Marquette Law Review

Volume 25
Issue 1 *December 1940: A Symposium on Freedom*

Article 8

The Old Freedom

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THE OLD FREEDOM

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DURING his presidency Woodrow Wilson wrote an interesting little volume which, with his usual felicitous diction, he called "The New Freedom." It was, in fact, a collection of his campaign speeches elaborating the party program. He endeavored to explain how the government could be carried on successfully at the least expense to the people. The "philosophy of spending" seems never to have occurred to him. Again, instead of curtailing production and paying for non-production, he seeks to employ the energies of the nation to their fullest extent. In two chapter headings he defines the New Freedom as "the emancipation of business" and "the liberation of the people's vital energies."

The following disquisition is not intended as a discussion of economic theory. It proposes rather to re-examine the concept of freedom as a problem in jurisprudence, which Prof. J. W. Burgess in his notable book on that subject characterized as "the reconciliation of government with liberty." He observed that there was more governmental regulation of our personal affairs than had been customary in our political history up to that time. The tendency of the time seemed to indicate a gradual abandonment of the current dictum, "that government is best which governs least." Professor Burgess says, "we are further away from the solution of the great problem than we were twenty years ago." [1] It may be added that we are still further from the solution now than we were when Burgess wrote his book. The intervening quarter of a century, especially the last decade, instead of reconciling government with liberty, has tended to emphasize the conflict. And yet, with a correct understanding of liberty and a proper conception of governmental functions, such conflict is not at all necessary. Neither does the reconciliation interfere with the most comprehensive program of social legislation and economic regulation. It is true that these latter forms of activity are fraught with danger to liberty which rapidly increases as the tendency to autocratic methods gains momentum. But there is no essential contradiction between liberty and government when both are regarded as subject to the same higher law by which we determine the meaning of the one and the function of the other.

It seems that the writer in the Ecclesiastical Review,[2] in commenting on Burgess's book, somewhat misconceives the problem when he says that it has its "counterpart in the problem of conciliation between the warring tendencies of man's own personal experience." St. Paul refers

[1] JOHN W. BURGESS, THE RECONCILIATION OF GOVERNMENT WITH LIBERTY 378.
[2] 54 ECCLESIASTICAL REVIEW 372.

to this personal problem when he speaks of the double law in his members.[3] Ovid also, in his seventh metamorphosis, refers to it in his famous dictum, *video meliora proboque, deteriora sequor.*[4] Both the Pauline and Ovidian references clearly indicate that one of the factors in the personal problems is an *evil* tendency, whereas in the political problem both factors are good. What the writer probably had in mind was the personal problem of those who are vested with political authority. They may indeed experience the warring tendencies of their nature, and recent history discloses that they have too frequently allowed the evil tendency to prevail.

But government itself should not be regarded as an evil; its authority, like all true authority, comes ultimately from God. If government were an evil, then its reconciliation with liberty would be inherently impossible. It would not then be a problem of reconciliation but of adjustment. The question would be: how much of this evil of government must we endure in order that we may preserve a part of our liberty. Or, to put it in another form, how much of our liberty must we sacrifice in order that the rest of it may be secure. This may accord very well with the "individualistic theory" which Father Ryan defines[5] in general terms as that theory which would reduce government functions to a minimum because its operations are regarded "as little better than necessary evils." It is partly the purpose of this article to show that this is fundamentally the wrong approach to the problem.

If we were to adopt the suggestion of the writer in the Ecclesiastical Review and seek a counterpart for our problem, we might find it in the alleged conflict between science and religion, a conflict that sometimes arises from a misconception of science, and sometimes from a misconception of religion. Where both terms are properly understood, a conflict is just as impossible as a contradiction between one true proposition and another. In somewhat the same manner, though the analogy may not be perfect, the apparent conflict between government and liberty sometimes arises from misgovernment and sometimes from a misunderstanding of liberty, but governmental functions properly exercised never interfere with freedom properly understood.

In the following discussion a few observations will be made on this problem, with especial reference to freedom of contract.

