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HOLMES AND LABOR LAW
WALTER NELLES and SAMUEL MERMIN

At this moment when the labor law of tomorrow is in suspense, it would be well if we saw clearly the confused labor law of the generation that is ending. One great mind both watched and worked at that law the whole while that it was happening. We believe no clearer picture of it can be had than one in which Holmes' views of what it should be, and legal consonances with them, are central, and inconsistent views and legal ways are shown with reference to them. What is here attempted is a sketch for such a picture, without pretension to completeness. Believing that there is light in their assemblage, we shall not scruple to re-quote familiar sayings and re-state familiar cases.

I

In his approach to labor questions Holmes was free from all such sentimentality as is expressed in talk of “human rights” or “brotherhood of man.” There was no humanitarian softness in his head.

His first publication relating to a labor case was in 1873. In England several gas stokers had been punished criminally for

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Suggestion of this came through examination of LANDIS, CASES ON LABOR LAW (1934), an excellently frugal and discriminating and richly annotated collection on which we have leaned heavily. Conjunction with the cases in the chapter called “General Theories” (most of which are used in Part II of this article) of a few others, especially those in which Holmes dissented in Massachusetts, would make it illustrate the chief judicial differences in policy and technique. A classification of those differences might be made explicit, and superimposed upon or coordinated with classification of cases as of picketing, boycotts, etc. If this were done, clearness and coherence in law school courses on the labor law of the passing generation might be easier to attain than hitherto, and even fewer cases than in Commissioner Landis' collection might need to be read in full.

striking to support the grievances of fellow workmen. The strike had kept a good part of London in darkness for several nights. The charge on which the strikers were found guilty was that they had conspired to interfere with their employers' business by the unlawful means of breaking their contracts of employment.\(^3\) Protests against the theory that this was unlawful\(^4\) resulted two years after Holmes had written in the statutory enactment that "An agreement or combination by two or more persons to do . . . any act in . . . furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime."\(^5\)

Only one sentence of Holmes' two page comment dealt with the case specifically. He approached it through discussion of "class legislation" and Herbert Spencer's harping on the view that the soundness of legislation depends upon its expediency "for society, considered as a whole;" saying:

"This tacit assumption of the solidarity of the interests of society is very common, but seems to us to be false. The struggle for life, undoubtedly, is constantly putting the interests of men at variance with those of the lower animals. And the struggle does not stop in the ascending scale with monkeys, but is equally the law of human existence. Outside of legislation this is undeniable. It is mitigated by sympathy, prudence, and all the social and moral qualities. But in the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action. All that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the de facto supreme power in the community, and that the spread of an educated sympathy should reduce the sacrifice of minorities to a minimum . . . . The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest. The objection to class legislation is not that it favors a class, but either that it fails to benefit the legislators, or that it is dangerous to them because a competing class has gained in power, or that it transcends the limits of self-preference which are imposed by sympathy . . . . The

\(^3\)Regina v. Bunn, 12 Cox C. C. 316 (1872). The contractual provision, or employment usage, violated was that of not quitting without notice.
\(^4\)WEBB, HISTORY OF TRADE UNIONISM (2d ed. 1920) 284-5.
\(^5\)CONSPIRACY AND PROTECTION OF PROPERTY ACT (1875) 38 & 39 Vict. c. 86, § 3.
law brought to bear upon the gas-stokers is perhaps open to the second [objection], that it requires to be backed by a more unquestioned power than is now possessed by the favored class."

Holmes might later, to avoid the probably unintended implication that nature determinesrightness, have substituted sensibly for rightly in the fifth of the sentences quoted. And he would almost certainly have added "educated sympathy" to prudence as an objection to "the law brought to bear upon the gas-stokers." But his basic beliefs remained, we believe, unchanged. Rights are as power makes them, however obnoxiously to whomsoever's sense of right.

II

Holmes' participation in labor law began simultaneously with the sowing, by the labor injunction, of the seeds of its profusion. The first labor injunction sustained by an important appellate court was sustained by the court of which he had lately become a member. In that case he said nothing. Perhaps he did not begin to consider the social tendencies of the innovation until In re Debs\(^7\) raised "storms of protest" in which "many thoughtful lawyers joined."\(^8\) The next year, at the end of his dissenting opinion in Vegelahn v. Guntner,\(^9\) he said emphatically: "The general question of the propriety of dealing with this kind of case by injunction I say nothing about." The reason, it seems, was that the defendants had not raised the question. Perhaps it was already useless for them to raise it, or for him to try to stem the injunction tide, if he had wished to.

The institution of the labor injunction must here be passed without more than mention that feelings about it were important in the scene in which Holmes' judicial activity commenced. So were feelings about "the trusts" and the Sherman Act, also here passed over. Of some other of the earlier conditions in and upon which Holmes acted, less summary reminder may be needed.

An important change was under way in the suppositions pretty generally taken for granted by lawyers, as still by laymen,

\(^7\)In re Debs, 158 U. S. 564, 15 Sup. Ct. 900 (1895).
\(^9\)167 Mass. 92, 44 N. E. 1077 (1896).
relating to legal liability. The nature of legal right and wrong had long seemed clear and settled, and inconsistencies of practice, even when noticed, were not suffered to disturb assumptions. It seemed sensible to say that all men, being equally free, had equal rights—or vice versa. Each had a right to do as he willed so long as he infringed not the equal rights of another. These equal rights were somewhat distinguished as of overlapping classes, such as personal liberty, property, contract, calling. Though no one pretended to draw precise lines between them, they were conceived as absolute and definite. In theory, legal wrong was “violation of some definite legal right.” In practice, however, the definiteness of legal rights depended upon that of legal wrongs. Legal wrongs had long been very definite. It had been rare to meet one which did not plainly fall into some well-marked category—trespass, for instance, or deceit, or breach of contract. So what could be more natural than assumption that all doing was in the lawful exercise of legal rights unless it bore the usual earmarks of some definite nominate category of legal wrong?

This assumption was usual. Cases were decided upon it—though if such a case seemed hard, the court might soften it with intimations of the long-run salutariness of legal hardships. This case was decided in 1867. At Boston the business of providing ships with crews was in the hands of keepers of boarding houses for sailors. The defendants were a number of these “shipping masters” who had agreed upon a scale of rates of sailors’ wages, and combined not to ship their boarders at lower rates. The plaintiff was a rate-cutting competitor of the defendants. The defendants had advertised a purpose to “lay him on the shelf”; and carried it out by withholding or even withdrawing their own boarders from vessels which shipped men through the plaintiff, disabling his customers from completing crews. The plaintiff got no legal remedy. To show why, it sufficed to point out that none of the defendants’ acts belonged in any recognized category of legal wrong. The court softened the blow by adding that if the plaintiff’s business was destroyed, “it is such a result as in the competition of business often follows from a course of proceeding that

10See e.g., Walker v. Cronin, 107 Mass. 555 (1871).
11Bowen v. Matheson, 14 Allen 499 (Mass. 1867).
the law permits... It would be nothing novel if the plaintiff in the exercise of his ingenuity should in his turn adopt some improvement that shall compel the defendants to dissolve their connection. At least he had the equal right to hurt them equally by equally lawful means if he could find them. The feeling was that unless loss incident to such a clash of equal rights were let lie as it fell, and written off as damnum sine injuria, general enjoyment of the blessings of equal liberty would be in jeopardy.

Of course legal usage was not in all respects consistent with the assumption that legal rights extended to whatever was not plainly in some pre-established category of legal wrong. Had it been there could have been no legal innovation. And not even private law was ever completely static. Most innovations could be assimilated without disturbing the assumption. After it was decided that mere posting of a letter of acceptance completes a contract, a non-payment of money which would earlier have been of right could be a wrong. So, after the new category of unfair competition was established, could a sale of goods with labels resembling a competitor’s. Satisfaction with these innovations quickly became general. Moreover, the earmarks of legal wrong, though changed, were as definite afterwards as before. An innovation of this character left assumption that everything was right which had not yet been classed as wrong as unshaken as if nothing inconsistent had occurred.

Some trickles of irreconcilably inconsistent usage were, however, gaining consequence during the nineteenth century, to merge towards its end, in labor cases, in a troubling stream. They consisted of cases in which normally lawful conduct was held unlawful without establishing new definite categories or earmarks of legal wrong.

In most cases of the species here considered, a number of defendants had been acting together in combination to someone’s damage. Though conspiracy was an old category of legal wrong, it was not a clear-cut category. It had wide vague edges. In the eighteenth century such broad statements as these had been current:

1³ See e.g., Marsh v. Billings, 7 Cush. 322 (Mass. 1851).
"A Conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it... There can be no doubt, but that all Confederacies whatsoever, wrongfully to prejudice a third Person, are highly criminal at Common Law, as where divers Persons confederate together by indirect Means to impoverish a third Person."

