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THE RELATION AND CORRELATION OF FREEDOM AND SECURITY

HENRY H. FOSTER, JR.*

Introduction

A FEW YEARS AGO, some forty-one eminent philosophers and scientists were asked to contribute to a symposium on the meaning of freedom.¹ As a semanticist might have anticipated, there was substantial disagreement as to the nature of so equivocal an abstraction. The classicists insisted that in so far as man was governed by reason he is free. Russell defined it negatively as absence of external obstacles. The biologists believed that life itself is liberty, and the moralists equated liberty with the pursuit of happiness.² Einstein believed that freedom of the mind could be found in freedom from authority and prejudice, but admitted that no one was free whose whole concern was with necessities. Dewey pinned his faith on "voluntary associations" and also referred to "effective freedom" as the ability to perform and understand. Whitehead expressed the notion that when ideas become effective there is freedom and described a "free society" as one where each trade and activity had a maximum of autonomy and was self-regulated like a profession. Several of the contributors felt that the essence of freedom was choice, and a few identified freedom with satisfaction.

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¹ FREEDOM: ITS MEANING (1940), edited by Ruth Nanda Anshen.

² The juxtaposition of these definitions provoked one essayist, Herbert W. Schneider, to comment that he understood from the Declaration of Independence, that life, liberty, and the pursuit of happiness, were supposed to be three different things. FREEDOM: ITS MEANING 664.

The understandable tendency of most of the contributors to read their personally prized values into the concept of freedom resulted in a series of moving essays which taken together illuminated the many facades of freedom but when viewed separately left the reader without a blueprint of the structure itself. This was to be expected, since the meaning of an abstraction is ultimately to be found in the concrete experiences from which it is abstracted. Hence, each essay was restricted by the individual writer's points of contact with the value of freedom.

The fact that as an abstraction freedom should have so many referents perhaps does not greatly impair its usefulness as an abstraction nor completely dissipate its force as a symbol, but it does indicate that its function may be more emotionally suggestive than informative. Indeed, as we look about us today, we may note that even the most odious totalitarian regimes have proclaimed their allegiance to the values of freedom and justice, and by a semblance of logic, albeit sophistry, attempt to convince their subjects that they are true to these higher values. Protests that this is a desecration or perversion of the true meaning of such values, although it may allay justifiable indignation, in the final analysis leads to a somewhat futile battle over "true" definitions.

Experience indicates that amateurs should shy away from grappling with abstractions. Since the days of Plato, philosophers and theologians have disputed the meaning of freedom and justice, good and evil. Perspicacity admonishes us to respect their specialty and to be content with serving as spectators. The Procrustean bed is theirs to manipulate and as they made it, perhaps they should lie in it.

But even if we forego the metaphysical meanings of freedom, leaving that problem for the experts, we may be able to make intellectual progress on a somewhat lower level. By adopting the pragmatic method and inquiring into the manifestations of freedom and how the law utilizes and furthers it, we may be able to observe some of its implications and make inferences as to its nature. At the outset, we perceive that the law is concerned with the interests asserted by individuals and groups. Many of these interests are often referred to as "liberties" or "rights." They also involve "duties." These rights, liberties, and duties frequently are asserted in the title of freedom or in the title of security. In legal literature, freedom seems to have an affirmative and security a negative connotation. The former is thought of as involving an affirmative expression of

certain interests, the latter as the conservation or stabilization of certain interests.

If we regard freedom as *security* from restraint (an authorized expression of certain liberties),³ and security as *freedom* from interference (the protection of certain interests, including liberties, by the imposition of restraints), the relationship between the values of freedom and security becomes apparant. If we go a step farther and examine how the law recognizes and protects these values, we see that this is done by conferring rights and imposing duties.

Now one of the significant things about rights and duties is that the law has come to regard them as correlatives. Analytical jurisprudence presumes that these terms are relational, always exist together, and that A's right necessarily implies B's duty. Perhaps, similarly, freedom and security may be regarded as relational, as always existing together, and as being correlatives in the limited sense that freedom is the name we give to an affirmative expression of certain liberties and security is the name given to their protection.

Hence, by employing the technique of fragmentation, by splitting the atoms of freedom and security into particular liberties, secured by rights, privileges, and duties, we may leave the summit of philosophical abstraction and descend to the plain of empirical observation. As abstractions they lack definite contour, but their components, "liberties", may be particular and culturally identifiable. Our premise is that freedom and security are aggregations of liberties which the legal order processes in terms of rights and duties. We will first consider the nature of rights and duties.

Interests, Rights, and Duties

We are indebted to Roscoe Pound for the formulation of his theory of interests which describes the processes of positive law.⁴ In eclectic fashion, Pound assimilated Rudolf Von Jhering's conception of a legal right as a legally protected interest, William James' conception of a claim or demand as a source of ethical obliga-

³ "The first form of civil liberties is security. Montesquieu gives the classic formulation of this idea (cited by Russell): 'The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.' And, we might add, need not be afraid of the police. . . ." Schneider, *supra* note 2, at 667.

⁴ POUND, *OUTLINE OF LECTURES ON JURISPRUDENCE* 96 (5th ed. 1943). See also Pound, *A Theory of Social Interests*, 15 *PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY* 16 (1921), reprinted HALL, *READINGS IN JURISPRUDENCE* 238-246 (1938).

tion, and defined individual interests as "claims or demands or desires involved immediately in the individual life and asserted in title of that life."⁵ From Pound's sociological point of view, law is conceived of as one means of social control, utilized by politically organized society as a media for the satisfaction of a maximum of human wants and desires with a minimum of friction and waste.⁶ This function is performed by recognizing, securing, delimiting, or rejecting certain classes of interests (claims or demands), according to the values of the time and place.⁷ The values which afford the standards employed in the delimitation of interests, Pound expressed in terms of jural postulates.

Elsewhere, Pound has described this process as one of "social engineering."⁸ What is the source of these "interests"? Pound concludes that the law does not create them (as the positivists had contended) and concedes that to this extent the venerable theory of natural rights is correct. Instead, the legal order processes the asserted interests. When the claim is recognized it acquires the status of a right, if it is rejected there is no-right. A right is a legally recognized interest, a claim or demand which has received the imprimatur of the positive law.

Moreover, interests may be classified into three major divisions: individual, public, and social. The interests which Pound classifies as "individual" include the ones which historically have been called "natural rights." Within this classification are interests of personality, domestic relations, and interests of substance (property and contracts). Those interests labeled "public" encompass claims made by the state as a juristic person and those made as guardian of the social interest (police power). Synthesis is achieved in the category of "social" interests because included are not only the interest in general security (safety, health, peace and order, security of transactions and security of acquisitions), the security of social institutions, the interest in general morals, aesthetics, and progress, but most important for our analysis, also subsumed under the category

⁵ PATTERSON, *JURISPRUDENCE* 520 (1953). Jerome Hall, in a recent article, points out that while Holmes inspired the major recent tendencies in American legal philosophy, Pound provided the learned texts, that Pound was greatly influenced by American sociology, especially by Ross and Ward, and that Pound adopted the philosophy of pragmatism as articulated by William James. See Hall, *American Tendencies in Legal Philosophy and the Definition of Law*, 3 *COMP. L. REV. OF JAPAN* 1 (1956).