General Concept of Freedom

The question of freedom is one which has occupied the attention of statesmen for centuries. It is one of those fundamental problems of government whose complete solution in practice must wait for the slow

[3] Rom. 7, 23.
[4] Met. VII, 20.
[5] Ryan and Millar, The State and the Church 208.

development of a more enlightened and Christianized civilization. We in America feel we are in the vanguard of that progress. Whatever success we may have had in achieving and maintaining the freedom of the people is due largely to the influence of Christianity, which sets up a standard of ethics for governments as well as for individuals, and inculcates on the part of both a keener sense of social justice. The principle that a government ought not to demand more than what good men would be willing to give without compulsion is at once the criterion of our progress and a mighty motive force toward that ideal situation where the governmentally prescribed conduct coincides exactly with the voluntary conduct of good and honest men. There can be no doubt that the Christian teaching, with all the grandeur and sublimity of its ideals, has exercised a profound influence for freedom, not merely in that large and wonderful sense in which it is said that "the truth shall make you free," [6] but also in the more definite sense that it finds a practical application in legislation by civil authority.

It is possible, however, to expatiate glibly on our glorious heritage of freedom without any clear conception of its nature and consequently without any appreciation of the dangers that threaten it at the present time. Freedom has been defined as the absence of restraint, and of course where there is no restraint there is full freedom. But this condition does not and never will exist anywhere. It is not even desirable that it should exist. Every intelligent person recognizes that there can not be perfect freedom for everybody. There will always be murderers, robbers, and liars whose conduct and speech must be restrained. The freedom which we cherish and seek to maintain in our political institutions may be more accurately defined as absence of restraint on rightful conduct. Freedom, regarded as an ideal worth striving for, is the freedom of good men, upon whom the law should place no palpable restraint. It is the wrongdoer who necessitates the intervention of government and the enactment of many laws: *In corruptissima republica plurimae leges,* said Tacitus. A law may in terms impose a restraint on everybody's conduct, but if it is so framed as to make the restraint palpable only to the wrongdoer, it does not limit the freedom of good men, because a good man does not feel the restraint of a just law. Consequently, in a realm where only just laws prevail, all good men enjoy perfect freedom. Using the term "law" here in the sense of positive enactment, a just law may forbid acts that a bad man may want to do, and an unjust law may forbid acts that a good man may want to do, but a just law never forbids anything that a good man wants to do. In this connection it is highly important to remember that justice is threefold, commutative, legal and distributive; commutative, that which should

[6] John 8, 32.

characterize the conduct of one citizen toward another; legal, that which should characterize his conduct toward the state or civil society as a whole; and distributive, that which should characterize the conduct of the government toward its subjects.[7] With this distinction in mind we may say that liberty prevails in any country in exact proportion to the distributive justice of its laws and the legal as well as the commutative justice of its people.

Such a definition accords well with experience. You are free when you feel free, and it is possible to feel free, notwithstanding many laws and rules that set a limit to permissible action. Take for instance the law against libel and slander, or trespass or deceit, or any one of the numerous offenses known to the criminal law. These laws certainly set a limit to permissible action, but it is only the evil character who feels their restraint. They do not interfere with the freedom of any honest and upright person, because he has no inclination to do these forbidden things. Father Ryan neatly develops this thought[8] by his distinction between "the hypothetical and the actual dimunition of liberty." The law against theft, he says, applies in form to all citizens, but it actually affects only a small minority, because the great majority have no desire to steal. Their liberty is only hypothetically, not actually diminished. This distinction, he says, is still more striking in the industrial field. The laws against the exploitation of child labor and the imposition of extortionate prices by monopoly are theoretically directed against everybody, but it is clear that the only persons whose freedom is actually lessened, are those who would exploit or extort. For other persons, he says, "the law is no restraint on actual liberty."

We want liberty, but we want justice too. We want both, and in the proper "reconstruction of the social order," there will be no need to sacrifice or curtail the one for the sake of the other. This was in fact one of Al Smith's campaign pledges when he was a presidential candidate. He repeatedly declared that if elected president, his administration would be "rooted in liberty under the law." We may safely assume that in making this pledge he had no intention of propounding a paradox, because he did not subscribe to Cardozo's definition of liberty as "the negation of law."[9] This ideal of "liberty under the law" is not liberty restricted or limited by law. Rather it is liberty protected by law, protected against interference by any wrongdoer, whether he be a private citizen or the government itself. It is the right of unrestrained activity for the upright citizen in all the affairs and relations of his life.