In the nineteenth century judges usually agreed, in the abstract, that a combination was not an unlawful conspiracy unless either its object or some intended means towards it was unlawful. But this did not prevent increase in the number of cases in which persons were held to have conspired unlawfully, even though they neither did nor contemplated anything which was not ordinarily lawful for an individual. In a good many of these cases unlawfulness was said to be imparted to otherwise lawful conduct by the defendants' malice.

The trickle of malice cases seems to have commenced, independently of conspiracy, in a case decided in 1706. The plaintiff had a pond on which he trapped wild ducks for the market. The defendant frightened away ducks not yet trapped "with the noise and stink of gunpowder." Lord Holt said that an action lay in this and in all cases "where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood." In this case it did not appear that the defendant had any other object than "to damnify the plaintiff." In but few malice cases since has there been such "disinterested malevolence."

And even when a defendant's malevolence seemed as utter, some courts, not finding his act (fencing his land, for instance) in any settled category of legal wrong, said that his malice "cannot make that wrong which in its own essence is lawful." In other cases "malice in law" was distinguished from "malice in fact." "Malice

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141 Hawkins, Pleas of the Crown (1716) c. 72, § 2, at 190. In the later 18th century a "conspiracy to impoverish" was a strike to make an employer increase wages. Rex v. Eccles, Leach C. C. 274 (1783); see Wright, Law of Criminal Conspiracies (Am. ed. 1887) 48-51.

15See cases cited in Ames, How Far an Act May be a Tort Because of the Wrongful Motive of the Actor (1905) 15 Harv. L. Rev. 411.

16Keeble v. Hickeringill, 11 East 574n (1706).


18Jenkins v. Fowler, 24 Pa. 308 (1855).
in law” was considered a necessary ingredient of a good many old-established definite legal wrongs. It was present, however, if the defendant intentionally did whatever might be the particular sort of harmful act. Publication of a libel, for instance, was “malicious in law” regardless of desire that harm should follow.\(^9\) It was often said that, except in criminal law, “malice in fact” was legally material only to support punitive damages and to rebut qualified privilege in defamation.

The view that actual malice could taint normally lawful acts with illegality continued to gain ground notwithstanding. But in the cases in which malice was said to be the reason that labor pressures were unlawful, the motives of defendants, striking for instance to compel discharge of non-union workmen, could never, by an undistorted vision, be seen as disinterestedly malevolent. Judges who felt this sometimes presented their conclusions of malice as determined by the malevolence of the defendants’ “primary” object. Or they might say, in words or substance, that the test was “whether they intended rather to harm others than to benefit themselves.”\(^20\) Other judges still wrote as if they thought defendants disinterestedly malevolent.

These and other judicial attitudes towards malice were represented in the opinions of the Law Lords in *Allen v. Flood*\(^{21}\) and *Quin v. Leathem.*\(^{22}\) In *Allen v. Flood* the plaintiffs were two shipwrights who had been employed to repair woodwork on a ship whose ironwork was being repaired by forty boilermakers. They were discharged when the defendant, an officer of the boilermakers’ union, told their employer that if he kept them the boilermakers would strike—their grievance being that the plaintiffs had there-tofore done ironwork on another ship for another employer. A jury having found that the defendant had maliciously induced the plaintiff’s employer to discharge them, judgment was entered for them for £20 apiece.

Lord Halsbury (with whom two other Lords concurred) thought the defendant’s conduct actionable if malicious, and the

\(^{21}\)1898] A. C. 1.
\(^{22}\)1901] A. C. 495.
The question, as he saw it, was whether the defendant intended rather to benefit the employer by warning him of his danger of being inconvenienced if he kept the plaintiffs at work beside the irate boilermakers, or, as the jury might well find, to punish the plaintiffs for having worked on iron. His opinion implies either that the defendant's union brethren had no pecuniary interest in keeping shipwrights from working on iron, or that intention to further such an interest was irrelevant to the question of the defendant's malice. The majority, six Lords, were for reversal, substantially agreeing that the law "does not take into account motive as an element of civil wrong." If it should, legal innocence or culpability would depend "upon the fluctuating opinions of the tribunal before whom the case may chance to come as to what a right-minded man ought or ought not to do in pursuing his own interests." One, Lord Shand, was positive, moreover, that the defendant was not malicious, being "bent, and bent exclusively, on the object of furthering the interests of those he represented."

For a moment it seemed that this case had ejected from the law of England the doctrine that malice can matter in it. But three years later malice was reinstated by a unanimous decision of the same court, six Lords sitting, of whom two had been of the majority in Allen v. Flood. The case of Quinn v. Leathem came up from Ireland. The plaintiff was an employing butcher, and the defendants members of a newly formed union of "butchers' assistants." Plaintiff's assistants had been unwilling to join the union at its inception. When trouble seemed brewing, plaintiff attended a union meeting and asked to have his men admitted, offering to pay all fines and demands against them. The sense of the meeting...

28[1898] A. C. 1, 84-5.  
24 Lord Watson, id. at 92.  
25 Lord Herschell, id. at 119; cf. Lord Macnaghten, id. at 153: "... permitting inquiries into motives when the immediate act ... is in itself innocent or neutral ... would, I think be intolerable, to say nothing of the probability of injustice ... in a class of cases in which there would be ample room for speculation and wide scope for prejudice."  
26 Id. at 163. In view of Lord Shand's position three years later, it seems worth noting that he added: "I agree with those of your Lordships who hold that, even if such a motive had existed in the mind of the defendant, [i.e., malice in the sense of personal ill-will] this would not have created liability in damages." Id. at 167.  
27[1901] A. C. 495. For a full statement of facts it is necessary to turn to Lord Brampton's judgment, id. at 516-518.
seemed to be that some, at least, of plaintiff's men "should walk the streets for twelve months," and that he put union men in their places. After plaintiff's refusal, defendants induced three of plaintiff's men to quit. One of them did so without notice in the middle of a week, contrary to the contract or usage under which he was employed. Defendants also "blacklisted" three of plaintiff's minor retail butcher customers, one of whom ceased dealing; and notified one Munce, to whom, without contract, unless usage made one, plaintiff delivered about 30 pounds of meat each week, that Munce's men would strike if another consignment of plaintiff's meat entered his shop. Munce reluctantly telegraphed plaintiff to stop deliveries unless he could make his peace.

The Lords affirmed plaintiff's judgment for £200 damages (for loss on meat already killed and dressed for Munce, and general loss of custom). They were unanimous in opinion that they were deciding Quinn v. Leathem consistently with Allen v. Flood. But their theories of their consistency, and of the true grounds of the butchers' assistants' liability, somewhat differed.

Only one Lord utterly eschewed malice, resting chiefly on inducement of breaches of contracts with knowledge of them.\(^{28}\) Two rested primarily on the defendants' malice, one, Lord Shand, saying that they acted, "not for any purpose of advancing their own interests, but for the sole purpose of injuring plaintiff in his trade."\(^{29}\) Both distinguished Allen v. Flood as decided in the view that the defendant there was not malicious. Two others put foremost the view that the plaintiff had a positive right to conduct his business as he pleased, and that, in invading it, the defendants (unlike the defendant in Allen v. Flood) were not in the exercise of a similar positive right.\(^{30}\) Of these five, one referred to conspiracy, as an element not present in Allen v. Flood; the others said more definitely that "a conspiracy to injure—an oppressive

\(^{28}\)Lord Macnaghten, id. at 505-510. The others regarded the procurement of breaches of contract as immaterial in this case.

\(^{29}\)Lord Halsbury, id. at 506-7; Lord Shand, id. at 512-515.

\(^{30}\)Lord Brampton, id. at 524-6, distinguished Allen v. Flood on the ground that the defendant there was exercising "an absolutely legal right." Here, however, plaintiff was in the exercise of his right, "as a trader in a free country," to regulate his own affairs; but he could not see any right, certainly not that of competition, which the defendants could claim to be exercising. Lord Lindley: "The defendants were doing a great deal more than exercising their own rights; they were dictating to the plaintiff and his customers and servants what they should do." Id. at 536; cf. id. at 533-5.
combination," gives rise to civil liability if it results in damage.\textsuperscript{31} Though one defined conspiracy with eighteenth century comprehensiveness,\textsuperscript{32} the others somewhat suggested, without succinctly saying, that the \textit{only} reason combination made a legal difference was that a single person would have been impotent to do the damage. As to why the doing of the damage was unlawful, their varying reasons were as already stated: interference with contracts, malice, invasion of positive right. The two whose main point was plaintiff's positive right described the defendants as malicious without asserting that their liability did, or that any could, depend on malice.\textsuperscript{33} One Lord took no part in the discussion, contenting himself, perhaps not unmaliciously, with voting for affirmance on the judgment below of the Irish Court of Appeal.\textsuperscript{34}

These English cases dramatize an intellectual muddle and contrariety of judicial leanings that had also characterized American labor law for many years before them. Holmes, in his first opinion in a case arising from conflict between workmen and employers, showed a way for judges to be lucid in dealing with such cases. If they should follow it, with dispassionate candor, though they might not become harmonious, they would at least uncloud their differences.

