Do We Still Value Liberty?

Remarks for the Mencken Grave Site Memorial Service
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(1,011 words)

Mr Mencken wrote that "liberty is the only genuinely valuable thing that men have invented, at least in the field of government, in a thousand years" [1] and few, at least here in America, would disagree. It is part of the mythos of the American founding that this nation was "conceived in liberty". With this statement we immediately hit a sour note, for the phrase "conceived in liberty" famously comes from Abraham Lincoln's Gettysburg address which Mr Mencken described as "a mellifluous and emotional statement of the obviously not true. The men who fought for self-determination at Gettysburg were not the Federals but the Confederates." [2]

I am not making the puerile, smugly self-righteous and snidely dismissive observation that the Founding Fathers owned slaves. That they did. They also established a system with a built-in cognitive dissonance but elaboration of this idea is a topic for another day.

In high-school civics class we were taught the childish fiction that The Constitution, and the Bill of Rights in particular, are there to limit the power of government and thus secure the liberty of the people. We were also taught that our government was a government "of the people, by the people, for the people". But if this is so, why would we want to limit ourselves? The answer lies in the definition of government, which Mr Mencken defines as "the class of job-holders, ever bent upon oppressing the citizen to the limit of his endurance" [3]. What of the prohibitions on what government may do? Again, Mencken: "the execution of these prohibitions was put into the hands of lawyers, which is to say, into the hands of men specifically educated to discover legal excuses for dishonest, dishonorable and anti-social acts. The actual history of the Constitution, as everyone knows, has been a history of the gradual abandonment of all such impediments to governmental tyranny." [4]

Mencken, writing in 1924, lamented that "the old rights of the free American, so carefully laid down by the Bill of Rights, are now worth nothing. Bit by bit, Congress and the State Legislatures have invaded and nullified them." [5] He gave examples of the failure of the Federal Courts to preserve the rights of free Americans: The Espionage Act cases, the labor injunction cases, the deportation cases, the Postal Act cases, the Mann Act cases, and the Prohibition cases [6]. Some of these are no longer good law. The names of most of these rubrics are sufficient to give one an idea of what they dealt with. The Mann Act dealt with prostitution, immorality, and what we now call human trafficking, serious matters indeed, but the operative concept of "immorality", as expressed in the act, was nebulous and made criminal certain consensual acts.

Because of such writings, and many others, Mencken today is lauded as a defender of liberty. Mencken is certainly a rich source of well-turned phrases. But was he a defender of what no one wants any more, at least in the form understood by him and his contemporaries? Americans are happy with qualified liberties, the qualification being that "liberty" is the freedom to do what I approve of and something to be trumped by other considerations if it involves another doing what I do not approve of.

But is even this notion of selective liberty still operative? Is "liberty" part of the word-noise of what passes for discourse today? That Americans complacently endure insults and indignities when they travel by air speaks louder than words.

In Mencken's time the cases brought before the Courts which affected the "old rights of the free America" were matters of news. The newspaper reader had at least a sense of what was being considered and why it was important. There was Mencken, a man with a national audience, who could object to highly visible constrictions of liberty.

Americans today are less aware of the ongoing diminishment of their liberties even though the means of dispersing news are far superior now to the newspapers, radio and newsreels of Mencken's time. I offer the following unextraordinary example.

How many of you have heard of the country where people have been detained and strip-searched for the following offenses: driving with a noisy muffler, driving with an inoperable headlight, failing to use a turn signal, riding a bicycle without an audible bell, having outstanding parking tickets, making an improper left turn, and violation of a dog leash law? [7]

Surely a legislature has gone mad if such things are permitted! Surely such things could not happen here today! If they did happen here it would have been in a backwards time years ago and the laws permitting such things would have long ago been voided by our Supreme Court.

The country is the United States of America, the land of the liberty-loving. The acts listed have occurred within, say, the last ten or so years.

On April 2, 2012, the United States Supreme Court held in a 5-4 decision that "officials may strip-search individuals who have been arrested for any crime before admitting the individuals to jail, even if there is no reason to suspect that the individual is carrying contraband." [8]

Is this a surprise? Over ninety years ago Mencken wrote: "when it comes to the mere rights of the citizen it [the Supreme Court] seems hopelessly inclined to give the prosecution the benefit of every doubt." [9]

A survey of 855 registered voters conducted after the Court announced its decision found that 31% of voters thought that regardless of the offense, officials should have the authority to strip search anyone taken to jail even if there is no reasonable suspicion. It is heartening that of the roughly two-thirds who disagreed there was no appreciable difference between Democrats and Republicans. What is disheartening is that 31% agreed. [10]

Mr Mencken wrote that law "is necessary only when it is necessary. The rest is only insult and oppression, and the citizen is under no more obligation to submit to it than he is to submit to any other insult or oppression." [11]

To what extent will you "submit to insult or oppression?"

Notes and References

1.) Mencken, H. L. "Why Liberty", *Chicago Sunday Tribune*, 1927-01-30, part 8, p. 1.

2.) Mencken, H. L. *Minority Report* (1956), item 332.

3.) Mencken, H. L. "Editorial", *American Mercury* **2**(3):281-286 (1924-07).

4.) *Ibid.*

5.) "Répétition Générale", Item 8, "On Minorities", *Smart Set* **67**(2):25-34 (1922-02).

6.) Mencken, H. L. "Editorial", *American Mercury* **1**(1):161-164, p. 163:1 (1924-02). The following suggestions for further reading are merely pointers to the huge body of writing about each set of cases. For **Espionage Act** cases argued before the Supreme Court see *Schenck v. United States*, 249 U.S. 47, (1919), *Debs v. United States,* 249 U.S. 211 (1919), *Abrams v. United States*, 250 U.S. 616 (1919), and *Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407 (1921); for **Labor Injunction** cases argued before the Supreme Court see *In re Debs,* 158 U.S. 564 (1895), *Loewe v. Lawlor,* 208 U.S. 274 (1908), and *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184 (1921); for **Deportation** cases see *Turner v. Williams*, 194 U. S. 279 (1904), and *Goldman v. United States*, 245 U. S. 474 (1918); the **Postal Act** cases refers to prosecutions under the Comstock Postal Act of 1873; for the **Mann Act** cases argued before the Supreme Court see *Hoke v. United States*, 227 U.S. 308 (1913), *Athanasaw v. United States*, 227 U.S. 326 (1913), *Caminetti v. United States*, 242 U.S. 470 (1917); for the **Prohibition** cases argued before the Supreme Court see *National Prohibition Cases*, 253 U.S. 250 (1920).

7.) List extracted from Justice Breyer's dissenting opinion in *Florence v. Board of Chosen Freeholders of Burlington* (2012). See http://www.law.cornell.edu/supct/pdf/10-945.pdf.

8.) The case is *Albert W. Florence v. Board of Chosen Freeholders of County of Burlington, et al.* 566 U.S. ____ (2012). See http://www.supremecourt.gov/opinions/11pdf/10-945.pdf.

9.) "Répétition Générale", Item 8, "On Minorities", *Smart Set* **67**(2):25-34 (1922-02).

10.) Fairleigh Dickinson University College at Florham, PublicMind Poll, "Nation Sides with New Jersey Motorist Against Court, Automatic Strip Searches", 2012-04-02. See http://publicmind.fdu.edu/2012/strip/final.pdf.

11.) H. L. Mencken, "Notes on Government", *Chicago Sunday Tribune*, 1926-01-10, Part 8, p. 1.