⁶ Pound, *Fifty Years of Jurisprudence*, 51 *HARV. L. REV.* 777, 810 (1938).

⁷ POUND, *op. cit. supra* note 4, at 96.

⁸ Pound, *supra* note 6, at 810.

of social interests is the social interest in the individual human life and in free self-assertion (including the propositions that one human being should not be subjected to the arbitrary will of another, and the social interest in affording an opportunity for self-realization and the development of capabilities).

How does the legal order secure these interests? Pound's answer is that the law secures interests by (1) conferring upon individuals legal rights or powers, (2) by leaving individuals free (legal privileges or "liberties"), (3) by imposing upon individuals duties which are correlative to rights, and (4) by imposing liabilities.

Pound is careful to point out that law is but one means of social control and that religion and custom are also significant control agencies. Moreover, in describing the juridical function, Pound did not dismiss the ideal element of law. As previously stated, the ideals of natural rights are incorporated into the claims of interests which are asserted by individuals or groups, and in addition Pound formulated five jural postulates which he says men in civilized society should be able to assume.⁹ These postulates are generalizations distilled from the principles expressed in Anglo-American law, run the gamut of actions and remedies, and are supported by empirical observation in that they are the fundamental principles underlying decisions and statutes.¹⁰

Although most of Pound's sociological jurisprudence is pragmatic and descriptive, his formulation of jural postulates and his recognition of the role that the ideal element in law plays in the composition of interests and in guiding judicial decision, helps to bridge the gulf between natural law and analytical jurisprudence and between morality and law. On the one hand, he takes a functional and pragmatic approach in analyzing legal institutions, and on the other hand he perceives that the "ought" element of law is always with us, in the assertion of demands and in the sense of justice or injustice which motivates litigant and court alike. The institutional method is one of reason and compromise in the disposition of conflicting and competing claims, legal phenomena are regarded as social phenomena, but what is done juridically, in the

⁹ POUND, *op. cit. supra* note 4, at 168, 179, 183-84, reprinted in PATTERSON, JURISPRUDENCE 516-17.

¹⁰ Although Pound himself did not purport to have found the eternal verities, his friend Hocking lapsed into hyperbole and claimed that Pound's jural postulates embodied the "absolute values of all time." Pound merely asserted that his postulates reflected the values he perceived in current decisions. See PATTERSON, JURISPRUDENCE 517.

final analysis, is dependent upon the values which are recognized and applied.

An integral part of the theory of interests is the concept that law is relational, that rights and duties exist between persons rather than between persons and things. Although Thomas Hobbes¹¹ and Jeremy Bentham¹² intimated that there might be utility in casting aside the abstractions of natural law and concentrating upon the definition and analysis of legal terms and institutions, John Austin was the first to undertake a formal and detailed analysis. Abjuring natural law, Austin concentrated upon positive law and concluded that "... every legal right is the creature of positive law: and it answers a relative duty imposed by that positive law To every legal right, there are therefore three parties: The sovereign government which sets up the positive law, and which through the positive law confers the legal right, and imposes the relative duty: the person or persons on whom the right is conferred: the person or persons on whom the duty is imposed"¹³ He also concluded, "*all* rights reside in persons, and are rights to acts or forbearances on the part of other persons. And acts and forbearances, considered from this aspect, I would style the objects of rights, and of the corresponding duties or obligations"¹⁴ Finally, in another connection, he argued that "Duty is the basis of right. That is to say, parties who have rights, or parties who are invested with rights, have rights to acts or forbearances enjoined by the sovereign upon other parties."¹⁵

In effect, Austin rejected the moral connotation of the word "right" and defined it to mean a dispensation from the sovereign which was relative to an onus imposed by such authority. The sovereign, operating through positive law, by fiat granted rights and imposed duties with reference to certain acts and forbearances. To natural law philosophers, of course, this was a grossly esoteric if not heretical definition of "right" and "duty." Moreover, Austin failed to

¹¹ HOBBS, *LEVIATHAN* 143-44 (Everyman Library ed. 1914).

¹² BENTHAM, *THE LIMITS OF JURISPRUDENCE* 88 (C. W. Everett ed. 1945).

¹³ AUSTIN, *I LECTURES ON JURISPRUDENCE* 290-91 (3d ed., Campbell 1869), reprinted HALL, *READINGS IN JURISPRUDENCE* 442, 443 (1938).

¹⁴ AUSTIN, *op. cit. supra* note 13, at 377-80; HALL, *op. cit. supra* note 13, at 451.

¹⁵ AUSTIN, *op. cit. supra* note 13, at 405-407; HALL, *op. cit. supra* note 13, at 453. As Mr. Justice Holmes has observed: "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified." *American Bank and Trust Co. v. Federal Bank*, 251 U.S. 350, 358 (1921).

perceive that it was the assertion of interests (claims and demands) which stimulated the positive law to action, and his emphasis on command overlooked the subject matter of the command. Pound speaks of the "recognition" of interests, rather than "command" of the sovereign. Finally, Austin argues that duties are anterior to rights, and hence his emphasis is a negative one, whereas Pound's theory of interests has an affirmative content in that although rights and duties (being correlatives) arise simultaneously, rather than the one out of the other, an interest preceded the declaration and as such was a potential right, and by the same token a moral obligation preceded the imposition of duty.¹⁶

What difference does it make which analysis is accepted? Perhaps none, but if we accept the thesis that "duty is the basis of right" our attention may be focused on past instances of liability rather than upon the nature of the claim. For example, there are two competing philosophies as to tort liability.¹⁷ What might be called the English view, typified by Salmond, is that tort law consists of "a number of specific rules prohibiting certain kinds of conduct and leaving all the residue outside the sphere of legal responsibility."¹⁸ This view results in closed categories of tort liability and a restriction of actionable wrongs to precedent, because the interest advanced by the plaintiff is secondary to, or its recognition is conditioned upon, whether or not previous cases have granted relief under like circumstances. Opposed to this view is one which concentrates upon the nature of the plaintiff's interest, which accepts the premise that it is prima facie wrongful to cause harm to another without just cause or excuse, and that for every wrong there should be a remedy.¹⁹ In other words, the interest should be recognized, the right conferred, and the correlative duty imposed, if the values of the time and place support the claim and if it is administratively feasible. In the case of new torts, where there is a new interest striving for recognition, an undue concentration upon duty—regarding it as the basis of right—may lead to a "hardening of the categories," whereas a perspective which takes into account com-

¹⁶ See Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 316 (1908), reprinted BOHLEN, *STUDIES IN THE LAW OF TORTS* 291 (1926). Holmes also reasoned that legal duties were logically antecedent to legal rights. See *THE COMMON LAW* 219-220 (1881).

¹⁷ See Goodhart, *The Foundation of Tortious Liability*, 2 MOD. L. REV. 1 (1938).

¹⁸ SALMOND, *LAW OF TORTS* (6th ed. 1924), reprinted in COHEN AND COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 210, 211 (1953).

¹⁹ POLLOCK, *LAW OF TORTS* 21 (9th ed. 1912).

peting interests will have greater adaptability. Invasion of privacy, recovery for the infliction of mental suffering, actions for prenatal injuries, are familiar examples where such an ideological conflict is apparent.

