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AMERICAN LABOR LAW AND LEGAL FORMALISM: HOW "LEGAL LOGIC" SHAPED AND VITIATED THE RIGHTS OF AMERICAN WORKERS

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INTRODUCTION

The late 19th century was a time of upheaval in labor relations in America, an upheaval which was reflected in, and which ultimately reflected, changes in the legal principles governing the treatment of labor conflicts in the courts. As a comparatively new field of jurisprudence, labor law provided the perfect testing ground for the flowering concept of legal formalism[1]—a view of legal theory that posits that law can be removed from politics by the development of a body of fundamental axioms from which a comprehensive legal system can be generated by a simple logical process.[2]

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[1] *See* Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 251-52 (1975); *see also* K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 303 (1962) (formal style of legal reasoning was dominant from approximately 1885 to 1910).

[2] Legal formalism is rooted in the concept of natural law. Pound, *Liberty of Contract*, 18 YALE L.J. 454, 465-68 (1909). Formalist reasoning relies on fairly specific legal rules established by case law and legislative enactment. *See* Paine, *Instrumentalism v. Formalism: Dissolving the Dichotomy*, 1978 WIS. L. REV. 997, 1007. The formalist model of judicial decisionmaking often is equated with rule application, deductive thinking, and the grouping of particulars into universal categories. *Id.* at 997. Critics of the formalist movement, however, refer to legal formalism as "mechanical" or "slot machine" jurisprudence, *see, e.g.*, T. BECKER, POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE 43 (1967); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 *passim* (1908), because it incorporates the notion that judges can "maximize" a number of conflicting goals through the formulation and mechanical application of rules rather than by resort to a rational decisionmaking process, *see* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 358-59 (1973).

On an abstract and highly simplified level, legal formalism envisions a complex and all-inclusive system of mutually exclusive legal rights around which unambiguous and impermeable boundaries may be drawn and within which the individual holding the superior right has complete freedom of action.[3] While judges were applying the logic of this concept in a variety of legal fields, they faced problems posed by centuries-old glosses and qualifications which had been placed on constructions of traditional rights.[4] Thus, in the field that should have been paradigmatically capable of formalist treatment—real property law, in which the settlement of physical boundaries provided a metaphor for the formalist construct—principles such as nuisance, dangerous uses, and prescriptive easements rendered difficult an unambiguous statement of rights.[5]

The field of labor relations was different. With the increasing frequency, importance, and violence of labor conflict subsequent to the Civil War, courts were confronted with what amounted to an almost entirely new field of law. Although there had been strikes prior to the Civil War, they were less frequent and involved fewer people than did those occurring in the latter part of the 19th century. At the same time, the primary legal device used to deal with the infrequent pre-Civil War strikes—criminal conspiracy indictments—fell into judicial disfavor.[6] The situation called for a neat,

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[3] *See, e.g.*, Goodard v. Winchell, 86 Iowa 71, 85, 52 N.W. 1124, 1125 (1892) (finder of lost property has a paramount right to possession as against everyone except true owner).

[4] *See, e.g.*, Marker v. Hanratty, 29 Del. (6 Boyce) 217, 218, 97 A. 904, 904 (Del. Super. Ct. 1916) (right to be free of unlawful bodily interference is qualified by right to defend oneself); *In re* Steinway, 159 N.Y. 250, 262-63, 53 N.E. 1103, 1107 (1899) (right of shareholder to inspect corporate books subject to qualification that inspection be sought at proper time and for proper purpose).

[5] *See, e.g.*, Hohfeld, *Faulty Analysis in Easement and License Cases*, 27 YALE L.J. 66, 69 n.8, 70 (1917) (difficulty in classifying legal principles in the field of real property law lies in the nature of the property interests involved since such interests are composed of a complex aggregate of rights, principles, and immunities). Formalist scholars did not consider nuisance, dangerous uses, prescriptive easements, and similar principles as posing a substantive challenge to the formalist model. Rather, such principles were taken to represent a simple *refinement* of the definition of property rights. Still, the existence of these qualifications made elegant formulations of the "absolute" rights of property difficult.

[6] R. WYKSTRA & E. STEVENS, LABOR LAW AND PUBLIC POLICY 46 (1970). The pre-Civil War courts generally followed the English common-law rule that combined action on the part of organized laborers was an illegal conspiracy. *Id.* at 34. Under the conspiracy doctrine, any action by a labor union that affected an employer's business was illegal, even where the act would have been legal had it been done by an individual. *Id.* For a comprehensive account of the conspiracy trials, see J. COMMONS & J. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 101-12 (1916), and Witte, *Early American Labor Cases*, 35 YALE L.J. 825,

definite, objective, and apolitical solution, and hence provided an opportunity to prove the viability and worth of a system of formal legal logic. If it could be shown that the complex and emotion-laden issues arising in labor disputes could be pared to an exercise in definition of rights, so that no lawful conflict could exist, it would have given powerful support to the contention that the effort to reduce law to a comprehensive system of definitions and rules of logic was both successful and useful. Complex common-law qualifications of rights would have remained, but new impetus would have been given to the effort to include such qualifications in a harmonious system of rights.

The judiciary's attempt to create a rhetoric of neutrality, couching labor decisions as applications of universal principles, may also have served an independent political function.[7] Indeed, it is possible that a successful appearance of judicial neutrality in rendering decisions that crippled working class organization in some of its most effective manifestations could have been a valua-

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825-28 (1926). However, as early as 1842, the Massachusetts courts rejected the conspiracy analysis of strikes. *See, e.g.*, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 136 (1842); *see* Witte, *supra*, at 827-28. In *Hunt*, the Supreme Judicial Court of Massachusetts held that the mere formation of a union and the refusal to work for an employer who fired nonmembers was not illegal. 45 Mass. (4 Met.) at 136.

After the Civil War, as increasing numbers of workers organized, labor conflict became more pervasive and, on occasion, more violent. *See* P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 69 (1964). For example, during the Railway Strike of 1877, labor had its first clash with the militia. R. WYKSTRA & E. STEVENS, *supra*, at 47. Also occurring in the late 19th century was a strike that resulted in the closing of the Pennsylvania coal mines for more than 6 months, *see* M. BEARD, A SHORT HISTORY OF THE AMERICAN LABOR MOVEMENT 82 (1920), and the rise of a secret society called the Molly Maguires, which allegedly was responsible for many violent riots in the anthracite coal regions, *see* P. TAFT, *supra*, at 73. Violent strikes were not limited to Pennsylvania. There also were the Haymarket Riots in Chicago, where more than 12 people were killed, and seven death sentences imposed. R. WYKSTRA & E. STEVENS, *supra*, at 47; *see also* S. ORTH, THE ARMIES OF LABOR 82 (1919) (nearly 500 labor disputes occurred in first months of 1886); P. TAFT, *supra*, at 79-80 (disputes with Erie Railroad caused strikes in New York); B. TAYLOR & F. WITNEY, LABOR RELATIONS LAW 26 (1983) (increased violence resulted from employer's practice of hiring strikebreakers).

