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CIVIL LIBERTIES AND THE STATE

HON. RICHARD J. HUGHES*

IN RECENT YEARS we have witnessed the rise of the totalitarian State adding a new dimension to man's inhumanity to man. Whether we are speaking of the experience of Nazi Germany or the present existence of the Communist states we find no recognition of the rights of individual conscience. The doctrine of German National Socialism conceived all powers as inhering in the person of a supreme leader, Adolph Hitler, and descending through an elite class to enslave man, in complete rejection of that basic principle of constitutionalism which recognizes that political power resides, as an inalienable right, in the people and ascends by their authority to a representative government. The essence of the totalitarian state is its omniscient character which absorbs the individual in the collectivity of the State. No area of life is outside the purview of the State locked as it is in total unity with every aspect of society. Thus it was a recent heresy in the Soviet Union for Boris Pasternak to bear witness to the integrity of individual conscience.

The Communist Challenge

It is this denial of the city of God which represents the fundamental challenge of the current communist dynamic as it seeks to supplant the constitutional and spiritual tradition of Western civilization. And it is the nature of this threat which has so disturbed many Americans. Some of us have discarded the balanced perspective and have sought solutions which could prove to be as fatal to a free society as the danger itself. This observation is not the easy generality of a professional civil libertarian trying to arouse his fellow citizens to the consequences of present trends.

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For the moment, the cause of civil liberties—as distinguished from civil rights for minorities—is not a feverish occupation of the Nation, as it was a few years ago. But there is still the restlessness in our country that supports those right-wing movements which have gained only recently a new and fashionable prominence and caused sufficient concern in the White House to move the President himself to warn the Nation of the pitfalls of the John Birchers and other reckless crusaders against the image, but not the reality, of communism.

While we maintain our commitment to free government—a scheme of ordered liberty—the communist challenge seems to offer a strong justification today for tipping the balance against the freedom of the individual in order to protect the body politic. The power of the State, in other words, is being employed for a “good cause.” When, however, men believe that their cause is “good” is the time when the temptation to intolerance grows. Note the temper of the controversy over communism and national security. Good will evaporates and motives are suspected as men are assigned to their polar categories: “neofascist” or “pro-communist.”

So a subtle danger may be developing for America. I refer to a gradual movement, which some claim to have discerned in our society, into what has been called “the garrison state,” whereby our government, in adapting itself to meet the challenge of communism, effects changes which eventually might curtail the freedom of the people and the control which they have, as a natural right, over their government. For reasons of national security with the approval of the majority, it is possible that the State will come to exercise its power to stifle dissent, to curb criticism and to

invade the sphere of individual conscience in outlawing particular political beliefs.

The Tyranny of the Majority

Thus it is the power of the State in all those areas bordering on internal security that should be our cause for concern. It is here that the lesson of St. Thomas More has particular relevance. In a way ours is a problem more subtle than was More's. He was faced with the power of the State in the person of a tyrant, King Henry the VIII, seeking to extend his domination to the spiritual sphere and encroach upon the authority of the Church. In defending the autonomy of the spirit and of the Church, More was defending at the same time the ultimate sanctuary of freedom, the individual conscience. Today, we face the possibility of a different sort of tyranny—that which was anticipated by the preceptive De Tocqueville in his *Democracy in America*—the tyranny of the majority. In less awesome language, this is that concept of government called majoritarianism which measures both the power and right of State action by the proper counting of heads. Against a majority represented by the Congress and the Chief Executive there is no appeal save the constitutional guarantees of the Bill of Rights as interpreted by the courts. And there is no sure consensus on the Supreme Court which tends in favor of the individual as against the power of Congress or the Executive Order. The opposite, in fact, seems to be the case. Thus, unlike St. Thomas More before a tyrant-King, the individual conscience today is faced with power of the democratic majority as reflected in our institutions of government; and the first amendment freedoms provide, at best, a doubtful guarantee of the rights of the individual.