Today, the definition of right and duty in terms of the legal relations between persons, is generally accepted as one of Austin's major contributions to legal analysis. The American Law Institute's restatements of the law uniformly accept analytical terminology. Although occasionally courts continue to think of property rights as relations between persons and things,²⁰ by and large "right" and "duty" have acquired a fixed meaning. Since Austin the rudiments of analytical jurisprudence have been brought to fruition by Hohfeld and the lawyer's vocabulary may include what is known as "Hohfeld terminology."²¹

According to Hohfeld and his able interpreter, Professor Corbin,²² the legal relations between persons, perceived by Austin, may be reduced to jural correlatives and jural opposites. Each pair of correlatives must always exist together, when A has one of the pair, another person, B, necessarily has the other. One of terms expresses the relation of A to B, the other expresses the relation of B to A. No pair of jural opposites can exist together, *i.e.*, when A has a "right" he cannot have "no-right" with respect to the same subject matter and the same person, when A has a "privilege," he cannot have a "duty".²³

The jural correlatives and the jural opposites which may have some bearing on this discussion are the bundles of *correlatives*: right and duty, privilege and no-right; and the *opposites*: right and no-right, privilege and duty.

We may note that duty, although it is the correlative of right, is the opposite of privilege. That right, although the correlative of duty, is the opposite of no-right; and that privilege, although the correlative of no-right, is the opposite of duty; that no-right, although the correlative of privilege, is the opposite of right. In substance, then, this means that if A has a right against B, B owes a duty to A, but that if A has no-right against B, B owes no duty to A; if A has

²⁰ Under the law of eminent domain, it becomes particularly important that property be viewed as a relation between persons. See Foster, *Tort Liability Under Damage Clauses*, 5 OKLA. L. REV. 1, 5 (1952).

²¹ Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), 26 YALE L.J. 710 (1917).

²² Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919).

²³ *Id.* at 166.

a privilege against *B*, *B* has no-right to oppose *A*'s privilege, but that if *A* has no privilege as to *B*, he owes a duty to *B*; that if we look at it from *B*'s point of view, *B* has a duty he owes to *A*, if *A* has a right, but if *A* has no privilege against *B*, *A* is under a duty to *B*; that if *B* has no-right to oppose *A*, *A* has a privilege against *B*, and if *A* has no-right against *B*, no duty is owed by *B*.

In his analysis of "privilege," Corbin explains that a privilege is the "legal relation of *A* to *B* when *A* (with respect to *B*) is *free* or at *liberty* to conduct himself in a certain manner as he pleases . . ." ²⁴ As pointed out by Max Radin, such a definition is at odds with both historical and current usage in that this sort of "privilege" is usually called a "right" and "so clearly are these 'privileges' rights, that they are usually the first things that are thought of as rights when the word occurs in speech. . . . It is, therefore, impossible, unless we wish to rewrite a good part of the English literature, to refuse the term 'right' to these situations. . . ." ²⁵ Radin, in his analysis, renamed "privilege" as used in this sense and referred to it as a "privilege-right" as distinguished from a "demand-right" (Hohfeld's "right"). Another writer, Terry, ²⁶ included this type of privilege as a specie of right which he labeled a "permissive right," and pointed out that in this situation *A* has no duty not to act, there is no restraint on him, and that "liberties" and the "freedoms" in the Bill of Rights were of this character.

It would seem that not only is there a substantial departure from the ordinary meaning of "rights" in the Hohfeldian definition of privilege, but also what is described as privilege is at variance with the lawyer's meaning of the term. Generally, a privilege is regarded as an exemption from liability, for what (but for the privilege) would be a breach of duty, and it is really the occasion, rather than the individual, which is privileged. ²⁷ Perhaps, the permissive character of privilege (exemption from liability) and the permissive character of some rights ("liberties") occasioned their joinder under the term "privilege", but the confusion leads to difficulties. If we think of some rights as being in the nature of demands *A* has on *B*, and of others as authorizations to *A* to act or forbear with reference to *B*, in each instance there being a correlative duty on *B* to comply with the demand or not to oppose *A* in the exercise of his right,

²⁴ *Id.* at 167-68.

²⁵ Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141, 1149 (1938).

²⁶ Terry, *Duties, Rights and Wrongs*, 10 A.B.A.J. 123 (1924).

²⁷ See PROSSER, *TORTS* § 16 (2d ed. 1955).

then, whether the act or forbearance is to be done or omitted by either *A* or *B*, is immaterial, and both are on a plane equality.²⁸

Accordingly, throughout this discussion, the term "right" may be taken to comprehend "liberties" and to include the situation where *A* is free or at liberty to conduct himself as he chooses. The legal consequence is that there is a duty not to interfere with another's liberty. Since, in any event, what is involved is the recognition of an interest, and since in either case there may be a correlative duty to serve or not to oppose the "*dominus*", it would seem that Hohfeld's distinction may be rejected. If we concentrate upon the conversion of interests into rights and duties we see that in each instance there is an affirmative vindication of one and a negative treatment or rejection of the other. In every case, there is an affirmative and a negative, a for and an against, an approbation and a disapproval. It follows that where there is a right or a "liberty" there is a correlative duty.

Freedom and Security as Correlatives

The preceding analysis of the theory of interests and the concept of jural correlatives and jural opposites, results in the assumption that rights, privileges, duties and liabilities, arise out of the processing of interests, but that interests are the grist for the juridical mill and that value judgments, or natural rights, stimulate the assertion of interests by litigants and influence the adjustment of those interests by the court in the individual case. In other words, values such as freedom and security, are both grounds for claims and grounds for decision. If we pinpoint the stage at which adjudication occurs, we see that legal relations exist only between persons and that the ubiquitous companion of right is its correlative duty. Upon the basis of these assumptions let us turn to a consideration of the problem of whether or not freedom and security are correlatives or opposites, and thereafter consider them as values.

We have assumed that freedom, in the lawyer's sense of the term, may be regarded as an aggregation, as the collective name given to the bundle of liberties recognized in a democratic society. When we examine the meaning of those things we call "liberties" we see that they consist of rights and privileges. In the case of

²⁸ The case of *Ploof v. Putnam*, 81 Vt. 471, 71 Atl. 188 (1908), illustrates the proposition that the defendant has a duty not to oppose the exercise of a privilege by the plaintiff, the defendant being held liable for the damage occasioned when his servant unmoored plaintiff's sloop from the defendant's dock

security, there is a connotation of restraint of interference. Restraint, to the lawyer, implies duty and obligation. On the one hand, we see that as duty is the correlative of right, restraint is the correlative of freedom, and on the other hand we see that freedom and restraint do not exist at the same time in the same person with reference to the same subject matter. A's freedom entails a restraint upon B, and a restraint upon B confers freedom on A. Or, to put it another way, every law restrains some liberty of some, but in doing so it establishes some liberty for others. Moreover, a rejection of A's interest is a negative recognition of B's interest. Freedom does not exist in a vacuum but in the relation between men, and all liberties depend upon restraints just as all rights depend on duties.²⁹

It follows from this that freedom involves the restraint of interference. One basic problem of law and society is how to bring about a balance and adjustment between conflicting assertions of freedom so that from a utilitarian point of view a maximum of freedom is enjoyed by all, license by none. If a liberty is subtracted from one person or group, it augments the liberty of another person or group. The delicate task is to achieve an equilibrium and to avoid an over-concentration of rights in one group because of the restraint which is thereby imposed upon other groups. If one group achieves a monopoly of rights or a superabundance of freedom, necessarily at the expense of others, the excess becomes power or license. The dictum of Lord Acton is then applicable.³⁰

where the former in the exercise of his privilege of necessity had tied up during a storm.