He proposed nothing unprecedented. As early as 1842 Shaw had openly invoked "considerations of policy and general con-
venience” in support of a decision. And had not Lord Mansfield earlier? A much more recent precedent showed how open dealing with policy might be reconcilable with legal tradition. In the Mogul case in 1889 Lord Justice Bowen had laid down this:

“Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person’s property or trade, is actionable if done without just cause or excuse. Such intentional action done without just cause or excuse is what the law calls a malicious wrong.”

Lord Bowen had done more. He had argued a question of “just cause or excuse” without much reference to “rights” and with much to policy. The Mogul case (with which the anti-trust agitation had given leaders of the American bench and bar occasion to become familiar) was similar on its facts to Bowen v. Matheson. The only difference, except that between steamship owners and keepers of boarding houses for sailors, was that it was the combination instead of the outsider that cut rates—cut them below cost of carriage and gave rebates to shippers in order to eliminate the plaintiff from the carrying trade from China. If it could be plainly proved, said Lord Bowen, that “trusts” such as the defendants were necessarily injurious to the public, “there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some remedy commensurate with the mischief.” He thought it not proved; moreover, for the common law to attempt to limit combinations of capital “would be only another method of attempting to set boundaries to the tides.” All the defendants had done was to “pursue to the bitter end a war of competition waged in the interest of their own trade.” And Lord Bowen knew no “natural standard of ‘fairness’ or ‘reasonableness’ (to be determined by the intense consciousness of judges and juries) beyond which competition ought not in law to go.” He concluded accordingly that, if unattended by any thitherto well recognized sort of illegality,

37Supra note 11.
"competition, however severe and egotistical, gives rise to no cause of action at common law."

In revising this for American use, Holmes faced the fact that our courts, especially in labor cases, were basing decisions on standards of fairness or reasonableness determined by their internal consciousness or unconsciousness. To try to make them stop would have been like attempting to set boundaries to the tides. But it would be well if they brought their standards into the open, and used them with open eyes. In his opinion in *Vegelahn v. Guntner,* immediately after statement that showing of temporal damage, "intentionally inflicted," establishes a cause of action unless the facts disclose, or the defendants prove, some ground of excuse or justification," comes the paragraph which there may still be some who do not know by heart:

"Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate

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38He had earlier written thus: "The ground of decision comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue. . . . I make these suggestions, not as criticism of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain." Holmes, *Privilege, Malice and Intent* (1894) 8 HARV. L. REV. 1, 8-9, reprinted in *COLLErT LEALr PAPERs* (1921) 117, 128-9.

39167 Mass. 92, 105-6, 44 N. E. 1077, 1080 (1896).

40Of course damage is "intentionally" inflicted when it results from intentional doing of something (underselling competitors, for instance) from which damage was plainly foreseeable, even if it was neither foreseen nor desired. Clarity as to this conception is largely due to *Holmes, The Common Law* (1881) Lectures II-V.
instincts than as definite ideas for which a rational defence is ready."

III

The questions of labor law are inescapably political. For every bit of labor legislation, whether judicial or by a legislative body, is a step either towards or away from effectuation of "the most difficult of all political arrangements"... that of so adjusting the conflicting claims of propertied and unpropertied classes "as to give security to each and to promote the welfare of all." 41

It is rash to claim to know in any instance which way the step is. For taking Madison's as the object of any public policy, the formation of a sound political conclusion of what tends towards it requires not only a special training, but such a special training as no one has ever had or can yet get. Sound conclusions are impossible, unless by luck, without a true and complete science of human animals and their societies and institutions, including law. And towards such a science the best efforts of the greatest pioneers to date—Hobbes, Harrington, Adam Smith, Bentham, Comte, Marx, Sumner, Holmes, Spengler and, perhaps, Pareto—have been only clear-headed gropings. The best political conclusions possible, for all the perfection of faith with which they may be cherished, are but guesses. "Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge." 42

Holmes' implication that all decisions are grounded upon judgments of public policy was not intended to be strictly accurate. 43 But probably all labor decisions, however grounded, can be rationally defended in one or another view of public policy, and perhaps most are so grounded.

... Even in labor law there is a small area, indistinctly bounded, of judicial agreement. Of course no court would say that physical

41Speech of Mr. Madison of Aug. 7, 1787 on the Right of Popular Suffrage (1836) 5 Elliott's Debates 580.
43He criticized Austin for intimating that mere motives for decision, "as a doctrine of political economy or the political aspirations of the judge, or his government, or the blandishments of the emperor's wife might have been," are legally immaterial. "Any motive" of judicial action, declared Holmes, "which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration." Early writings of O. W. Holmes, Jr. (1931) 44 Harv. L. Rev. 717, 789.
force, or dangerous threat of it, or fraud, or anything else done in a labor dispute and clearly within a still generally satisfactory category of legal wrong, was lawful. And in some cases outside this class few but rabid partisans would dispute that the results reached were warranted by the policy of protecting people from high-handed outrage. Quinn v. Leathem is a striking instance, on the special facts that before the boycott the plaintiff had offered to surrender to the union and pay fines and dues to get his men admitted. Carew v. Rutherford44 is another. There a contractor had been compelled by strike to pay a fine to the Boston stoncutters’ union because he had sent stone to New York for cutting. Agreement about such cases does not, however extend to the doctrines and usages for which they have been used as authorities.

The clearest showing of one of the views of policy which have had weight in the disputed areas of labor law is in Holmes’ dissenting opinions in Massachusetts. In Vegelahn v. Guntner46 the question was of the lawfulness of picketing, presumably in aid of an ordinary strike against a single employer for better wages, supposing the pickets’ “persuasion and social pressure” to be limited to “simple advice, not obtruded beyond the point where the other person was willing to listen, . . . and giving notice of the strike.” Holmes conceded the seriousness of the temporal damage which the defendants “intended” to inflict. After the passage already quoted, he stated thus his theory of their justification:

“It has been the law for centuries that a man may set up a business in a country town too small to support more than one, though he expects and intends thereby to ruin someone already there, and succeeds in his intent. In such a case he is not held to act ‘unlawfully and without justifiable cause.’ . . . The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs . . . .

“This illustration . . . shows without the need of further authority that the policy of allowing free competition justifies the intentional infliction of temporal damage, including the damage of interference with a man’s business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. . . . The only

44106 Mass. 1 (1870).
45167 Mass. 92, 44 N. E. 1077 (1896).
debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages which, apart from this consequence, [i.e., damage], are within the defendant's lawful control. It may be done by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants.

"I have seen the suggestion made that the conflict between employers and employed is not competition . . . . If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests . . . .

"There is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle . . . . There was a combination of the most flagrant and dominant kind in *Bowen v. Matheson* and in the *Mogul Steamship Company's* case, and combination was essential to the success achieved. But it is not necessary to cite cases; it is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way . . . .

"If it be true that workingmen may combine with a view,
among other things, to getting as much as they can for their labor; just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. . . . The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist, does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business.”

Having thus stated a theory of competitive justification covering much more than the “peaceful picketing” involved in Vegalahn v. Guntner, Holmes needed to add but little in Plant v. Woods to show its application to the boycott there in question. Both the plaintiffs and the defendants were house painters, the plaintiffs being seceders from the defendants’ union. Building contractors, though employing mostly members of the defendants’ union, were also employing the plaintiffs. The defendants bad threatened strikes unless the employers would make the plaintiffs’ tenure of employment conditional upon their re-joining the defendants’ union. The majority opinion had followed Holmes to the extent of putting the question as of justification for the temporal damage threatened, holding, however, that the defendants were not justified because, as in Carew v. Rutherford, their intention was to coerce by means as potent as a highwayman’s, to ends not more lawful. Holmes’ opinion thus explained the “difference of degree” between himself and his colleagues:

“To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defend-

46 Mass. 492, 505, 57 N. E. 1011, 1016 (1900).
47 Carew v. Rutherford, 106 Mass. 1 (1870). This article might well have contained a section dealing with judicial use of “intimidation and coercion,” as, or almost as, sufficient reason for deeming labor pressure unjustifiable. Holmes said of it: “I pause here to remark that the word ‘threats’ often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. . . . So as to ‘compel.’” Vegalahn v. Guntner, 167 Mass. 107, 44 N. E. 1081 (1896).
ants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers may lawfully employ in their preparation the means which they might use in the final contest."

In short, if, under modern conditions, there is to be sense as well as sound in the "equal freedom" of laborers to strive in lawful ways towards lawful ends, "lawful ways" and "lawful ends" should not be so restricted as to deprive laborers of freedom to compete with other laborers for strength to compete with employers effectually. "Competition, however severe and egotistical" should justify damage by labor pressures up to a limit of social tolerableness to be set by educated sympathy and prudence. Insistence upon this logical implication of the policy of laissez-faire involved no assumption by Holmes of the eternal rightness or excellence of that policy. It was our policy because it had been "generally accepted." He recognized that the doctrine that "free competition is worth more to society than it costs" was already "disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them." If he thought it still worth more to society than it costs, it was doubtless because there seemed no more chance than in the time of Adam Smith that a government could be endowed with intelligence enough to undertake to distribute economic goods by law without doing more harm than good. But the cost of laissez-faire was obviously heavy and increasing. General acceptance might soon fail unless courts construed free competition with intelligent sympathy and prudence.

