced them to a wonderful personal independence." *

* Ralph Waldo Emerson *Miscellanies* (Centenary Edition *Works* XI) pp. 518, 534.

English Freedom Transported Overseas

The basic concepts of English freedom reached the English colonies very early: government under law, government by consent, and civil rights. The Virginia Company of London in 1618 ordered its governor in Virginia to summon a representative assembly, first of its kind in the New World. As early as 1619 the Virginia Burgesses were attempting to catch the Speaker's eye, objecting on the ground of privilege, and generally making a nuisance of themselves, just like members of the House of Commons. Equally important was the replacement, the same year, of an *ad hoc* code of military law in Virginia by English common law. These two freedoms, government under law and government by consent, have gone hand in hand ever since.

Woe betide us if ever they are divorced!

The earliest New England colonies carried on for several years without any definite body of law. The Puritan magistracy, regarding itself as senior partner with Almighty God, found the rôle of exclusive lawgiver and judge highly congenial, and wished so to continue. But the elected deputies to the colonial assemblies observed that the magistrates were so very clever at finding some color of law for almost anything they wanted to do that magisterial discretion – or indigestion – had become the real law of the colony.

Accordingly, in 1635 and 1636, committees were appointed by the General Courts of Plymouth Colony and of Massachusetts Bay to draft a set of "Fundamentals." Governor Winthrop of the Bay Colony expressly stated, "The

deputies having conceived great danger to our state in regard that our magistrates, for want of positive laws, in many cases might proceed according to their discretions, it was agreed that some men should be appointed to frame a body of grounds of laws in resemblance to a Magna Charta, which . . . should be received for fundamental laws."[7] Massachusetts did not adopt a set of fundamental laws until 1641; but Plymouth apparently obtained hers as early as 1636.[8] The language of these Plymouth Colony Fundamentals is significant:

> 1. Wee the Associates of the Colony of New-Plimouth, coming hither as free born Subjects of the Kingdome of England, Endowed with all and singular the Priviledges belonging to such: Being Assembled,
>
> Do Enact, Ordain and Constitute; that no Act, Imposition, Law or Ordinance be made or Imposed upon us at present or to come, but such as shall be Enacted by consent of the body of Freemen or Associates, or their Representatives legally assembled; which is according to the free Liberties of the free born People of England.
>
> 2. And for the well Governing this Colony: It is also Resolved and Ordered, that there be a free Election annually, of Governour, Deputy Governour and Assistants, by the Vote of the Freemen of this Corporation.

[7] John Winthrop *Journal* (Hosmer ed. 1908) I p. 151.

[8] The evidence is inconclusive as the records are defective; but in the printed *Book of the General Laws of the Inhabitants of New-Plimouth* (1685) the first chapter is headed "The General Fundamentals. Anno 1636 and Revised 1671." The same Fundamentals with slightly different wording are printed in the *Book of the General Laws* (1671), but no reference is there made to their having been adopted in 1636. However, the difference of thirty-five years is inconsequential, since all these Fundamentals are clearly of English origin. The 1685 edition is reprinted in William Bradford *History of Plymouth Plantation* (Ford ed. 1912) II pp. 238-240.

3. It is also Enacted, that Justice and Right be equally and impartially Administred unto all, not sold, denied or causelesly deferred unto any.

4. It is also Enacted, that no person in this Government shall suffer or be indamaged, in respect of Life, Limb, Liberty, Good Name or Estate, under colour of Law, or countenance of Authority, but by Virtue or Equity of some express Law of the General Court of this Colony, or the good and equitable Laws of our Nation, suitable for us, in matters which are of a civil nature (as by the Court here hath been accustomed) wherein we have no particular Law of our own. And that none shall suffer as aforesaid, without being brought to answer by due course and process of Law.

Here are familiar provisions of Magna Carta: *per legem terrae* and *nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.* And the above paragraphs are followed by guarantees of jury trial, of a defendant's right to challenge jurors, of two witnesses for a conviction in a criminal case, and of the right to sell, inherit or bequeath property. It was "ordered and declared . . . that all these aforegoing Orders and Constitutions are so Fundamentally Essential to the just Rights, Liberties, Common Good, and Special End of this Colony, as that they shall and ought to be inviolably preserved."

Although legal historians are still discussing what "fundamental" laws meant to Englishmen in the seventeenth century,[9] it is clear from our last quotation that fundamentals in Plymouth Colony were regarded as a constitution is today, enactments superior to ordinary statute law.

[9] John W. Gough *Fundamental Law in English Constitutional History* (1955).

The same understanding is behind the Massachusetts Body of Liberties, as our quotation from Governor Winthrop proves. And note the clear statement in the Body of Liberties that political freedom is the necessary condition for security:

> The free fruition of such liberties Immunities and priveledges as humanitie, Civilitie, and Christianitie call for . . . hath ever bene and ever will be the tranquillitie and Stabilitie of Churches and Commonwealths. And the deniall or deprivall thereof will be the disturbance if not the ruine of both.
>
> We hould it therefore our dutie and safetie . . . to collect and expresse all such freedomes as for present we foresee may concerne us, and our posteritie after us, And to ratify them with our sollemne consent.
>
> Wee doe therefore this day . . . decree and confirm these following Rites, liberties and priveledges . . . to be . . . enjoyed and observed throughout our Jurisdiction for ever.[10]

These early colonial fundamentals are sufficient proof of the attachment of seventeenth-century Englishmen, irrespective of their religious views, to government under law, government by consent, and political liberties. Note also that they are conscious of the interdependence of liberty and security. These two concepts are often discussed today as if they were contradictory. On the contrary, they are complementary; one cannot long be maintained without the

[10] The Massachusetts Body of Liberties is printed in 3rd series Massachusetts Historical Society *Collections* VIII (1843) pp. 216–237; in W. H. Whitmore ed. *Colonial Laws of the Massachusetts Colony* (1889); in Old South Leaflet No. 164; and William MacDonald *Select Charters* (1899) No. 17.

other. How often have events in our time illustrated the adage of Benjamin Franklin to the effect that "They that can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety"! The German nation made a present of its liberties to Adolf Hitler, largely in the hope of guaranteeing security, and lost that too. Conversely, republican Spain went wild on liberty but offered no security, and Spain preferred Franco.

