1930

Liberty

Robert C. Brown
Indiana University School of Law

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LIBERTY.

The Standard Dictionary defines “liberty” most generally as “The state of being exempt from the domination of others or from restricting circumstances.” May we not compress this into the simple “freedom from restraint”? This seems an adequate definition for our subject, considered in a non-technical sense.

Only the legal aspects of this idea concern us here. “Liberty” has had a long history in the law but the apparent meanings of the word are very nearly as numerous as the actual number of times it has been used. That “liberty” is not the only perfectly good word which has been ruined by lawyers must be freely admitted; but the ruin is rather complete. Perhaps it might be better to drop the word and substitute another or others with more definite meanings; but for the American lawyer, at least, this solution is impossible because the word plays a large and a rather troublesome part in our constitutional bills of rights. It appears in both the Fifth and Fourteenth Amendments to the Federal Constitution and usually in the bills of rights in our state constitutions. So whatever it is, it is protected.

But here too it is certainly liberty in the legal sense that is meant, our bills of rights dealing only with governments and therefore with law. As Bentham points out, merely moral rights cannot be regarded by the law, and only confusion can come from confusing political rights with merely moral, or what some people call natural, rights.

It is not intended to convey the impression that the writer believes that the concept of liberty is an unimportant one. It is something that should be preserved as a characteristic of our body politic, because of its affirmative value. While, as already shown, liberty is a negative concept in the law, it has affirmative value, simply because, other things being equal, the free man is more valuable to society than one deprived of liberty. The word has been much misused and has a somewhat nebulous meaning;

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1 See Miller, “The Data of Jurisprudence,” pp. 96-100.
but it expresses a desirable condition, which should be protected by the law, in the social interest.

It might seem then that legal liberty could be adequately described as freedom from legal restraint. Austin seems to adopt this view, although he cannot refrain from introducing into his definition something of his political philosophy. "Political or civil liberty," he tells us, "is the liberty from legal obligation which is left or granted by a sovereign government to any of its own subjects, and since the power of government is incapable of legal limitation, the government is legally free to abridge their political liberty, at its own pleasure or discretion." This doctrine certainly sounds strange to our American ears, but I fancy that Austin would not back down very much even when confronted with our theory and practice of government. Certainly he sounds as if he had some acquaintance with American spell-binders (or else the latter must have blood-brothers in England) for he continues, "To the ignorant bawling fanatics who stun you with their pother about liberty, political or civil liberty seems to be the principal end for which government ought to exist. But the final cause or purpose for which government ought to exist, is the furtherance of the common weal to the greatest possible extent." He also adds, "Speaking generally, a political or civil liberty is coupled with a legal right to it; and, consequently, political liberty is fostered by that very political restraint from which the devotees of the idol liberty are so fearfully and blindly averse."

It must be remembered that Austin means by "political liberty" what we might call legal liberty; his words have none of our American connotation of voting, party politics, and the like. We shall have occasion to return to these ideas of Austin. Here it must be pointed out that Austin's followers, Brown and Salmond, have pointed out a technical inaccuracy in Austin's own idea that liberty necessarily includes a right to restrain anyone else from interfering with the exercise of liberty. For example, a revocable license to go on the land of another, while it certainly gives a liberty to do so, does not give a right to immunity from interference by the owner. But these are

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5 "Jurisprudence," section 75.
exceptional cases and certainly do not of themselves affect the validity of Austin's main thesis.

Of late years, several authorities, notably Professors Hohfeld and Kocourek, have attempted to remedy the uncertainties of legal terminology which so greatly affect this and other subjects. They have not, however, come to an agreement with respect to how the words are to be used. Professor Hohfeld thought that "liberty" and "privilege" are to be regarded as words of substantially the same meaning. The objection to this would seem to be that "privilege" has a well-settled connotation of justification for an act *prima facie* unlawful, while "liberty" generally means simply that the law regards the particular act under consideration with entire unconcern. But it must be conceded that the practical difference is often rather slight.

However, the controversy suggests an important practical question, which is also suggested by the above quotations from Austin. The question may be phrased as follows: Assuming that the law permits an individual to perform a certain act or series of acts, should the law also use its power to restrain other persons from interfering with the performance of those acts?