²⁹ See MacIver, *The Meaning of Liberty and Its Perversions*, FREEDOM: ITS MEANING 278, 281. "All liberties are at the expense of other liberties . . . that is what is meant by calling them cultural rather than natural. Hence not all men can have the same liberties; the most they can hope for are 'equal,' 'equitable,' or 'like' liberties. 'Reciprocal liberties' would be a still better term to denote the correlative nature of rights and duties. . . ." Schneider, *supra* note 2, at 670.

"If unity is found in diversity, certainty in doubt, and permanence in change, what is the common factor that reconciles these anomalies and which keeps our social order together? Diversity, doubt, and change imply the existence of freedom to differ, to doubt, and to alter existing conditions. Indeed, freedom is the essential characteristic of democracy as we understand it. *But freedom without restraint or qualification destroys itself* and in so doing destroys the unity, certainty, and permanence which a politically organized society must have if it is to endure. To survive, freedom needs a framework within which it can operate. . . . The framework of freedom is law. . . ." Nutting, *The Framework of Freedom*, 5 J. LEGAL ED. 131, 133 (1952).

³⁰ "Power corrupts: absolute power corrupts absolutely." As Brandeis, Gilson, and others point out . . . the aim of law is to make men free of each other's power." Schneider, *supra* note 2, at 669.

From this standpoint the judicial process becomes one of adjustment and compromise. Competing and conflicting interests must be weighed and balanced in the allocation of rights and duties. Maintaining equilibrium or a balance of power is part of the judicial function. Diverse interests must be harmonized and reconciled to the extent that it is possible to do so. Because of their interrelation and counter effects, rights (and duties) are not viewed as "absolute." The qualification of rights and duties, what Pound refers to as "delimitation", becomes a prime job for the judiciary. And it must be kept in mind that bestowal of a right involves the imposition of a duty, and that a recognition of *A*'s claim to freedom will occasion restraint upon *B*. In this respect there is a marked similarity between the judicial and the legislative processes.³¹

In the area of political controversy, we are sometimes confronted with the argument that every law is an encroachment upon liberty. Occasionally, such an appeal is addressed to a court or is expressed in an opinion. Under our analysis such emotional appeals are at best—or at worst—half-truths. For the "encroachment" upon *A*'s liberty simultaneously confers liberty upon *B*, and before the "encroachment" *A*'s liberty was a restraint as to *B*.

For example, many employers would insist that they have a "right" to run their business as they see fit. Their employees, or their union, may be equally insistent that there is a "right" to organize and bargain collectively. For many years, the law recognized and gave protection to the "right" asserted by employers. More recently, a social re-evaluation has occurred, and now, due to statute, there is a "right" to organize and bargain collectively, and as a corollary, there is a duty not to interfere with the exercise of such rights. The statute in question—the Wagner Act—took some freedom away from employers. But it gave a new freedom to employees.

Similarly, the recognition of the equity of redemption, was an "encroachment" upon the rights of the mortgagee; the setting of legal rates of interest was an invasion of the prerogatives of the money lender; regulation of wages and hours or prices, and outlawing "yellow-dog" contracts, infringed upon the rights of employers; all regulation of public utilities lessens the freedom of such

³¹ Obviously, most legislation is passed in response to claims, demands, and desires advanced by citizens and groups, and a committee hearing may be the counterpart to a judicial processing of interests. For a comparison of the similarity between these functions of the legislative and judicial processes, see Belows, *In Defense of Lobbying*, 172 HARPER'S MAGAZINE 96 (1935).

enterprises; and in fact, any duty or obligation imposed by the civil or criminal law, from the viewpoint of the "servus" is an impairment of liberty. But on the affirmative side, at the same time, liberty was bestowed upon others.³²

Freedom as a Value

A common definition of freedom is "the state or condition of being free—not bound by restrictions." Although this definition is far from adequate because, as we have seen, one peculiar and paradoxical quality of freedom is that for man to be free there must be some restraint, and hence the value has a reciprocal or social character, it is true that freedom often is associated with the ability to move. The puling babe, the rebellious youngster, the defiant adolescent, and the frustrated adult, all resent real or imaginary restraints and restrictions, almost instinctively. All living things must have some ability to move, else they perish. Literal restraint or confinement provokes a sense of claustrophobia and we view with horror the tragic figure of Prometheus and the victim in Poe's *The Cask of Amontillado*. Dante's *Inferno* reaches the ultimate in its portrayal of divers types of restraints and confinements.

But, when we reduce freedom to its component liberties (rights and privileges), individual assertions of freedom become qualified by the overriding demands of society and other individuals. A basic problem of the social control we call law is to bring about a balance and adjustment between various interests so that from a utilitarian point of view a maximum of freedom is enjoyed by all, license by none. An assertion of freedom may be limited at the point where it conflicts with significant freedoms of others or its exercise would occasion imminent peril to the social order.

Different content is read into the fundamental values of freedom and security, emphasis varies, during the course of social evolution. From the standpoint of law, this is because the interrelation between the recipients of rights and duties is subject to modification, mutation, and change when there is a shift in the current of popular demand. Freedom and security remain constant as social values but their particularization into rights, privileges, duties and obligations, changes with the times. This, I take it, is what is meant

³² See CAHN, *THE SENSE OF INJUSTICE* 54 (1949); Haldane, *A Comparative Study of Freedom*, *FREEDOM: ITS MEANING* 447, 451.

by the statement that it is the function of law to reflect the values of the time and place.³³

During the course of the social and political history of Western civilization, there has been a consistent devotion to the ideal of freedom. It is the content of freedom, or its particularization into rights and privileges, which has changed from time to time. Freedom, justice, beauty, truth, good, are with us always, but they exist as ideals or abstractions, having concrete reality only when manifested as attributes or qualities of particular things. In this sense "freedom" is the quality common to all free things. This means, moreover, that for most of us the relevant question becomes, "freedom for whom and for what?"

For centuries both philosophers and law men grappled with the concept of natural law. Demosthenes believed that man discovered law, which was the gift of the gods.³⁴ Aristotle distinguished between natural law, "that which everywhere has the same force and does not exist by people's thinking this or that," and positive law, or "that which is originally indifferent."³⁵ The Stoics viewed *Jus Naturale* as the way of happiness for all men, and believed nature and reason were one.³⁶ Cicero in his *De Legibus*, identified "right reason" with those qualities of human nature whereby "man is associated with the gods," and concluded that positive law was obligatory only if it was in harmony with the universal attributes of human nature, and if it was at variance with "true law" it lost its right to be considered law at all.³⁷ During the Middle Ages, on the continent and in England, repeatedly claims in terms of natural rights were made against those in authority. The great philosopher and theologian, Saint Thomas Aquinas, in Italy, and Englishmen such as John of Salisbury, Henry of Bracton, Sir John Fortescue, and Sir Edward Coke, all contributed to the distinctive political doctrine that political authority is intrinsically limited and that temporal power was subject to a "higher law." It was assumed that certain eternal principles of right and justice, of divine origin, were valid for all times and all places, were obligatory for all men, and were

³³ This concept is traceable to Rudolf Von Jhering. See JHERING, *THE LAW AS A MEANS TO AN END* (Husik trans. 1914).

