

# DEFINING LIBERTY

## An Analysis of Its Three Elements

WENDELL J. BROWN

Abraham Lincoln said the American people were much in want of a good definition of the word *liberty*. Mr. Brown has accepted that challenge, and to define what liberty is he divides it into three elements and analyzes each. He writes of the goals liberty seeks to achieve, the procedures by which it moves, and the underlying faiths that sustain it.

SOCRATES thought that trial lawyers were too much in a hurry to be good philosophers. True enough, there are witnesses and documentary evidence to be examined. Trial lawyers do not have much time for the creation of philosophical systems. *A priori* thinking is usually confined to what we do when we guess what the law is before we take down the books to see what it is.

Lincoln was a trial lawyer. He used abstract exposition, but not for its own sake. Rather it pro-

vided him with a sense of direction during a period when there were enough hot heads around to satisfy the most belligerent. During that period one hundred years ago he took time to say: "The world has never had a good definition of the word *liberty*, and the American people, just now, are much in want of one."

Different from other forms of life, *Homo sapiens* does occasionally have use for concepts. Liberty is one of them. The word *liberty* is its symbol. Of late, I have not seen the word identified by its basic elements in one short piece. That is the intent of this short excursion.

In the context of a free society there are three elements in the

---

A member of the Illinois Bar since 1926, Wendell J. Brown received his legal education at the Northwestern University School of Law and has practiced in Chicago since. He is a member of the American College of Trial Lawyers.

This article is reprinted here, by permission, from the April, 1965, issue of the *American Bar Association Journal*.

concept of liberty. One of these is what liberty seeks to accomplish. The second is how to accomplish it procedurally. And the third is its underlying faiths.

## I.

### WHAT LIBERTY SEEKS TO ACCOMPLISH

In terms of what a free society seeks to accomplish, liberty is five freedoms for each individual: (1) freedom to come and go, (2) equality and justice before the law, (3) security of property, (4) freedom of speech, and (5) freedom of conscience. There are many other names for these five individual freedoms—freedom of the press, freedom of expression and opinion, freedom of religion, freedom of association, right of habeas corpus, right of assembly, right of jury trial, etc. But these five individual freedoms are the “blessings of liberty” that constitute the first element of the word.

The active and politically minded members of a free society may use a “more or less” liberal or an absolute “either-or” approach, but these five individual freedoms *are* what a free society seeks to accomplish.

The intent of a free society is to keep the use of all man-made power within the periphery of these five individual freedoms.

This requires that the activities provided for in our laws have to be limited by the inherent give-and-take requirements contained in each of these five individual freedoms. We do not expect either these five individual freedoms or their conflicts with each other to “wither away,” and we know that we could not have them where the state is everything, or where there is no state.

## II.

### PROCEDURAL WAYS TO REACH THE GOALS

Liberty is a political sense of direction. Therefore, liberty is also a current process based on its procedures and underlying faiths. The second element in the concept of liberty is identified in the debatable area of the best procedural ways to accomplish it.

When I was a boy in a small Indiana town, the statement was made with impunity by one of our articulate statesmen that, “what this country needs is a good five-cent cigar.” The popular inference intended by that otherwise irrelevant comment was that we could leave the processes of liberty alone and still have it. Today we are forced not to expect our procedures to work that perfectly. At every turn there is the requirement that an overwhelming number of us accept the responsibility

our procedures impose; at every turn we have learned to expect that some will not.

### ***Universal Suffrage and Majority Rule***

There is no one procedural formula applicable to all nations alike for the attainment of the five individual freedoms of liberty. The newborn of each nation come into a society which has institutions, mores, laws, and habits which they could not choose. The people of each nation have to custom-build their own procedures and institutions. They are not conceived in a cultural vacuum. In a nation that would have them, there must be a dominant number who have already made the convictions, morals, and habits of free men their own.

The force of public opinion controls. Different from the military practices and propaganda power of totalitarianism, communistic or other, it would be a contradiction of terms to say or think that liberty could be thrust upon the people of a nation. Physical power can be thrust upon the people of a nation, but not the power of liberty. Men are not persuaded, save they persuade themselves. The inspiration and perspiration that create and maintain a free state must ultimately move from within or not at all.

