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Burton Brody

ONE POTATO[E], TWO POTATO[E], THREE POTATO[E], FOUR POWER, POWER, WE WANT MORE: A THOUGHT ON "OVERLAWYERING"

BURTON BRODY*

INTRODUCTION

It was one of those rare collegial conversations from which one gains an insight rather than merely engages in Dean-bashing (nitpicking?, whining?). You are free to characterize casual faculty conversation as your experience dictates. He said:

> You know—it was, after all, an informal conversation—the mistake most people make in thinking about criminal law is that they see it as a grant of power to the State. Just the opposite is true; criminal law is a limitation of sovereign power. Before there was criminal law, the King could kill you for any reason or for no reason other than he wanted you gone!! After criminal law came into existence, the King could only kill you if he had an acceptable reason, i.e., you had committed a crime.[1]

That observation certainly made me look at criminal law in a new way.

Sometime later, in a telephone conversation with my brother about an article of his dealing with "unfair discharge"[2], it dawned on me that employers too—although much more recently!—had also had their power to "terminate"[3] severely restricted. Putting these two thoughts together—no mean feat for an aging contracts teacher!—I began to see much of American law in a new way.

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* Burton Brody, Professor of Law, University of Denver College of Law.

1. The colleague with whom I had this discussion recalls it and will verify it if someone accuses me of imagining it for the purposes of this paper.

2. Arthur Brody, *Wrongful Termination As Labor Law*, 17 SW. U. L. REV. 434 (1988). My brother remembers his article and although he sees the employment relationship in terms of power (see 435-437), he does not necessarily agree that "lawyering" is the solution; although all the solutions he discusses involve legal action. Therefore he asks that I point out that he is not responsible for the views herein expressed because, as one might well guess, he is not his brother's keeper.

Who then, one might well ask, is responsible for the care and feeding of so brutish a mythologic beast as a Contracts teacher?

Certainly not my wife. She is too beautiful and refined a woman—I describe her thus because it is accurate and because, as she often reminds me, I have to sleep sometime!—for such demeaning labor.

The only other possible candidate for such discreditable work is my Dean. Any inspection quickly discloses that he has decently discharged his disgraceful duties; I am obviously well fed, but my cage could use a cleaning!!

3. At this point I will not ask you to pardon the pun. However, I reserve the right to do so should the Muse continue to strike me in this fashion. For the moment, you must take comfort in the fact that it is rare for law review writing to be completed in one sitting. So your chances are good she will strike me differently in future sessions.

PREMISE

Limiting the arbitrary exercise of power characterizes the development of American law in the twentieth century. Limiting power and, more importantly to the conduct and quality of private affairs, limiting the ability of the powerful to wield power arbitrarily, may be the distinguishing feature our law. In a nation that has limitation of government power imbedded in its founding document, limitations of and on the exercise of private power became inevitable.

If the epigram, "Power corrupts and absolute power corrupts absolutely," is an accurate description of the effect of power on those who wield it, one might equally describe the reaction of Americans subjected to it as, "Power annoys and despotic power revolts ultimately." The distrust of autocratic rule that gave rise to the American experiment in democracy echoes in a national antipathy toward authority. This antiauthoritarianism takes form in laws that limit the acquisition, accumulation, and most frequently, the exercise of power.

Legal curbs on power have been created in a number of different ways. One method was to legislatively create limits on the acquisition and exercise of power, giving courts additional cases and issues to adjudicate. A second method was to enact a new set of rights that countervailed an existing concentration of power and also create a special bureaucracy to administer the conflicts between the new rights and the challenged power. Another uniquely American means of legally restricting the exercise of power was to judicially create new criteria for the exercise of existing power and thus create new issues that had to be litigated.

Regardless of the manner of its creation, the essence of a limitation on power, or its exercise, is that it creates issues that must be adjudicated by a bureaucracy and, in some instances, requires a new bureaucracy to administer and adjudicate the limits. The individuals in this society trained to deal with bureaucracy are lawyers. And further, the individuals in this society capable of administering a bureaucracy (rule-making, investigating and adjudicating) are lawyers. Thus the nexus between lawyering and eliminating abusive power and its exercise is apparent.

