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A PROPOSAL FOR CO-OPERATIVE RESEARCH ON THE BILL OF RIGHTS

BY JEROME HALL

ONE of the most amazing phenomena of our times is neglect of study of the Bill of Rights. The propaganda, of course, has grown mountain-high; scholarly publication remains almost negligible. The paramount importance of what is symbolized in the Bill may be taken as axiomatic in the present state of world affairs. Why then the seeming neglect by competent scholars? One answer, at least, can be given by any one who has seriously grappled with the problems raised by almost any one of the provisions in the Bill. As insight into the problems increases, so does chagrin deepen! For one finds himself in the very center of the most perplexing problems of our times. The ramifications spread until they include the moot issues of history, economics, law, sociology, politics, and philosophy. Any hope of being immediately helpful in the threatening cataclysm of western civilization, any persisting intention to uphold the democracy of this country, to enter the arena against the powerful forces of repression, slowly but almost inevitably gives way to a feeling of helplessness, of frustration, even of escapism to avoid the consequent torment. The fact is that the job that needs doing is far too extensive and involved for the capacities of any single scholar, however gifted. The only hope for escape from the disheartening dilemma that confronts the scholar may be found, if anywhere, in organized co-operative study. Only such endeavor can maintain the severe standards of serious truth-seeking in the social sphere

and offer simultaneously the likelihood of efficacy of discovery. (Obviously the solution of the scholars' problem is hardly significant as a personal matter; all of that, all the foregoing, is incidental to solution of the major social problems of our times. The likelihood of facilitating that end is the sole criterion for evaluation of the present proposal.)

Let us consider briefly the nature of the task that confronts us. What sort of scholarship does study of the Bill of Rights require? What fields of learning are involved? Clearly the answers depend on the sort of questions we ask. Although in the abstract, no limits may be imposed, it will be generally agreed that the chief focus is set by the practical problems we confront and by the more enduring policies and objectives that guide us. There is no escape from the conclusion that in the very formulation of problems and objectives, certain basic axioms are accepted as "true"; but we can invite the criticism of these by persons who dissent or are skeptical of their validity. Here their initial validity, at least, is assumed. Hence the more directly relevant inquiry concerns the nature of the job to be done. This can be indicated by reference to the disciplines that are directly involved.

I. *History*

We know that a majority of Americans in 1787 were British; that the major institutions, legal system, and habits of thought were British. We know that the very terms employed in

the Bill of Rights are in many instances traceable directly to the major documents of the British Constitution. We also know that there were substantial numbers of non-British in the colonies—a unique departure from the English situation; and that 18th century French thought was vitally influential, that Dutch and other influences were operative. The Petition of Right, the Bill of Rights, Habeas Corpus were 17th century instruments, but back of these is a long history of more or less relevant, medieval ideas. In addition, the Colonial Charters contained some of the traditional, familiar phrases; there were important colonial enactments and tracts that symbolized the continuity. Finally the first state constitutions embodied the history up to the framing of the Constitution. That historic event was significant particularly as regards the universalizing of formulas that had previously been restricted to British subjects. A few provisions, trial by jury, *ex post facto*, attainder, and habeas corpus were included in the original document; the rest were added later in "The" Bill of Rights. Finally there is the history of legislation and decision since 1791.

2. *Sociology*

The need for sociological analysis of the Bill of Rights is two-fold. Firstly is that of deeper understanding of the document, and of the special insight that results from studying various provisions in relation to concomitant social and economic conditions. From the Petition of Right (1627) to the American Bill of Rights (1791) is a span of something over a century and a half, characterized largely by opposition to uncontrolled executive government. It saw the rise to dominance of the mer-

chant classes. The Commercial and not the Industrial Revolution provides the salient economic setting. The study of the inter-relations of the above institutions and changes should result in a series of insights, hypotheses, and generalizations that could be tested against other cultures than the British and American (especially the Dutch, French and Scandinavian as successes; also Weimar Germany, and other failures.) Not the least in importance is the relationship of the Bill of Rights and related legislation and decisions to the political, social, and economic development of this country. We should emerge from such a study with much more than vague suspicions regarding the impact of industrialism, monopoly, and centralization on civil liberties.

Secondly, we need to know the sociology of the Bill of Rights because we have a certain practical end in view—the securing, growth, and spread of these rights and institutions elsewhere in the world. If we know the social, economic and ideological conditions that stimulate the actual exercise of civil liberties, and know them in detail, it is more than barely possible that well-directed efforts here and elsewhere may have desirable results. On the assumption that some degree of deliberate direction is possible, it is apparent that we need the sociological knowledge to implement American political and cultural ambitions.