During the 2,500 years of re-

corded history there has never been a dominantly free society without some form of self-government. Historically, self-government has been a common denominator of all dominantly free societies. The statement that the perpetuation of the five freedoms of individual liberty requires universal suffrage and majority rule is of such persuasive power that even though we know that the majority has to be a responsible majority, I believe that we have to take that gamble. Procedurally we take that gamble aided by a written constitution.

### ***A Written Constitution***

In the United States our political procedures are realistically grounded. Many years before Castro, Hitler, and Mussolini, and in fact many years before Lord Acton said it, our Founding Fathers were aware that "power tends to corrupt and absolute power corrupts absolutely." Accordingly, under our procedures we seek to accomplish the five freedoms of individual liberty by a representative republic under an organic written law. By its terms and in fact our Federal Constitution is the "supreme Law of the Land." It provides for a diffusion of delegated power into judicial, executive, and legislative branches, a system of checks and balances, a

co-ordination of Federal with state rights and a Bill of Rights, all with the power to amend by orderly procedures. We have set up these procedural odds in favor of a free society.

Other free societies may prefer an unwritten constitution, but we believe that a written one is the best procedural way for us to accomplish the five freedoms of individual liberty. When we make it work for us, we avoid a concentration of arbitrary power, both private and public.

Thus far, we have found that when our written Constitution is interpreted by use of the cardinal rules of construction applied to legal instruments, it is a powerful tool in the maintenance of the five freedoms of individual liberty and the right to an equal ballot. This attitude toward our Constitution does not result in complete agreement, but that does not perturb me. On the contrary, I do scare easily when I read a majority opinion of our United States Supreme Court which shows an attitude toward our written Constitution that allows it to be interpreted without any real use of the cardinal rules of construction of written instruments. For example, such is the accusation of Justice Harlan in his dissenting opinion in *Reynolds v. Sims*, 377 U. S. 533 (1964), when he writes:

... It is meaningless to speak of constitutional "development" when both the language and history of the controlling provisions of the Constitution are wholly ignored.<sup>1</sup>

Our procedures to maintain a free society do not allow for that attitude to become a habit. In the same dissenting opinion Justice Harlan says why this is so:

... The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.<sup>2</sup>

In actual litigated controversies there have been more than 4,000 decisions authored by our United States Supreme Court which have interpreted and applied its less than 7,000 words – more than 50,000 pages of interpretative decisions. Some of these controversies

<sup>1</sup> 377 U. S. at 591.

<sup>2</sup> 377 U. S. at 625.

have stemmed from the use of legislative power, some from the use of executive power, some from the use of judicial power—and all from a claimed usurpation of public or private power. But in each new justiciable controversy we, the people<sup>3</sup>, return to our written Constitution for the tools of advocacy of political liberty, including the five freedoms of individual liberty. The periphery of separate legal controversies has thus been procedurally set.

The advocates of liberty are alert to the interpretative fact that the “interstices” in our Constitution are a part of that document in the same way that the interspaced cracks in a sidewalk are a part of a sidewalk. It is an entity and its parts are to be interpreted and applied in that way. The process of staying on the sidewalk, even for the sane and sober, is not uncontroversial. Still, I prefer having a written constitution to doing without one.

### **An Independent Judiciary**

A paradox in our procedures to secure liberty is that an independent judiciary, our United States Supreme Court, without purse or sword, has a limited power of coercion. Justice Jackson reminds

<sup>3</sup> Including trial lawyers and the members of the United States Supreme Court in most instances.

us that decisional law could not exist except “where men are free . . . and judges independent.” This interdependence makes it doubly clear that (1) the zeal that a judge feels for what the law ought to be has to be tempered with a zeal for what the law is; and (2) a practical test of a free society is the willingness of its administrators to lend the judges their aid, and of its people to obey their constitutional decisions until changed by the court itself under its two-edged, self-imposed weapon of *stare decisis* or by amendment of the Constitution.

Learned Hand once wrote that “liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.”<sup>4</sup> The underlying issue, I believe, for a free society to face head on is one of the acceptability or nonacceptability of a faith that there are progressively higher laws that can be merged into man-made laws under orderly procedures. When Charles Evans Hughes, a great trial lawyer, stated that the Constitution is what the Supreme Court says it is, he merely stated the hard fact that the trial lawyer has to face once the Supreme Court has spo-

<sup>4</sup> HAND, THE SPIRIT OF LIBERTY 144 (1944).

ken unequivocally. In a free society the procedural adaptation of liberty is not the sole responsibility of the three branches of our government. The supreme power and, therefore, the supreme political responsibility for the attainment of liberty resides in the people. There, too, are its underlying faiths, without which the five freedoms of liberty are unattainable with any procedures that we may devise.