It is submitted that the answer should generally be in the affirmative. If the state is really to be the guardian of liberty it must not merely refrain from improper restraint itself, but must use reasonable means to see that the restraint is not applied from other sources.

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8 (1901) A. C. 495, 534.

As is said by Lord Lindsley in *Quinn v. Leathem*, "As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law he has no redress. . . . But if the interference is wrongful and is intended to damage a third person and he is damaged in fact—in other words if he is wrongfully and intentionally struck at through others, and is
Speaking generally, all forms of liberty fall within our constitutional bills of rights. But certain kinds of liberty must be considered separately from the constitutions, because they are discussed in the English cases and also because they are sometimes discussed by American judges as inherent rights entirely apart from constitutional protection—an echo of Lord Coke's famous theory. Of these the most fundamental is the right to pursue any lawful calling, as a part of liberty.

Perhaps the strongest statement of this theory is in Butchers' Union Co. v. Crescent City Co. The case merely upheld the power of a municipality to put an end to a slaughter-house monopoly already granted and the validity of which had been upheld in the Slaughter-House Cases. Mr. Justice Field and Mr. Justice Bradley, both of whom had dissented in the previous decision, of course concurred in this decision but both wrote opinions vindicating their previously expressed ideas as to the illegality of the monopoly.

While Justice Field evidently thinks that this freedom to thereby damnified—the whole aspect of the case is changed; the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances."

This language has been quoted at this point mainly to show judicial authority for the view that protection of liberty requires restraint upon those who would unlawfully interfere with such liberty. If this idea is accepted it will have important consequences in our consideration of the court decisions, to which we may now turn.

As is well known, the Declaration of Independence expresses the now discredited ideas of 18th century natural law, with its emphasis on individualism.

111 U. S. 746, 4 Sup. Ct. 652 (1884).
16 Wall. 36 (1872).
111 U. S. 757.

Mr. Justice Field, after quoting the language of the Declaration of Independence as to inalienable rights, says:

"The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright."
choose one's occupation is inherent and does not need constitutional protection, Mr. Justice Bradley is even more specific on this point.\textsuperscript{13}

The passage from Quinn v. Lathem,\textsuperscript{14} which has already been quoted, has similar language as to the right of a person to earn his living in whatever way he chooses; and the more recent case of Attorney General v. Adelaide Steamship Co.\textsuperscript{15} also uses similar language, although in that case the restraint of liberty was considered lawful.

These last cases, although decided in a jurisdiction not blessed with a written bill of rights, do not treat this kind of liberty as a natural right, except in the sense that it exists unless the legislature finds it necessary to interfere with it. To this extent we should probably agree that there is such a natural liberty. But to assume, as our American courts were once accustomed to assume, that a man's natural right to do, or try to do, whatever he pleases, cannot be interfered with in the public interest, is to bring about an intolerable situation. Mr. Justice Field's individualist theories might be well enough among the 49'ers of California but it will not be workable today, simply because not safe.\textsuperscript{16} The newspapers have recently told us of an uproar in Soviet Russia because a mechanic has posed as a surgeon and has performed a large number of operations. But our

\textsuperscript{13} "The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen, contrary not only to common right, but, as I think, to the express words of the Constitution." (The italics are Mr. Justice Bradley's.) \textit{Ibid.}, 762.

\textsuperscript{14} \textit{Supra}, note 8.

\textsuperscript{15} (1913) A. C. 781.

\textsuperscript{16} \textit{Matter of Jacobs}, 98 N. Y. 98 (1885), is a horrible example of the harm that may be done by this sort of reasoning. Here a state statute prohibiting the manufacture of tobacco products in tenement houses was held unconstitutional as restricting the liberty of tenement house dwellers to choose their occupation. That these occupants of tenement houses were themselves the victims of an outrageous sweating system, and that this condition endangered the public health, were notorious facts, which, however, were blindly ignored by the court.
American state of Indiana is from a strict legal standpoint in an even worse situation, for there by constitutional provision any person of good character may practice law.

But such populist ideas are pretty well worn out in this country; even in Indiana the constitutional provision is now being so administered as to make it virtually ineffective. The courts have been compelled to admit that while no person may be arbitrarily shut out of any proper occupation, yet he may be shut out in the public interest. The safety of our social institutions necessitates adequate training for lawyers and the protection of human life requires adequate training not only for physicians but for locomotive engineers and many other occupations. Mr. Justice Bradley to the contrary notwithstanding, it may be necessary to confine these and numberless other occupations to a "few favored individuals," if you wish to call them so.