³⁴ Quoted in HOLLND, *ELEMENTS OF JURISPRUDENCE* at 44n. (12th ed. 1916).

³⁵ 7 ARISTOTLE, *NICOMESHEAN ETHICS* (Ross trans. 1925).

³⁶ CORWIN, "THE HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 9 (Great Seal Books ed. 1955).

³⁷ *Id.* at 10-11.

discoverable by reason or might be made known through divine revelation.

Of course, it made considerable difference who had the function of "discovering" this "higher law." It is a matter of utmost importance for our culture that while on the continent the discernment of natural law and its content was a matter for philosophers and theologians, in England from the fourteenth century on the "right reason" of natural law came to mean *judicial* right reason. The test of "reasonableness" employed by the common law judges was a test derived from custom, *stare decisis*, logic and common sense. Natural law, in the hands of the legal profession, became a matter of inductive logic, reasoning from concrete cases, rather than deduction from abstract principles. Thus, the common law came to focus its attention on liberties (rights and duties) while the civil law remained absorbed with freedom as an abstraction. The contrast between common law and European codes as well as that between law and equity reflects these opposing perspectives.

Throughout the history of the common law, therefore, the story of freedom has been told by the emergence and recognition of particular liberties. *Magna Carta*, the Petition of Right, the Declaration of Independence, and the Bill of Rights, enumerated particular grievances as well as general principles. In the case of *Magna Carta*, it was only after the particular liberties had been recognized for the barons that the generalization occurred and it became a charter of "common liberties."

By concentrating upon the particular, the problem of "freedom for what and for whom", the common law has managed to add to its bundle of liberties as we prosper and progress. Moreover, due to our habit of reasoning from the particular to the general, rather than from the abstract to the concrete, most of us find it easier and more meaningful to point to instances we regard as deprivations of liberty than to attempt a definition of freedom itself. In his provocative book, *The Sense of Injustice*, Edmond Cahn employs this technique in that he abandons a frontal assault upon the meaning of justice and instead concentrates on the sense of injustice which he claims is clearly and frequently manifested and is a familiar and observable phenomenon.³⁸ So too, in the case of freedom, that which is subject to empirical observation is its manifestations in terms of rights and duties.

³⁸ *Id.* at 26.

³⁹ At 12-13.

Our sense of freedom—or, to state it negatively, our sense of deprivation of liberty—is thus tied to what is done in the specific instance. As a matter of fact, when this is forgotten, and courts fly in the stratosphere of higher law too long, contact with reality is lost. Thus when freedom of contract becomes an *idée fixe*, the concrete liberty of employees may be sacrificed to the abstract freedom of contract of employer and employee deduced from eternal and immutable natural law. The beneficiaries of social legislation, whose spokesmen lobbied for the legislation, must be saved from the enslavement they naively procured under a spurious claim of freedom; the right of children to labor and women to toil long hours,⁴⁰ must override the economic facts of life. From the rarified atmosphere of natural law, the real world seems remote and obscure.⁴¹ On the other hand, when we utilize the pragmatic method of looking at the consequences rather than at abstractions, compare alternatives, and consider possible results, the evaluation may be guided by empirical observation rather than amorphous ideals which so often have proved chimerical and have meant all things to all men.

It follows that we have a sentimental attachment to the value of freedom, it is an emotive term, a winning slogan, but it has substantial meaning and definite content only when we split it into component liberties that we know as rights and privileges.

Security as a Value

Security, it has been said, is the state or condition of being secure—free from danger or risk. We have seen that, paradoxically, freedom implies restraint. To be free there must be some restraint and perhaps restraint of restraint. In the case of security, in a democratic order, there must be freedom or the consequence is insecurity. Neither can exist without the other; even as values they complement and qualify one another.

We have noted that the drive for freedom is a basic one, common to all living things. Sometimes the value of security is spoken of as the “law of self-preservation.” It too is basic. Modern psychology has stressed the need for a sense of security and has at-

⁴⁰ See the opinion by Mr. Justice Sutherland in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

⁴¹ See dissent of Mr. Justice Holmes in the *Adkins* case, where he observes: “It will need more than the Nineteenth Amendment to convince me that there are no differences between men and women. . . .”

tributed many of our woes to the so-called sense of insecurity.⁴² Judge Jerome Frank has even tried to use Freudian psychiatry to explain our approach to law.⁴³ But security, as a value, invites the inquiry, "security for whom, security of what?" The concept becomes meaningful to most of us only when we reduce it to terms of human experience.

How does the legal order promote the value of security? Primarily, it does so by imposing duties and obligations, or what we have called restraints. The security of transactions is effected by imposing the obligation to perform promises or its substitute, a secondary duty to pay damages. Security of the person is maintained by the imposition of statutory and common law duties, both civil and criminal, the breach of which gives rise to damages or penalty. The use and enjoyment of property is secured through the duties imposed by the law of trespass and case. The "Thou shalt nots" and the interdictions of the law are restraints upon what might otherwise be regarded as freedom of action.

But, as we have seen, duty is the correlative of right. The restraints imposed by law upon one, protect the liberty of another. So when we ask the pragmatic question, "security for whom, security for what?" we are demanding a specification of the reasons which justify restraint or duty in the concrete situation. Here, it is interesting to note, the common law has always been more willing to proscribe certain kinds of conduct or action than it has been to impose a duty of affirmative action.⁴⁴ Ordinarily, one is not required to bestow an affirmative advantage or benefit unless there is some prior relationship from which to imply an undertaking to do so.⁴⁵ The normal duty is to desist, not to interfere, intermeddle, or inflict harm. Whether the distinction arises out of causality, inaction being regarded as more remote than misfeasance, a respect for inertia, or the rationalization that at least nonfeasance made the situation no worse, there has been a marked tendency within recent years to whittle away at the distinction and to find a basis in some relationship upon which to predicate a duty,⁴⁶ and it has been pre-

⁴² For a popular treatment of the social significance of a sense of insecurity, see OVERSTREET, *THE MATURE MIND* (1949).

⁴³ FRANK, *LAW AND THE MODERN MIND* (1936).

⁴⁴ See Bohlen, *The Basis of Affirmative Obligations in the Law of Tort*, 53 U. PA. L. REV. 209, 237, 337 (1905), reprinted BOHLEN, *STUDIES IN THE LAW OF TORTS* 33 (1926).