At the same time that labor conflict was becoming more acute in the 19th century, the conspiracy doctrine was being applied with decreasing frequency. R. WYKSTRA & E. STEVENS, *supra*, at 45. In its place, courts began to employ an alternative means of controlling strikes—the injunction. C. GREGORY & H. KATZ, LABOR AND THE LAW 30 (1979). *See generally* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 17-46 (1930) (exposition on the early use of the injunction in labor disputes).

[7] *See, e.g.*, Vegelahn v. Guntner, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (Holmes, J., dissenting); *see* Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779, 783 (1918) (decisions to grant injunctions in labor cases result from policy considerations rather than deductive reasoning).

ble political tool for the conservative opponents of such organizations, who could claim that "the law" as enunciated applies equally to all.[8] How effective the attempts at neutrality were at serving the political goal is beyond the scope of this Article. It is suggested, however, that the repeated efforts by some courts to assert the rights of workers in the abstract, while negating them in the particular, indicates that at least some judges were concerned not only with their ultimate conclusions, but also with the political ramifications of their decisions.[9] In addition, the readiness of subsequent courts to accept the rules enunciated in these cases, even when rejecting their logic, indicates some success by the prior judges in making their blatantly political decisions appear to be supported by sound legal reasoning.[10]

The effort made in a variety of state courts to develop universal harmonizing principles for deciding labor cases ultimately proved unsuccessful. As will be demonstrated, numerous courts employed different methods in an attempt to develop the rules from which legal decisions would follow.[11] These rules, however, were undermined by one of two inherent flaws. Either the rules degenerated into mere locutions which appeared on their face to be statements of general decision rules, but which were unintelligible except as statements of conclusion, or they were intelligible, but only could be justified by reference to the same political goals that legal formalism was intended to eliminate from judicial reasoning.

In formulating these rules, the courts developed a menu of techniques for dealing with conflicts between rights and interests

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[8] Anatole France's satiric comment on the economics of equality underscores the absurdity of arguments that the law applies equally to all: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." J. COURNOS, A MODERN PLUTARCH 27 (1928).

[9] *See, e.g.*, Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 308 Ill. 488, 496, 139 N.E. 887, 890 (1923) (conceding that the union had rights, but holding the employer's rights superior).

[10] *See, e.g.*, Ossey v. Retail Clerks' Union, 326 Ill. 405, 416-17, 158 N.E. 162, 166 (1927); Heitkemper v. Central Labor Council, 99 Or. 1, 24, 192 P. 765, 772 (1920). In *Ossey*, the Supreme Court of Illinois relied on the United States Supreme Court decision in American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921), and held that picketing, when accompanied by threats, intimidation, or interference with the business of the employer, was illegal. 326 Ill. at 416-17, 158 N.E. at 166. The *American Steel* Court relied in part on an earlier Illinois case, in which the Illinois Supreme Court, after first making a factual finding that the actions of the union were malicious, held that the union's picketing activities were unlawful. *See* A.R. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 435-37, 83 N.E. 940, 944-45 (1908).

[11] *See infra* notes 13-15 and accompanying text.

that, as asserted, were irreconcilable. The menu appeared to constitute a list of decisional rules, but in fact simply provided verbal descriptions of predetermined results. Though the formulas represent different approaches to the same problem, each can be viewed as a way in which courts unsuccessfully attempted to deal with the central problem of the classical legal model—the development of self-executing definitions of the rights of parties.

Described very broadly, there appear to have been three chief categories of formulaic solutions to the problem of defining fully complementary[12] and mutually exclusive rights. The simplest solution was for the court flatly to define the rights of one party to the dispute and to couple that with an unarticulated assumption that the rights of the opposing party were perfectly complementary.[13] A second solution was to apply apparently factual standards which in truth were circular definitions of legal conclusions.[14] The third, and most complex, solution involved the court in a process of factually distinguishing different kinds of labor activity. Such distinctions, however, were of greater political import than they were of legal significance. Having drawn the line, courts then proceeded to retract from the political/legal analysis to now meaningless "factual" findings. In other words, the third solution converged on the second; what initially were real but legally indefensible factual distinctions became legal conclusions comprised of circular definitions.[15] Though each of these contrived formulas had a pure form, which clearly was distinguishable from the other two, over the years each formula tended to blend imperceptibly into the others.

The significance of examining the interplay of legal formalism and labor law of the 19th and early 20th centuries lies in the fact that the formulaic concepts that developed continue to be reflected in much of labor law in 1983.[16] The indefensible distinctions and

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[12] The term "complementary" is used in this Article in a geometric sense—rights are complementary if they cannot overlap, but together constitute a whole.

[13] *See, e.g., infra* notes 87-124 and accompanying text; *see also* State v. Glidden, 55 Conn. 46, 72, 8 A. 890, 894 (1887) (since the rights of the employer and the worker cannot coexist, the rights of the worker must yield); Delz v. Winfree, 80 Tex. 400, 405, 16 S.W. 111, 112 (1891) (although defendants may be acting in the lawful exercise of some distinct right, they may be subject to a superior right).

[14] *See infra* notes 134-96.

[15] *See infra* notes 197-307 and accompanying text; *see also* Lehigh Structural Steel Co. v. Atlantic Smelting & Ref. Works, 92 N.J. Eq. 131, 143, 111 A. 376, 381 (Ch. Ct. 1920) (sympathy strike organized to establish a closed shop unlawful, since such a strike would not directly benefit workers).

[16] Treatment of the following issues is illustrative of the manifestation of legal formal-

definitions that progressively were revealed to rest on inadequate foundations from the 1870's through the 1940's have become reified and accepted by modern labor law practitioners as standards in their trade. For example, nearly 50 years after the passage of the Norris-LaGuardia Act[17] supposedly marked a watershed for American trade unionism,[18] unionized workers are still being victimized by 19th-century judicial manipulations of the empty concept of freedom of contract, by which the judiciary created extensive rights in employers to the detriment of unions that desired to engage in recognitional picketing.[19] The rules that the 19th-century judges created were political then, and are political now. Then, they were falsely legitimized as "logic"; now they are legitimized as "precedent."[20] Thus, the superstructure of rules remains, long after

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ism in modern labor law: the distinction between primary and secondary activity, *see, e.g.*, NLRB v. International Longshoremen's Ass'n, 447 U.S. 490, 511 (1980) (union rules mandating that union labor handle containers on ships valid only if rules are designed to preserve traditional longshoreman's work); Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 635 (1975) (agreement between union and general contractors providing that subcontracting work only be given to firms that employ union labor may be the basis of federal antitrust suit as potential restraint on competition); the ill-defined bargaining position of supervisors who also are union members, *see* Florida Power & Light Co. v. International Bhd. of Elec. Workers Local 641, 417 U.S. 790, 812 n.22 (1974) (supervisors face "something of a dilemma," since choice to support either management or labor is likely to appear disloyal to side not chosen); and the common treatment by arbitrators of "management rights" clauses in collective-bargaining agreements as preserving management's common-law right to complete freedom of business operation, except as explicitly limited by statute or contract, *see, e.g.*, Cleveland Newspaper Publishers Ass'n, 51 Lab. Arb. (BNA) 1174, 1181 (1969) (Dworkin, Arb.) ("[w]hen a collective bargaining agreement is entered into, . . . managerial rights are given up only to the extent evidenced in the agreement"); National Lead Co., 43 Lab. Arb. (BNA) 1025, 1027-28 (1964) (Larkin, Arb.) ("[c]ompany does not have to bargain with the Union to get 'rights' which are inherent in the management function; but it may relinquish certain of those rights in the course of bargaining with the Union"). In each of these instances, the categories and logic of formalism continue to dominate legal discussion.