### III.

#### THE UNDERLYING FAITHS OF LIBERTY

The third element in the concept of liberty is its underlying faiths. My quest at this point is not for absolute certainty, but to understand, the best I am able, the underlying faiths of liberty. I venture to think that a more ambitious quest would fade away into a copiousness of words. The *why* of liberty is too deeply related to the *why* of life for me to expect to do more.

When I think of ultimates for the human race or for just me, there is no certainty. Harold Macmillan, former Prime Minister of Great Britain, recently made the comment that the only thing of which he is sure is that there is a God. Justice Holmes reminded us, "Every year if not every day we have to wager our salvation

upon some prophecy based on an imperfect knowledge."<sup>5</sup> This mixture of ego and humility is not an uncommon asset of the advocate of liberty; it could never be found in an advocate of any political faith that it premised on infallibility.

There is a spirit of conciliation between reasonable men when we consider the finer reaches of the five individual freedoms which liberty seeks to accomplish. Also, there is a spirit of conciliation between reasonable men when we think of the best procedural ways to achieve liberty. But there can be no spirit of compromise in its underlying faiths. We believe in them or we do not believe in them. If we believe in them, we cannot be diverted from them or allow them to be destroyed.

The strength, the compassion, the courage and the intelligence behind the concept of liberty evolve from its underlying faiths. These underlying faiths either move from within ourselves or not at all. There is no formula for them and there is no certainty. The creed of liberty leaves all supposedly final philosophical formulas with an open end. It does not answer the why of life. Partly for that reason it has a chance to survive without changes in the sense

<sup>5</sup> *Abrams v. United States*, 250 U. S. 624 at 630 (1919) (dissenting opinion).

of direction that is its underlying essence.

The creed of liberty, I believe, can be stated in one fairly short paragraph as:

A living organism differs from any mechanical device that man can conceive in that it forms itself and keeps itself in working order and activity. Man is a living organism. Biological and psychosocial cultural man is different from most or all other living organisms. Man has an inner power of choice that has to be kept alive or he ceases to live as such. With liberty he keeps himself in working order and activity. Without it he does not. It is, therefore, an operational need in the process of living of a human entity.

This is the basic approach to the underlying faiths of liberty. But I cannot stop with a statement which depends upon the word *liberty* itself. The more than semantic question persists: "What are the underlying faiths in the concept of liberty?"

In the United States it is our cultural habit to take it impatiently for granted that we know the answer to that question. Not merely that we would rather be thought blasé than to be thought naïve. Rather we feel that we have an intuitive sense of liberty that needs no further identification. We impatiently sense that when we refer to liberty, we refer to

that essential element in social, economic, and political life by which man is enabled to keep himself in working order and activity. This is essential, but it is not, I believe, the totality of our faiths in a free society.

After several "pace-offs," John Dewey decided that one fairly accurate way to conceive of the human mind is by reference to its ability to "resolve doubts as such." Human beings are endowed with the power to see that doubts are doubts, and to resolve some of them, rightly or wrongly. The first doubt for me to resolve in my search for all the underlying faiths of liberty is to determine what a faith is. I shouldn't take it for granted that I know what faiths in general are.

A faith is a "rule of conduct," but that answer is a part of the objective effect of a faith that we already have and does not completely identify what a faith is.

Different from a mathematical proposition, a communicable faith, before it can limit and govern our group actions, I suggest, must have an emotional appeal as well as a valid rational appeal. Liberty makes good use of the feelings of courage and compassion, for liberty begins when the weak become strong and ends when the strong lose their sense of compassion. The statement that emotion and

reason are a house divided is only a metaphor. Man functions as an entity. He is at once an emotional, instinct-packed, volitional, physical, and sometimes rational entity. The underlying faiths of liberty, like all faiths, must be a part of all of these characteristics functioning together, inasmuch as each man has to function that way if he functions at all.