⁴⁵ *Ibid.*

⁴⁶ PROSSER, *TORTS* § 38 (2d ed. 1955).

dicted that in time the distinction may be discarded as obsolete.⁴⁷ Obviously, jurisprudentially speaking, what is happening in this area of tort law is that the defendant's interest in freedom of *inaction* is yielding to the plaintiff's interests of personality and a social interest in the individual life. Eventually, if administratively feasible, the rule may emerge that there is an affirmative duty to aid others when there is a moral obligation to do so, because courts will consider that the social interest in relieving distress is more important than individualistic insouciance.⁴⁸

In the imposition of duties, the common law has been circumspect and cautious. Although the law of trespass and nuisance has given prime emphasis to the security of property owners, sometimes at the expense of other individual interests,⁴⁹ there has been only a qualified concern over interests of personality as distinguished from substance. *Heaven v. Pender*,⁵⁰ although it states a general principle underlying moral obligations, has not yet been fully accepted, and in the case of foreseeable economic harm, more than mere negligence may be a prerequisite for duty.⁵¹ Moreover, the mystic doctrine of proximate cause, as well as the defenses of contributory negligence and assumption of risk, privilege and immunity, may preclude the imposition of duty or make a breach non-actionable. These matters, together with the normal rule which places the burden of proof on the plaintiff, restrict, limit, and qualify the recognition of the claimed rights and interests of personality.

The law of torts is the example par excellence of the judicial

⁴⁷ CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 25 (1928).

⁴⁸ See 1 BENTHAM'S *WORKS* 164 (1859), where he argues: "In particular, in cases where the person is in danger, why should it not be made the duty of every man to save another from mischief, when it can be done without prejudicing himself. . . ?" Bentham's American disciple, Livingston, in his Draft Code, held it was criminal homicide to omit saving a person's life if that could be done "without personal danger or pecuniary loss." See HALL, *PRINCIPLES OF CRIMINAL LAW* 250-52 (1947).

⁴⁹ For example, see Bohlen, *The Duty of a Landowner*, 69 U. PA. L. REV. 142, 237, 340 (1921), reprinted in BOHLEN, *STUDIES IN THE LAW OF TORTS* 156 (1926).

⁵⁰ 11 Q.B.D. 503 (1883), opinion by Brett, M.R. (Lord Esher) who stated the general proposition that "whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

⁵¹ For example, see *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139 (1931).

process of securing and delimiting interests. The process is one of continual weighing and balancing, adjustment and compromise. The dominant social values of the time and place, albeit belatedly, occasion reevaluation and reappraisal, and leaven the administration of law. Moreover, to a lesser extent, the law of contracts shows the same change and shift in emphasis in weighing other interests with the interest of having promises performed, as is shown by the growth of the law of warranty,⁵² the dilution of caveat emptor,⁵³ the development of the law relative to fraud and mistake,⁵⁴ and the expansion of notions of public policy.⁵⁵ Even the law of trespass has not remained impervious to the increment occasioned by the assertion of other interests.⁵⁶

Security, then, whether it be of person, property, or transactions, is recognized and given effect as an important individual interest of personality and of substance, and, further, it is assumed that there is a social interest in general security as well as in the individual human life, but in its imposition of duties and conference of rights, the law recognizes that there are other interests which are entitled to evaluation if not recognition. One of the interesting and significant developments of our times is the gradual descendancy of interests of substance from their preferred position in the hierarchy of individual interests and the tendency to regard them as being on the same plain as interests of personality. When this is done in a given case, it does not mean that security as a value has been discarded or ignored, for security of the person, whether it be an interest in integrity of the body or life, personal liberty, or honor and reputation, is just as much entitled to the name of "security" as are interests of substance. So when we reiterate our question, "Security for whom, security of what?" we may find that we

⁵² See Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929); Carpenter, *Responsibility for Intentional, Negligent and Innocent Misrepresentation*, 24 LL. L. REV. 749 (1930).

⁵³ Compare *Chandelor v. Lopus*, 4 Cro. Jac. (1906), with the implied warranties imposed by the UNIFORM SALES ACT §§ 15(1) and (2), and the new UNIFORM COMMERCIAL CODE §§ 2-314, 315.

⁵⁴ See Keeton, *The Ambit of a Fraudulent Representor's Responsibility*, 17 TEX. L. REV. 1 (1938).

⁵⁵ See II ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* (1914), reprinted in part, COHEN AND COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 175 (1953).

⁵⁶ RESTATEMENT, *TORTS* §§ 166, 822 (1938), predicate liability on the basis of intentional or negligent conduct or extra-hazardous activity. This restriction of liability is commented upon in Foster and Keeton, *Liability Without Fault*, 3 OKLA. L. REV. 1 (1950).

are faced with a choice between competing interests, each of which partakes of this value, that security as an abstraction offers us little help, and that, as in the case of the value of freedom, we had best focus our attention on the possible consequences of our action rather than upon so illusive an ideal.

Synthesis

By taking a functional approach to the legal order and by concentrating on the recognition and delimitation of interests, the interrelation and interdependence of rights and duties becomes manifest. It is hoped that this is not grubbing in the ground to observe the movement of the stars.⁵⁷ By focusing attention upon observable phenomena it may be that there is a sounder basis for postulating some conceptions as to the nature of freedom and security. The premise asserted in that freedom and security are relational rather than opposites, and that we should employ a pragmatic method in order to ascertain the content of these values.

No doubt it may be objected that historically freedom and security have often been taken for opposites and at times have been regarded as incompatible. Generalizations have been made to the effect that an overemphasis of security and the restriction of freedom of action are indicia of a primitive society and that civilization is characterized by its recognition of freedom as a superior value.⁵⁸ But when we pause to look at the applications of these values we see that in order to be free, men must be relatively secure, and in order to be secure there must be a measure of freedom. Freedom

⁵⁷ The reference is to the students of the observatory in Aristophane's play who diligently grubbed in the ground to ascertain the movement of the stars.

⁵⁸ In HOEBEL, *THE LAW OF PRIMITIVE MAN* 4-5 (1954), an anthropologist who has acquired a considerable knowledge of law, accepts Hohfeldian terminology and examines the legal order of several cultures. He concludes that ". . . anthropologically considered, law is merely one aspect of our culture—the aspect which employs the force of organized society to regulate individual and group conduct and to prevent, redress or punish deviations from prescribed social norms." When this area of behavior we speak of as law is found in the culture of a preliterate people, we call it primitive law. When it is found within the culture of ancient societies that had in their time only recently entered the threshold of civilization, we call it archaic law. And when we find it in the structure of developed civilizations, we call it modern." Hoebel demonstrates that although individual postulates vary from culture to culture, they are referable to the values of freedom and security and that it is the manner of implementing these values which varies. See also, Mueller, *Tort, Crime and the Primitive*, 46 J. CRIM. L., C. & P.S. 303, 307 (1955), where the learned author concludes that either the 20th century law of wrongs is primitive, or the primitive law of wrongs is quite modern.

and security do not exclude nor oppose each other. Liberties are recognized either affirmatively when rights are conferred or negatively when duties are imposed. Security is achieved affirmatively by the imposition of restraints, or negatively by the withholding of rights. Hence the value of security is recognized also by this process of conferring rights and imposing duties. The security of freedom depends upon what is done in the processing of interests, and the stability of social institutions (often thought of solely in terms of general security) may likewise depend upon the extent to which interests asserted in the name of freedom are recognized and given effect. The real competition in the legal process is not between the values of freedom and security but between conflicting interests which in varying degrees always reflect both of these values. Security includes not only the stability of social institutions but also the durability of those interests we call liberties. Freedom comprehends not only the preservation of our liberties but also the maintenance of social order.

