than wilful conduct on the part of the employer and the law should recognize that fact by an equality of treatment.

Morals are an evaluation of interests. The wilfulness of the conduct does not reveal the interest which may be involved in any violation of a contract. Even if it did, the employee would still be entitled to as favorable a treatment by the law as is accorded to the wilful employer. The traditional precepts of morality which crystallized in pre-Victorian England can no longer dominate modern America.

In solving the problem of misconduct in the defaulting employee, the fixative quality of doctrine has made wilfulness a preordained category of vice, which facts contradict. Indoctrination has distorted the law if it is to be judged by life. Society is less interested in the preservation of the integrity of contracts and the nature of the obligation which contracts impose, than it is in the social consequences of wilful conduct. Wilful conduct should merit a uniformity of treatment by the law except so far as a diversity of situation between employer and employee dictates penalizing by forfeiture the wanton, reckless and corrupt conduct of the employee in the interest of general morals and social security.

Quite clearly justice demands that the legislature should recognize the fallacy of the doctrine of wilfulness as it is applied by the courts to personal service contracts. Legislation should supplant it by the doctrine of reparation, with specified exceptions. The position of the employer and the employee before the law should be a symbol of equality rather than an historic perversion paraded under the banner of conventional principles of contract.

HOLMES AND LABOR LAW

by

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Abstracted from 13 NEW YORK UNIVERSITY LAW QUARTERLY REVIEW 517, MAY 1936

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.

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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." His 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. *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307 (1888). In that case he said nothing. Perhaps he did not begin to consider the social tendencies of the innovation until *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092 (1895), raised "storms of protest" in which "many thoughtful lawyers joined." The next year, at the end of his dissenting opinion in *Veglahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896), 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.

An intellectual muddle and contrariety of judicial leanings characterized American labor law for many years. 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. 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."

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." *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173 (1919). Holmes' implication that all decisions are grounded upon judgments of public policy was not intended to be strictly accurate. 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 force, or dangerous threat of it, or fraud, or anything else done in a labor dispute was 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.

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 *Vegalahn v. Gunther*, *supra*, 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. But he states in justification:

"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."

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 combine 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 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." *Vegalahn v. Guniner*, *supra*. 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 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.

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 extreme Hamiltonian view of policy. Of course definiteness is impossible 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 assumption 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 satisfactions as well as pains of work and workmanship, and that in this interest the increase of wealth might wisely be retarded. Cases both ways may sometimes have been decided by moral sentiments and traditions. Persons born since Holmes said that he "can remember when many people thought that, apart from violence or breach of contract, strikes were wicked."

It has been shown that Holmes' theory of justification has had impressive recognition in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 42 Sup. Ct. 72, 66 L. Ed. 189 (1921), and by the New York court. 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. Nat. Prot. Assn. v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902). 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." Schwartz & Jaffee v. Hillman, 115 Misc. 61, 189 N.Y.S. 21 (1921).

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.

In view of the Duplex case, 254 U.S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349 (1921), which preceded and the Stonecutters' case, 274 U.S. 37, 47 Sup. Ct. 522, 71 L. Ed. 916 (1926), which followed, it may seem that the Supreme
Court's inclination 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 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, 257 U. S. 312, 42 Sup. Ct. 124, 66 L. Ed. 254 (1921), (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, 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975 (1922). 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. Ind. Assn. of San Francisco v. United States, 268 U. S. 64, 45 Sup. Ct. 403, 69 L. Ed. 809 (1925). 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. Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785 (1923). It emasculated the labor provisions 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. Wolff Packing Company v. Kansas Court of Industrial Relations, 262 U. S. 572, 43 Sup. Ct. 630, 67 L. Ed. 1103 (1923). And its decision in the Stonecutters' case, supra, disturbed even some of those who believed prosperity had firm foundations, and that the new economics of high wages was making inevitably for industrial 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 freedom.
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.

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. 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. 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 for a long time, standing only on their own defense, to subsist." He saw that other policies would inevitably be tried as conditions became intolerable to increasing numbers. And something better might be stumbled on.