This concept of liberty may be further exemplified in the lives of those who voluntarily subject themselves to rules and regulations be-

[7] II CATHREIN, MORALPHILOSOPHIE 355.
[8] RYAN AND MILLAR, THE STATE AND THE CHURCH 214.
[9] CARDOZO, PARADOXES OF LEGAL SCIENCE 94.

yond those enacted by the civil power. Take, for instance, the case of a Benedictine or Carthusian monk, or of any person living in a religious order. We commonly think of such a person as living under rules and regulations that would be quite uncomfortable for us. And yet it is possible for him, with all his rules, to have more real freedom than many of us who lead a secular life. The more he advances in the way of perfection, the less does he feel the restraint of his laws: the closer he comes to God, the less does he feel the restraint of any law that God has made or approved. When he reaches the point where, in all his desires and aspirations, he is at one with the Divine Will, then he enjoys full and perfect freedom, because he has found the ultimate basis for the reconciliation of law and liberty. This is the wisdom of St. Augustine as suggested in that well known prayer of his, *"da, Domine, quod jubes, et jube quod vis."* He did not ask that the divine commands be suited to the weakness of his will: rather he asked for grace that would strengthen his will to meet the divine commands, whatever they might be. Thus he sought the solution of the problem, not by adapting the law to his inclinations, but by seeking to make his inclinations conform to the law. Of course, in his case there could be no question about the justice of the law, because what he had in mind was the divine law as made known by Revelation. But the principle involved is broader than that, because every human law is also divine in as much as it derives its obligatory force ultimately from God. When enacted in the proper exercise of civil authority, it bears the divine sanction. As long ago as 1885, Pope Leo XIII, citing St. Paul, 10, declared: "whoever holds the right to govern, holds it from God alone, the Sovereign Ruler of all."[11]

Cardozo's Problem

It may be worth while to pause a little to consider Cardozo's method of solution. Since he regards liberty as the negation of law, his solution must therefore consist in attempting to enlarge liberty by decreasing as much as possible the demands of the law. Social order and tranquillity will always make a certain amount of governmental regulation necessary, but we have freedom in proportion to the extent to which we can dispense with this evil. Hence, the justice whose maintenance should be the aim and object of all civil authority is not co-extensive with moral or ethical conduct. It is "so much of morality as juristic thought discovers to be wisely and efficiently enforcible by the aid of jural sanctions." As one writer points out,[12] "this makes justice merely a segment of morality." Another writer,[13] in reviewing Cardozo's book, expresses

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[10] Rom. 13, 1.
[11] Encyclical, Immortale Dei.
[12] Burch, *The Paradoxes of Legal Science: A Review* (1929) 27 Mich. L. Rev. 639.
[13] Thilly, Book Review, (1928) 14 Corn. L. Q. 118.

the thought sententiously thus: "the jural norm of justice is a minimum of ethics."

With these premises Cardozo easily comes to the conclusion that *A* and *B* living in society can not both have complete freedom, because *A's* freedom to do whatever he pleases, including acts that cause harm to *B*, will inevitably clash with *B's* freedom to do whatever he pleases, including every act that saves him from harm. If *A* causes harm to *B*, the question whether *A* shall answer to *B*, Cardozo says,[14] means exactly this and nothing more: "Shall the freedom of *A* to work damage to *B* be restrained so as to preserve to *B* the freedom to be exempt from damage?" This, says Justice Burch of the Supreme Court of Kansas,[15] is putting the question "in inscrutable form." And Max Radin[16] makes the objection that such an adjustment would be "as little possible as to draw a triangle with four sides." The difficulty of the Cardozean formulation lies in his apparent assumption that freedom is the absence of restraint on the selfishness of man. He endeavors to reconcile law with liberty by considering how selfish he can permit *A* to be without interfering too much with the selfishness of *B*. This is certainly the wrong approach. It should not be a question of curtailing the freedom of one person for the benefit of another. Under a just law, both may be completely free. If, in the work of improving their character, they reach the point, where their desires and inclinations conform to the justice of the law, then neither of them will in any way feel the restraint that it imposes. The restraint, as Father Ryan would say, is merely hypothetical, not actual. They are then completely free to do as they please. This is real freedom. The solution, therefore, is not to be found by seeking to adapt the law to the selfish desires of *A*, avoiding as much as possible any restraint on those desires, but by recognizing in the enactment of the law the requirements of justice, and leaving it to *A* to achieve his own complete freedom in the Augustinian manner. Father Thomas J. Gerard expresses it pithily when he says, "the most perfect freedom is that which comes from the submission to law."[17]