The real conflict occurs at the stage of adjudication when competing interests vie for recognition. Since one man's freedom is another man's restraint, and one man's security may occasion insecurity in his brother, a choice must be made between conflicting claims which are asserted in the name of both freedom and security. It becomes apparent that if we are to avoid a dilemma, or to have anything but a Hobson's choice, we must seek some answer to the questions "freedom for whom, freedom for what?" and "security for whom, security for what?"

Have we any standards to guide us in choosing between competing interests which claim the same values? The answer would seem to be quite obviously the common law, our constitutions, and abstract notions of justice, are the sources to which we may refer for guidance. For example, the express recognition of certain liberties in our Bill of Rights may give a preferred position to them when they come into conflict with other interests. In the hierarchy of interests, freedom of expression may therefore be entitled to greater emphasis.

Not only is there a constitutional preference for certain liberties, but the common law itself nurtured the idea that there is a public interest or duty to protect and safeguard individual liberties. When King Alfred with the assistance of his wise men collected the best out of local laws and customs and made them common by extending them to the whole nation, the stage was set for the "right

reason" which was the basis of the common law.⁵⁹ Within a quarter of a century after *Magna Carta*, chapter twenty-nine was taken to extend to the populace, and under Edward I, the judiciary was ordered to treat the Great Charter as "common law."⁶⁰ In *Dr. Bonham's Case*,⁶¹ Sir Edward Coke successfully contended that if an act of Parliament "is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an act to be void." Contemporaneously, "Freeborn John" Lilburne asserted the "Liberties of Englishmen,"⁶² and later, in the trial of William Penn and William Mead,⁶³ the defendants claimed that it was a principle of English law "that no man is bound to accuse himself." Thus, in the formative years of American political institutions and philosophy, it was assumed that the principle of "common law and reason" was a higher law which might be asserted against the government itself.⁶⁴

It has been observed that many of the rights which the Constitution of the United States protects at this moment against legislative power were first protected by the common law against one's neighbors.⁶⁵ In other words, the recognition of so-called public rights, to some extent, depends on the prior recognition of private rights. Throughout this discussion our attention has been directed towards individual interests. But we have also seen that Pound's

⁵⁹ CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 24 (Great Seal Books 1955).

⁶⁰ *Id.* at 33.

⁶¹ 8 Co. 107a (1610), 2 Brownl. 225 (1610), discussed by CORWIN, *op. cit. supra* note 59, at 44. It was held that the London College of Physicians was not entitled, under the act of Parliament which it invoked in justification, to punish Dr. Bonham for practicing medicine without a license.

⁶² See GIBB, JOHN LILBURNE (1947), and Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 SYRACUSE L. REV. 213 (1952). "Freeborn John", who usually has been given but a footnote in history in connection with the Leveler's Movement, for forty years during the first half of the seventeenth century, fought fabulous legal battles with the Stuarts, Cromwell, and Parliament, in order to vindicate the rights of Englishmen. Most of the procedural safeguards we today associate with due process were claimed as "rights" by Lilburne and many modern political reforms were anticipated by him.

⁶³ 6 How. St. Tr. 951 (1670). They were tried for conspiracy to disturb the peace because they had held a public meeting in the street outside their padlocked meeting house. In effect a plea against self-incrimination was invoked, and they were acquitted by the jury. An enraged court fined the jurors and the jurors were imprisoned when their fines were not paid. One juror, Bushel, brought habeas corpus, and the decision in his case (1670) abolished the prior practice of fining or imprisoning jurors who brought in verdicts contrary to the instructions of the court.

⁶⁴ CORWIN, *op. cit. supra* note 59, at 72.

⁶⁵ *Id.* at 24.

theory of interests in addition to individual interests contains classifications of "social" interests and "public" interests. It is here that synthesis occurs. For interests termed "social" include an interest in the individual as well as an interest in the general "security." Moreover, public interests include those claims made by the state as guardian of social interests (including individual interests) which are usually asserted under the police power of the state. It is within this framework and context that problems arise as to civil liberties and civil rights.

Not infrequently, the judicial process is faced with the task of reconciling an apparent conflict between the security of social institutions and an interest in free self-assertion. If we view both of these interests as significant social interests and matters of public concern, and keep in mind that the common law and our Constitution so regard them, then the claimed liberty may get at least an even break in the comparison. But if, on the other hand, the stability of social institutions is looked upon as a public interest and the claimed liberty as the interest of a mere individual, the issue has been foreclosed.⁶⁶ One of the legacies of the common law is that individual liberties *are* social and public in character, that they may be asserted against the state itself, and that before their abridgement is warranted, it must be foreseeable that more public harm would come from their vindication than from their deprivation.

This is a most troublesome problem for the courts. There is little to guide them to concrete solutions other than the method of according to those liberties which have been recognized by the common law and our constitutions a *prima facie* preferred status and looking painstakingly at the probable consequences of the decision. The "clear and present danger test" of Holmes⁶⁷ and the "gravity of the evil, as discounted by its improbability" concept of Learned Hand,⁶⁸

⁶⁶ See for example the opinion by Judge Prettyman in *Barsky v. United States*, 83 App. D.C. 127, 167 F.2d 241 (1948), where he says, ". . . the problem is the relative necessity of the public interest as against the private rights . . .", and forecloses further analysis due to the way he puts the question. See also the examples cited in Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, LECTURES ON LEGAL TOPICS, 1923-1924 (1928), reprinted HALL, READINGS IN JURISPRUDENCE 484.

⁶⁷ This doctrine was first enunciated in *Schenck v. United States*, 249 U.S. 47 (1919), was reiterated in *Whitney v. California*, 274 U.S. 357 (1927), and finally became accepted by a majority of the court in *Herndon v. Lowry*, 301 U.S. 342 (1937), after Charles Evans Hughes became Chief Justice.

⁶⁸ *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). For different estimates as to whether or not the *Dennis* case overrules the "clear and present danger" test, see HOOK, HERESY, YES-CON-

are attempts to articulate standards for judgment rather than to formulate rules of thumb. Both Holmes and Hand accord civil rights a preferred position in the market of interests, but each recognizes that there are some qualifications and limitations. What other interests are there which may thus override the individual-social-public interest (liberty) which is guaranteed by common law and constitution? It would seem that there are at least two implied limitations which qualify even those liberties guaranteed by the Constitution. First, a serious and imminent threat to public safety or the processes of government warrants the restraint of even constitutional liberties. Here, the question is one of "proximity and degree" according to Holmes, and of "gravity of the evil" according to Hand, the former emphasizing the time element, and the latter the magnitude of the harm. It is agreed that there must be a direct as distinguished from a remote threat of substantive evil, but they differ as to where the line should be drawn. The second limitation is also a matter of preservation.⁶⁹ A constitutional liberty may be curbed at the point where its assertion would occasion the destruction or substantial impairment of some other interest which is deemed worthy of survival. For example, free speech is limited by the law of sedition because of the real or apparent danger to social institutions,⁷⁰ and the law of defamation and that pertaining to obscenity restrict free speech by giving a qualified protection to the interest in one's good name⁷¹ and the interest of public moral-

SPIRACY, No. c. 5 (1954), and PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 72 (1954).