We must take caution lest, in the name of national security, a slow erosion of our priceless heritage of liberty should take place. Constitutional guarantees of individual freedom, are essential to the maintenance of free government. They were considered so by our Founding Fathers even with the risks attendant upon such freedoms in the early days of the fledgling Republic. For they recognized that there is no alternative to free inquiry, free assembly and free communication if government is to be responsive to the consent of the governed. In the American scheme, government is not the judge of opinion or truth; rather it stands subject to judgment by the people. The preservation of the greatest possible freedom of dissent is necessary, then, not only for the right and dignity of individual conscience, but because of its social function in enabling the voice of the governed to be heard in a government which serves rather than dominates, in a government of free men and not of slaves.

The Public Philosophy

For this reason there is need for a re-evaluation of our attitude toward the constitutional freedoms of Americans. Surely, they have been invoked by those whose ideas most Americans find despicable. But, remember, the guarantees must be for everyone, or they will serve no one of us. To the first amendment freedoms we must restore the tradition of the public philosophy that shaped Western civilization, that sustained St. Thomas More, that informed the very Founding Fathers in their constitutional labors. We cannot safely suffer for long the eclipse of the bright substance of an ancient tradition of historic freedoms.

The true strength of constitutional guarantees of individual freedom can be found

only in the public philosophy; essentially, a higher law above all men and all governments. As expressed by St. Thomas More in his final words: "The King's good servant, but God's first." The power of the State brushed aside the principle upon which More took his stand but in taking this stand he reaffirmed the proposition of a higher law and the reality of a sphere in man's life into which no government might move with authority. It would be difficult to improve on John Courtney Murray's description of this public philosophy, as one

derived from the ancient tradition whose central assertion was the existence of a rational order of truth and justice, which man does not create, since it is the reflection of the Eternal Reason of God, but which man can discover since he is himself made in the image of God. . . .

The Jesuit scholar then points up these derivative political principles:

From this philosophy we drew the moral concept of freedom under law, both divine and human, and the concept of justice, and the concept of human equality. From it too, we derived the political ideas of representation and consent. This philosophy fashioned for us the conception of the legal order of society as subject to a higher law whence it derives its binding force upon the conscience. This philosophy therefore taught us that human law is neither simple fact nor sheer force, but a special form of moral direction brought to bear, coercively, upon the action of society in the interests of freedom and order. In this philosophy the state is a part of the moral universe, subject—as the individual man is—to the objective canons of justice.

Summing up, Father Murray notes:

Therefore the state is not omnipotent; it is limited in its power and action by rights that are inherent in the human person, and it is dedicated by its very nature

to the service of the human person and to the furtherance of his innate destinies, both temporal and eternal.

By his death St. Thomas More strengthened that tradition and the principles which found expression in the Declaration of Independence and the American Constitution. But these principles were not mere abstractions to our forefathers. To cite again the perceptive Jesuit scholar, Fr. Murray, we find that

the Bill of Rights was an effective instrument for the delimitation of governmental authority and social power, not because it was written on paper in 1789 or 1791, but because the rights it proclaims had already been engraved on the conscience of a people.

So in an era of rationalism—when, for example, Frenchmen were attempting to form a government according to a blueprint of reason divorced from the principles of public philosophy—the Founding Fathers, being good common-law lawyers with a solid view of man's nature, his capacity for good and evil, a sense of history and the possible—gave us a government of ordered liberty with constitutional guar-

antees of those very natural rights of man.

Thus, it was recognized that freedom of dissent is essential to the people's check over their government. Stifle dissent, check criticism, and we are likely to become mere instruments of a State purpose. We should expect the legal profession to be in the fore of the fight for the preservation of civil liberties. Remember a free society is not inevitable. It is a condition sustained only by the unflagging efforts of the citizens of that society. The maintenance of a free society requires a recognition of the importance of the basic freedoms of speech and assembly, as well as a scrupulous regard for due process. And, on the part of all of us, a sense of self-restraint.

To the Bar, then, falls a special duty to preserve this patrimony. To the Catholic lawyer, an even greater duty for it is his Church which has been the guardian of the tradition of public philosophy throughout history and which remains so today, a tradition standing as a strong rock against which ancient and modern waves of tyranny and hatred have beaten and been thrown back.