LAWS THAT LIMIT POWER

The classic example of laws that limit the acquisition and abuse of power are the antitrust laws.[4] Concerned that too much economic and market power was being concentrated in the hands of too few,[5] Congress

4. Sherman Act, 15 U.S.C. §§ 1-7 (1988 & Supp. IV 1993); Clayton Act, 15 U.S.C. §§ 12-27 (1988 & Supp. IV 1993); Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1988).

5. *See* Robert H. Bork, *The Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7-48 (1966); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 88-99 (1965); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY (1955). For congressional debate surrounding the Sherman Act *see* S. Res. 1, 51st Cong., 1st Sess. (1889) *reprinted in* 1 The legislative History of the Federal Antitrust Laws and Related Statutes § 89 (Earl W. Kintner ed. 1978); *see also* 21 CONG. REC. 2460, 2457, 3146, 3152 (1890).

enacted the Sherman Antitrust Act.[6] There has been much debate whether the primary goal of the antitrust laws was to protect competition (i.e., limit the powerful) or promote efficiency.[7] Regardless of the debate, seemingly unresolved and unresolvable, it is fair to conclude that at least a part of the motivation behind the antitrust laws was a distrust of power. Judge Learned Hand, in *United States v. Aluminum Corporation of America* said:

> We have been speaking only of the economic reasons which forbid monopoly; but, *as we have already implied,* there are others, based on the belief that great industrial consolidations are *inherently undesirable,* regardless of their economic results. In the debates in Congress Senator Sherman . . . himself showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the *helplessness* of the individual before them.[8]

The distrust of power and its abuse are clearer in the antitrust laws that followed the Sherman Act. Section 3 of the Clayton Act[9] prohibits "tie in" sales (i.e., a seller tying one product to another, or expressly prohibiting purchasing a competitor's product, or requiring the purchaser to purchase only from a certain supplier). Prohibiting tying sales explicitly inhibits a seller with substantial market power from using that power to affect another market.[10] Section 7, the antimerger section of the Clayton Act,[11] expresses obvious concern about excessive power by making illegal those mergers that substantially lessen competition. And Sections 2(a) and (f) of the Clayton Act, as amended by the Robinson-Patman Act,[12] clearly aim at abusive use of market power by making it unlawful for

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6. 15 U.S.C. §§ 1-7.

7. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 2-6 (1988); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1978). Professor Bork's views, although concerned with other issues, support the position that Congress sought to limit the accumulation and exercise of power when it enacted the antitrust laws:

> (1) The only legitimate goal of American antitrust law is the maximization of consumer welfare; therefore,
>
> (2) "Competition," for the purposes of antitrust analysis, must be understood as a term of art signifying any state of affairs in which consumer welfare cannot be increased by judicial decree.

Id. at 51. Bork refines his definition of competition:

> "Competition" may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree. Conversely, "monopoly" and " restraint of trade" would be terms of art for situations in which consumer welfare could be so improved, and to "monopolize" or engage in "unfair competition" would be to use practices *inimical* to consumer welfare.

Id. at 61 (emphasis added). Thus, Bork seems to say that the purpose of the antitrust laws is to protect consumers from "monopoly" and "unfair competition," i.e., excessive accumulations of power and the abuse of it.

8. United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d. Cir. 1945) (emphasis added).

9. 15 U.S.C. § 14.

10. *See* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 434-40 (1977).

11. 15 U.S.C. § 18.

12. *Id.* §§ 13a, 13f.

sellers to discriminate in price between buyers, and for buyers to induce or receive a discriminatory price.

Additionally, in 1914 the Federal Trade Commission Act was enacted.[13] It outlawed unfair methods of competition in commerce[14] and created the Commission[15] to help the Justice Department enforce the antitrust laws. Together these offices, and their efforts in pursuing congressional mandates to control the acquisition and exercise of economic and market power, have created the need for many lawyers. In 1980, the Antitrust Division of Justice alone recorded more than 4,644 attorney days spent in court.[16] When one contemplates the amount of lawyering that lies behind a day in court, it becomes obvious that the distrust of power reflected in the antitrust laws created and sustained the need for much lawyering in government and out.