⁶⁹ From the standpoint of conservation, the assertion of any one liberty should be checked at the point where its exercise (abuse) would occasion the complete abnegation of some other liberty. We would all agree, to use Holmes' example, that free speech does not justify shouting "fire" in a crowded theatre; that one's interest in free movement does not excuse the deliberate spreading of contagion; that freedom of religion does not warrant invasion of a synagogue by a protestant in order to deliver an anti-semitic tirade; and that even a state of war would not justify the complete abridgement of criticism of the government.

⁷⁰ *Dennis v. United States*, 341 U.S. 494 (1951).

⁷¹ *Peck v. Chicago Tribune*, 214 U.S. 185 (1909) (liability for defamation); *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418 (1911) (liability for "unfair to organized labor" blacklisting); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) ("free press" guaranty precludes prior restraint); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) ("free press" guaranty invalidated special tax on newspaper); *Patterson v. Colorado*, 205 U.S. 454 (1906) (newspaper criticism of court held contempt); *Toledo Newspaper Co. v. United States*, 247 U.S. 402 (1918) (newspaper criticism as contempt); *Craig v. Har-*

ity.⁷² But in normal competition with such other interests, free speech fares the better.⁷³ Such liberties, in other words, may be qualified by the imperatives of general security, but not by its expedients.

Since the inception of the "cold war," there have been indications of a retreat from the Holmesian evaluation of civil rights. Holmes, in effect, presumed the unconstitutionality of legislation which he believed entailed an abridgement of the rights guaranteed by the first and fourteenth amendments, but if no such rights were involved, under his concept of balance of power and division of labor, he otherwise presumed the constitutionality of legislation.⁷⁴ Mr. Justice Frankfurter, in particular, has tended to abandon the distinction between civil rights and other cases, and to indulge in a blanket presumption of the constitutionality of all legislation.⁷⁵ The result is to demote civil rights from their preferred status or to accord an equal weight to legislative judgment as to constitutional specifications. Whether this is viewed as a set-back in the long struggle for judicial protection from governmental oppression or a commendable example of judicial humility, may depend upon one's estimates of the legislative branch and the proper ambit of judicial review, but hindsight shows us the illusory character of many of the perils which legislatures or courts mistakenly believed justified the curtailment of liberty.⁷⁶

ney, 331 U.S. 367 (1947) (contempt); *Bridges v. California*, 314 U.S. 252 (1941) (contempt); *Pennekamp v. Florida*, 328 U.S. 331 (1949) (contempt).

⁷² *Burstyn v. Wilson*, 343 U.S. 495 (1952) (movie censorship); *Hannegan v. Esquire*, 327 U.S. 146 (1946) (mailing privilege).

⁷³ Among recent cases which involve a delicate balancing of interests are: *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words"); *Feiner v. New York*, 340 U.S. 315 (1951) (impeding traffic and imminent riot); *Beauharnais v. Illinois*, 343 U.S. 252 (1949) ("group libel" law); *Terminello v. Chicago*, 337 U.S. 1 (1949) (inciting to riot).

⁷⁴ See Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121 (1929), and compare his toleration of legislative experimentation in economic and social matters in *Lochner v. New York*, 198 U.S. 45 (1905), and *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), with his "clear and present danger" test in "free speech" cases.

⁷⁵ See Mr. Justice Frankfurter's concurring opinion in the *Dennis* case, 341 U.S. 494, 517.

⁷⁶ Professor Helen Merrill Lynd has observed: "We find it easy to tolerate, even to welcome, the heresy of another time and place, but our own heretics we say are different. We marvel at the suppression of John Huss; we deplore the exiling of Roger Williams; we are eloquent in the denunciation of the persecution of Galileo or Socrates, but our own heretics, the so-called corrupters of our children, are *really* dangerous and our only recourse is to have them drink the hemlock. They do not conform to our traditional pattern of what heretics should be or, as we frequently put it, they do not fall within the pattern of

In addition to the common law and our constitutions, the hierarchy of our freedoms (interests and rights) is affected by those intangibles which enter into our sense of justice (or injustice). It would be unrealistic to imagine that the method of pragmatism affords a complete explanation of the judicial process. The ultimate basis of choice between conflicting interests may be non-rational or determined by value judgments. What freedoms, and whose freedoms, come first, and have priority depends in no small measure upon faith, as does its corrolary, what security and security for whom. The democratic faith we profess is that the security of our freedoms (liberties) is the most important security as long as it does not become a matter of survival. So too, the restraint we most welcome is the restraint of restraint for it is by that method that the judicial process protects our freedoms and secures us from oppression. Our democratic philosophy today is constructed around the social nature of man, the interest of society in the individual and the individual in society. Those claims which once were made in terms of individual rights are now seen in their social aspect. Free speech as a liberty is not grounded solely on the private interest of the utterer, it is also asserted as a social interest because of society's concern for its constituents and also because society has an interest in hearing the speech.⁷⁷ It is part of our faith that we are willing to wager that in the long run freedom of expression results in more social good than harm, and that general security is promoted rather than menaced by allowing a relatively free expression of ideas.

At the same time, however, we also recognize that the essence of democracy is compromise, that no so-called rights are absolute, and that there must be a give and take in the securing of interests. Living in a relatively insecure world, we realize that complete safety

our traditional political parties." Heywood Broun once said: "Free speech is about as good a cause as the world has ever known. But like the poor, it is always with us and gets shoved aside in favor of things which seem at a given moment more vital. They never are more vital. Not when you look at them from a distance. When the necessity of free speech is the most important we shut it off. Everybody favors free speech in the slack moments when no axes are being ground."

⁷⁷ ". . . the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race: posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its own collision with error. . . ." JOHN STUART MILL, *ON LIBERTY* 23 (Atlantic Library ed. 1923).

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for ourselves or for our order is impossible of attainment; living in a crowded society, we see that complete freedom of action is an impossibility. In our dedication to the value of freedom we have sometimes thought that security was but a means to the end of freedom, but upon reflection, we see both of these related values must co-exist or wither and die together.

Although we have been preoccupied with a description of the legal order and an analysis of legal concepts, we have not meant to imply that religion, philosophy, and custom have nothing to do with the values of freedom and security. On the contrary, as values they have ethical and moral content. An abuse of freedom, its conversion into power, may be a gross immorality. Undue concern for security may be a denial of Christian charity. Moreover, self-restraint is a moral responsibility placed by ethics upon those who would assert their rights as free men.⁷⁸ Finally, in our concern over the institutionalization of freedom and security, we must not forget that their preservation and perpetuation, in the final analysis, depends upon our capacity to love liberty as well as life itself, and that perhaps "even more than love of liberty, we need a love of tolerance,"⁷⁹ which may be regarded as respect for the liberty of others.

⁷⁸ See essay by Henri Bergson on *Freedom and Obligation*, in *FREEDOM: ITS MEANING* 612. WALTER LIPPMANN, in his *THE PUBLIC PHILOSOPHY* (1955), advances the thesis that there has been too great an emphasis upon "rights" rather than "duty" and that our civilization needs a reemphasis of the meaning of obligation and self-restraint.

⁷⁹ Schneider, *The Liberties of Man*, *FREEDOM: ITS MEANING* 671.