Labor decisions have more often been consonant with another view of policy than with Holmes'. From the beginning in this country, when Alexander Hamilton took the reins, paternalism towards business has competed with laissez-faire. Since this policy involves leaving business men free of legal hindrances, it

is commonly confused with laissez-faire. Perhaps, indeed, it is only in fusion or confusion with it that laissez-faire has been an American policy. The fact that the Hamiltonian policy involves legal favor to business makes it, however, an antithetical opposite to laissez-faire as conceived by the foremost of its founding fathers. The Hamiltonian policy has been rationally defended as conducive to the nearest approach to generality of material security and welfare that practically is possible. The defense takes concentration of wealth in the hands of the acquisitive strongest to be inevitable, since never in history has it been long avoided. The control of wealth and distribution of its annual product must be left to them, since the wealth would only evaporate in weaker hands. The more they acquire, the greater the annual return available for distribution. And the whole annual return is always in fact distributed, through payments for work, wares, entertainment, investments and donations, and not more inequitably than under any other practicable arrangement. Legal permission of effectual labor power is certain to result in retarding the increase of wealth and diminishing the annual distribution. Therefore law should endeavor to keep labor power within whatever may be its limits for the moment, restricting those limits when practicable.

Though this conclusion is flatly opposed to Holmes', it seems

50Adam Smith's reason for laissez faire was that experience had shown that attempts to promote prosperity by law were more likely to do harm than good, unless to a few favored individuals, whereas if individuals generally are left alone by law in socially tolerable pursuits of selfish interests, they are in many cases led as if by an invisible hand to services to general welfare which are no part of their intention. Smith, Wealth of Nations (1776) Bk. iv, c. 2. Of course the letting alone was not to be carried to a drily logical extreme, which would be anarchy. Self-seekers were not to be let alone if the results were certain to be bad, and those of legal regulation certain to be better. Issuance of currency notes by bankers, for instance, must be regulated, even though it seem violative of "natural liberty." For "those exertions of the natural liberty of a few individuals, which might endanger the security of the whole society, are, and ought to be, restrained by the laws of all governments." Smith, op. cit. supra, Bk. ii, c. 2. The main thing was that governments should refrain from affirmative legal assistance to self-seeking. Then the advancement of commerce and manufactures would follow the pace, but in due subordination, of that of agriculture, the natural mainstay and foundation of all welfare, each expanding only as expansion of the other assured a market. Smith, op. cit. supra, Bk. iii, c. 1. Only the interests of farmers concur with those of society in general. So legislatures should especially beware of listening to merchants and manufacturers, "whose interest is never exactly the same with that of the public, who have generally an interest to deceive and even to oppress the public, and who accordingly have, on many occasions, both deceived and oppressed it." Smith, op. cit. supra, Bk. i, c. 2.
by no means unlikely that he accepted (perhaps not without qualifications) all the antecedent propositions in the series, his
difference being grounded upon sympathy and prudence.51

Of the labor decisions and usages as to which there has been
judicial discord, nearly every one can be defended or explained
as consonant on the whole either with Holmes' or with the ex-
treme Hamiltonian view of policy. Of course definiteness is im-
possible as to in what cases or to what extent either view has been
the true ground of decision. Many more views, values, interests
and feelings than can be detected must have counted. Radically
anti-capitalist policies have counted by intensifying judicial fears
of labor power. In cases consonant with Holmes' view courts may
often have been moved rather by loyalty to democratic tradition.
There may sometimes, in spite of the near-universality of as-
sumption that wealth and welfare are identical, have been some
influence of the Jeffersonian conception that generality of well-
being depends upon diffusion of opportunity for individuals to
develop self-reliance and self-respect and to experience the satis-
factions as well as pains of work and workmanship, and that in this
interest the increase of wealth might wisely be retarded.52 Cases
both ways may sometimes have been decided by moral sentiments
and traditions. Persons born since Holmes said that he "can re-
member when many people thought that, apart from violence or
breach of contract, strikes were wicked."53

IV

Nor least among the instruments that have been uprooting

51This seems indicated by the conclusion of his opinion in Plant v. Woods, 176
Mass. 492, 505, 57 N. E. 1011, 1016: "I think it well to add that I cherish no
illusions as to the meaning and effect of strikes. While I think the strike a lawful
instrument in the universal struggle of life, I think it pure phantasy to suppose that
there is a body of capital of which labor as a whole secures a larger share by that
means. The annual product, subject to an infinitesimal deduction for the luxuries
of the few, is directed to consumption by the multitude, and is consumed by the
multitude always. Organization and strikes may get a larger share for the members
of an organization but, if they do, they get it at the expense of the less organized
and less powerful portion of the laboring mass. They do not create something out
of nothing." Cf. Picou, Taxation or Unemployment (1933) 252-252, 291-5; Wealth
and Welfare (1912) 320-45; Hicks, Theory of Wages (1933) 136-229, 179-197;
Dobbs, Wages (1930) 164-9; Marshall, Wages, 15 Encyc. Soc. Sci. 291, especially
bibliography, at 318-9.

52There is a longer, though inadequate, attempt to explain Jefferson's social

old legal takings for granted is Bowen's formula: *Intentional infliction of temporal damage is unlawful unless privileged*, with Holmes' addition that privilege, or justification, depends upon considerations of policy and of social advantage. Law School jurists were quickly hospitable to this formula. There was no sudden and universal adoption of it by courts, even after Holmes, in *Aikens v. Wisconsin*, had put behind it the authority of the Supreme Court of the United States. There may even yet be judges who have never heard of it. But legal professional like other tribal ways change subtly through imitation and suggestion, without clear awareness by the rank and file that they are changing. It has come to be considered crude for a judge or lawyer to talk or write as if any and every sort of thing were necessarily within the doer's legal rights unless within some clear-cut category of legal wrong, and the old habit of doing so is near abandonment. And most judges, at least in courts of last resort, now approach cases in confused fields, such as that of labor law, with more or less consistency with the formula. Of course, the vast mass of cases clearly within definite and generally satisfactory rules, in which no judge would dream of budging from the policy of stare decisis, are unaffected by the formula. But in other cases its currency makes judges feel easier than formerly about deciding as they think best, even where they do not deem it prudent to go the length of stating the true grounds of their decisions.

The formula has deprived labor law of what used to be its chief bone of contention. For it dissolves the old mystery of conspiracy—how the bare fact of combination can taint lawful behavior. Combination matters only when damage would not result without it. The unlawfulness of inflicting damage, unless the ways and ends are justifiable, is the same for one as for many, and for many as for one. "The most innocent and constitutionally protected of acts or omissions may be made a step in 'an unlawful enterprise' . . ."—whether of one or many.

*Malice* is another matter with respect to which judicial usage seems, at least on the surface, to have gone far towards consonance with Holmes. Not for a good while has an important labor case

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54195 U. S. 194, 25 Sup. Ct. 3 (1904).
55See CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 129.
been said to turn on “whether the defendants intended rather to benefit themselves or to harm others,” or harm to others said to be the sole motive of labor pressure. It seems now settled that if and when malice makes conduct unlawful which without it would be lawful, malice means “disinterested malevolence” or “doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired.” And we know of no labor case not long out of date in which a question described as of malice has even been considered.

Where the word has lately been used at all, it has usually been with the qualification that it means only “without just cause or excuse.” It might, to be sure, be easy to multiply fairly recent instances of judicial language in the old tradition; intimations, for example, that a labor pressure is “for the purpose” of doing damage. But such aspersions of motive seem to have lost legal significance, unless in judicial construction of the Sherman Act. Like verbal abuse of “scabs” by strikers, they seem usually to be irrepressible emanations of the heat engendered by conflicts between workmen and employers. When, however, in a labor case under the Sherman Act, it is said that “interstate commerce was the direct object of attack ‘for the sake of which the several specific acts and courses of conduct were done and adopted’ . . . .” it almost seems that “malice” as imputed by Lord Halsbury has been re-established as a criterion of unlawfulness, with the substitution of interstate commerce for competitors as the object of malevolence.