If we bear in mind this intimate connection between freedom and justice, we will be in a better position to comprehend that great trinity of civil liberties: speech, religion and contract. A few years ago the writer had occasion to develop this concept of liberty in its application to freedom of speech; and he hopes at some future time to consider its application to religious liberty. The present discussion is confined to freedom of contract, especially the third "unfair labor practice" as defined in the Wagner Act and the minimum wage feature of the Wage-Hour Law. Let us consider them separately.

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[14] CARDOZO, PARADOXES OF LEGAL SCIENCE 132.
[15] Burch, *The Paradoxes of Legal Science: A Review* (1929) 27 MICH. L. REV. 642.
[16] Radin, *Book Review* (1929) 17 CAL. L. REV. 76.
[17] 2 Homiletic Monthly 404 (1911).

THE WAGNER ACT

The clause defining the third unfair practice ties a tin can to the tail of the yellow dog. It will be remembered that this refers to a labor contract in which the worker agrees, as a condition of his employment, not to join any union without the consent of his employer. The decisions sustaining the constitutionality of the Norris-LaGuardia Anti-Injunction Act, although it forbade the issuance of any injunction merely on the ground of interference with such a contract, no doubt made Congressmen feel safe in inserting in the Wagner Act an express prohibition of such a contract. The federal courts, however, in the *Coppage*[18] and *Hitchman*[19] cases approved such contracts in unmistakable terms. It may be worth while to examine the ethical basis of these decisions. The two cases stand or fall together. If it was morally wrong for the Kansas statute to prohibit the "yellow dog" contract, because it is a perfectly just and binding agreement, then it was morally right for the court, for the same reason, to issue its injunction against interference with such a contract. From a moral standpoint the correctness of the decision in both cases depends on whether the "yellow dog" stipulation in a labor contract is both just and binding. Sometimes the distinction between the justice and the binding character of the stipulation is overlooked. Much of the confusion in the discussion of this subject is traceable to this source. The distinction is important because a stipulation may very well be just without being binding. This distinction should be kept in mind especially when objecting to the "yellow dog" contract on the ground of coercion. If there is really coercion in the proper sense of the term (i.e. coercion due to some conduct on the part of the employer, as distinguished from coercion for which he is in no way responsible), then the conclusion would merely be that the contract is not binding; but it would not necessarily follow that the terms in themselves are unjust. If the employer were to take advantage of the economic pressure on the employee for the purpose of putting unjust provisions in the contract, his conduct would no doubt be morally reprehensible, but this would certainly not be so, if he took advantage of the situation, arising without his fault, in order to insert a just stipulation to which the employee might not otherwise agree. In other words, the injustice of the provision can not be proven by merely showing that the employee acted under coercion. A simple example may make this clear. Suppose the employer, using coercion, insists on the three stipulations A, B, and C; Stipulation A, providing that the employee shall work ten hours a day; B, that he shall wear a green uniform; and C, that he shall become a member of union X. The fact that these three stipulations were in-

[18] Coppage v. Kansas, 236 U.S. 1, 35 Sup. Ct. 240 (1915).
[19] Hitchman v. Mitchell, 245 U.S. 229, 38 Sup. Ct. 65 (1917).

serted under coercion may show that they are not binding, but does it not necessarily show that they are in themselves unjust? Hardly.

If then we assume, for the present, that the stipulation in question is a just provision, then the correctness of the decision in these two cases would depend on the question of coercion. Here there is a remarkable difference between the two cases. In the *Hitchman* Case there was no statute involved. Therefore, if the injunction restraining interference with the contract were refused on the ground that the contract was made under coercion, then the moral justification for such refusal would depend upon whether there was any evidence in that case showing that the employer had done something that was coercive in its nature, other than merely threatening to withhold the consideration. (Such a threat, although never called coercion, is a kind of forceful persuasion present in every contract). In the *Coppage* case, where the statute forbids such a stipulation in a contract, if we assume that the stipulation is just, then the statute can be sustained only on the further assumption that there is always coercion by the employer. Thus, whether these two decisions logically can be objected to on the ground that they ignore the question of coercion, would depend, in the *Hitchman* case, on whether there was any evidence of coercive conduct on the part of the employer: and, in the *Coppage* case, it would depend on whether the court ought to assume such coercive conduct in every case, whether there was any evidence of it or not.