In this matter the problem may be considered to be practically solved. The solution is a rather recent one and the courts still love to talk about this kind of liberty. But it is clear now that most of them will accept any reasonable restrictions upon the rights of individuals to enter into occupations that need regulation and that the courts now understand that our complicated society requires far more rigid restrictions than could possibly have been sustained in the past. There may yet be an occasional reactionary decision but we may be fairly confident that this problem has changed from a practical to little more than a verbal one.

Another sort of liberty, the existence of which has been under debate, is the right to do an act which injures another, but which is otherwise lawful, with the sole purpose of injuring that other person. In other words, does one have the liberty to act merely for spiteful ends?

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17 This change of view began about 1905 and was reasonably complete by the end of the second decade of the present century. See for examples of the modern view as to this question, Weed v. Bergh, 141 Wis. 569, 124 N. W. 664 (1910), which upholds a state statute restricting banking to corporations; and Collins v. Texas, 223 U. S. 288, 32 Sup. Ct. 286 (1912), which upholds a state statute requiring proper training for osteopaths.

18 The writer has intentionally refrained from the use of the word "malice," which has been so used in legal literature as to become practically meaningless or even positively misleading.
The authorities, which are frequently grouped under the designation of the "spite fence cases," although actually including other sorts of fact situations, seem to be all one way, at least at common law. For instance, *Chatfield v. Wilson*,¹⁹ and *Phelps v. Nowlen*,²⁰ both sanction interferences with underground water-courses on defendant's own land, with the sole purpose of injuring the plaintiff, and adjoining owner who was using the water not then or afterward used by the defendant. The Vermont court said:

"It may be laid down as a proposition not to be controverted, that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it."²¹

*Letts v. Kessler*²² is perhaps the strongest example of the spite fence cases. Here the defendant, angry at the plaintiff because she had compelled him to remove some supports for his own structures from her boarding house adjoining his property, built a high board fence of no possible utility, as near to the plaintiff's house as possible, with the intended result of cutting off all light and air from the first floor of the plaintiff's house, thereby practically making it impossible for her to continue to keep boarders.²³

It is conceived that the court misses the real point. The proper way to look at the case would seem to be this. An act which directly injures the plaintiff, especially if it is intended to do so, is *prima facie* illegal and requires justification. This is especially clear if the plaintiff is to have the liberty previously considered, to choose her own occupation. Such justification may be derived from competition or from the *bona fide* use of

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¹⁹ 28 Vt. 49 (1856).
²⁰ 72 N. Y. 39 (1878).
²¹ 26 Vt. 57.
²² 54 Oh. St. 73, 42 N. E. 765 (1896).
²³ The court in denying any relief to the plaintiff, said:

"It is and must be conceded that he (i.e., the defendant) might, by erecting a building on the lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such case she would be without right and without remedy, even though done with the same feelings of malice as induced him to erect the fence, . . . If through feelings of malice he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the act, and not the motive." *Ibid.*, 88.
his own property for socially justifiable ends. This is a part of the defendant’s liberty of action, which should be protected by the law. But is the law justified in protecting him in his liberty merely to wreck his spite? The answer should, it seems, be in the negative. As is said by Mr. Justice Holmes in *Aikens v. Wisconsin*, a decision upholding a state statute making it a crime to combine “for the purpose of wilfully or maliciously injuring another in his reputation, trade, business, or profession”:

“It would be impossible to hold that the liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, was among the rights which the fourteenth amendment was intended to preserve.”

The famous, or perhaps better, notorious, case of *Allen v. Flood* is, if it can be construed to decide anything, an authority for the same rule that spitefulness cannot make an act illegal, if otherwise unobjectionable. After *Quinn v. Leathem*, there is not much more left of *Allen v. Flood*, but that decision contains a good deal of language to this effect, which the House of Lords in later cases seems to assume is still law in England. Actually there would not seem to have been any spitefulness on the part of the defendant in the *Allen* case, and the case only proves that lawyers have ruined the word “malice” even more thoroughly than they have “liberty.”