Returning to the English colonies, note also that most of the ancient liberties that Englishmen took with them to the ends of the earth were matters of legal procedure. They bear out Sir Henry Maine's remark that "substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." [11]

Another procedural right which came up very early in New England was the one recently brought into focus as a part of the Fifth Amendment to the United States Federal Constitution – the defense against self-incrimination. *Nemo tenetur prodere seipsum* (Nobody may be required to accuse himself) is an old maxim of the English common law, quoted by Coke. John Lilburne, the Puritan printer, invoked it in vain in 1637. He was whipped down the Strand from the Fleet to Palace Yard, and then imprisoned until the Long Parliament ordered him released. Two years after his release, in 1642, there occurred what would now be called a crime wave in Plymouth Colony. Governor Bradford wrote to three ministers, all University of Cambridge

[11] Sir Henry Maine *Dissertations on Early Law and Custom* (1883) p. 389.

men, to ask whether it would be lawful to put pressure, i.e., torture, on the defendant in order to extract a confession. All three answered that it would be unlawful to extract a confession from the delinquent either by oath or by bodily torture, and quoted *Nemo tenetur prodere seipsum* as a maxim of the common law.[12]

The American Revolution

So much for the foundation of government by law, government by consent, and civil rights in the English colonies. Now let us skip a century and a quarter, to the American Revolution.

The very men who led the secession of the Thirteen Colonies from the British Empire organized their new Republic of Republics on the firm foundation of these same three principles. All the British Commonwealths have arrived at the same end gradually – "precept upon precept; line upon line" – without any violent breach with Britain; but they have taken their time about it. The leaders of the new United States felt that they must settle the matter promptly – "*secure* freedom for themselves and their posterity." Knowing from their study of history that revolutions beget other revolutions, and that if the desired end product of ordered liberty were not quickly reached, the unwanted result might be military despotism or anarchy, they made haste.

[12] William Bradford *Of Plymouth Plantation* (Morison ed. 1952) pp. 404–413.

Fortunately the leaders of the American Revolution not only knew what had to be done, but were eager for the task. Take, for example, two of our most ardent patriots, Thomas Jefferson and John Adams. Jefferson, on 16 May 1776, when he was working hard for independence in the Continental Congress, wrote to a member of the Virginia Convention that he regarded constitution-making as more important. "In truth," said he, "it is the whole object of the present controversy; for should a bad government be instituted for us in future, it had been as well to have accepted . . . the bad one offered us from beyond the water without the risk and expence of contest." [13] John Adams, the same year, wrote to George Wythe, "You and I, my dear friend, have been sent into life at a time when the greatest lawgivers of antiquity would have wished to live. How few of the human race have ever enjoyed an opportunity of making an election of government . . . for themselves or their children! When, before the present epocha, had three millions of people full power and fair opportunity to form and establish the wisest and happiest government that human wisdom can contrive?" [14]

Prophetic words; for within four years John Adams had the opportunity to draft a constitution for his own state, Massachusetts.

The first reason, then, why Americans were able to establish government under law for themselves was the conviction of leading revolutionists that it must be done, and

[13] Julian P. Boyd ed. *Papers of Thomas Jefferson* (1950) I p. 292.
[14] John Adams "Thoughts on Government" in *Works* (1851) IV p. 200.

their knowledge of how to do it. Their know-how came partly from reading Locke and Montesquieu, yet more from the English tradition and practice of political freedom. That tradition was then bright and sharp as a newly minted coin, not tarnished and worn thin as it is today; and it was one in which every American, not merely an educated élite, shared. One of the distressing things in the present scene is the way large numbers of English-speaking people, ignoring their hard-won liberties, run after demagogues who would rise to unlimited power on the ruins of liberty. It did not even occur to the Americans of 1776 to do that. Tom Paine, the nearest person to a demagogue in the Thirteen Colonies, had no following. Typical of the attachment of the common, workaday American of that era to government under law is a resolution passed at the town meeting of Medfield, a little farming community in Massachusetts:

> While we profess ourselves advocates for Rational Constitutenal Liberty we dont mean to patronise Libertinesm and Licenteousness we are sensible of the necessety of Goverment for the Security of Life Liberty and property and mean to vindecate and Submit to all Lawfull Constitutianal authority." [15]

By the close of the War of Independence, eleven of the thirteen states had adopted written constitutions of government; the other two, which had satisfactory joint-stock corporation charters, merely added a bill of rights and carried on.

A bill of rights in each state constitution was regarded as

[15] Harry A. Cushing *History of Transition from Provincial to Commonwealth Government* (1896) p. 12 note 4.

an essential bulwark of political freedom. Each of the American states, in theory, was sovereign, possessing the plenitude of political power. Hence, if the citizen were to be protected from tyranny, his natural rights must be stated as part of the constitution, and in such form as could be enforced if necessary by court action.

Interwoven with these specific rights were statements of political principle. For instance, the Virginia Bill of Rights of June 1776, which all the other states imitated, opens with the declaration: "That all men are by nature equally free and independent, and have certain inherent rights," of which they cannot be divested. There follow statements that all power is vested in the people, of whom magistrates are trustees and servants; that government is instituted for the benefit of the people, who have a right to alter, reform or abolish it; that no offices shall be hereditary; that the powers of government, legislative, executive, and judicial, shall be separate and distinct from each other; that the legislators and executives, but not the judges, be elected by frequent elections at stated times, and "reduced to a private station" after a few years. Interesting, is it not, to see how far the Whig aristocracy of Virginia had drifted to the left of the Whig aristocracy of England? For George Mason, who drafted this Virginia Bill of Rights, was a proud member of an ancient family, who in moments of irritation would refer to George Washington as "that damned ex-surveyor." But perhaps it isn't so strange, since, in the United States at least, the greatest constructive leaders of democracy, with the notable exception of Abraham Lincoln, have been recruited from the gentry. Thomas Jef-

ferson, Andrew Jackson, Woodrow Wilson and both Roosevelts were gentlemen, which cannot be said of many conservative leaders who bitterly opposed them.