But the real ground of objection to these decisions is that they assume the justice of the stipulation. A recent writer,[20] in recasting the argument of Justice Pitney in the *Coppage* case into the form of a syllogism states the major premise thus: "Whatever interferes with the right of freedom of contract, unless it be for public health, safety, morals, or general welfare, is arbitrary and unjust." The writer says he has no quarrel with this premise. He has adopted the form which has become almost standardized in judicial decisions and texts on constitutional law. But a definition with an "unless" clause never seems quite satisfactory. It creates a certain antitheses between the two parts of the definition and seems to indicate a failure to think through to the proposition which is broad enough to include both parts harmoniously. It seems preferable to recast the premise as follows: Whatever interferes or prevents a person from making a just contract abridges his freedom of contract, and such abridgment is both Constitutionally and morally wrong; whatever hinders or prevents a person from making an unjust contract, likewise abridges his freedom of contract, but such abridgment is neither constitutionally nor morally wrong.

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[20] WILLIAM E. DOYLE, S.J., SIX MAJOR DECISIONS OF THE UNITED STATES SUPREME COURT.

It should be remembered that the justice here referred to is not commutative merely: it includes legal justice also. That is the reason why in determining the justice of the "yellow dog" contract, we must consider not merely its fairness to the worker individually, but also its relation to the general welfare. It can be shown and has been shown that such a contract, when used extensively, is injurious to the public good. Consequently, a statute forbidding it is morally defensible and any employer who insists on it violates the requirements of legal justice. Whether he also violates the requirements of commutative justice depends on whether the worker receives some additional compensation as an extra consideration for his assent to this stipulation. This must be the justification for the Norris-La Guardia Anti-Injunction Act, The Wagner Act, the Wage-Hour Law, and any other statute which prescribes certain kinds of contracts. A statute may ever so unquestionably limit the kinds of contract a person may lawfully make, and still be morally and constitutionally defensible as long as it does not restrict any man's freedom to make a just contract. The freedom of wicked men to make unjust contracts is no more within the protection and design of the Constitution or the natural law than their freedom to do other wrongful acts. It can not be repeated too often or emphasized too strongly that the freedom which we cherish as a natural right and which the Constitution is designed to protect, is not freedom indiscriminately for everybody. Rather, it is the freedom of the upright citizen acting in accordance with the objective standard of the moral law. There is no reason why the making of contracts should be an exception to the rule. It is only when the demands of both legal and commutative justice are satisfied that the state should grant its *nihil obstat.*

THE WAGE-HOUR LAW

The same principle is applicable to the Fair Standards Act of 1938, commonly known as the Wage-Hour Law, which is the culmination of many previous attempts at minimum wage legislation, both state and federal. Some of these had been declared unconstitutional because they interfered with freedom of contract, but this interference was not due to any essential contradiction between minimum wage legislation and freedom of contract. It was due rather to the manner in which the minimum wage was to be ascertained and established. These statutes were framed and enacted chiefly to meet the demands of the labor organizations, with little or no regard for either justice or the Constitution. But by 1938 congressmen and the real friends of Labor had learned that all labor legislation, and especially minimum wage legislation must be so framed as not to interfere with the contractual freedom of any employer who honestly desires to make a contract with his workers and

is willing to pay them a fair wage. This is the freedom created by the natural law and protected by the Constitution. When stated in this form, it is obvious that minimum wage legislation is not necessarily opposed to contractual freedom, and the Wage-Hour Law well exemplifies their perfect consistency. Let us look at the problem a little more closely.

If the statute interferes with the making of any just contract, then it is an unwarranted interference with freedom of contract. Hence, the justification for such a statute, both constitutionally and morally, must depend on the question whether a contract containing a stipulation for less than the minimum wage is just: and this in turn must depend on whether the employer has the obligation of paying at least the minimum wage. If there is such an obligation, it must arise from the requirements of distributive, commutative,or legal justice.