As already intimated, legislatures have not agreed with courts as to the sacredness of the liberty of individuals to injure others for spite, and have passed much legislation against spite fences and similar performances. Some of these statutes go much farther than the one upheld in *Aikens v. Wisconsin*. We have here another example of the rather usual occurrence of judicial blunders being corrected by the legislative bodies. It is still true that mere spitefulness on the defendant’s part will not necessarily subject him to liability for he may have some
other justification, and no doubt this sort of liability must be imposed with extreme caution in order not to unduly restrict the defendant's right to use his own property for business purposes which may be distasteful, though not a nuisance to his neighbors. The possibility of this sort of injustice is pointed out in Phelps v. Nowlen.\textsuperscript{30} But under the statutes liberty does not include the right to injure one's neighbors merely for spite, and this is right. Even if liberty is the primary end of the law, which may certainly be doubted, yet it is the liberty of all that must be considered. The abuse of liberty by one person means the loss of liberty by others.

This brings us to a definite consideration of what liberty is protected by our bills of rights. The answer seems to be very simple. It is all kinds of legal liberty. Put in another way, any possible restraint by the Federal government raises a question under the Fifth Amendment; and the same rule applies to state restraints under the Fourteenth Amendment.

This is absolutely what was said by Mr. Justice McReynolds in Meyer v. Nebraska.\textsuperscript{31} His statement refers to the Fourteenth Amendment but is equally applicable to the Fifth.\textsuperscript{32}

Most of the above will be agreed to and it will also be recognized that it does not involve any vital issues at present. Bodily freedom is now amply protected and the same is true of liberty to establish a family. Religious liberty, once a burning question, is entirely settled. The matter of liberty to choose one's occupation has already been sufficiently considered. But what of the statement that liberty includes "the right of the individual to contract?" Liberty of contract—what is it and what are its boundaries?

Dean Roscoe Pound in his article on this subject\textsuperscript{33} has

\textsuperscript{30} Supra, note 20.
\textsuperscript{31} 262 U. S. 390, 43 Sup. Ct. 625 (1923).
\textsuperscript{32} "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Ibid., 399. See also a similar statement in Allgeyer v. Louisiana, 165 U. S. 578, 589, 17 Sup. Ct. 427 (1897).
\textsuperscript{33} "Liberty of Contract," 18 Yale Law Journal, 454.
pointed out that this phrase, the subject of innumerable legal controversies in these later years and indeed still controverted, is of comparatively recent appearance in legal literature. The reason for this, however, is that the concept of contract, as an enforceable legal obligation, is itself quite modern.

The courts have embraced the idea with an ardor far from proportionate to its youth, and this makes the question legitimate whether there really is anything valid in this concept. It is believed, though, that this question requires an affirmative answer. The power to contract is in our present social order just as essential as the liberty to work at all. If liberty is the end of law, the question is already answered; but even if it is only a means to social ends, this liberty is essential to such ends. The welfare of the individual man and his power of self-support, both of which are clearly subserved by this liberty, are certainly a part of the interest of society. It does not follow, however, that this liberty is without limit; and it is here that one may well disagree with many actual decisions of the courts.

An example of the immoderate use of this valuable, but somewhat intoxicating, verbal beverage of liberty of contract is Adair v. United States, holding unconstitutional a Congressional statute forbidding interstate carriers from exacting from prospective employees, as a condition of employment, a promise that they will not become members of labor unions, and from discharging their employees for becoming members of such unions. The efficacy and desirability of such a statute may well be doubted, but the court went further and held it a violation of the Fifth Amendment by reason of an interference with the liberty of contract of both employees and carriers. In reaching this result, Mr. Justice Harlan, writing for the majority, relies for his ideas of the scope of liberty of contract very largely on Lockner v. New York. The Lockner case held unconstitutional, as an improper limitation of liberty of contract, a New York statute restricting the hours of labor of bakers in that state. The decision has generally been regarded as one of the most completely indefensible pronouncements of the Supreme Court, not only because it overturns legislative protection of workmen, at least possibly rea-

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sonable and proper (though this alone would be sufficient to con-
demn the case), but because the statute clearly had a sufficient
basis in the protection of the public health. While Adair v. United States cannot be attacked on this last basis, yet the
statute there involved might be justified as protecting the public
order and safety. At any rate, the fact that the court relies
so much on the discredited Lockner case in its opinion in the
Adair case, is itself sufficient to throw doubt upon the sound-
ness of the latter decision.