Following these statements of political philosophy in the Virginia Constitution come provisions lifted from Magna Carta, the Petition of Right and the Bill of Rights of 1689, such as no suspension of laws by the executive; a speedy jury trial; the right to be confronted with witnesses and charges, and not to be forced to incriminate oneself; no excessive bail or general search warrants; no standing army; freedom of religion. Besides these ancient bulwarks of English liberty, and a few others that had been suggested as desirable by Montesquieu, such as the prohibition of cruel or unusual punishments, and subordination of the military to the civil power, there is something new in the Virginia Bill of Rights: "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotick governments." [16]

Freedom of Speech and of the Press

Here is a newcomer in the natural rights field, one long a-coming. Censorship of newspapers and other publications had always prevailed in England, in the supposed interest of public order; and the recent abuse of it, in the case of John Wilkes's No. 45 of the *North Briton*,[17] was fresh in everyone's memory. The colonial Sons of Liberty, knowing Jack

[16] S. E. Morison *Sources and Documents on the American Revolution* (1923) pp. 150–151.

[17] Raymond Postgate *That Devil Wilkes* (1930) Chap. IV.

Wilkes only from a distance, adored him; and from his experience and their own in the Zenger case, they insisted on freedom of the press. The closely allied freedom of speech first appears in the Pennsylvania Bill of Rights, adopted three months later: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments . . ." The Federal Bill of Rights of 1791 is even more positive: "Congress shall make no law . . . abridging the freedom of speech or of the press . . ."[18]

Before the eighteenth century, neither was regarded as a natural right. Both, it seems, grew out of the hard-won privilege of freedom of debate for members of Parliament. Hard-won, I say, because English M.P.s had gone to jail for it, and even died for it. Queen Elizabeth I declared she wanted no talk in Parliament about the Church, or about her love affairs or about her succession; and when Peter Wentworth defiantly declared that these were the very subjects he wished to debate in the House, and proceeded to do so, she put him in jail, and there he died. And in Stuart times there was the arrest and imprisonment of Sir John Eliot by Charles I. Warned that "it might happen here," the American states placed freedom of debate in legislative bodies in their bills of rights or frames of government. Our elected lawmakers are guaranteed immunity from interference, no matter how libelous they may be, or how great nonsense they may talk. From this privilege of the elected it was a natural transition to demand it for the electors, and for all citizens.

[18] S. E. Morison *Sources and Documents on the American Revolution* (1923) pp. 164, 363.

Freedom of debate within Parliament was finally secured by the Bill of Rights of 1689; and for all other English-speaking countries as well. But it is far from being a recognized right or privilege under the totalitarian governments.

Take the case of Milovan Djilas in Yugoslavia, in 1955. Djilas, a Montenegrin communist who was regarded as the logical successor to Tito as chief of state, was elected to the Yugoslav Parliament almost unanimously. He proceeded to write some articles which criticized communist doctrine and tactlessly adverted to the private lives of some of his colleagues in the government. For that he was expelled from the party and from Parliament, as was the lawyer who defended him. Both men were tried in secret for sedition, and were found guilty; but, since this happened in Yugoslavia, not Russia, they were allowed to live. If we had this system in the United States, Senator Wayne Morse of Oregon would have been tried for sedition because, after being elected as a Republican, he opposed President Eisenhower; he would have been expelled from the Senate and rendered ineligible for any other political office.

Democracy and Freedom

I should not do justice to the American revolutionary leaders if I gave the impression that they thought they could secure political freedom by a mere statement of what their governments could not do. Equally important, in their eyes, were the frames of government that they set up; the organization of government by consent.

The Virginia Constitution, drafted under the influence of Locke, who said that the legislative should be the supreme power of the state, gave the governor too little power. The Pennsylvania Constitution, which reflected the views of Benjamin Franklin, went still further and set up a unicameral legislature, elected by manhood suffrage, with a weak, multiple executive and an elected judiciary. There being no check on the one legislative chamber, it rode roughshod over minorities during the war and became so thoroughly discredited after fifteen years that the conservatives rallied and replaced it by a bicameral constitution. Significantly enough, the Pennsylvania Constitution was greatly admired and imitated by the French *philosophes* and members of *l'Assemblée constituante* of 1789. They chose the worst of the American constitutions to imitate because it was "logical." For, if you establish government by the people, why check the people?

Most of the American constitution-makers, especially John Adams, believed that the "people" needed checking just as much as a monarch did, and acted on that undemocratic principle. For Massachusetts, John Adams, keenest student of political theory in the revolutionary generation, drafted a constitution that was neither democratic, nor aristocratic, nor authoritarian, but a mixture of the three. Following Montesquieu (who obtained the idea from Polybius), Adams believed that any "pure" government was bad because it would always degenerate into something impure. A pure democracy would degenerate into demagoguery, as in ancient Athens and recent Pennsylvania; a pure aristocracy into oligarchy, as in Poland; and a pure monarchy into

despotism, as in France and Spain. Therefore, governments, to guarantee freedom, should be a mixture of the three. In the Massachusetts Constitution of 1780, as in the Federal Constitution of 1787 (which in many respects followed it), you had a strong chief executive to represent the monarchical principle; a senate to represent the aristocratic; and a house of representatives, together with popular annual election of the governor, to represent the democratic principle. Finally, as a balance wheel to the whole, you had an independent judiciary, the judges appointed to hold office during good behavior; and among the duties of the judiciary are seeing that the constitution is observed and that the rights of the people are protected against the government.