The laws granting employees the right to organize and bargain collectively as to wages, hours and working conditions are an example of law that limits the exercise of power rather than prevents its acquisition. The legislative concern with the disproportionate power of employers, and their use of it, can be seen in the preamble to the Norris-LaGuardia Act which stated that employees should be "free from the interference, restraint, or *coercion* of employers . . . ."[17]

Congress attacked management's predominance by seeking to equalize power between workers and management. It did so by enacting the National Labor Relations Act (The Wagner Act) that granted workers the right to organize and bargain collectively.[18] It sought to further limit management's excessive power by restricting its exercise; it required management to bargain in good faith with labor[19] and to refrain from certain abuses of power called "unfair labor practices."[20] The Supreme Court, in upholding the constitutionality of the Wagner Act, also recognized that employers had too often exercised their power autocratically when it observed:

> *Refusal to confer and negotiate* has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice . . . .[21]

The Wagner Act also created the National Labor Relations Board to administer and enforce labor's new rights and the limitations imposed on

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13. Act of Sept. 26, 1914, ch. 311, 38 Stat. 717 (codified as amended at 15 U.S.C. §§ 41-51 (1988 & Supp. IV 1993)).

14. 15 U.S.C. § 45.

15. *Id.* § 41.

16. 1980 ATT'Y GEN. ANN. REP. 112.

17. 29 U.S.C. § 102 (emphasis added).

18. 29 U.S.C. §§ 151-69 (1988). For confirmation that Senator Wagner saw the act in terms of power, and beyond, see Leon H. Keyserling, *The Wagner Act: Its Origin And Current Significance*, 29 GEO. WASH. L. REV. 199, 215-24 (1960). Mr. Keyserling served as the Senator's Legislative Assistant at the time the Act was in Congress. *Id.* at 199.

19. 29 U.S.C. § 158(d).

20. *Id.* § 158(a).

21. N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937) (emphasis added).

the exercise of management's power.[22] The Board became an active participant in American industrial and legal life. In 1936 it filed 1,068 cases, including 865 unfair labor practice cases; it closed 738, including 636 unfair labor cases.[23] By 1967, the annual case totals were 30,425 opened 29,494 closed with the unfair labor practice case totals being 17,040 opened and 16,360 closed.[24] The 1985 totals were 41,175 opened, 43,328 closed; 32,685 unfair labor practice cases opened and 33,946 closed.[25] The opening, investigating, litigating, deciding, appealing and implementing so many cases per year for fifty years no doubt required the skills and services of many lawyers at the Board and a corresponding number in private practice.

American law's response to abusive use of power is also seen within labor law. After World War II, when it was perceived that unions were misusing the power they had developed under the protection of the Wagner Act, Congress enacted the Labor Management Relations Act (Taft-Hartley) that outlawed union activity that obstructed commerce, i.e., jurisdictional strikes and secondary boycotts.[26] Taft-Hartley also gave employees the right to refrain from union activities and prohibited union discipline of employees exercising such a right.[27] The act further limited union power by requiring mediation in certain situations,[28] by providing for suits to enforce collective bargaining agreements,[29] by placing restrictions on payments to employee representatives and on union health and welfare funds,[30] and by restricting union political contributions.[31] Continued and further abuse of power by union officials led to the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act).[32] Landrum-Griffin limited the power of unions and union officials by, among other things, creating a members' "bill of rights,"[33] requiring periodic financial reports from unions and union officers,[34] regulating union elections,[35] and regulating the use and loan of union funds.[36]

Thus the creation, protection, and regulation of union activity can be seen as the legal system first seeking to temper the power of employers by fostering the right of employees to act collectively, and then seeking to temper untoward union power. And later, when for various reasons, strong unions could not or would not prevent abusive employer practices,