But more definite criticism of the Adair case may be had.
The court, probably without realizing it and therefore without
due restraint, is enforcing its own economic philosophy of laissez faire, when Congress has for equally good reasons deter-
mined that another philosophy would actually work better.
And the court is assuming that the legal equality between rail-
road and single employee is a practical one. Congress after a
fuller presentation of the facts than was available to the court
had concluded that the actual inequality between the parties was
so great as to make special protection of the men necessary in
order to protect their liberty of contract. Most persons conver-
sant with the actual facts would agree that Congress was right
and the court was wrong. If this is so, the result of the decision
was to take away a substantial part of the legal liberty of con-
tract of the employees—a result precisely contrary to that
avowedly, and no doubt actually, desired.

State v. Loomis must be considered somewhat at length
since it is typical of decisions and supporting reasoning which
are unfortunately still met with. This case holds unconstitu-
tional a statute requiring laborers in mines and factories to be
paid in cash or orders redeemable in cash—an attempt to strike
at the practice of paying laborers in orders redeemable only at
the company store, at grossly inflated prices.

\textsuperscript{38} Supra, note 34.
\textsuperscript{37} 115 Mo. 307, 22 S. W. 350 (1893).
\textsuperscript{36} Ibid., 315. The court in reaching this result, thus expresses itself:

"It will not do to say that these sections simply regulate payment
of wages, for that is not their purpose. They undertake to deny to
the persons engaged in the two designated pursuits the right to en-
force the most ordinary everyday contracts—a right accorded to all
other persons. This denial of the right to contract is based upon a
classification which is purely arbitrary, because the ground of the
classification has no relation whatever to the natural capacity of per-
sons to contract."
Right here one wants to pause and inquire what "natural capacity of persons to contract" has to do with the case. One is reminded of the epitaph:

"Here lies the body of Elbridge Gay,  
Who was killed disputing the right of way;  
He was right, dead right, as he drove along,  
But he's just as dead as if he'd been wrong."

Probably everyone who has to be in the streets as a driver of an automobile, or otherwise, will agree that natural and even legal equalities and rights do not always work out in practice. Here the legislature had concluded that the natural capacity of the miners and factory-hands to contract, which it surely had no intention of denying, did not in fact protect them from the extortion of their employers, carried out in the matter described above. Now practically every person of normal intelligence knew that this sort of thing was going on and was a shocking injustice to the workingmen of the state. In spite of the occasional efforts of some judges to convince us that they do not know anything about certain matters that everyone else does, it cannot be believed that judges are really thus abnormally ignorant. And so we must conclude that the judges knew these facts also. Then how explain such a decision? It seems that we must look to a judicial obsession with this concept of legal equality, so serious that it caused learned and worthy judges to shut their minds to facts which as men they knew and as honorable and fair-minded men we must assume they resented. But such an obsession, carried so far, can do nothing but harm.30

In this same decision the court continued:

"Now it may be that instances of oppression have occurred and will occur on the part of some mineowners and manufacturers, but do they not occur quite as frequently in other fields of labor?"

This is intended as a rhetorical question calling for an obviously affirmative answer; but in fact the answer is almost certainly "no." But even if the legislature has failed to cure all

30 Ibid.
the evils in the industrial life of the state, that is a very poor reason for upsetting its solution, or at least improvement, of this one.\footnote{People v. Coler} \footnote{People v. Godcharles} seems, however, to take the prize for judicial imbecility in this connection. That case holds that a state cannot regulate wages of workmen on municipal contracts.\footnote{People v. Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. 354 (1887), and Commonwealth v. Perry, 155 Mass. 117, 28 N. E. 126 (1891), are other cases to the same effect.}

Let us see just what this means. Certainly the court would not deny that the humblest citizen of the state may, in employing a contractor, make such terms as his judgment, or his whim, calls for. He may insist on the employment of such laborers and their being paid such wages as he chooses. He may also insist that all foremen wear clerical collars and that work be commenced each morning with prayer of a half-hour's duration; or indeed anything else that the most whimsical or unreasonable person can conjure up. These conditions may be very burdensome to the contractor but if he agrees to them\footnote{Ibid., 15. As might be expected, there are literally pages of vapid bromidisms on this subject, but perhaps the following sample is a fair one—and also as much as the reader can be expected to stand:}