It can hardly be an accident that two "mixt governments" set up by Americans in the revolutionary period, those of Massachusetts and of the United States, are the only ones that have survived to this day. Both have become much more democratic and less "mixt" than they were originally, by the process of amendment. But they are still governments "of laws and not of men," as John Adams declared he had designed the Massachusetts Constitution to be.[19]

If democracy is used as a relative term, the United States was already democratic in 1800, compared with England. For its democracy, not for its political freedom, the United States was disliked by English and Canadian Tories. It was a bad and apparently successful example of a doctrine that

[19] Constitution of Massachusetts, Part First, Article XXX. Adams doubtless derived the expression from Bracton's *Non per hominem sed per legem et Deum.*

they loathed. In comparison, however, with the United States and the British Commonwealths of today, the United States of the early nineteenth century was undemocratic.

But that is not to condemn it. There is no necessary connection between democracy and political freedom. Representative government is absolutely essential to political freedom, but not democracy. Unquestionably universal suffrage has helped the common man, the organized laborer in particular, to get what he wants out of government; and what he wants nowadays is not freedom, which he takes for granted, but a larger slice of the economic pie. In my opinion, the growth of democracy in the United States has not contributed to the growth of political freedom. And the reasons, I think, are clear: (1) Political education has never caught up with political power. (2) The religious sanction to government has declined, with commensurate loss of public virtue; character and intelligence are losing the race to greed and selfishness. It is only by comparison with totalitarian governments, where the religious sanction is wholly wanting, and where free rein is given to cruelty and other abominable traits of human nature, that we are reconciled to the milder ills and supportable disadvantages of democracy.

From another point of view, we should be prayerfully grateful that the political institutions of Canada and the United States have stood up to the tornado of economic and social change in the last hundred years. Our settled area has expanded from the Appalachians and the Ottawa River to the Pacific. The population of the United States has increased sixfold since 1850; that of Canada, fourfold since

1871.[20] The Anglo-Saxon tradition has been diluted by immigrants from lands that never knew political freedom; wars and economic factors have subjected the state and Federal constitutions to strains that were never anticipated, and to demands that could not be foreseen. In the meantime, interest in constitutional matters has greatly declined. When Boston had a total population under 15,000, a thousand men turned out to debate the state constitution, article by article, for the better part of three days, and 887 men voted on it; but today, when the city has a population of over one million, we cannot fill the same building – the "Cradle of Liberty" – for a debate on civil liberties.

We have all come to take our liberties too much for granted. I can well remember how, as a young man, I assumed that the Statue of Liberty really was enlightening the world; that freedom and representative institutions on the British or American model were rapidly spreading. My real education in the meaning of liberty occurred almost fifty years ago when I was traveling by train from Munich to Switzerland. In the compartment with me were four or five well-dressed men from Russian Poland. As we neared the Swiss border they showed suppressed excitement; after the brief customs inspection was over and the train pulled out of the frontier station, and they were certain of being on Swiss soil, they began to dance about, snap their fingers, and shake hands with each other and with me. I was so amazed at this exhibition that one of the Poles who spoke a

[20] Population of the United States was 3,929,714 in 1790; 23,191,876 in 1850; 150,697,361 in 1950. Population of Canada was 3,689,257 in 1871; 14,009,429 in 1951.

little English explained. "You are an American – yes? Then you cannot understand what it means to us to leave a land of tyranny and breathe the free air of a republic."

"Why, I thought Russia had a constitution now," said I. This, translated for the benefit of the others, produced a chorus of sarcastic laughter and, "Yes, yes! But we still have the secret police!"

"Well," said I, "we have policemen in America, too, and there has just been a big scandal in New York about their corruption."

My Polish acquaintance laughed at my naïveté and said, "What is a little corruption if you are *free?* Your police have to obey the law like everyone else; in our country there is no law above the police but the will of the emperor."

So, Democracy, with all thy faults I love thee still! In moments of impatience we may hanker after an authoritarian government to deal with demagogues, criminals and hoodlums. But remember, if we had such a government, whether fascist or communist, these demagogues, criminals and hoodlums would be just the ones who would have absolute power over us.

The New Situation Created by Communism

It is deplorable that the American people are not more firmly and emotionally attached to their ancient liberties. There's not much glamour in a Bill of Rights or a Habeas Corpus Act – until you need it, or are in a jam; vocal mi-

norities are a nuisance to people in power. It is not difficult to maintain those traditional safeguards in a tight little island like Britain, but it is very difficult to do so in a swarming, expanding, changing country like the United States and Canada. Almost a century ago Emerson remarked:

> The American marches with a careless swagger to the height of power, very heedless of his own liberty or of other peoples', in his reckless confidence that he can have all he wants, risking all the prized charters of the human race, bought with battles and revolutions and religion, gambling them all away for a paltry selfish gain.[21]

And now, we are confronted with a fresh force which makes a new situation, and strains our already tenuous attachment to civil liberties – namely, communism. Our governments were set up, and our bills of rights drafted, on the assumption that everyone agreed on fundamentals and that you could count on your opponents' being fair if you were fair. The business of sending a defeated political rival to the Tower or the block was supposed to have ended in the seventeenth century. But we are now familiar with the spectacle in Russia and Red China of thousands and thousands of people being subjected to hard labor, imprisonment and execution without "due process," merely because of political opposition. Fascists and communists alike, after getting into power by using political freedom, promptly suppressed it; and we know perfectly well that they would do the same here and in Britain and in the United States, if they could. Should we, then, offer them the safeguards of liberty when

[21] Ralph Waldo Emerson *Miscellanies* (Centenary Edition *Works* XI) p. 512.

their object is to kill liberty; should we leave them the opportunity to attain power by legal means, as the Czech communists were given, when they give nobody the right to resist them by legal means? It is a tough problem, and there is no easy solution.