Before the World War there were few signs of any tendency of judges to follow Holmes in dealing openly and dispassionately, on grounds of policy, with hard questions of justification. It is easier for them to rely upon “some natural standard of fairness or reasonableness” found in their internals, and cloud decisions with legal verbiage. At least three ways of dodging explanation of decisions of hard questions have been much followed. One,

57Id. at 203, 25 Sup. Ct. at 4.
58Outside of the field of labor law, malice in the sense of “disinterested malevolence” is sometimes the criterion of statutory guilt or liability, as in Aikens v. Wisconsin, 195 U. S. 194, 25 Sup. Ct. 3 (1904); also of common law liability in such cases, as in Tuttle v. Buck, 107 Minn. 145, 119 N. E. 946 (1909).
calling for no special illustration, is to "match the colors of the case at hand against the colors of many sample cases spread out upon their desk."61 Another, perhaps now become time-dishonored, is that illustrated by Lord Brampton's "judgment" in *Quinn v. Leathem*—assertion that the decision is determined by plaintiff's, or defendant's, "positive right" or "rights."62 These "rights" were commonly of such "property" as is described below:

"Delusive exactness is a source of fallacy throughout the law. By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute [for "statute" here read "non-owner's course of conduct"] cannot substantially cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law from various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm."63

"Property rights" in courses of conduct were sometimes put as exclusive, sometimes as "equal," sometimes as "superior." But probably there are now few judges left to whom dogmatic assertion of a plaintiff's "right" could seem quite adequate to dispose of a claim of justification on grounds of policy.

A subtle modification of technique is illustrated in the prevailing opinion in the *Hitchman* case.63 Though every claim of justification was set up and knocked down, the stress upon plaintiff's *rights* was always dominant. To the suggestion that the plaintiff's endeavor "to secure a closed non-union mine through individual agreements with its employees" furnished some sort of excuse for coercive pressure to make it a closed union mine, "It is a sufficient answer, in law, to repeat that plaintiff had a legal and constitutional right to exclude union men from its employ." Rights, to be sure, were conceded to be relative. "The cardinal error of the defendants' position lies in assumption" that their right "to enlarge union membership by inviting other workingmen to

61Cardozo, op. cit. supra note 55, at 20.
63Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 250-259, 38 Sup. Ct. 65, 72-75 (1917). The point here taken was suggested by Cook, Privileges of Labor Unions in the Struggle for Life (1918) 27 Yale L. J. 779.
"join" is absolute. It is defeated by the plaintiff's right to run non-union, of whose exercise the defendants had notice, as well as by the defendants' use of deceitful means. In this and many other opinions concession that even the plaintiff's rights may not be absolute seems to be with the lips only. The heart feels them as absolute, and inclines the mind to beg the question at issue—In whom, as a matter of wise public policy, should the right here be adjudged to be?

Another way of evading questions of policy may have derived from Holmes, not with his sanction. In Plant v. Woods he described the object of strengthening a union as one degree remote from that of raising wages. The Massachusetts court, upon his leaving, seized upon nearness of benefit aimed at as a safe and sane criterion of the lawfulness of labor pressure. Though, according to his successor, the contention of interests between employers and employed is not in a strict sense competition,

"... the principle which warrants competition permits also reasonable efforts, of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other."

Plant v. Woods had already held it unlawful for a union to coerce employers to discharge non-member workmen. When the court had bowed slightly to Holmes, conceding that economic coercion might sometimes have a quasi-competitive justification, explanation of Plant v. Woods on the ground that the benefit aimed at was indirect, as Holmes himself could be construed as saying, doubtless seemed more satisfyingly definite than the explanation with which Holmes had been answered in that case by the spokesman of the majority of the court.

64 Few judges construed the decision as determined by the defendants' use of deceitful means, even after Taft, C. J., had said: "The unlawful and deceitful means used were quite enough to sustain the decision of the court without more." American Steel Foundries v. Tri-City Trades & Labor Council, 257 U. S. 184, 211, 42 Sup. Ct. 72, 79 (1921). See the thirty-eight subsequent cases resting on the Hitchman case listed in Landis, Cases on Labor Law (1934) 129n.

65 Loc. cit. supra note 46.


67 "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the
The Massachusetts courts, being scrupulous, made *directness* the true ground of some decisions. Clearly no benefit can be more direct than that of having jobs. It was soon held, accordingly, quite lawful for union masons to strike to compel contractors to give members of their union the work of pointing masonry, thitherto done by specialized pointers. This strike was not tainted by the object found vicious in *Plant v. Woods*—that of forcing men to join the union. For the pointers, being untrained at laying brick or stone, were ineligible to join the union. The effect was to make them unemployable at their trade. But, as was said in the opinion, competition “is always selfish, often sharp, and sometimes deadly.”

Sometimes, however, the logic of *directness* has been found evitable. The musicians’ union, pursuant to its rules, would not allow a union organist to work in a moving picture theatre unless at least four other musicians were employed. For as good a non-union organist as he wanted the theatre owner had to pay more than twice the union rate of wages. It was held unlawful for the union to enforce its rule. However direct might be the benefit of more work for union men, the attempt to reap it interfered with the theatre owner’s right to a free flow of labor. And the union’s purpose of having jobs created for its members was “indirect.”

Of course the benefit of the closed shop was indirect in Massachusetts and strikes for it unlawful. The additional reason that the closed shop gives unions a monopoly of the labor market was stated for a while. But its force evaporated when, in a case in which employers testified to a preference for dealing “with one strong union, under good control and management,” a trade agreement for the closed shop was held lawful. Though such a trade plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. *Plant v. Woods*, 176 Mass. 492, 502, 57 N. E. 1011, 1015 (1900).

*Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753 (1906). The anomaly of this lawfulness of getting men thrown out of work because union men want their jobs as jobs (Pickett v. Walsh) and the unlawfulness of getting them thrown out of work because they will not join the union (Plant v. Woods) has variously amused and irked law review writers. See Landis, Cases on Labor Law 317, 319 nn.

*Haverhill Strand Theatre v. Gillen*, 229 Mass. 413, 118 N. E. 671 (1918). The opinion is by the judge who wrote in Pickett v. Walsh, 192 Mass. 572, 78 N. E. 753 (1906). That it is justifiable for a musicians’ union to enforce the “none unless several” rule was held in Scott-Stafford Opera House Co. v. Minneapolis Musicians Assn., 118 Minn. 410, 136 N. W. 1092 (1912).


agreement may lawfully provide that only members of the union be employed unless when there are not enough available, a union may not lawfully get enforcement of such a provision to the extent of having a non-union fellow workman discharged.\textsuperscript{72} So when a well-advised Massachusetts union, through lawful strikes for higher wages or otherwise, has brought a body of employers to the point of willingness to agree to the closed shop, the employers first discharge all their men, then execute the trade agreement, and then re-employ those of the men discharged who belong to the union.\textsuperscript{73}

Testing of justification by directness of benefit aimed at has not been confined to Massachusetts. At several times and places union carpenters, working for building contractors, have refused to install doors, sashes or other “trim” made in factories where non-union carpenters were employed. The New York Court of Appeals held such a boycott lawful.\textsuperscript{74} The reason stated (this was in 1917; that court would later have written otherwise) was that extension of the union among mill-hand carpenters was in the “primary” and “direct” interest of the carpenters who worked on buildings. The Massachusetts court held such a boycott unlawful.\textsuperscript{75} “It is plain,” it said, “that there is a distinct line of demarcation between the nature of the work performed by the maker of finish (or trim) and the installer of it. . . . Obviously it is of more concern to workers who obtain their livelihood in a particular craft that they all should join a union, than that workers in other lines of endeavor should become unionized.”

V

One clear unity in the labor law of Holmes’ time was in agreement that the policy of free competition justifies labor pressure for some ends by some means. In 1921 the Hamiltonian Chief Justice at whose left hand Holmes was sitting said this:

“Labor unions . . . were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. . . . Union was essential to give laborers an opportunity


\textsuperscript{73}Landis, Cases on Labor Law (1934) 378 n.

\textsuperscript{74}Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917).

to deal on an equality with their employer. They united . . . to leave him in a body in order by this inconvenience to induce him to make better terms with them . . . . The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.\footnote{Taft, C. J., in American Steel Foundries v. Tri-City Trades & Labor Council, 257 U. S. 184, 209, 42 Sup. Ct. 72, 78 (1921).}

This legality, never before so lucidly explained, of simple strikes for wages, hours or working conditions, had happened, to be sure, without adjudication. That no court had for many years denied it was because denial had seemed imprudent to even the boldest Hamiltonian extremists on the bench. It seems clear that the judge who wrote for the majority in\footnote{He said: "It is well to see what is the meaning of this threat to strike. . . . It means more than that the strikers will cease to work. . . . It means that those who have ceased work will, by strong, persistent, and organized persuasion of every description, do all that they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practised by organized labor will be made to injure him in his business, even to his ruin, if possible; and that, by the use of vile and opprobrious epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ. . . . Even if the intent of the strikers . . . be to discountenance all actual or threatened injury . . . except that which is the direct necessary result of the interruption of the work, . . . still with full knowledge of what is to be expected they give the signal. . . . Such is the nature of the threat, and such the degree of coercion and intimidation involved in it." Plant v. Woods, 176 Mass. 492, 496-7, 57 N. E. 1011, 1013 (1900).}\footnote{Arthur v. Oakes, 63 Fed. 310 (C. C. A. 7th, 1894).} But the decision that strikers, however lawless their striking, cannot constitutionally be compelled to go back to work,\footnote{Taft, C. J., in American Steel Foundries v. Tri-City Trades & Labor Council, 257 U. S. 184, 209, 42 Sup. Ct. 72, 78 (1921).} had clinched the impracticability of preventing strikes judicially. Courts which
may have thought this unfortunate did the next best thing: forbade picketing altogether. But perhaps no courts, or few, now would (or could, since enactment of legalizing statutes) deny, as an abstract proposition, that in a lawful strike picketing can be lawful, if limited and conducted as sedately as Chief Justice Taft prescribed in the case last quoted from. The militant and sinister word “picket” was to have no legal recognition. To enjoin pickets only from violence and from behaving “in a threatening and abusive manner” was insufficient. Pickets were to be free gently to persuade those who accepted their offers of conversation. But they must not be importunate or otherwise offensive, let alone defamatory. “To prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries,” the number was limited in the instance to one at each entrance to the factory—but with permission to judges in other cases to fix the number as seemed fitting.