3. *Law*

The legal phases of the Bill of Rights are numerous. We deal throughout with documents and words, and the special meanings that have been officially applied. A large part of the legal analysis must be directed to decisions

that bear no necessary relation to any provision in the Bill. How have these arisen, and what is their validity? In other directions, e. g. the decisions on religion, the activities involved are remote from the expressed provisions. What is their origin, status and authority? There is the problem of judicial technique and the relevance and utility of precedent. The legal analysis parallels the historical throughout; in a sense it constitutes a type of history, and its special job is to lay bare the structure of rules and the official ways of applying and implementing them.

4. *Politics*

Here the major concerns are with certain institutions and their procedures, with the forms of prestige and power that have come into being, and their functioning in relation to the Bill of Rights. Perhaps most important of all problems in this regard are those of administration. As practical matters, the acute questions of violation of civil liberties have arisen and arise through violations of due process. More generally, they concern the activities of police, municipal officers, licensing boards, and administrative war-time tribunals. Indeed the relationship of the symbols to the actual life of the community constitutes one of the most basic divisions of this study in its most general formulation.

5. *Philosophy*

Finally, any thoroughgoing study of the Bill of Rights must consider its philosophical implications. The challenge in recent years has been complete and fundamental. Recent philosophies range from Neo-Scholasticism on the

one hand, to logical-positivism on the other. Perhaps it is fatuous to imagine that such extremes can be mediated. But an effort must be made to secure a significant discussion of philosophical views relevant to the Bill of Rights, one that escapes the professionalism of the schools. What is called for may perhaps be most briefly (and perilously!) designated as a full debate on the validity of a modern philosophy of "natural law," not in an abstract or traditional mode, but with specific reference to the various provisions in the Bill of Rights, and appealing to common sense for verification rather than to professionalism.

Not the least important result of scholarly study of the Bill of Rights may be that we shall discover that some of its provisions have never been applied and are obsolete, that others are only slightly relevant to contemporary issues, and that there are no provisions whatever concerning problems that have arisen in recent years to become the most burning issues of the times.

Obviously the magnitude of the work envisaged has only been suggested in the briefest possible manner. Reliance must be upon the insight of interested persons to fill in some of the gaps. What needs emphasis, in closing, is that personnel is of maximum importance and that understanding of related disciplines is a minimum intellectual equipment of each participant. There must be active cross-fertilization of the various analyses. Thus only legal scholars who have a cultivated eye to the concomitant social and economic changes can execute the type of legal analysis required. Only sociologists who have some knowledge of the political institutions as well as of the legal processes

can supply the necessary data and sociological explanations. And so on as to all the collaborators, not least, those who undertake the philosophical discussions. The success of the undertaking will depend largely upon those who guide the studies and especially on those few persons who interest themselves chiefly in the over-all job of integration of the various analyses.

A final caveat is necessary to ward off disappointment. For it may fairly be hazarded that a careful study of the Bill of Rights will reveal that it was by no means the product of sheer unalloyed altruism. Man is hardly distinguished by self-abnegation, leastwise in his daily conduct. Hence careful study of the Bill may be expected to reveal not only aspiration and notable achievement, but also, hypocrisy, and in some regards, even dismal failures. It is necessary to give warning in this prognostication lest the sensitive but uninitiated flee in anguish when their dreams encounter the realities. For even limited exploratory studies of the Bill reveal the enormous gaps between ideals and actual practice. There is anything but un-

disturbed relief for escapists in study of the venerated Bill. But those of stouter hearts will, it may also be hazarded, find here an enterprise worthy of their steel. as of intellect to the task, they will survive the shock and disappointment, and emerge vastly more enlightened and, perhaps, with greater confidence in the people and in the prospects for human progress. For though there is stress and struggle and disillusionment, there is also definite accomplishment, real improvement in living and in the quality of individual development.

If they bring maturity of spirit as well

The above proposal is an appeal to qualified scholars to devote their energies to the major problems of our times as these present themselves in the context of our Bill of Rights. It calls upon them to collaborate in an organized study which will give assurance that their own work will exert a maximum influence and significance. It offers one reasonable hope of scholarly implementation of democratic government here, and indeed, if adequate aid is forthcoming, throughout the post-war world.