[17] Ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1976)).

[18] *See* R. WYKSTRA & E. STEVENS, *supra* note 6, at 109.

[19] Recognitional picketing is designed to force an employer to bargain with a union with which the employer has no current relationship. The concept of recognitional picketing generally was not accepted at common law. *See* C. GREGORY, LABOR AND THE LAW 142 (2d rev. ed. 1961). This lack of acceptance is "not surprising in view of the reluctance of most courts to concede that peaceful picketing even by strikers was lawful." *Id.* Congress, apparently influenced by the common-law rule, enacted limitations on recognitional picketing. *See* International Hod Carriers Bldg. & Common Laborers Union Local 840, 135 N.L.R.B. 1153, 1156-58 (1962). *See generally* Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78, 79-82 (1962) (discussion of Legislature's intent in enacting ban on recognitional picketing).

[20] *See* Republic Steel Corp. v. United Mine Workers, 570 F.2d 467, 470-74 (3d Cir. 1978) (tracing development of national labor policy).

their so-called "logical" foundations have been weathered away.

This Article suggests that, at a minimum, modern labor law should be reexamined in light of its tainted origins. The Article will trace the application of legal formalistic thought to labor law from the 1870's through the 1940's, focusing on the labor law of Massachusetts and Illinois, since both states were fairly industrialized by the late 19th century, and each had an active labor movement that generated a substantial amount of legal activity.[21] Beyond that, the Massachusetts court, and in particular Justice Holmes, who had a special interest in labor matters, was an almost inevitable choice, whereas Illinois presented an interesting contrast precisely because of its lack of legal luminaries.

There are two writers whose works are instrumental to the analysis of this Article—Oliver Wendell Holmes and Wesley Hohfeld. The brooding omnipresence of Holmes looms over any discussion of American legal developments in the late 19th and early 20th centuries.[22] Holmes turned his guns on contemporary thought to the field of labor law in an article entitled *Privilege, Malice, and Intent*,[23] and in a noteworthy dissent in *Vegelahn v. Guntner*,[24] incisively exposing the illogic of its underpinnings.[25] In *Privilege, Malice, and Intent*, Holmes contended that while the question of what kind of economically damaging behavior should be privileged is an issue to be addressed by the legislature, it nevertheless is an inquiry into which courts sometimes stray of necessity, yet fail both to acknowledge the political motivations involved and to subject the questions to rigorous analysis. Justice Holmes remarked:

> But whether, and how far, a privilege shall be allowed is a

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[21] *See, e.g.*, A.R. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 431-35, 83 N.E. 940, 943-45 (1908); Plant v. Woods, 176 Mass. 492, 503-04, 57 N.E. 1011, 1015 (1900); Commonwealth v. Perry, 155 Mass. 117, 121-22, 28 N.E. 1126, 1127 (1891).

[22] *See* D. BURTON, OLIVER WENDELL HOLMES, JR. 76-82 (1980). A number of cases involving labor-management conflicts occurred while Holmes was serving on the Supreme Judicial Court of Massachusetts. Justice Holmes usually dissented in these cases. *See, e.g., Plant*, 176 Mass. at 504, 57 N.E. at 1015 (Holmes, C.J., dissenting); *Vegelahn*, 167 Mass. at 104, 44 N.E. at 1079 (Holmes, J., dissenting). Indeed, the only majority opinion in which Justice Holmes took part was one that he authored. *See* Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N.E. 766 (1889). In *Ryalls*, Holmes construed the employers' liability act to be an expansion of an employer's common-law liability rather than a limitation on an employee's right to recover. *Id.* at 195-96, 22 N.E. at 767-68.

[23] Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

[24] 167 Mass. 92, 104-09, 44 N.E. 1077, 1079-82 (1896) (Holmes, J., dissenting).

[25] *See* D. BURTON, *supra* note 22, at 85.

> question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.[26]

In his forays into labor law, Holmes was only making particular the general theme of much of his work during the period—that policy decisions play a major role in the development of law, and that judges and lawyers therefore should stop concealing their policy arguments and decisions behind a facade of politically-neutral formal logic.[27]

Holmes' treatment of labor law marked a major step away from the self-imposed blindness of the truly formal analysis of the conflict of rights in labor relations. Widely read, quoted, and renounced, both *Privilege* and *Vegelahn* form the backdrop against which much of this Article must be viewed.

Wesley Hohfeld's major work, *Some Fundamental Legal Con-*

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[26] Holmes, *supra* note 23, at 3.

[27] Justice Holmes remarked:

> In England, it is lawful for merchants to combine to offer unprofitably low rates and a rebate to shippers for the purpose of preventing the plaintiff from becoming a competitor, as he has a right to do . . . . But it seems to be unlawful for the officer of a trade union to order the members not to work for a man if he supplies goods to the plaintiff, for the purpose of forcing the plaintiff to abstain from doing what he has a right to do.
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> . . . It might be said that the [union] defendants were free not to contract, but that they had no right to advise or persuade the contractors who would have dealt with the plaintiff not to do so, and that, by communicating the union's willingness to deal with the contractors, if they would not deal with the plaintiff, the defendants were using such persuasion. But if this refinement is not a roundabout denial of the freedom not to contract, . . . the same mode of reasoning could be used in the cases where the defendant escapes. The ground of decision really 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.

Id. at 7-8 (footnote omitted); *see* J. HURST, JUSTICE HOLMES ON LEGAL HISTORY 94-101 (1964).

ceptions as Applied in Judicial Reasoning,[28] was written some years after *Privilege* and *Vegelahn*, at a time when sociological jurisprudence was in full swing. Hohfeld's work has been viewed as an example of systemization run riot.[29] Although he was a participant in the liberal attack on legal formalism, Hohfeld was not content simply to write about the functions of law and the necessity for a "sociological jurisprudence." Rather, he was interested in showing that the legal logicians were unsuccessful on their own terms—logic—and in providing an alternative logical structure that could be used as the basis for a new, more rational jurisprudence.[30] His basic insight can be exemplified in a chart, which expresses his conception of logical relations in the law:

Jural opposites	right	privilege	power	immunity
	no-right	duty	disability	liability
Jural correlatives	right	privilege	power	immunity
	duty	no-right	liability	disability[31]

Hohfeld's work is, to some extent, a period piece, but it remains a useful way of organizing legal conclusions.[32] More importantly, it provides a useful method of examining cases written in a formal mode precisely because it is written in similar terms and reflects much the same concern for system, rules, and logic. Hohfeld's work provides a standard against which formalism properly can be judged.[33]

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[28] Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[29] *Cf.* Husik, *Hohfeld's Jurisprudence*, 72 U. PA. L. REV. 263, 273-74 (1924) (Hohfeld's terminology not helpful in the practical solution of legal problems).