Another abstract proposition which it seems safe to say no court disputes is that when, in an otherwise lawful strike, violence by strikers is so serious and persistent as to “characterize the whole campaign” the strike is unlawful and picketing should be enjoined altogether. But disagreement in practice is here so great that agreement in theory is almost empty. Even on better evidence than colored affidavits, questions of the extent of strike violence and of union responsibility for it must be often doubtful. Judicial convictions of policy may turn the balance. All activities in aid of the Railway Shopmen’s Strike of 1922 were restrained by some federal judges on the theory that the strikers’ nation-wide campaign of

79"There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching." Atchison, T. & S. F. R. Co. v. Gee, 139 Fed. 582, 584 (S. D. Iowa, 1905).

80American Steel Foundries v. Tri-City Trades & Labor Council, 257 U. S. 184, 205, 42 Sup. Ct. 72, 77 (1921).

81"Experience... has caused me to be so incredulous of affidavits that I have required... the presence of the chief witnesses upon each side... A comparison of the picture produced by their testimony with that produced by their affidavits has proven the utter untrustworthiness of affidavits. Such documents are packed with falsehoods, or with half-truths, which in such a matter are more deceptive than deliberate falsehoods." Great N. R. Co. v. Brousseau, 286 Fed. 414, 416 (N. Dak. 1923).
violence made the strike an unlawful restraint of interstate commerce.\(^2\) Judge Amidon enjoined in his district only specific unlawful tactics; and found that "the officers of the union in charge of the strike, and a great majority of the men, have joined with the peace officers in a sincere effort to conduct the strike in a lawful and orderly manner."\(^3\) Even where the lawfulness of "peaceful picketing" in a lawful strike was not denied, it has been open to individual judges to construe petty fracases as warrant for prohibiting all further picketing. The New York Court of Appeals has recommended to New York judges the course which Holmes pressed for unsuccessfully in Massachusetts in *Vegelahn v. Guntner*:\(^4\) injunction only of torts by pickets, even though some violent torts may already have been committed, unless or until it is really plain that violence will characterize the whole campaign. "An injunction does not issue as punishment for the past. Its only legitimate end is protection for the future."\(^5\) The *American Steel Foundries* case,\(^6\) in which the picketing had been intimidatory before the injunction, accords. But appellate courts are impotent to control the fact finding ways of courts below.

The *American Steel Foundries* case went with Holmes a step beyond concession of the lawfulness of simple strikes and gentlemanly picketing. Following the statement already quoted that combination is a lawful instrument for workmen in competition with their own employers, Chief Justice Taft continued:

"To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community.

\(^2\) These were the "Daughtery injunction" cases, of which the chief was United States v. Railway Employees Dept., A. F. of L., 283 Fed. 479 (N. D. Ill. 1922); 286 Fed. 228 (N. D. Ill. 1923); and 290 Fed. 978 (N. D. Ill. 1923). The "veritable reign of terror" evidenced by the affidavits was thought to show that the strike was for the "primary purpose" of crippling and destroying interstate commerce. See 283 Fed. at 491-2 and 290 Fed. at 978, 982, both cited supra. For the text of the "temporary restraining order" see Frankfurter and Greene, The Labor Injunction (1930) 253 ff.; for that of the "permanent injunction," Landis, Cases on Labor Law 262 ff.

\(^3\) Loc. cit. supra note 81. In view of the danger that pickets might be intimidated or attacked, or subjected to trumped up charges, by armed guards or strikebreakers, Judge Amidon permitted three pickets at each entrance to railway property.

\(^4\) 167 Mass. 92, 95-6, 104-5, 44 N. E. 1077, 1079-80 (1896).


united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild."

This view was applied to these facts: The plaintiff was operating open-shop, after a long shut-down, with a small force of 350 men, of whom 150 were of skilled trades and working at less than union wages. The defendants were a combination of 37 skilled trade local unions of steel product plant workmen of the neighborhood. There was no strike in the plaintiff's plant, unless the quitting of two men can be called one. The defendants' object, held lawful, was to induce the plaintiff's men to strike in the interest of preventing the wage cuts which the defendants' employers would naturally attempt to make in order to meet the plaintiff's low wage competition in sales of products. The court did not say in words that it was legalizing a secondary boycott.87 But the distinctive element was clearly there—coercion through strangers to a competition, in what was called in Massachusetts the "strict sense" of that word (the strangers being either persuaded or coerced), for the advantage of one of the competitors. The plaintiff's men were not united in immediate interest with the defendants; in fact they might have suffered had they struck. The plaintiff was a stranger to the defendants' competition with their own employers; the conflict of defendants' interests with plaintiff's was "indirect." Yet it was held that the defendants might properly, if they could (the if, to be sure, seems large), persuade the plaintiff's men to become their cat's-paws and, by striking, coerce the plaintiff to pay union wages in the interest of security for their continuance in plaintiff's competitors' plants.

In New York, not long after, there was a similar recognition of Holmes' view of competition and what it should justify. Efforts to unionize small restaurants and moving picture theatres have been frequent. Since such establishments have but few employees, easily replaceable, strikes, if possible at all, are usually impotent. Per-

87Applying the word boycott only to secondary boycotts, we shall usually henceforth, as heretofore, omit the adjective. Primary boycotts—simple strikes, for instance, of the sort everywhere held lawful—are scarcely ever called such. For useless attempts to differentiate boycotts, for legal purposes, with an exactness which will not be delusive, see Oakes, op. cit. supra note 79, at 602-606.
suaision of potential customers not to patronize has been more
effective. Picketing with that object has the boycott characteristic.
It persuades "strangers" to both union and restaurant proprietor,
to coerce the latter by withholding patronage. It was held lawful
in Exchange Bakery v. Rifkin, Judge Andrews saying:

"A labor union ... may be as interested in the wages of those
not members ... as in its own members because of the influence
of one upon the other. ... Economic organization to-day is not
based on the single shop. Unions believe that wages may be in-
creased, collective bargaining maintained, only if union conditions
prevail, not in some single factory but generally. That they may
prevail [a union] may call a strike and picket the premises of an
employer with the intent of inducing him to employ only union
labor. And it may adopt either method separately. Picketing
without a strike is no more unlawful than a strike without picketing:
... Resulting injury is incidental and must be endured."

It is not likely that this case would be taken as overruling Auburn
Draying Co. v. Wardell. The boycott there looked very different.
The plaintiff was a trucking company at Auburn running open
shop, employing 45 teamsters. "The plaintiff neither encouraged
nor forbade its employees to join" a newly formed teamsters’ union,
which demanded that plaintiff compel its men to join. Twenty-two
other local unions of diverse trades combined with the teamsters’
union through a Central Labor Union to enforce this demand by
boycott. And "dealers, ice deliverers, bakers, butchers, builders,
plumbers and contractors, because of the notices, warnings and
declarations of the defendants, in varying and serious degrees dis-
continued business with the plaintiff and refused further to employ
it to do carting, hauling or collection work for fear of loss of
business and labor troubles."

It seems probable that Holmes would have agreed that this
boycott was unjustifiable. But not because he found the benefit
aimed at "remote" or "indirect". It is hard to see how he could
have formulated any definite looking criterion of distinction from
boycotts he thought justifiable whose exactness would not have been
delusive. Our best guess is that on the particular circumstances
he might have found a clear and present danger of tyrannous labor

89227 N. Y. 1, 124, N. E. 97 (1919).
90Id. at 5, 124 N. E. at 99.
domination of the city, which both sympathy and prudence called for checking.

If this guess is right, it may explain the seeming inconsistency with his general position of his position in the Danbury Hatters' case. The union hatters' case for justification, had it been argued, would have been the same as that of the unions of steel product plant and restaurant employees whose boycotts have been since held lawful. To secure the effectiveness of their union, even in the southwestern corner of Connecticut, they had to extend it to Loewe's shop. A strike of Loewe's men seems to have failed because strike breakers unamenable to persuasion were substituted. What less could they do, with the faintest chance that it might be effectual, than combine with members of the American Federation of Labor throughout the country to press Loewe to unionize his factory by not dealing, and persuading others not to deal, with shops which carried Loewe's hats in stock, using only notoriety and persuasion to make the boycott count? Unless the menace of a boycott so extensive accounts for Holmes' concurrence, it seems irreconcilable with his dissent in the later interstate boycott cases. The guess of course is doubtful. At this distance the boycott seems not very terrifying. But the fact that a national "central labor union" was vigorously active in it may have made it seem ominous.