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22. 29 U.S.C. § 153.
23. 1 NLRB ANN. REP. 29, 33 (1936).
24. 32 NLRB ANN. REP. 1 (1967).
25. 50 NLRB ANN. REP. 1 (1985).
26. 29 U.S.C. §§ 141-97 (1988 & Supp. III 1992).
27. *Id.* §§ 157-158(b)(1).
28. *Id.* § 158(d)(3), 158(d)(4)(C).
29. *Id.* § 159(c)(1)(A)(i).
30. *Id.* § 186(a).
31. *Id.*
32. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended in scattered sections of 29 U.S.C.).
33. 29 U.S.C. § 411 (1988).
34. *Id.* § 432.
35. *Id.* § 481.
36. *Id.* § 503.

additional legislative action became necessary. So statutory limits on abuse of the power to hire were established by Title VII of the Civil Rights Act of 1964[37] to prevent discrimination against individuals based on race, color, religion, sex or national origin.[38] Title VII also created the Equal Employment Opportunity Commission,[39] creating more lawyer positions in government, and no doubt, increasing at least the workload in the private Bar. Additionally, the Age Discrimination in Employment Act[40] and the Americans With Disabilities Act[41] create additional issues requiring the attention of lawyers.

However, the disparity in power continued to exist for the nonunion worker[42] and the majority of the work force did not belong to unions.[43] The evolution of the "termination at will" rule into a body of "unfair discharge" law, viewed from an American antiauthoritarian perspective, illustrates the law acting to eliminate autocratic workplace behavior directed at nonunion workers.[44] Unfair discharge law demonstrates, once again, that American law consistently seeks to limit the arbitrary exercise of power. As one observer put it: "The development of rights of action for wrongfully discharged at will employees reflects *the general trend toward increasing the accountability of those who possess power over the lives of others.*"[45] One can also view current cases dealing with sexual harassment as the legal system's attempt to deal with a particularly vile abuse of management's workplace power.[46]

Another private relationship that has drawn the attention of the law because of abusive use of power by the more powerful party is the landlord-tenant relationship. Statutes granting lessee's greater rights and limiting lessor's power were enacted,[47] and warranties of habitability granting tenants the right to withhold rent in certain circumstances were created.[48]

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37. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 257 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15 (1988 & Supp. III 1992)).

38. 42 U.S.C. § 2000e-2.

39. *Id.* § 2000e-4.

40. 29 U.S.C. §§ 621-34 (1988 & Supp. III 1992).

41. 42 U.S.C. §§ 12112-114 (Supp. III 1992).

42. For what I would describe as well written, realistic appraisal, see Brody, *supra* note 2, at 435-37.

43. Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 483 (1976).

44. *See* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1408 (1967); Clyde W. Summers, *The Rights of Individual Workers*, 52 FORDHAM L. REVIEW 1082, 1100-03 (1984).

45. Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449, 495-96 (1985) (emphasis added).

46. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Turley v. Union Carbide Corp., 618 F. Supp. 1438 (S.D. W. Va. 1985); *see also* Bailey v. Unocal Corp., 700 F. Supp. 396 (N.D. Ill. 1988) (applying state law).

47. OR. REV. STAT. §§ 90.100-90.940 (1991); *see also* CAL. CIVIL CODE §§ 1940-1954.1 (West 1985 & Supp. 1993); COLO. REV. STAT. §§ 38-12-101 to 38-12-302 (1982 & Supp. 1992); ILL. ANN. STAT. 765 ILCS 705/1 (Smith-Hurd 1993); N.Y. REAL PROPERTY LAW §§ 220-238 (McKinney 1989).

48. *See, e.g.*, Javins v. First Nat. Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970) (court recognized landlord's obligation to keep leased premises in habitable condition); *see also* 1 RESTATEMENT (SECOND) OF PROPERTY §§ 5.2, 5.4 (1977) (where

Courts of various states limited the ability of landlords to use their superior power to extract from renters exculpatory clauses that freed the landlord from liability for negligence.[49] And federal[50] and state[51] fair housing laws seek to prevent lessors from abusing their power through objectionable discrimination. All these attempts to limit the exercise of lessor power increased the need for legal services.