[30] *See, e.g.*, Hohfeld, *supra* note 28, at 59. In one subsection, Hohfeld criticizes the assumption that all legal relations may be reduced to "rights" and "duties," and that simple categories are sufficient to analyze even the most complex legal issues. *Id.* at 28-58. He primarily was concerned with the importance of precise usage of such terms in judicial decisions. *See id.* at 30-31.

[31] *Id.* at 30. Jural correlatives describe the relative position of different parties. Thus, if *A* has a right, some *B* or every *B* has a duty. Jural opposites describe opposite experiences or positions of a single party. If *A* has a right, some *B* or every *B* has a "no-right" in relation to *A*. Hohfeld refers to eight concepts—rights and duties, privileges and no-rights, powers and liabilities, immunities and disabilities—as "the lowest common denominators of the law." *Id.* at 58.

[32] Hohfeld's categories have been used in the definitional sections of the Restatement of the Law of Contracts and the Restatement of the Law of Property. *See* RESTATEMENT OF PROPERTY §§ 1-10 (1936); *Introduction* to RESTATEMENT OF CONTRACTS at xiii (1932).

[33] Another work that greatly influenced this Article is Walter Wheeler Cook's *Privileges of Labor Unions in the Struggle for Life*. *See* Cook, *supra* note 7, at 779. Cook's work

RIGHTS VS. NO-RIGHTS

The establishment of physical boundaries between parcels of land previously was used as a metaphor for a formalist conception of legal rights.[34] The image is of a system of mutually-exclusive rights that can no more "conflict" than can tracts of land separated by clearly marked fences. People may stray onto other people's rights as they may onto their neighbor's property, but either act clearly would be a legal wrong. Each of the argumentative techniques discussed in this Article can be viewed as an attempt to operationalize this construct, to supply the workings for the complicated machinery of social interaction under a regime of self-contained rights.

The cases in this section illustrate two ways in which the courts avoided acknowledging even the possibility that conflicting interests might create conflicts between "rights." The first is the pervasive confusion of Hohfeldian "privileges" and "rights." The distinction between privileges, actions that a party legally may take, and rights, actions that give rise to a positive duty on the part of another, should have been central to a formal analysis. Judges, however, repeatedly progressed from stating a party's privilege, for example, the privilege to do business, to concluding that the very existence of that privilege gave rise to a correlative duty, such as the "duty not to picket" a business.[35]

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provides an extremely effective example of how labor cases can be analyzed from both a political and a logical viewpoint in terms similar to those employed in this Article.

[34] *See supra* note 5 and accompanying text.

[35] Hohfeld, *supra* note 28, at 33. Noting the broad, indiscriminate use of the words "right" and "privilege" in judicial opinions, Hohfeld reasoned that such ambiguity of terminology impeded a clear understanding of legal relations and hindered the expeditious solution of legal conflicts. *Id.* In order to eliminate these obstructions, the meanings and applications of the terms "right," one's affirmative claim against another, and "privilege," one's freedom from the right or claim of another, must be separated and refined. *Id.* As a means of achieving this terminological reform, Hohfeld urged recognition of the correlatives and opposites of the two terms. *Id.* at 30-33; *see supra* text accompanying note 31. A right, Hohfeld contended, is the opposite of a "no-right" and the correlative of a "duty," while a privilege is the opposite of a "duty" and the correlative of a "no-right." Hohfeld, *supra* note 28, at 30. To demonstrate the significance of the distinction between the terms "privilege" and "freedom," Hohfeld offered the following illustration:

> Suppose that X, being already the legal owner of the salad, contracts with Y that he (X) will never eat this particular food. With A, B, C, D and others no such contract has been made. One of the relations now existing between X and Y is, as a consequence, fundamentally different from the relation between X and A. As regards Y, X has no privilege of eating the salad; but as regards either A or any of the others, X has such a privilege.

The second means of ignoring conflicting potential rights was to ignore the claims of the losing party, which usually was the union. The court typically began by defining the employer's "rights," often confusing them with privileges, and then treating the outcome as determined by that single definition, paying no heed to the claim of the losing party that it also had interests that gave it rights, privileges, or immunities. As a means of analysis, this had the advantage of allowing the courts to avoid considering the fact that the claimed rights of each party often were incompatible, yet equally plausible if analyzed in isolation. For example, a court examining the right of an employer to hire freely in the marketplace, and a union's correlative duty not to disseminate information regarding an ongoing dispute between it and the employer, could ignore the conflicting right of potential employees to be aware of such a dispute and an employer's correlative duty not to interfere with the dissemination of information, or even a duty on the employer to inform scabs that they were being hired as such. Moving with excessive ease from a Hohfeldian privilege to a Hohfeldian right, and then concluding the analysis, effectively excused the courts from dealing with the problem of incompatible legal relationships.

The courts did not, however, always attempt simply to disregard potentially conflicting rights. At times they addressed potential conflicts in a more straightforward manner by defining them away. They accomplished this either by redefining the rights of the winning party or by relegating the rights of the losing party to some lower status, such as a "privilege," an "interest," or the like. Sometimes this was a matter simply of employing adjectives—the winner's rights were "absolute," "fundamental," or "constitutional." At other times, the technique had a more substantive appearance, as the courts attempted to hone the definition of the winner's rights, rather than simply to use new adjectives to describe them. Thus, at different times the rights of employers were described in terms of the right to a free flow of labor, the right to employ workmen in business or service, the right to make reasonable contracts, and more. In any case, the loser was likely to be described as having something other than, and of less importance

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Id. at 35-36. In effect, with respect to *A*, *X* is under no duty to eat the salad, and *A* has no right to force him to do so. On the other hand, *Y*'s right to prevent *X* from eating the salad gives rise to *X*'s duty not to eat it and takes away *X*'s right to eat it. *Id.*

than, a "right."

Winners and Losers in Massachusetts: Rights and Privileges of the Parties

In 1870, the Supreme Judicial Court of Massachusetts first addressed the concept of conflicting legal relationships in the labor context. In *Carew v. Rutherford*,[36] an employer was fined by a union for allegedly violating the union's bylaws.[37] The employer sued the union in tort and for restitution of the fine.[38] In holding for the employer, the court observed that "[e]very man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can."[39] This statement illustrates the first technique described above. The employer's "right to determine what branch of business he will pursue" is a classic Hohfeldian privilege.[40] In creating a

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[36] 106 Mass. 1 (1870).