I cannot agree with my idealistic friends who wish nothing to be done about it; who say that communists should be treated like everyone else, in the hope that they may be weaned away from their doctrine by sweet reasonableness. It is certain from the events of the past twenty years that sweet reasonableness does not work on communists. Nor can I agree with that philosophical historian, the late Carl Becker, who wrote, "The real danger is not that Communists and Fascists will destroy our democratic government by free speaking, but that our democratic government, through the failure to cure social evils, will destroy itself by breeding Communists and Fascists." [22] It seems to me that this is a flabby fallacy, of the same class as that one which says that society is the guilty party to an individual's crime, or that the Treaty of Versailles was responsible for Adolf Hitler.

There was very little challenge to traditional civil rights in the United States or any other English-speaking country, until the Bolshevik revolution of 1917. Down to that time socialists and even communists were tolerated because they were not taken seriously. But with a Communist International centered in Russia, and manipulated by the Soviets, contempt changed gradually to apprehension, fear and

[22] Carl L. Becker *Freedom and Responsibility in the American Way of Life* (1949) p. 36.

panic. For a time the danger of communism was obscured by World War II, when communists in English-speaking countries were ordered to pitch in and help; but the celebrations of V-E Day were not over before the cold war was renewed. The iron curtain fell, and Czechoslovakia, the democratic republic formed in our own image, with a bilingual population recalling that of Canada, was subverted by communists who had been accorded full civil rights.

Then there was *la trahison des clercs*, to use Maritain's term. A small but prominent group of American intellectuals appear to have decided during the Great Depression that democracy and capitalism were finished, that the world would go either fascist or communist; and they chose communism. They made a point of infiltrating key departments of the government, such as Treasury, State and Defense, where they could "take over" in the event of the expected collapse; and in the meantime did everything within their power to ingratiate the Soviet government. So long as the United States and Russia were fighting on the same side, this infiltration went largely unnoticed. But when the cold war opened in 1945, the communists had to "fish or cut bait" for their Russian skipper, or leave the boat; and some were so deeply involved that they did not dare leave, and still others did not care to.

Nor am I one of those who call the anticommunist crusade of the decade 1945–1955 a "witch hunt," hysterical though much of it has been. There were no witches in 1691 or any other time; but there are real communists in 1956. The loyalty of a small segment of our population has been transferred to a foreign power dedicated to the task of over-

throwing our institutions by violent means and making our respective countries Soviet satellites, like Poland and Red China. Many will say that the danger has been exaggerated, which is probably true. They point out the very small number of communists in the English-speaking countries compared with those in France and Italy, whose free governments have nevertheless managed to carry on. The danger to Britain, a beautiful atomic target three thousand miles nearer to Russia than we are, is far greater than to us; yet Britain has kept her head. That is indeed true, and we admire Britain for it; but it would be a mistake to weigh our danger by numbers. The second Russian Revolution of 1917 was pulled off by a party that numbered only a fraction of one per cent of the voting population; Czechoslovakia was subverted by a minority party. *Le flegme britannique* as an attitude toward the problem may in the long run have worse consequences than the American method of roaring, bellowing, and tramping about like an angry hippopotamus.

Administrative Autocracy and the Attorney General's List

Efforts in the United States to meet this menace within the framework of democratic government have so far had very little success in attaining their avowed object. But the rough and ill-considered methods employed have brought about a major menace to political freedom. These efforts mesh in with another trend of our times, the vast growth of

administration; between the two gears there is little room for freedom.

The administrative branch of the United States Federal Government has reached a position almost equal to the executive (of which it was originally an offshoot), the legislative and the judicial. This mushrooming growth of administration has been a necessary concomitant to the vast increase of governmental power, especially that of the Federal Government, in the United States. As government has taken on new duties and responsibilities, and pretends to protect and enhance the citizen's welfare "from the cradle to the grave," new administrative agencies, boards, commissions, committees and authorities have pullulated. No small number of these have acquired great power over the individual citizen, who has no effective means of control or redress other than appeal to the courts – thank God for *that* rule of law!

These administrative bodies have been making their own rules and laws. Their operations, in my opinion, have threatened that essential condition of political freedom, government under law, far more than the communists have; since these administrative boards are an integral and legal part of the government, while the communists, so far, have been very few within the government and very weak outside it. The menace of a bloated and irresponsible administrative arm has hitherto received far less attention than the communist menace. It is a good sign that in 1955 the Hoover Commission, the American Bar Association, and President Eisenhower's Commission on Administrative Procedure have been studying the whole matter with a view to bring-

ing administrative agencies *per legem terrae* – under due process of law.

Contributing to the situation, feeding into the two gears of red-hunting and administrative power, is a doctrine new to the common law, or to the law of any country outside the iron curtain: that of guilt by association. In the eyes of the red-baiters, a man is a security risk if he subscribes to a red-infiltrated charity fund, no matter how innocent he is of knowledge as to its real nature, or how charitable his intent; or if he has attended cocktail parties where communists are present, or had a communist friend, or belonged to a communist club twenty years ago when he was in college. Of all these trends, this is perhaps the most dangerous to liberty, because it permits publicity-mad inquisitors to blacken the good names of good citizens almost at will. Hardly any civic-minded, public-spirited individual who goes in for good causes and contributes to charities can have avoided some innocent association with communists at some time or other.

Some very striking examples of the way administrative agencies may combine with the anticommunist line to limit the freedom of individuals, and deprive them not only of due process but of livelihood, are afforded by the story of the Attorney General's List of Subversive Organizations.[23]

It is well known that during that period in the 1930s when the Communist International ordered its constituent communist cells around the world to form a "popular front" against fascism, a large number of supposedly eleemosynary

[23] The list is printed in Eleanor Bontecou *The Federal Loyalty-Security Program* (1953) pp. 352–358.

organizations were formed in the United States by communists, or were infiltrated by them. Many had pleasant-sounding and patriotic names, such as Legion for Peace and Freedom, Abraham Lincoln Brigade, and Samuel Adams School, which appealed to good citizens, and to which many contributed. In 1948 President Truman, needled by the Republicans to weed out infiltrating communists, ordered the Attorney General to draw up a list of subversive [24] and communist-front organizations, merely as one means of determining the loyalty of Federal employees. The list was supposed to be kept secret, and to be used for this one purpose only; if an employee was found to belong to a number of these "front" organizations, he should be questioned and checked, not condemned out of hand as a communist or a subversive. But the list was not kept secret; few things in Washington are. And once out, the Attorney General's List became a touchstone for disloyalty and sedition, and a means of "making hay" for professional red-baiters.