Of course a judge may have many reasons for not dissenting when dissent seems useless. Having concurred in the decision that the complaint against the hatters was proof against demurrer, Holmes may have felt precluded from dissenting from affirmance of the judgment. And he may have written the court's opinion mainly to prevent another justice from saying what he would have. But he probably regretted later that he put it solely upon authority.

91Complaint held good against demurrer: Loewe v. Lawlor, 208 U. S. 274, 28 Sup. Ct. 301 (1908); judgment for plaintiff after trial aff'd, Lawlor v. Loewe, 235 U. S. 522, 35 Sup. Ct. 170 (1915), Holmes writing.

92We understand that counsel for the Danbury Hatters did not argue that the boycott would be lawful at common law, virtually confining themselves to the point that the Sherman Anti-Trust Act could not sensibly be construed as applying to the activities of labor unions.


94On the main point he said only that, "whatever may be the law otherwise, Eastern States Lumber Dealers v. United States, 234 U. S. 600, 34 Sup. Ct. 951 (1913), establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of 'unfair dealers,' manifestly intended to put the ban upon those whose names appear therein, among an important body of
For its authority was a main reliance of the judges who wrote for
the majority in the Duplex and Stonecutters' cases.\textsuperscript{56}

In those cases the settled rule relied on was that, given "intent"
or manifest tendency to affect interstate commerce sufficiently, the
Sherman Act prohibits secondary boycotts indiscriminately. This
was deemed so established as to outlaw close thinking about par-
ticular boycotts. Whether a boycott is lawful or unlawful at com-
mon law was said to be "of minor consequence" and "immaterial".\textsuperscript{50}
It was not in words denied that the standard of lawfulness under
the Sherman Act is reasonableness, and that "what is reasonable'
must be determined by the application of principles of the common
law as administered in federal courts".\textsuperscript{97} But whether the particular
possible customers combined with a view to joint action and in anticipa-
tion of such reports, is within the prohibitions of the Sherman Act if it is intended to
restrain and restrains commerce among the States. It requires more than the blind-
ess of justice not to see that" what was done by the United Hafters and the
American Federation of Labor was of the same description as what was done by the
lumber dealers.

\textsuperscript{56}Duplex Printing Press Co. v. Deering, 254 U. S. 443 (1921); Bedford Cut

\textsuperscript{97}Brandeis, J., id. at 58., For the history of judicial construction of the Sherman
Act in labor cases, and of the labor provisions of the Clayton Act, see Berezan, Labor
And the Sherman Act (1930); and Frankfurter and Greene, The Labor
Injunction (1930).

That hard and fast criteria of reasonableness under the Sherman Act may some-
times give way to reasonableness under the particular circumstances is clearly shown
by Nat. Assn. of Window Glass Manufacturers v. United States, 263 U. S. 403,
44 Sup. Ct. 148 (1923), decided by a unanimous court, Holmes writing. The de-
fendants, a combination of organized employers with the union of their workmen,
boycotts were reasonable according to the principles of that common law was treated as not open for examination.

By the most orthodox conventions, whether the Sherman Act prohibited restraint of interstate commerce by such boycotts depended on the reasonableness or unreasonableness of the boycotts as determined by common law principles; and the mandate of those principles was open for the Court's consideration, unless precedents precluded. The Hatters' case was not necessarily preclusive; all that it necessarily settled was that a boycott affecting interstate commerce is unreasonable when such vast forces as those of the American Federation of Labor, aided by vast forces of the consuming public, carry it to the point of clear and present danger of oppressive labor tyranny. Before the Stonecutters' case the Steel Foundries case had declared what, arguably, was already law when the Duplex case was decided earlier in the same year; that a boycott on not too dangerously vast a scale, and pruned by injunction of prunable improprieties, if any, may, on common law principles, be a reasonable and lawful way for laborers to effect the lawful end of extending their union among those of the same trade whose labor at lower wages would injure their whole guild. That case's dicta restricting boycotts to a trade and a neighborhood were not decisions; only a boycott by allied trades in a neighborhood was in question. It would seem in the Duplex and Stonecutters' cases to have been open to the Court to consider whether, in the particular circumstances of each case, the particular boycotts were reasonable or unreasonable means to the end whose reasonableness the Steel Foundries case attests. Whether any lesser means than boycott could have been effectual to that end might, in each case, have been a relevant question; and if it could not, it might become relevant to determine whether, in each instance, limitation to a neighborhood would be reasonable or arbitrary. It would seem that the question of the reasonableness of limitation to closely allied trades would not, in either instance, be very important; if in

had a complete national monopoly of everything to do with the manufacture of hand-blown window glass. Their agreement provided for limitation of output, and equitable division of the available work among the union blowers, and of the available blowers among the plants in operation. This was held reasonable. For the industry, in competition with machine made glass, was dying.


For it would seem that machinists are of the same trade whether they work
the Duplex case it seemed unreasonable for the machinists to get aid from truckmen, that excess might have been prunable by injunction without relegating workmen in the other four printing press factories to a wage-scale dependent upon the Michigan plaintiff's. We are not arguing, merely indicating arguments that were technically open.

The fact that they were open is not least among the gains of the Holmesian policy in the decade prior to the depression. Further detail of the state of labor law with relation to that policy would add little but tediousness. On what has been the principal question in an important department which we may seem to have slighted, consonance with Holmes' theory of justification seems to have come about without adjudication. Since the Senate proceedings relative to the nomination of Judge Parker to the Supreme Court in 1930,\textsuperscript{100} the doctrine that "individual non-union contracts" between workmen and employers should be sacred, seems to have been abrogated, consonantly with Holmes' theory, by public opinion, even where not by statute.\textsuperscript{101} As to when labor pressure may be unjustifiable because it interferes with an employer's business contracts, there have been some cases.\textsuperscript{102} But we know of no expression by Holmes or a clearly Holmesian court on such a question. So also as to many minor or infrequent sorts of questions.\textsuperscript{103}

on printing presses or other mechanisms. And stonecutters similarly. But of course the Massachusetts view (\textit{supra} note 75) was open—that the interests of men of the same trade who perform one process can have no close connection with the interests of men who perform another.

\textsuperscript{100}Extracts are published in \textit{Landis, Cases on Labor Law} 141 ff.; \textit{cf. Id.} at 181-2.

\textsuperscript{101}See Fraenkel, \textit{Recent Statutes Affecting Labor Injunctions} (1936) 30 ILL. L. REV. 854, from which most of the citations given, \textit{infra} note 115, have been taken.

\textsuperscript{102}An interesting one concerned union hatters at Danbury: \textit{R. & W. Hat Shop v. Scully}, 98 Conn. 1, 118 Atl. 55 (1922). In a time of shortage of "hats in the rough," and consequent irregularity of employment for union hat "finishers," closed shop manufacturers of "hats in the rough" were successfully pressed, through their workmen, to give priority in deliveries to closed shop over non-union manufacturers of finished hats. In consequence, a manufacturer of "hats in the rough" broke a contract to deliver such hats to the plaintiff, a non-union manufacturer of finished hats. Plaintiff was held entitled to damages from officers of the union held chargeable with notice of the contract. Beach, J., dissenting, said: "A stranger to a contract may not, for his own benefit and without legal justification, knowingly induce a breach of it, but he is not bound to assist in its performance." The general question in such cases is when, or whether, other people's contracts should be legal barriers to a union's efforts to benefit its members.

\textsuperscript{103}Such for instance as the legitimacy of pressure to prevent use of labor-saving machinery. A few years ago it would have been unthinkable that an important court would view such an object sympathetically. See Hopkins \textit{v. Oxley Stave Co.}, 83 Fed. 912 (C. C. A. 8th, 1897). There is now, however, a decision that a painters' union is justified in preventing its members from working for an employer who has invested in
It has been shown that Holmes' theory of justification has had impressive recognition in the *Steel Foundries* case and by the New York Court of Appeals. Holmesian cases in other courts could be cited. And there have been many consonant cases, reaching Holmesian results, though not, or questionably, on Holmesian grounds. But we are not dealing with numerical state of authority. Nor are we undertaking to detect and exhibit all the tangled ways that courts have followed in labor cases. Everyone knows that the trend of decision has been anti-Holmesian, with exceptions and concessions. The following is a clear avowal of convictions that may underlie many anti-Holmesian decisions:

"Can the courts step in between capital and labor to strike the medium and balance the scales? . . . The courts cannot find the balancing point by boxing the compass of judicial opinion from extreme radicalism to ultra-conservatism. They must stand at all times as the representatives of capital, of captains of industry, devoted to the principle of individual initiative, protect property and persons from violence and destruction, . . . and yet save labor from oppression, and conciliatory toward the removal of the workers' just grievances."