"The contractor is a private individual engaged in private business. When he enters into a fair and honest contract for some municipal improvement, that contract is property entitled to the same protection as any other property. It is not competent for the legislature to deprive him of the benefit of this contract by imposing burdensome conditions with respect to the means of performance, or to regulate the rate of wages which he shall pay to his workmen, or to withhold the contract price when such conditions are not complied with in the judgment of the city. When he is left free to select his own workmen upon such terms as he and they can fairly agree upon, he is deprived of that liberty of action and right to accumulate property embraced within the guaranties of the Constitution, since his right to the free use of all his faculties in the pursuit of an honest vocation is so far abridged."

\footnote{Of course he need not enter into the contract if he does not desire to do so; but neither need one enter into a contract with the state or its municipalities.}
the agency of the citizens as a whole. Further comment seems unnecessary except to say that, hard as it may be to believe, the Coler case does not stand alone, though fortunately it is in the minority.44

State v. Kreutzberg45 is in accord with Adair v. United States.46 It is, however, much better reasoned, the opinion by Judge Dodge admitting that the court is governed by its views of public policy—which is certainly another way of saying philosophy. This is inevitable, and all that can be reasonably asked is that the judges frankly recognize the fact of such influence. So this reasoning marks a long step in the right direction. If the result is wrong, as the writer is inclined to think it is, that is because the court was not sufficiently informed of the factual situation which had led the legislature to pass the statute. It is often the fault of counsel, when the court is thus uninformed of facts not generally known, but it does not seem unreasonable to ask the courts to make a rather stronger presumption in favor of legislative action depending upon such facts, than most of them have been accustomed to do.

The well-known case of Adkins v. Children's Hospital,47 decided in 1923, holds unconstitutional a Congressional statute providing for minimum wages for women in the District of Columbia. This recent decision seems somewhat discouraging, especially as Mr. Justice Sutherland, writing for the majority, uses the conventional phrases with respect to liberty of contract as the ground for his decision. But there is some encouragement in the situation. In the first place, the majority consisted of only five justices, with three dissenting. Mr. Justice Brandeis took no part, but no one who knows anything about him would need two guesses as to which side he would have been on. Then Mr. Justice Sutherland's opinion shows that he now realizes that liberty of contract needs some limitation.48

This is a considerable and a very welcome concession. It

44 Atkin v. Kansas, 191 U. S. 207, 24 Sup. Ct. 124 (1904) is a leading authority contra to the Coler case.
45 114 Wis. 530, 90 N. W. 1098 (1902).
46 Supra, note 34.
47 261 U. S. 525, 43 Sup. Ct. 394.
48 Ibid., 546. He says:
"There is, of course, no such thing as absolute freedom of contract. It is subject to a great variety of restraints. But freedom of contract is, nevertheless, the general rule and restraint the exception."
seems, nevertheless, that the dissenting opinions have all the better of it. Mr. Justice Sutherland is no doubt misled by his own reasoning which consists very largely of what Professor Thomas Reed Powell is accustomed to call a "parade of imaginary horribles", a method of argument which seldom convinces anyone but the person using it, and him wrongly. But the fundamental difficulty is the same old one that the majority does not realize that Congress, being advised by reputable and careful authorities on the subject, had concluded that the protection of women, in matters both physical and others less tangible but no less important, like liberty of contract, required such regulation. The court hardly had sufficient data to be even in a position to pass upon the correctness of the judgment of Congress. Anyway, how could it assert that Congress had not acted unreasonably, when sociological authorities were practically unanimous that Congress' action was not only reasonable but clearly right.

The last important authority on this subject is Tyson v. Banton, decided in 1927. The decision invalidates a New York statute limiting resale prices on theater tickets—an attempt to put the rapacious ticket-brokers in New York City under some restraint. Here again Mr. Justice Sutherland wrote the opinion for a bare majority of the court, there being four dissenting justices. The opinion does have some rather familiar language about liberty of contract, as for instance the right of the owner of any article to sell it on such terms as he desires. But most of the dissension in the court is as to whether the business of theater ticket brokers is affected with a public interest. This has some relation to liberty of contract, but it opens up a whole field of the law, which cannot be considered here. The opinion is subject to the same criticism made in other connections, that it fails to take proper consideration of the actual facts of the situation; but there is a reasonable argument for it, in that theaters are perhaps rather luxuries than necessities, and so extortion in that business is not of such direct public interest.