Up to the fall of 1955, actual or former membership in an organization on the Attorney General's List has been used as a criterion to determine the individual's unfitness for tenancy in a Federal housing project; employment in the merchant marine; employment in manufacturing plants which have defense contracts; retention in the armed forces or honorable discharge therefrom; employment by international organizations, such as the United Nations, of which the United States is a member; public employment in five

[24] This in itself is a new word in our political vocabulary, rarely encountered before 1940.

states of the Union and in Hawaii; municipal employment in three cities; teaching positions in the public schools and colleges of three states; admission to the bar in two states; and private employment by the Columbia Broadcasting System and Consolidated Edison Company.[25]

The Attorney General's List was also used by the Department of State as justification to deny a passport to members of or contributors to listed organizations; this was challenged, in the case of *Schachtman* v. *Dulles*, and the State Department backed down. The State of Oklahoma required every state official or employee to take a test oath stating that he was not, nor had been within five years, a member of any organization on the Attorney General's List. This was held unconstitutional by the Supreme Court of the United States as depriving people of employment without due process of law. "Under the Oklahoma Act," declared the Court, "the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. . . . Indiscriminate classification of innocent with knowing activity must fall, as an assertion of arbitrary power. The oath offends due process." [26]

Another case involving both the Attorney General's List

[25] Supreme Court of United States, October term 1955, Petition of Writ of Certiorari in case of *National Lawyers Guild* v. *Herbert Brownell Jr., Attorney General*, signed Osmond K. Fraenkel et al.

[26] *Wieman* v. *Updegraff*, 344 U. S. Reports 191 (1925). Opinion of the Court (Justice Clark). Justices Black and Frankfurter wrote strong concurring opinions.

and an administrative board in New York State was the occasion of some vigorous dissenting opinions.[27]

Dr. Edward K. Barsky, a physician of New York City with a blameless record as a good citizen, was interested, along with several thousand other normal and patriotic Americans, in preserving the Spanish Republic against the Franco counterrevolution. He acted as head of a hospital in Spain during the civil war, and, after it ended, organized the Joint Anti-Fascist Refugee Committee, which collected and distributed relief to Republican refugees in France and helped them to emigrate to Mexico, Canada and the United States. Undoubtedly some of these refugees were Spanish communists or anarchists, but the great majority were simply republicans; the only reason for putting Dr. Barsky's committee on the Attorney General's List was its definite anti-Franco slant, at a time when a widespread propaganda insisted that all Franco's opponents were reds.[28]

The Joint Anti-Fascist Refugee Committee was one of several hundred organizations investigated by Congress. Dr. Barsky, badly advised by counsel, refused to produce its records, fearing lest the Franco government retaliate on Spanish relatives of his contributors. In consequence, he served six months in jail for contempt of Congress.

[27] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. Reports 123 (1950); *Barsky* v. *Board of Regents of New York*, 347 U. S. Reports 442 (1954). I am here, for the sake of brevity, treating the two cases as one.

[28] I am perhaps a little sensitive to this, because President Conant of Harvard, Dr. Alexander Forbes and myself were astonished, a few years ago, to find our names on a privately compiled list called "The Harvard Red-ucators." Our crime was having contributed five or ten dollars each to a society headed by Dr. Cannon of Harvard, a friend of the Spanish premier Dr. Negrin, for the relief of Spanish war orphans.

That was bad enough; but when the doctor got out of jail and attempted to resume the practice of medicine in New York City, he was suspended from it for an additional six months by a New York administrative organ entitled the Regents of the University of the State of New York.[29] The Regents decided, after a hearing, that Dr. Barsky must be further punished by suspending his license to practice. He sued the Regents. The Supreme Court of New York refused to take jurisdiction, declaring that it had no power over this independent administrative board; and the case went to the Supreme Court of the United States, on the ground that Barsky had been deprived of his livelihood without due process of law.

The doctor lost; but three notable dissenting opinions were delivered by Justices Black, Frankfurter and Douglas. The first-named scored the Regents as "an agency vested with intermingled legislative-executive-judicial power so broad that it is in effect not a tribunal operating within the ordinary safeguards of law but an agency with arbitrary power to decide, conceivably on the basis of suspicion, whim or caprice, whether or not physicians shall lose their licenses." Justice Douglas remarked, "When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us." Justice Black expressed the opinion that the Attorney General's List, as then applied, had virtually become a bill of attainder such as had been

[29] This is not a university organization but an administrative board entrusted with the duty of licensing teachers, physicians, surgeons and apothecaries.

outlawed by the Federal Constitution. "In this day," he said, "when prejudice, hate and fear are constantly invoked to justify irresponsible smears and persecution of persons even faintly suspected of entertaining unpopular views, it may be futile to suggest that the cause of internal security would be fostered, not hurt, by faithful adherence to our constitutional guarantee of individual liberty. Nevertheless, since prejudice manifests itself in much the same way in every age and country, and since what has happened before can happen again, it surely should not be amiss to call attention to what has occurred when dominant governmental groups have been left free to give uncontrolled rein to their prejudices against unorthodox minorities." And, as illustration, he introduced as part of the record Macaulay's famous account of the bill of attainder passed by the Irish Parliament of James II.[20]

The "Star Chamber"

Similarly, the practice of Congress's sending one or two members of an inquisitorial team trotting about the country, allegedly to gain information on subversive activities, has become a series of "star chamber" proceedings, in which all legal safeguards to a defendant are ignored. He is called upon to affirm or deny charges made by anonymous accusers; he is bullied and blackguarded in the best style of old Judge Jeffries; his livelihood is threatened; and his good

[20] *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. Reports 145–149.

name – that good name which was regarded as a man's right as far back as the Plymouth Fundamentals of 1636 – is impaired or destroyed.