[37] *Id.* at 9. The employer in *Carew* had contracted to provide cut stone to builders in the Boston area. *Id.* at 8. Most of the work force belonged to the Journeymen Freestone Cutters' Association of Boston (the Association). *Id.* The bylaws of the Association provided that the "association will not allow any ornamental work of any kind to be taken from one yard to another, or any other place, to be cut or finished . . . ." *Id.* at 6 n.* (art. 24). Carew nevertheless sent stone to New York to be finished, *id.* at 9, and, as a result, the Association voted to fine Carew $500 for violating the bylaws, *id.* at 8. When Carew refused to pay, 12 stonecutters went on strike. *Id.* at 9. In order to fulfill his contract, Carew was forced to pay the fine. *Id.*

[38] *Id.* at 8. In the tort count, Carew alleged that the Association, by "conspiring and confederating together," had extorted the money from him. *Id.*

[39] *Id.* at 14. The court found it unnecessary to decide whether the relief was granted to remedy the tort of "disturbing a man in the exercise of his rights and privileges, or to recover back money tortiously obtained." *Id.* at 13. The court noted, however, that although "[f]reedom is the policy of this country," *id.* at 15, no one has a right to band together to "disturb or annoy" others, *id.* Thus, the court concluded that the union's practices "would tend to establish a tyranny of irresponsible persons over labor" and therefore were illegal. *Id.*

[40] *See* Hohfeld, *supra* note 28, at 33. *See generally* Corbin, *Legal Analysis and Terminology*, in READINGS IN JURISPRUDENCE 471, 476-80 (J. Hall ed. 1938) (formal definitions of Hohfeldian concepts) (revised reprint of Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919)) [hereinafter cited as *Legal Analysis*].

Using "right" in the generic sense, *see* Hohfeld, *supra* note 28, at 31 & n.29, it has been stated that "a person living under our Constitution has the *right* to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit," People v. Gillson, 109 N.Y. 389, 398, 17 N.E. 343, 345 (1888) (emphasis added). This generic right, or Hohfeldian privilege, is "subject only to such restraints as are necessary for the common welfare." 109 N.Y. at 398-99, 17 N.E. at 345; *see also* Holmes, *supra* note 23, at 3 (question of how far a privilege should be extended is a policy question). Thus, Justice Holmes observed that "a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established

right for the employer, the court recognized a duty on the part of the union not to interfere in any way with the employer's business. Courts, however, were not ready to recognize a general duty of noninterference with the employer's privilege.[41] Indeed, the *Carew* court noted that people have the right "to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions."[42] At most, the "right" asserted in *Carew* was a limited one, giving rise to a very narrowly defined duty, and hardly could bear the burden of mandating, as if by logical necessity, that the union had a duty not to enforce its bylaws.[43] Indeed, under Hohfeld's scheme a right and a duty must be defined together;[44] stating a "right" without recognizing that it exists only in relation to duties was certain to create a situation like that in *Carew,* in which there was, in fact, no logical connection between the enunciated right and the holding derived from it.[45]

The following year, in *Walker v. Cronin,*[46] the Massachusetts court held that a union could be liable in tort for inducing union members to leave the employer when he refused to contract with the union.[47] By acknowledging that the employer had no right to

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there already." Holmes, *supra* note 23, at 3. The impetus for this privilege "rests on the economic postulate that free competition is worth more to society than it costs." *Id.*

[41] *See, e.g.*, Bowen v. Matheson, 96 Mass. (14 Allen) 499, 503-04 (1867). In *Bowen*, the Massachusetts court held that a union, as long as it did not act in an illegal manner, may form and compete, even if the resulting competition is destructive to existing business. *Id.* at 502-03. Justice Holmes' example of the shopkeeper's rights, *see* Holmes, *supra* note 23, at 3; *supra* note 40, illustrated why the court may have been reluctant to declare a broad right to do business, since that "right" was, at a minimum, limited by the identical right of business competitors.

[42] *Carew*, 106 Mass. at 14.

[43] *Cf.* Holmes, *supra* note 23, at 3-4 (discussing rights and privileges of employers).

[44] *See* Hohfeld, *supra* note 28, at 30-32.

[45] *See id.* at 31 ("even those who use the word and the conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative"). To the extent that the Association's rules might be analogized to an effort to establish an exclusive relationship between Carew and the Association, it is worth noting that contracts for exclusive dealing were enforceable in other contexts. *See, e.g.*, Carter-Crume Co. v. Peurrung, 86 F. 439, 442 (6th Cir. 1898) (contract with independent manufacturer for its entire output not an illegal restraint of trade); New York Trap Rock Co. v. Brown, 61 N.J.L. 536, 536, 43 A. 100, 100-01 (1898) (per curiam) (contract for exclusive sales agency is valid); *see* Meyer v. Estes, 164 Mass. 457, 464, 41 N.E. 683, 685-86 (1895) (contract restricting purchaser of certain electrotype plates from selling plates or reproducing them is valid restraint of trade, given nature of property, although contract effectively creates copyright on material that could not be copyrighted under statute).

[46] 107 Mass. 555 (1871).

[47] *Id.* at 567-68. The defendants in *Walker* allegedly were interfering with the plaintiff's

compel the employees to continue working for him, the court uncovered the troublesome problem that the plaintiff had no more than a privilege to employ the workers.[48] The court, however, avoided the dilemma by concluding that the union did not have a right to dissuade workers from contracting with the employer—which under Hohfeld's scheme does correlate with privilege[49]—and distinguished *Walker* from the case in which a defendant interferes with another's business to protect its own legal rights, such as the "right" to competition.[50] In essence, the court concluded that the union's "no-right" to interfere with the employer's privilege rendered the union's actions illegal. Rather than formulating its conclusion by applying this logic, however, the court used the following analogy to describe the interest of an employer in being protected from union action:

> One may dig upon his own land for water, . . . although he thereby cuts off the supply of water from his neighbor's well. . . . But the rights of the owner of land being absolute therein, and the adjoining proprietor having no legal right to such a supply of water from lands of another, the superior right must prevail.[51]

The court concluded that "[e]very one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance."[52]

Both conflict-resolution techniques were at work in *Walker*. The right to employ people initially is acknowledged as a privilege that is limited by the privileges of competitors, as is the "right to enjoy the fruits and advantages of [one's] own enterprise, industry,

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shoe and boot business by inducing and coercing the plaintiff's employees to refuse to work or to work negligently. *Id.* at 562.

[48] *Id.* at 563-64. Under Hohfeldian analysis, if the employer had a right to employ workers, there would be a corresponding duty in someone to be his employee. *See* Hohfeld, *supra* note 28, at 28-32.

[49] *See* Hohfeld, *supra* note 28, at 30; *supra* note 35.

[50] 107 Mass. at 564. The court observed that "every one has an equal right to employ workmen in his business or service; and if, by the exercise of this right in such manner as he may see fit, persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists . . . ." *Id.* at 563.