An abuse of a public power, the policing power, drew the attention of the United States Supreme Court and appears to have stimulated the need for a good deal of lawyering. *Miranda v. Arizona*,[52] the famous case that requires police interrogators to advise suspects of their rights prior to custodial interrogation, is based on a longstanding concern that over-zealous police practice can transform inquiry into inquisition. The advice, coupled with the right to have an attorney present during such interrogations, is a check on the exercise of the physical and psychological power police officers wield over those in custody.

Some indication of the lawyering created by *Miranda* can be gathered by looking at a recent study by Inbau and Manak.[53] They surveyed *Miranda* issue decisions by the Supreme Court, the federal circuit courts of appeal and the intermediate appellate courts of California decided from 1966 (the year of the decision) through 1986. The study reveals that *Miranda* caused considerable litigation and thus, demanded more lawyering and lawyers. The Supreme Court considered forty-four such cases,[54] the United States Circuit Courts of Appeals considered *Miranda* issues in nine hundred eighty cases (covering 2,155 pages and approximately 1,200,000 words!)[55] and the California appellate courts, three hundred sixty three.[56] Alone, these cases represent a lot of lawyering, but when one ponders that this is only a sample and the other forty nine states would, in all likelihood, also have had a good deal of activity, and then add to that the work required at the federal and state trial levels to cause the appellate decisions, one begins to see that *Miranda* created the need for a swarm of legally trained people.

Other situations in which the law has addressed a particular misuse of power are almost too numerous to mention. However, I shall mention a few for the purposes of illustration, confident that the reader can think of others.

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withholding rent is available remedy for tenant when landlord fails to maintain premises for suitable use).

49. *See* Tenants Council v. DeFranceaux, 305 F. Supp. 560 (D.C. 1969); McCutcheon v. United Homes Corp. 486 P.2d 1093 (Wash. 1971).

50. 42 U.S.C. §§ 3601-31 (1988 & Supp. III 1992).

51. *See* CAL. GOVERNMENT CODE § 12940 (West 1992 & Supp. 1993); COLO. REV. STAT. ANN. § 24-34-502 (1988 & Supp. 1993); FLA. STAT. ANN. §§ 760.20-760.37 (West 1986); ILL. ANN. STAT. 775 ILCS 5/1-101 (Smith-Hurd 1993); N.Y. CIVIL LAW §§ 18-a to 19-b (McKinney 1992).

52. Miranda v. Arizona, 384 U.S. 436 (1966).

53. Fred E. Inbau & James P. Manak, *Miranda v. Arizona—Is it Worth the Cost?*, 24 CAL. W. L. REV. 185, 186 (1988).

54. *Id.* at 188.

55. *Id.* at 189.

56. *Id.*

In my own field, the expansion of the doctrine of unconscionability[57] and the duty of good faith in the performance and enforcement of contracts[58] seem to aim at preventing abusive use of superior economic or bargaining power. The doctrine of contracts of adhesion[59] seems similarly motivated. Economic duress cases also seek to prevent abuse of bargaining power.[60] Even the old pre-existing duty rule cases dealt with misdealing by contracting parties who, under the circumstances, held the upper hand.[61] Similarly, the Uniform Consumer Credit Code[62] and the Uniform Consumer Sales Practices Act[63] would appear to be directed at abuse of market and economic power by lenders and sellers.

There are two other legal limitations on the exercise of power that deserve mention but are beyond my ability to discuss in any depth. I set them forth because they may be indicative of other limitations and will cause the reader to think of more. The "informed consent" principle in the rendering of medical services tempers the arbitrary exercise of the superior power that flows from superior knowledge. And lastly, I simply ask whether one of the motivations behind the liberalizing of pleading rules and the rules of evidence was the desire to lessen the litigation power of those who could afford more expensive counsel?

CONCLUSION

For those who believe that limiting power is an essential characteristic of American law, it is worth noting that the very first dissent[64] ever filed by Justice Holmes was in a case where the Massachusetts Supreme Judicial Court held unconstitutional a statute limiting the power of employers to fine employees.[65] It is further worth noting that Holmes served nine years on the Court before he felt constrained to dissent.[66] Of greatest signifi-

57. U.C.C. § 2-302 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

58. U.C.C. § 1-203 (1978); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); *see also* Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2d Cir. 1945) (court requires good faith when giving notice of contract cancellation).