"Under a procedure of this kind, the constitutional guarantees against unwarranted search and seizure break down, the prohibition against . . . a Government charge of criminal action without the formal presentment of a Grand Jury is evaded, the rules of evidence which have been adopted for the protection of the innocent are ignored, the department becomes the victim of vague, unformulated and indefinite charges, and instead of a Government of law we have a Government of lawlessness."

These words are not mine, but those of President Coolidge in 1924 when his Secretary of the Treasury, Andrew Mellon, was being investigated by Congress.[21]

Government under law was vindicated against investigative procedures in a case that comes home to Queen's University, that of the *United States* v. *Leon J. Kamin.* Senator Joseph McCarthy, acting as a subcommittee of a subcommittee of a committee of Congress to investigate the operation and effectiveness of government operations connected with defense, demanded, in January 1955, that Dr. Kamin answer certain questions about a communist cell at Harvard that he belonged to ten years before, and from which he had since separated. Dr. Kamin refused. He was then sued for contempt of Congress. When the case came before the Federal District Court in Boston in October 1955, Senator McCarthy appeared as star witness for the prosecution, prepared to enjoy another Roman holiday with the modern

[21] Arthur E. Sutherland ed. *Government Under Law* (1956) p. 125.

setting of flash bulb photographs and an applauding mob. Upon the first unseemly demonstration, Judge Bailey Aldrich declared a mistrial and dismissed the jury. Dr. Kamin waived a jury trial. On 5 January 1956 Judge Aldrich delivered his opinion, to the effect that the subcommittee had no statutory power to inquire into alleged subversion in universities, and that the questions asked by Senator McCarthy were not pertinent to the legal scope of his inquiry; hence refusal to answer them was not contempt.[82]

Conclusion

We need constantly to be reminded of these traditional English liberties; we need frequently to recur to first principles and ask ourselves whether proposed remedies are not worse than the disease. In the United States, of all countries, a country where a war of independence was fought in the name of freedom, where modern democracy won its first victories, where a civil war was fought to preserve and extend freedom, and which joined the crusade of World War II against a particularly nasty form of tyranny, the basic principles of freedom should be respected. For without them, the citizen must lose his rights as an individual. To the many good citizens who are advocating a contrary policy, I would suggest that they ponder the famous Irish bull in Sir Boyle Roche's speech advocating the suspension of habeas corpus by the Irish parliament: "It would surely

[82] 136 Federal Supplement p. 791, *United States* v. *Leon J. Kamin*, 5 January 1956.

be better, Mr. Speaker, to give up not only a part, but if necessary the whole of our Constitution to preserve the remainder!"

Is there no sane method of dealing with communism; no middle way between those that endanger civil rights, and the British ostrich method of pretending that no danger exists?

I believe that there is. First, give the local communist parties, now outlawed as conspiracies, the bait of legal recognition if they can show evidence, over a year or so, of *not* following the Cominform party line; i.e., of being an American political party and not merely the United States branch of a Russian party. That has been done in the case of communist-controlled labor unions under the National Labor Relations Act as amended in 1947. The principle could work just as well and be as easily enforceable for social and political associations. The communist party should be allowed to agitate for communism as much as it pleases, so long as force and violence are renounced. Let us rest on the dictum of Judge Learned Hand that the First Amendment to the Federal Constitution, "Congress shall make no law . . . abridging freedom of speech or of the press," protects all utterances seeking constituent changes by the process that the Constitution provides, no matter how revolutionary those proposed changes may be.[11] Here is a challenge to American communists, who have consistently claimed, through their organ *The Daily Worker* (which, incidentally, has never been suppressed), that they are an American

[11] *United States* v. *Dennis* et al., 183 U. S. Reports 2nd Series 201 (1950).

party, and not the American branch of an international conspiracy. If they are sincere about this, they will comply with the law; if not, they will stay underground where they now are, and should be treated exactly like any other group of spies or saboteurs.

Secondly, while I agree that no communist should be employed in the Federal Government or defense plants, or given a commission in the armed forces, every case of a suspected communist or "fellow traveler" in the government should be adjudged on its merits, and not by some such absurd touchstone as having given money to help antifascists get out of Spain. Still less should anyone be suspended or expelled from employment on mere suspicion, or the denunciation of "faceless accusers." Civil rights will mean nothing if a man can be deprived of his job, which often means exclusion from any similar job, by anonymous accusations and private spite. Emerson said as much over a century ago: "A man has a right to be employed, to be trusted, to be loved, to be revered." [54]

Although civil liberty and political freedom are based on eternal principles, the expression of them must vary from age to age and from country to country. "New ways of political freedom should always be in the crucible of thought and action." [55] As examples of new ways, we have the rights to employment, welfare and security as stated in the United Nations Universal Declaration of Human Rights. New ways, yes; but not new principles. John Maurice Clark, in

[54] Emerson's essay "Politics" (1844) in Centenary Edition *Works* III p. 219.

[55] Hon. Luis Muñoz-Marin (Governor of Puerto Rico) speech at Harvard Commencement, 1955.

his Cook Foundation lectures of 1947, declared that a new definition of natural rights is required, because they no longer *fit* the "differentiated functions" of present society.[36] This is equivalent to saying that a new definition of Christianity is required for twentieth-century society because we have a different social organization from Augustan Rome. I believe, on the contrary, that our present society needs not only a resurgence of primitive Christianity, but a reaffirmation of basic civil liberties.