This Hamiltonian candor, rare in public utterance since Hamilton himself, has sometimes been unfairly aspersed. The point of view expressed is not indefensible intellectually. It is only detestible—except to those who hold it. The imprudence of public expression of it may not be least among the reasons why judicial reasoning on questions of justification seems often to have been inadequate.

VI

In view of the *Duplex* case which preceded and the *Stoncutters’* which followed, it may seem that the Supreme Court’s inclination towards Holmes in the *Steel Foundries* case had slight significance. We think momentous the concession that it is justifiable for laborers to strive, by lawful means, to extend their union, “and especially among those whose labor at lower wages will injure their whole a corporation that uses paint spraying machines. Bayer v. Brotherhood, 103 N. J. Eq. 257, 154 Atl. 759 (1931).

105An instance is the first important New York case in which it was held lawful to strike for the closed shop. Nat. Prot. Assn. v. Cumming, 170 N. Y. 315, 63 N. E. 369 (1902). The opinion seems to rest either upon democratic convictions as to human “rights” and liberties or upon the old assumption that nothing can be unlawful unless within some definite category of wrong, or upon both.

guild." It is true that the qualifications with which it was coupled would make almost any effectual means unlawful. But the Holmesian sound kept ringing. And there was not a little perception, with indignation or amusement, of its contradiction by the Hamiltonian sense. Malicious persons diagnosed the concession as a trick to temper the social wind which the *Duplex* case had raised, and which *Truax v. Corrigan* in which decision was to be announced two weeks later) would be certain to augment.

Later decisions kept that wind from quite abating even during the boom. The Court held labor unions suable, and threatened them with "intent" to restrain interstate commerce in the *Coronado* cases. It held that the Sherman Act did not prohibit a boycott by employers, aimed to destroy closed shop conditions by inducing dealers in building materials to refuse to sell them to contractors who continued to hire only union men. The boycott was viewed as local to California; but, in the light of other cases, the fairness of the findings that restraint of interstate commerce was neither substantial nor intended was not too clear to question. It held unconstitutional the law providing that women in industry should not be paid less than fixed minima in the District of Columbia. It emasculated the labor provision of an earlier Railway Labor Act. It held a labor leader punishable for the contempt of calling a strike in violation of an injunction issued pursuant to a statute making arbitration compulsory. The statute, which he had challenged vainly, was held unconstitutional in later cases. And its decision in the *Stonecutters'* case disturbed even some of those who believed prosperity had firm foundations, and that the new economics of high wages was making inevitably for industrial

109257 U. S. 312, 42 Sup. Ct. 124 (1921). A state statute forbidding the issuance of injunctions in labor disputes was held unconstitutional, Holmes, Brandeis, Pitney and Clarke, JJ., dissenting. It was thought that the statute, as construed by the state court, would in effect legalize picketing of the "Don't patronize" sort. In the instance the picketing had been abusive and disorderly.


109Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923).


good feeling. Holmes concurred in several of these cases. But news of their results, and little more, reached a large public. The reactions of labor leaders, and persons sympathetically disposed towards labor, were not discriminating as to their policy or justice.

These reactions have joined many other social forces to produce a flock of statutes. Some of them, however motivated, go far towards enacting Holmes' views of what, if laissez faire is still to be our policy, organized laborers should be free to do to make effectual their desires for economic sunshine, and one provides for an administrative tribunal to serve as guardian of their freedoms.

113 Norris-La Guardia Act, 47 Stat. 70-73 (1932), 29 U. S. C. A. §§ 101-115 (1935) (described infra note 114) with which the following state statutes approach identity in many or some provisions: Colo. Laws 1933, c. 59; Idaho Laws 1933, c. 215; Ind. Laws 1933, c. 12; La. Laws 1934, c. 203; Md. Laws 1935, c. 574; Mass. Acts 1935, c. 407; Minn. Laws 1933, c. 416; N. Y. Laws 1935, cc. 11, 298, 399 and 477 (adding these new sections: Sec. 17 to the Civil Rights Law, Sec. 753-a to the Judiciary Law, and Secs. 882-a and 876-a to the Civil Practice Act; and amending Penal Law § 600 (4) (5); N. D. Laws 1935, c. 247; Ore. Laws 1933, c. 355; Utah Laws 1933, c. 15; Wash. Laws Spec. Sess. 1933, c. 7; Wis. Laws 1931, c. 376. The following statutes with similar objects are less like in form; Ill. Laws 1925, 378, Laws 1933, 588; N. J. Laws 1926, c. 207; Laws 1932, c. 244; Pa. Laws 1931, Acts 310, 311, Laws 1933, Act 219. The following limit injunctions only as to yellow dog contracts: Ariz. Laws 1931, c. 19; Cal. Laws 1933, 1478; Ohio Laws 1931, 562. The following restrict use of injunctions in some respects, without specification as to yellow dog contracts: Me. Laws 1933, c. 261; Wyo. Laws 1933, c. 37.


114 Those of the Norris-LaGuardia Act pattern, among other things, (1) deprive courts of jurisdiction, in cases growing out of labor disputes, to base either legal or equitable relief upon "yellow-dog" contracts, or enjoin participants in a labor dispute (unless for fraud or violence) from publicity about the dispute (by picketing or otherwise) or from urging or causing persons to strike or join a union, "labor disputes" and "participants" being so defined that injunctions against boycotts would seem usually to be precluded; (2) provide that no labor injunction shall issue (unless a temporary restraining order to become void within five days) except on testimony in open court, that appeals from them have priority upon appellate court calendars, and that charges of "indirect criminal contempt" of injunctions be triable by jury.

115 The National Labor Relations Act, supra note 113, empowers a federal board to take effective measures to prevent restriction by employers of workmen's freedom of self organization and right to be represented in collective bargaining by representatives of their own choosing. The Board may investigate (with power
Even if the living Constitution should kill these statutes, judicial inclination towards Holmes' views might be left stronger than it has been. On the other hand, it may be that the labor injunction, and the whole mass of law and statutes clustered about it, will become unimportant, and "industrial relations" be regulated by the new big businesses of industrial espionage and strike breaking, backed by military force.\[^{116}\]

Holmes surely would have been for trial of the new statutory "social experiments that an important part of the community desires", even though they seemed futile or even noxious to him and those whose judgment he most respected.\[^{117}\] Even if proposed new ways of trying to protect life, liberty and property were inconsistent, instead of consistent, with *laissez faire*, he would not for such a reason have thought they should not have their chance. He adhered to that policy only because it seemed to him unlikely that any substitute yet pressed could be effectual to make our conditions less remote from those of an ideal commonwealth.\[^{118}\] He would have granted that conditions as they have been differed only in degree, and that not large, from those of the Hobbesian "state of nature"—a "war of every man against every man" in which, because some carry invasion of others further than their own security requires, if those who "would be glad to be at ease within modest bounds, should not by invasion increase their power, they would not be able, long time, standing only on their own defense, to

of subpoena) questions of domination or interference by employers, and issue (subject to judicial review) cease and desist orders—which are subject to judicial review. The constitutional theory of the Act is that labor disputes affect interstate commerce prejudicially.

\[^{116}\] During the week of April 12, 1936, there was testimony before the sub-committee of the Senate Committee on Education and Labor which is investigating industrial espionage that the income from that source of three private detective agencies has probably amounted to $60,000,000 a year. New Republic, Apr. 22, 1936, at 303. LANDIS, CASES ON LABOR LAW 228-9 n, has an extensive bibliography of this subject, and the use of armed guards and military force in strikes; see also LEVINSON, I BREAK STRIKES—THE TECHNIQUE OF PAUL L. BERCOVE (1935); WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 198-201; Use of Military Force in Domestic Disturbances (1936) 45 YALE L. J. 879.

\[^{117}\] "There is nothing," he said, "that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making" of such experiments. Truax v. Corrigan, 257 U. S. 312, 344, 42 Sup. Ct. 124, 139 (1921). This sentence was qualified by "in the insulated chambers afforded by the several States." The question, however, was of state legislation. Holmes was not unaware of the inadequacy of state boundaries to insulate Michigan from New York printing press factories.

\[^{118}\] "Probableism" was his name for his own philosophy.
subsist". He saw that other policies would inevitably be tried as conditions became intolerable to increasing numbers. And something better might be stumbled on.

We hold no brief for any policy, any statute. We have advocated nothing. Our aim has been to show some main things of a scene of legal history in which a great man held the stage, surrounded by incoherence. We do not maintain that Holmes was right. It may be that no one is, or ever has been. As Holmes knew better than most, there is no science by which the rightness of any best guess of social policy can be tested. That may be the most useful lesson of the scene in which he was hero. Without better social understanding than anyone has ever had, and power informed by it as well by sympathy and prudence, the chance seems slight for anything worth calling "solution" of labor and other problems.

\footnote{Hobbes, Leviathan (1649) Part I, c. xiii.}