Father Ryan makes an argument for its basis in distributive justice.[21] He says "the wage-paying function is delegated by society to the employer." He recognizes that "society owes its labor members a living wage," but he says "society has transferred the obligation" to the employer, and the employer "accepts the task" and is therefore "morally bound to discharge it."

This seems to me a little far-fetched. Certainly it never occurs to either party in the contract of employment that in making that contract, the employer assumes not merely the obligations thereby created, but also some previously existing obligation owing to the workman by some third party, e.g., the State.

It would be more satisfactory if a basis for the employer's obligation could be found in commutative justice. Dr. Cronin puts it on this ground,[22] but his argument is not very convincing. The two propositions on which he bases his argument may be readily admitted: "the workman has a right to a living wage," and "the workman has a right to a share in the increased prosperity because to some extent he is the cause of it." From the fact that the workman has this right, it necessarily follows that there is an obligation somewhere, but not that the obligation rests upon some particular individual. Thus, if *A* has a right, someone else must have a corresponding duty, but whether this some one else is *B*, or *C*, or *X* is a different question. It is true, of course, where a right arises by contract, there is a corresponding obligation on the part of the other party to the contract, but this is not necessarily so where the right arises independently of any contract. Now the right of the workman arises from his natural need of living, a need that is not the consequence of his occupation and is not peculiar to any class of persons. It is a need which every one has before, during, and after employment. It is one thing to say that an individual has the right to demand from

[21] RYAN, A LIVING WAGE 112.
[22] 2 CRONIN, SCIENCE OF ETHICS 340.

the state or the community the means of sustaining himself in health and comfort and quite another to assert that the means must be supplied by the person who happens to be his employer at the time. Father Ryan makes this clear when, after establishing the workman's right, he draws the conclusion that the "corresponding obligation falls upon the members of the industrial community where the laborer lives."[23] It requires considerable further explanation and argument to show that this obligation rests on a particular member of the community.

A more covincing argument, also putting the employer's obligation on the ground of commutative justice, is made by Father Nell-Bruenig, S.J., in his analysis and discussion of the *Encyclical Quadragesimo.* He invokes the principle of equivalence[24] and points out[25] how the Pope "stresses once more the central point, namely, the value of the work done." The meaning of a just wage is stated just as clearly: it is the wage demanded by commutative justice. A little further on,[26] in explaining the application of the principle of equivalence to the wage contract, he says: "commutative justice requires the employer to pay the actual present value of the work done. If the economic system is working properly and if both parties will give labor its proper place in this system, thus enabling labor to do its share, then certainly the value of the performance will be equal to family needs and consequently a family wage should be paid in accordance with justice. If however the economic structure is disturbed or if it proves impossible to give labor its proper place in this system, then the value of the work done may more or less fall short of family requirements. Then the employer cannot be required, either on the basis of commutative justice or for any other reason, to pay family wages." By this interpretation of the encyclical, Father Nell-Bruenig applies the principle of equivalence to the wage contract and thus puts the employer's obligation to pay a minimum wage on the ground of commutative justice. He is, however, careful to emphasize the fact that his statements in this connection are an *"interpretation* of the doctrine of *Quadragesimo.* Not every premise and step in the reasoning undertaken here can be found equally expressed in the concise statement of the *Encyclical,* but it is the only possible interpretation that does justice the wording and the spirit of the document."[27]

If, however, the principle of equivalence were the sole criterion for determining the justice of a minimum wage, it is conceivable that the amount to be paid would be less than a living wage, or less than a family wage, or less than the wage fixed by statute as the minimum wage. This

[23] RYAN, A LIVING WAGE 69, 110.
[24] BRUENIG, REORGANIZATION OF SOCIAL ECONOMY 166.
[25] Id. at 168.
[26] Id. at 177.
[27] Id. at 178.