Liberty is not a mathematical formula. Much less is it an artifact, a product of human workmanship that we can pick up with our hands and examine for color, size, and content. We cannot point to it, weigh it, or count it. To prove it we cannot explode it over the deserts of New Mexico. It is a belief system in the process of biological and psychosocial living, and a belief system requires a meeting of the minds about a faith which we have in common and which each of us has made his own. Before we can say that our faiths in liberty are a part of us, we must be able to say that "we feel them," "we think them," and "we act them." That is what faiths are.

### ***Liberty Lies Within the Man***

The core of individual liberty is a matter of faith, a faith that there is an inner life for each individual, the liberation of which will produce results, the only re-

sults over which we human beings have any control. These results are a part of a stream of life, but the advocate of liberty believes that they can be credited or debited to an individual account — an account without an infallible book-keeper.

The advocate of liberty believes that by the use of the individual inner drives of compassion, courage, reason, and intelligence, mankind need not inevitably destroy itself and that the course of mankind can continue. He believes that liberty, if he has it, is in the process of living and never at the end of a rainbow of wishful thinking. He believes that it is complementary of the orderly laws of cause and effect, of probability and of chance, of which man is not completely informed. It is complementary of them because it rests in part upon the faith that each individual is endowed by his Creator with some power of individual choice.

The great contemporary contributions of others in his scientific field caused Einstein to question what he could claim for his own. But with all his skepticism or humility, he never lost faith in his sense of selfhood. Each advocate of liberty believes that the responsive and positive chords in his life must be struck by him.

What are the underlying faiths



of liberty? A faith in the God-given and yet spontaneous spark of creativity in each of us which makes us different from all others; a faith that this spark of creativity can be preserved in its totality by just laws applicable to all equally; a faith in the worthiness of its preservation; a faith in the practicality of its preservation by the people themselves — these are the underlying faiths of liberty.

The division between scientific thought and critical philosophical thought, between observable objectivity and value judgments, though useful, does not cause one to think that man, individual man, does not have to function as a separate entity of energy if he is going to function at all, or that any political system can evade that fact and survive.

The discoveries of nuclear physics make it imperative that we, all mankind, use value judgments that are universal. We cannot throw senseless rhetoric or eliminative bombs at each other and expect the species *Homo sapiens* to survive in perpetuity.

### **More than Mere Words**

Although there is easily observable evidence to the contrary, political liberty is not a mere play on words that each side of current controversies uses for its rhetorical effect. Rather, by its three

specific elements it is a synthesis of thought and action, a concept that can be accepted or rejected. It is not as certain, perhaps, as the concept that God made little green apples, but thus far the only perceivable bridge between science and philosophy and between nations and between men that will preserve the life and hopes of the individual and of mankind, is the concept of liberty — the grand concept of the dignity and brotherhood of man under a just and cosmic God.

“Where liberty dwells, There is my country.” These words, uttered by John Milton, the blind poet who yet could inwardly see, may have been words of pride or words of yearning. For mankind today they are optimistic words — words of hope. They suggest a sense of direction based on the three elements of liberty in the context of a free society. In a world in which man must seek his salvation with imperfect knowledge, could there be a better way?

It is the only way that I can see that will give my grandchildren a chance to decide for themselves the course their lives shall take in a free society. Right now they kick about going to bed at night, but I think they are tough enough to handle their share of responsibility in a free society when their time comes. ♦

# THE GREAT COMMUNIST

# SCHISM

WILLIAM HENRY CHAMBERLIN

BETWEEN 1917 and 1949, within the span of a generation, communism achieved a leap from the status of the small, little-known political sect in the Russian revolutionary movement to a system that dominated the lives of one-third of the population of the world, including the Soviet Union, mainland China, and the considerable area in Eastern and Central Europe which had been subjected to communism as a result of Soviet military invasion and occupation. Not since the early sweep of the Mohammedans from the deserts of Arabia over the Near and Middle East and North Africa had a new doctrine acquired

power so swiftly on such a large scale.

What made the success of communism seem more formidable was its apparent concentration of power and authority in Moscow. Stalin had only to whisper a command and it was translated into action not only in the countries under Russian military and police control, but also by the communist parties in America and Western Europe, where they had not yet gained power. An article in a French communist publication was sufficient to cause the American communists to discard the comparatively moderate leadership of Earl Browder and substitute the more violent, intransigent William Z. Foster.

The communists seemed to have

---

Mr. Chamberlin is a skilled observer and reporter of economic and political conditions at home and abroad.