[51] *Id.* at 564 (citing Greenleaf v. Francis, 35 Mass. (18 Pick.) 117, 121-22 (1836)). *Greenleaf* is the first case in the United States to hold that an owner of land has an absolute right, rather than merely a superior right, as to his neighbor in the use of his own land. Frazier v. Brown, 12 Ohio St. 294, 305 (1861).

[52] 107 Mass. at 564.

skill and credit."[53] Using the water rights analogy, however, the court determined that the union, like an adjacent landowner, had a *duty* of noninterference.[54] Thus, the court found that with respect to the union, the employer had a *right*, not a privilege.[55] At the same time, the union's plausible *right* to bargain with an employer that employs union workers and the employer's asserted duty to bargain with the union and respect a contract so negotiated was not explicitly rejected by the court; it simply was lost to view. The court thus started with a plaintiff's *privilege*, analogized the *defendant* to other parties that owed a *duty*, and then generated a new plaintiff's *right* out of the defendant's analogized duty. It accomplished this in part by introducing a conclusory finding of malice on the part of the union, although the reported decision does not indicate any evidence of malice as a factual matter. In fact, the union's malice apparently consisted simply of interfering with the employer's "right."[56]

The problem of conflicting rights was neatly avoided in *Commonwealth v. Perry*.[57] The *Perry* court struck down as unconstitutional a statute forbidding employers of weavers to fine or to withhold wages because of imperfections in the finished cloth,[58] noting:

> There are certain fundamental rights of every citizen which are

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[53] *See id.*

[54] *See id.* The *Walker* court asserted that the employer's right to labor is a "superior" right, much like the right of a landowner to use his property as he wishes. *See id.* An adjacent landowner has a right to use his own property, but cannot interfere with the superior right of a neighbor to use his property. *Id.* A labor union, according to the *Walker* court, is similar to the adjacent landowner; although the union has rights, it cannot interfere with the superior rights of the employer. *See id.*

[55] *See id.*

[56] *See id.* at 562.

[57] 155 Mass. 117, 28 N.E. 1126 (1891).

[58] *Id.* at 121-22, 28 N.E. at 1127. The statute at issue in *Perry* prohibited employers from refusing to pay employee-weavers who damaged cloth by "negligence or want of skill." *Id.* at 120, 28 N.E. at 1126. The court found that to compel an employer to pay for "inferior work" would violate the contract clause of the Constitution, *id.* at 121, 28 N.E. at 1126-27, which "provides, among other things, that no state shall pass 'any law impairing the obligation of contracts,'" *id.* at 121, 28 N.E. at 1127 (quoting U.S. CONST. art. I, § 10, cl. 1). Thus the employer was deemed to possess a constitutional right to employ and to contract with employees of his choice. 155 Mass. at 121-22, 28 N.E. at 1127.

In his dissent, Justice Holmes contended that the statute should be upheld, noting that "the legislature could deprive the employers of an honest tool which they were using for a dishonest purpose . . . ." *Id.* (Holmes, J., dissenting). Justice Holmes reasoned that the statute must have been based on a legislative determination that weavers "often were cheated out of a part of their wages under a false pretense," and he was unwilling to substitute the judgment of the court for that of the legislature. *Id.*

> recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void . . . . The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. . . . The right to employ weavers, and to make proper contracts with them, is therefore protected by our constitution . . . . If [the statute] be held to forbid the making of such contracts, . . . it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guarantees to every one . . . .[59]

In *Perry*, the employer's Hohfeldian "right" is inferred from the existence of a constitutional *immunity* against government interference.[60] This miscategorization, however, is not as significant as the court's ignoring the interests of the losing parties. In both *Carew* and *Walker*, at least, the workers were discussed by the court.[61] In *Perry*, however, the weavers and any rights which they might have had played no part in the court's decision. The "fundamental right" to make "reasonable and proper" contracts that are "protected by our constitution" actually defined the no-rights of the weavers.[62] Had the weavers' interest in being paid been consid-

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[59] 155 Mass. at 121-22, 28 N.E. at 1126-27.

[60] *See* Hohfeld, *supra* note 28, at 55-58. According to Hohfeld, "an immunity is one's freedom from the legal power or 'control' of another as regards some legal relation." *Id.* at 55. In *Perry*, therefore, the court, in asserting that an employer could refuse to pay an employee for inferior work, assumed the existence of an immunity, not a right. *See* 155 Mass. at 121-22, 28 N.E. at 1126-27; Hohfeld, *supra* note 28, at 55-58. If the employer's absence of obligation was viewed as a Hohfeldian right of nonpayment, a correlative duty on the part of the employee necessarily would exist. Hohfeld, *supra* note 28, at 31. Yet the employee's inability to collect payment cannot properly be described as a duty; instead, it may be said that the employee was under a disability, the correlative of immunity. *See id.* at 55; Goble, *A Redefinition of Basic Legal Terms*, 35 COLUM. L. REV. 535, 537-38 (1935).

[61] In *Carew*, the court stated that employees had rights concurrent with those of employers. *See* 106 Mass. at 14-15. The rights enumerated in *Carew* included the right to determine one's occupation, the right to contract freely with others or to refuse to contract with any person or class of persons to further one's own advantage, the right to form associations to insist on certain wages and conditions, and the right to refuse to work for certain persons or classes of persons. *Id.* at 14. The *Walker* court, in countering the employer's claim of a violation of his rights, acknowledged cases in which employees were "acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts, except so far as they were in violation of a superior right in another." 107 Mass. at 563.

[62] *See* 155 Mass. at 121, 28 N.E. at 1126-27. The court virtually ignored the corresponding rights of employer and employee to receive the performance bargained for and to receive payment for that performance. Instead, the court focused on the employer's general rights to secure property and to make reasonable and proper contracts, which effectively raised the

ered to result in a *right* to be paid and had the employer's correlative *duty* to pay been acknowledged by the court, the court might have found itself in a dilemma. This dilemma would result from the possible conflict between the employer's duty and its immunity from government interference, and the confusion of the weavers' rights to payment, duty to perform their contracts, and immunity from government intervention on the employer's side.[63] This, in turn, might have raised the possibility of overlapping "public" and "private" law, a circumstance that was neatly avoided by ignoring the very question of the weavers' rights. The *Perry* decision exemplifies the model of logically complementary rights. Under the model, it should never be necessary to do more than state one party's rights in order to define the rights of the other and dissolve apparent conflict by reference to factual matters. Any rights of the weavers in *Perry* that were not encompassed in the general, fundamental right of every citizen to make reasonable contracts must, by logical necessity, have begun where the employer's rights left off.

In *Vegelahn v. Guntner*,[64] the Massachusetts court once again considered only the rights of the winning party.[65] The court observed:

> An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by

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employer's rights to a level superior to any concurrent right held by the employees and thereby reduced any actions taken by workers to indefensible violations of these superior rights. *Id.* at 121-22, 28 N.E. at 1127. From these rights a third right apparently was extrapolated—the right to withhold payment for deficient performance. *Id.* at 122, 28 N.E. at 1126.