59. Henningsen v. Bloomfield Motors Inc., 161 A.2d 69 (N.J. 1960).

60. Laemmar v. J. Walter Thompson Co., 435 F.2d 680 (7th Cir. 1970); Mitchell v. C.C. Sanitation Co., 430 S.W.2d 933 (Tex. Ct. App. 1968).

61. 1A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 171 (1963); Burton F. Brody, *Performance of a Pre-Existing Duty As Consideration: The Actual Criteria for the Efficacy of an Agreement Altering Contractual Obligation*, 52 DEN. U. L. REV. 433, 450-56 (1975).

62. UNIFORM CONSUMER CREDIT CODE, *reprinted in* SELECTED COMMERCIAL STATUTES 1200 (1993). "Another basic issue in the regulation of consumer credit is adequate protection of consumers from creditor practices and agreements that are abusive or have the potential for abuse." *Id.* at 1210.

63. UNIFORM CONSUMER SALES PRACTICES ACT, *reprinted in* SELECTED COMMERCIAL STATUTES 1348 (1993). The following quote is from Section 1 of the Act: "Purposes, Rules of Construction . . . (2) [T]o protect consumers from suppliers who commit deceptive and unconscionable sales practices . . . ." *Id.*

64. SHELDON M. NOVICK, THE HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 197 (1990).

65. Commonwealth v. Perry, 28 N.E. 1126, 1127 (1891).

66. Holmes was appointed to the Massachusetts Supreme Court on December 15, 1882. NOVICK, *supra* note 63, at 169. Holmes' reluctance to dissent is expressed in the first paragraph of his opinion, where he says: "I have the misfortune to differ from my brethren. I have submitted my views to them at length, and, considering the importance of the question,

cance to those who see the nexus between lawyering and limiting power is that Holmes felt constrained to uphold the statute because he saw it as an attempt to limit an abuse of power. He wrote:

> I suppose that this act was passed because the operatives, or some of them, thought they were often cheated out of a part of their wages under a false pretence that the work done by them was imperfect, and persuaded the Legislature that their view was true. If their view was true, I cannot doubt that the Legislature had the right *to deprive the employers of an honest tool which they were using for a dishonest purpose* . . . .[67]

In dissenting from the majority in *Perry*, Holmes saw limiting abuse of private power to be so fundamental as to prevail over constitutional protection of property rights and constitutional prohibition against impairment of the right to contract.

The law, as it has been seen by its most able and respected practitioners, serves American society by limiting power and its abuse. I am pleased that students here at the University of Denver College of Law are learning this view of the law. Mr. Steve Hall, selected by his classmates as one of the student speakers at our May 1992 Commencement, spoke to this:

> They say there are too many lawyers . . . . I offer this thought in rebuttal: . . . If the charter of this profession is to aspire to a standard of dignity, competence, devotion to duty, and to the value of the individual human being . . . . And in this day of an ever more complicated social contract . . . ever more abstract definition of property rights . . . exploding technological developments . . . imploding ideologies and governments . . . hazardous waste, ozone holes, starvation, AIDS, Rodney King, Anita Hill . . . . [T]hen how could there *possibly* be too many lawyers.[68]

It would appear that the legal profession, from its most revered members to its newest, understands and accepts its obligation to create and maintain a just distribution and use of power within this society. It may well be that lawyers, as a profession, have day-to-day operational responsibility for the American antipathy toward authority. Our charge is to make antiauthoritarianism work within an ordered society. Anyone who believes there are too many lawyers represents those among us who hold power and would rather not be accountable for its exercise. And any lawyer who fails to recognize the professional responsibility we bear toward preventing the arbitrary exercise of power, makes the case that we are "overlawyered" by at least one.

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feel bound to make public a brief statement, notwithstanding the respect and deference I feel for the judgment of those from whom I differ." *Perry*, 28 N.E. at 1127.

67. *Perry*, 28 N.E. at 1127 (emphasis added).

68. Mr. Steve Hall, Address at the University of Denver College of Law Commencement (May 9, 1992) (emphasis supplied) (transcript on file with the DEN. U. L. REV.).