But of more interest than the actual decision is the dissent-

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49 The same method of argument is used, and with the same pernicious effect, in Lochner v. New York, supra, note 35.
ing opinion of Mr. Justice Holmes, or at least the following sentence from it:

"Subject to compensation when compensation is due, the Legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."52

This sounds rather startling. One may ask, if this is so what becomes of our bills of rights, or more specifically (but still not very much so) what of our liberties? Yet is this not what is actually happening? Mr. Justice Holmes himself points out that the 18th Amendment was not necessary to enable Kansas to put an end to the existing liquor traffic, previously entirely legal.52 The Commonwealth of Massachusetts once so thoroughly approved of lotteries that it conducted some itself, for the benefit of Harvard College; but this business, too, has fallen under the condemnation of popular opinion and of the law. Other businesses may, and in fact are morally certain to, follow these into popular and legal condemnation.

It follows that our liberties are not so well protected legally as it is, or at least once was, the fashion to suppose. The bills of rights are not construed to permit people to do exactly as they please, and even where bills of rights do seem to interfere with regulations desired by popular opinion, it has not been found impossible to change these bills of rights. Even the most conservative of our courts are now compelled to recognize that the concept of natural rights must be abandoned at least so far as it connotes complete protection from governmental action.

This is submitted to be the sound view, whether one thinks that government exists to preserve liberty, or whether one agrees with Austin that liberty is merely a means to the end of social welfare. Unbridled liberty of action has never been conducive to social welfare, and even if liberty is regarded as an end in itself, it must be regulated, since the unbridled liberty of one is almost certain to injure the liberties of others.

This increasing limitation of liberty is, nearly all agree, the predominant legal phenomenon of our age. Many view it with alarm, but the more sensible position would seem to be to recognize that it is a necessary and indeed inevitable result of

\(^{52}\text{Ibid., 446.}\n
\(^{52}\text{Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273 (1887).}\)
the growing complexity and delicacy of adjustment of our social life. Even the most elementary form of liberty, that of locomotion, must be restricted in this automobile age.

Of the more complex forms, liberty to do spiteful acts should never have been protected, but the legislatures are gradually correcting this. Liberty to choose one's occupation is no longer tolerable to its full extent, and the courts have reached a belated recognition of this fact. Liberty of contract, valuable and necessary as it is, likewise requires regulation in the interest of the public as a whole and in the interest of certain classes of the community who are in fact in a poor position for bargaining. This the courts have been a long time in recognizing, and it may be doubted whether they have yet seen the light as clearly as is their duty. But the tendency is clearly in the right direction. Reactionary decisions still appear, but they are growing less numerous, and furthermore are announced with some reluctance and almost apology, rather than with the perverse delight which the courts used to show.\textsuperscript{53} Liberty is worth preserving, and it is so very much so that it is worth regulating in order that it may be available to all. Everyone but some courts and, one hates to admit it, but it is a fact, a considerable part of the legal profession, has seen this for a long time; and it is percolating even to these classes of society. There is no permanent way of protecting liberty against public opinion, and attempts to do so are undoubtedly a real menace to the continuation of our liberties. But that is the only possible menace. The sense of the people, at least the second, sober sense, may be confidently depended on not to restrain our liberties much further than is necessary in order to effectively preserve them. When the legal profession, including the courts, fully realize that American liberty is not necessarily in accordance with our professional presuppositions, and that our profession is not the sole guardian of it, against a tyrannical majority, our social machinery will work more smoothly, and our liberties will still be preserved, and perhaps even more effectively than at present.

Robert C. Brown.

\textsuperscript{53} The perverse delight which courts often take in making "strong decisions"—those opposed to business custom, common sense, and justice—has often been remarked. These reactionary decisions with respect to liberty of contract are "strong decisions" in this sense, and it is at least encouraging that the courts which make them are no longer so much entranced with their own ingenuity.