[63] The constitutional proscription against statutes that violate contractual rights places a disability on the government. *See id.* at 120-21, 28 N.E. at 1126-27. Since the correlative of a disability is an immunity, the government's inability to legislate certain controls over business amounts to an immunity from government interference. *See* Hohfeld, *supra* note 28, at 55-58.

[64] 167 Mass. 92, 44 N.E. 1077 (1896).

[65] *Id.* at 98-99, 44 N.E. at 1077-78. The union in *Vegelahn* sought to buttress its strike against the employer by means that ranged from violence to non-violent picketing. *Id.* at 97, 44 N.E. at 1077. The employer had sought a preliminary injunction against *all* union activities, and the motion was heard by Justice Holmes. Justice Holmes granted an injunction pendente lite against the violent activities, but refused to enjoin the peaceful picketing by a limited number of workers. The permanent injunction issued by the Supreme Judicial Court of Massachusetts went beyond Justice Holmes' temporary injunction, limiting all union activities, whether violent or peaceful. *Id.* at 98, 44 N.E. at 1078.

the constitution itself.[66]

The employer's "right" is, in actuality, a privilege.[67] From this privilege, the court concluded that the union had a duty not to picket,[68] and from that duty a different right than the one initially stated was inferred—a right not simply to engage willing workers, but to do so without any publicity concerning the existence of a labor dispute.[69] There is no logical development from the court's initial statement to its conclusion, and nothing inherent in the definition of the plaintiff's "right" that would have precluded recognition of a union privilege to picket.[70] By mischaracterizing both what the employer *had* and what the union *claimed*, the court created a new right where ostensibly it was only applying existing rules.

The court's statement of the rights of the nonunion workers in *Vegelahn* also was treated simply as part of the logical exposition, but involved a substantive conclusion regarding the nature and scope of rights that were then in controversy. By discussing the right of "persons employed . . . to enter into or remain in the employment," the court elevated a privilege into a right[71] and precluded a decision on the status of a somewhat different right or privilege—the possible right of current and potential employees to be informed, through non-violent picketing, or even by the employer, that the plaintiff was considered unfair to organized labor.[72] The court did not reject the existence of such a right; it elim-

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[66] *Id.* at 97, 44 N.E. at 1077.

[67] *See supra* note 48 and accompanying text.

[68] 167 Mass. at 98-99, 44 N.E. at 1077-78. Labeling the legal interest of the employer as a right instead of a privilege facilitated the court's finding that even peaceful picketing was unlawful, since the logical correlative duty of the right to hire was the duty not to interfere with hiring, and any form of picketing implies some degree of interference with normal hiring practices. *See id.* at 97-98, 44 N.E. at 1077.

[69] *See id.* The *Vegelahn* majority noted that the union's violation of its duty not to picket would render employment "unpleasant or intolerable." *Id.* Picketing, the court concluded, "is an unlawful interference with the rights both of employer and of employed." *Id.*

[70] The *Vegelahn* court stated that the employer had "a right to engage all persons who are willing to work for him . . . ." *Id.* A union privilege to picket would be defined, in Hohfeldian terminology, not in relation to this right, but in relation to a correlative no-right of the employer. *See* Hohfeld, *supra* note 28, at 33. Such a correlative could be stated as a no-right to interfere with peaceful picketing.

[71] *See Vegelahn*, 167 Mass. at 97, 44 N.E. at 1077-78; Hohfeld, *supra* note 28, at 30-32; *supra* notes 48 & 65-68 and accompanying text.

[72] *See* Hohfeld, *supra* note 28, at 32-34. A finding for employees of a right to information might give rise to the correlative duty on the part of the employer to allow the union to engage in informational picketing, or even to a duty of the employer to inform scabs that

inated it from consideration.

Justice Holmes, dissenting in *Vegelahn*,[73] authored an influential attack on the implicit presumption of the majority that its decision was purely a "legal" one:

> [I]n 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 a 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 general propositions of law which nobody disputes.[74]

Justice Holmes concluded:

> 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

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they are hired as such. *See id.* at 30-32. The union thus would have a privilege to picket, with a correlative no-right of the employer to interfere. Today, informational picketing is protected by section 8(b)(7)(C) of the National Labor Relations Act, which contains the provision that "picketing . . . for the purpose of truthfully advising the public . . . that an employer does not employ members of, or have a contract with, a labor organization," is not prohibited. 29 U.S.C. § 158(b)(7)(C) (1976); *see, e.g.*, Local Joint Executive Bd. of Hotel & Restaurant Employees, 135 N.L.R.B. 1183, 1184-85 (1962) (construing the exemption in the NLRA for informational picketing). Such picketing is illegal, however, when its effect is "to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services." 29 U.S.C. § 158(b)(7)(C) (1976).

[73] 167 Mass. at 104-09, 44 N.E. at 1079-82 (Holmes, J., dissenting). Courts routinely cite Holmes' dissent in *Vegelahn* when determining the lawfulness of questionable and marginal actions. *E.g.*, Republic Steel Corp. v. United Mine Workers, 570 F.2d 467, 471 (3d Cir. 1978) (historical evolution of unionism in American mining industry reflects inferior bargaining position of unions); Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 137 n.10 (2d Cir. 1945) (policy considerations are a strong influence on development of legal rules).

[74] *Vegelahn*, 167 Mass. at 105-06, 44 N.E. at 1080 (Holmes, J., dissenting). Holmes further wrote:

> 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.

Id. at 108, 44 N.E. at 1081 (Holmes, J., dissenting).

> 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 goods for the purpose and with the effect of driving a smaller antagonist from the business.[75]

These cases illustrate how the Massachusetts court reached conclusions that appeared to be exercises in deduction from fundamental "legal" principles, but in fact were unjustified even by their own terms. By treating mere privileges as rights and by willfully refusing to recognize claims of conflicting rights, the court failed to explain why one privilege should be elevated to a right and another should be disregarded entirely. Though the rules stated in these cases were clear and enforceable in ways which some of those discussed below were not, they remained mere post hoc justifications for politically-biased decisions in favor of propertied plaintiffs.

Vegelahn was followed by a series of cases in which the Massachusetts court attempted to deal in different ways with the attack on the model of logically defined and consistent, mutually compatible rights presented in Justice Holmes' dissent.[76] These later cases reflect an effort to keep the construct fundamentally intact while acknowledging that the technique of focusing solely on the winner's rights was unworkable.

The most thorough concession to Justice Holmes' position occurred in *Plant v. Woods*,[77] in which the court held that strikes to form closed shops were illegal as a matter of law.[78] In *Plant*, suit was brought against a union by former union dissidents who had become members of a rival union.[79] The union struck to have the plaintiffs excluded from any shop in which members of the defend-

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[75] *Id.* at 1081-82.