A few straws in the wind indicate that the trumpet blast of freedom is not blowing vainly to windward, as Byron wrote in *Childe Harold*. The president of the American Bar Association, an organization that has been guilty in the past of intemperate red-baiting, ends his speech of August 1955 thus: "The Time is Ripe for . . . a Revolution dedicated, as in 1776, not to establishing new principles, but to restoring the ancient liberties." [37] State and Federal courts in the United States are not meeting the issue head on, any more than King Agrippa did when confronted by the case of *Judaea* v. *Saint Paul;* but they are cautiously guiding the body politic to a common-sense moderation in these matters.[38] The segregation cases [39] have begun the destruction

[36] J. M. Clark *Alternatives to Serfdom* (1948) p. 19. He adds, "The needs, reactions and capacities of man are his natural rights." What nonsense! This is equivalent to saying that religion should encourage and stimulate the natural instincts of *l'homme moyen sensuel*, instead of doing its best to restrain him.

[37] Speech of Loyd Wright, Esq., before 1st General Session, American Bar Association Assembly, 22 August 1955.

[38] See *Quinn* v. *United States*, 349 U. S. Reports 155 (1955), which upholds the citizen's right to invoke the Fifth Amendment against self-incrimination.

[39] *Brown* v. *Board of Education of Topeka; Bolling* v. *Sharpe*, 347 U. S. Reports 483, 497 (1954).

of the last barriers against Negroes' obtaining the same political rights as white men in the United States.

The battle is not won; the struggle is unceasing. But it must go on, since political freedom is the essential framework of all other freedoms. It is always the first bastion to be attacked by fascists and communists.

The passion for freedom may not die, but it grows very cool at times, and our times are one of them. I would that that passion which animated our forebears might revive and conquer the craven fear of communism. What use to defend our liberties by such means as will destroy them? Woe unto America if these political freedoms are continuously scorned and flouted; for they embody not only the experience of eight centuries of struggle by English-speaking people; they are founded on immutable principles of justice:

> The unchangeable, unwritten laws of Heaven.
> They were not born today, nor yesterday;
> They die not, and none knoweth whence they sprang.

NOTE ON CIVIL RIGHTS IN CANADA

Since exact information as to how civil rights are protected in Canada, without formal bills of rights, is hard to come by, readers in the United States may be interested in a short note on the subject.

The Constitution of Canada, i.e., the British North America Act of 1867 with subsequent amendments, and the Statute of Westminster of 1931, is a federal constitution. It attempts to deal with "state rights" and to check inroads by the provinces on the rights of citizens by a proviso to the effect that acts of the provincial legislatures can be disallowed

by the Federal Cabinet within a year of enactment. This is a transference to the Canadian government of the old King in Council disallowance of colonial laws. There are no statutory limits to this power of disallowance, but in course of time the Federal Cabinet has adopted the practice of disallowing a provincial law, generally after a hearing, on two grounds only: (1) conflict with the interests or policies of the federal authority; (2) conflict with "justice and sound principles of legislation."

The latter ground has been used very sparingly in recent years, and cannot be claimed as an effective deterrent to violations of civil rights. For instance, the Quebec "Padlock Law" of 1937, probably the most illiberal ever passed by a North American legislature, was not disallowed. "Under its authority the Attorney-General could, *without court action*, close for one year premises suspected of being used to propagate 'communism' (the word was not defined). In effect the authorities took arbitrary discretion to harry persons suspected of 'communism' (political heretics, in other words), by searching their domiciles, seizing their books and papers, and, through the 'padlock,' turning them out of their very homes. So far did this go that policemen at times pushed their way into private meetings in McGill University, ready to make note of 'dangerous thoughts.' " [40]

The ostensible reason for not disallowing this act (which is still on the statute books in 1956) was that it concerned only Quebec; if her people chose to suspend civil rights, that was their affair. It is probable, however, that the real reason for allowing so notorious a law to stay on the books

[40] A. R. M. Lower *Colony to Nation* (1953) p. 528.

was plain politics. The Liberal Party, then in power nationally as well as in Quebec, was afraid to offend and alienate its large majority in that province.

In Canada the constitutionality of a provincial law may also be tested in the courts, and voided by them if adjudged to be contrary to the Dominion constitution. The Padlock Law, already in force nine years, is now being tested, on the ground that it is an improper interference with the federal power over criminal law.

It is a sad fact that the French Canadians, though very stout and voluble in defense of their own rights under the Quebec Act, have slight regard for civil rights in principle. Only the well-educated élite has absorbed British doctrines of liberty; the rank and file are highly susceptible to emotional appeals and inclined to equate British liberalism with communism. Their traditions, which are consciously kept alive and frequently appealed to by their leaders, are authoritarian and monarchical rather than libertarian and republican. During my sojourn in Canada in January of 1956, Premier Duplessis (who was responsible for the Padlock Law) drafted, and the Quebec Legislature passed, a "Newsprint Law." This is a punitive measure aimed at an individual pulp and paper company, increasing its taxes not only for 1956 but for 1955. It also sets up an administrative board for allocation of newsprint to the press, from which there is no appeal to higher authority or to the courts; an obvious attempt to put pressure on journalists unfriendly to the Liberal Party. In the United States such a law could be voided by state or Federal courts on at least three grounds – denying the equal protection of the laws, *ex post facto*,

and refusal to allow appeals to the courts. But it is unlikely that the Newsprint Law will be disallowed by the Federal Cabinet, for the same reason that the Padlock Law was not disallowed. And it would take a very ingenious lawyer to find any ground of conflict with the Canadian Constitution which could persuade a court of justice to declare it void.

In the Maritime and Western Provinces of Canada and in Ontario, civil rights have generally been maintained without the safeguard of a Bill of Rights, owing to the strength of British tradition. There have been some exceptions, as in the case of the crackpot "Social Credit" governments elected during the Great Depression; but, in general, civil rights have been as faithfully respected by English-speaking Canadians as by the English themselves.

Thoughtful and patriotic Canadians of both language groups are not complacent about the situation in their country, especially about Quebec. They are distressed by the bad example furnished by McCarthyism in the United States, which encourages the worst elements in their country. They hope that the Supreme Court of Canada may develop a doctrine that provincial legislation which interferes with freedom of speech, of assembly, or of the press, is a violation of that clause in the British North America Act which, at least by implication, would prevent any provincial interference with the process of ascertaining the popular will in federal elections.