would be an exceptional case, but even in such a case, it would still be possible to justify the statute on the ground of legal justice. This theory was elaborated by Rev. Charles Antoine, S.J.,[28] and substantially adopted by the United States Supreme Court in sustaining the Washington minimum wage statute.[29] It was this decision which showed Congressmen how to write a minimum wage law without violating freedom of contract. The law of 1938 differs radically from the earlier minimum wage statutes that were declared unconstitutional. Those earlier statutes were enacted mainly as humanitarian measures, designed to prevent the inordinate exploitation of labor. Instead of being based on any theory of justice, they were intended as a means of forcing the employer to be charitable. This was especially true of the congressional enactment in the *Adkins* case[30] of 1923 and the New York statute in the famous *Tipaldo* case of 1936.[31] The next year when the Washington minimum law came before the court in the *Chambermaid's* case,[32] the argument that appealed to the court was one that was based on legal justice. It was pointed that wage-cutting threatens the stability of industry and that reduced wages mean decreased purchasing power which in turn paralyzes trade. Thus the consequences of a wage insufficient for the worker do not stop with the worker alone; they may affect profoundly the economic structure of society. If this were true, then the employer would be under an obligation of legal justice to refrain from making any contract for less than a living wage.

The Wage-Hour Law of 1938 is based on the same principle. But it goes even further. It seeks to work out commutative as well as legal justice. It establishes a criterion for fixing the minimum wage which is a clear recognition of the principle of equivalence as implictly required by the papal encyclical. Under the new law, the wage-order of the administrator must coincide with the report of his industry committee which has thoroughly investigated the conditions in the particular industry and made its recommendation and report to him. He may accept or reject this report, but he cannot fix a wage different from that recommended. If he rejects the report, he must either ask the same committee to go back and re-investigate and make a new report, or else appoint another committee for that purpose. He cannot override the committee and impose a minimum wage according to his own judgment. This committee, in making its recommendation is required by statute to consider not merely the needs of the employee, but also the circumstances of the employer, especially "competitive conditions

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[28] ANTOINE, COUR D' ECONOMIC SOCIALE 601.
[29] West Coast Hotel v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L.Ed. 703 (1937).
[30] Adkins v. Children's Hospital, 43 Sup. Ct. 394, 261 U.S. 525, 67 L.Ed. 785 (1923).
[31] Morehead v. Tipaldo, 56 Sup. Ct. 918, 298 U.S. 587, 80 L.Ed. 1347 (1936).
[32] West Coast Hotel v. Parrish, 300 U.S. 379, 57 Sup. Ct. 578, 81 L.Ed. 703 (1937).

as affected by transportation and cost of production." As a further aid in determining what is just, the committee is required to consider wages established for similar work by collective bargaining as well as wages paid in industries that voluntarily maintain minimum wage contracts. This distinctive feature of the Wage-Hour Law marks a significant departure from the old labor policy. It is no longer merely an appeal to humanitarian and charitable motives. It seeks rather to use legislation as an instrument of justice, both commutative and legal, and thus to avoid any interference with the employer's freedom to make just contracts.

Returning to the general problems, it may be said in conclusion that the reconciliation of government with liberty can be accomplished only by a more direct and conscious reference to the principles of eternal justice. During the past twenty-five years various attempts have been made to establish a new economic order in the United States. Wilson's *New Freedom* was one of these: the program of the weekly magazine, *The New Republic,* was another; the New Deal is the latest. But the crying need of the hour is not a new deal with strong inclinations toward autocracy; not a new republic with positivistic tendencies; and not a new freedom, unless that alluring name be but the synonym for a more perfect realization of the Old Freedom with its unswerving allegiance to the Higher Law.

It should be remembered that liberty always has a twofold aspect. On the one hand there are those well known inalienable rights created by the moral law and protected by the Constitution, the preservation of which is the very essence of freedom. On the other hand, in our enthusiasm for these rights we should not forget that the moral law, though it does indeed condemn unjust conduct on the part of the government as well as on the part of individuals, places no restraint on the just acts of any individual or any government. There is therefore no essential conflict between government and liberty. Law is not, as Cardozo says it is, "the negation of liberty." The Cardozo ideal, placing no restraint on any conduct at all, is not only impossible but morally wrong. It is not for this ideal that men have fought and died. Rather it is the Old Freedom, recognizing in both of its aspects the dominance of the moral law. It is this, in all ages and lands, which has been the subject of the statesman's dream and the theme of the poet's song. It is of this we sing, when, in our best American mood, we join whole-heartedly in the refrain "Let freedom ring."

MARQUETTE
LAW REVIEW

DECEMBER, 1940

VOLUME XXV MILWAUKEE, WISCONSIN NUMBER ONE

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Published December, February, April and June by the faculty and students of Marquette University School of Law. $2.00 per annum. 60 cents per current number.