[76] *See, e.g.*, Simon v. Schwachman, 301 Mass. 573, 18 N.E.2d 1, 4 (1938). Justice Holmes argued in *Vegelahn* that just as an employer had the right to contract and establish a business, the workers had the right to combine to seek better wages and conditions. 167 Mass. at 108-09, 44 N.E. at 1081 (Holmes, J., dissenting). Justice Holmes viewed these conflicting rights as compatible in the sense that they could exist coextensively, and were in fact necessary to maintain a just balance. *Id.* at 108-09, 44 N.E. at 1081-82. (Holmes, J., dissenting).

[77] 176 Mass. 492, 57 N.E. 1011 (1900).

[78] *Id.* at 502, 57 N.E. at 1015. The legality of engaging in a strike to achieve a closed shop was passed upon more often by the Massachusetts courts than by those of any other jurisdiction. E. WITTE, THE GOVERNMENT IN LABOR DISPUTES 23 & n.2 (1932).

[79] 176 Mass. 492, 494, 57 N.E. 1011, 1012 (1900).

ant union worked.[80] The strike, although peaceful, was found by the court to carry an implicit threat of economic harm to the employers.[81] The court characterized the primary right involved as the right "to dispose of one's labor with full freedom," a right which "is a legal right, and . . . entitled to legal protection."[82] Nevertheless, it recognized that "in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause . . . ."[83] Having acknowledged that a mere statement of the plaintiff's rights did not resolve the issue before it, the court concluded by finding that "[t]he necessity that the plaintiffs . . . join [the] association" did not justify the defendant's interference with the right of the plaintiffs to "be free from molestation," and held for the plaintiffs.[84] The last part of the decision might have been modeled directly on Justice Holmes' dissent in *Vegelahn*,[85] although Justice Holmes himself dissented in *Plant*, accepting the form of the court's argument, but rejecting its conclusion.[86]

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[80] *Id.* at 496, 57 N.E. at 1012. The defendant union informed the employer that it considered the plaintiffs to be non-union workers, and requested that the employer induce the plaintiffs to rejoin the union. *Id.* at 495, 57 N.E. at 1012. The failure of this attempted reunification of the plaintiffs with the defendant union caused the union to strike. *Id.* at 496, 57 N.E. at 1012. The union's objective was to organize all workers in the craft into one union, thereby strengthening its own bargaining power. *Id.*

[81] *Id.* at 496-97, 57 N.E. at 1012-13. Despite the absence of direct threats of personal violence, Judge Hammond concluded that the defendant union had used coercion, intimidation, and threats of property loss against the employer to effectuate its plan against the plaintiff union. *Id.* at 496-97, 57 N.E. at 1012. The court interpreted the actions of the defendant union to mean that:

> [T]he employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practiced by organized labor will be made to injure him in his business, . . . and that . . . attempts will be made to intimidate those who enter or desire to enter his employ . . . .

Id. at 496-97, 57 N.E. at 1013.

[82] *Id.* at 498, 57 N.E. at 1013.

[83] *Id.* at 499, 57 N.E. at 1014.

[84] *Id.* at 502, 57 N.E. at 1015.

[85] *See* Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (1896) (Holmes, J., dissenting).

[86] 176 Mass. at 504-05, 57 N.E. at 1016 (Holmes, C.J., dissenting). Dissenting, Chief Justice Holmes indicated that the majority decision, although employing the same reasoning that he had used in his *Vegelahn* dissent, was contrary to his holding on the issue due to "a difference of degree." *Id.* at 504, 57 N.E. at 1016 (Holmes, C.J., dissenting). Justice Holmes believed that the union's purpose in threatening to strike or boycott the employer—to strengthen itself—was sufficient justification. *Id.* at 505, 57 N.E. at 1016 (Holmes, C.J., dissenting). The majority, according to Chief Justice Holmes, held that this purpose was too remote or indirect, whereas a purpose concerned directly with wages would have provided adequate justification. *Id.* at 504, 57 N.E. at 1016 (Holmes, C.J., dissenting). Chief Justice

In *Berry v. Donovan*,[87] the Massachusetts court again acted on Justice Holmes' call for judicial justification of decisions in terms of political and economic policy. In so doing, it held a union liable in tort for causing the discharge of a non-union worker pursuant to a closed shop agreement with the employer.[88] *Berry* represents an almost pure exercise in sociological jurisprudence. In addressing the question of whether the union could enforce its closed shop contract, Chief Justice Knowlton declared:

> The primary right of the plaintiff to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. The right to dispose of one's labor as he will, and to have the benefit of one's lawful contracts, is incident to the freedom of the individual, which lies at the foundation of the government in all countries that maintain the principles of civil liberty. Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other.[89]

The union did not have "an equal or superior right," the court reasoned, since the contract between the union and the employer, which called for the dismissal of non-union employees, was irrelevant to the action between the worker and the union.[90] The court found that public policy and support for established rights necessitated drawing a new *factual* distinction between direct and indirect efforts to win shorter hours, better working conditions and higher wages,[91] and noted that a strike for higher pay was factually

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Holmes concluded by stating that it is "lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike." *Id.* at 505, 57 N.E. at 1016 (Holmes, C.J., dissenting).

[87] 188 Mass. 353, 74 N.E. 603, *appeal dismissed*, 199 U.S. 612 (1905).

[88] *Id.* at 355-56, 74 N.E. at 604. The plaintiff had worked 4 years for a company under a contract that was terminable at will, and subsequently entered into a contract with the employer in which the employer promised to hire only union members. *Id.* at 354, 74 N.E. at 604. As to persons already employed, the employer agreed "not to retain any shoe worker in his employment after receiving notice from the union that such shoe worker is objectionable to the union . . . [for] any . . . cause." *Id.* After the contract was executed, the plaintiff repeatedly refused to join the union and the defendant notified the employer that the plaintiff was considered objectionable and demanded that his employment be terminated. *Id.* The union claimed that it was acting in accordance with its contract with the company and was justified in demanding the plaintiff's termination. *Id.*

[89] *Id.* at 355-56, 74 N.E. at 604.

[90] *See id.* at 356-57, 74 N.E. at 604-05.

[91] *Id.* For an extensive discussion of the use of the direct-indirect distinction in Massachusetts, see *infra* notes 200-36 and accompanying text.

distinct from a strike for a closed shop intended to empower the employees to achieve higher wages at a later date.[92] Such a distinction is a real one in the sense that there is a true factual difference between the two kinds of strikes, but it is contrived in the sense that many factual differences exist which do not result in legal distinctions. For example, it will certainly be true that participants in different strikes will have different, and presumably legally irrelevant, physical characteristics. The distinctions attain legal significance only when the court attributes such import to them. Having given significance to this previously irrelevant factual distinction, the *Berry* court was able to delineate a structure of complementary rights.[93] In doing so, though, the court demonstrated that rights could *always* be made compatible by this sort of re-characterization of the facts, and that this process ultimately could deprive a system of rights of its power to generate sufficiently general legal answers. Ostensibly, existing legal rules determine which facts are "legally relevant"; application of these rules to the facts is supposed to be what produces legal holdings.[94] However far this ideal may be from reality, it is completely undercut if the courts can redefine what is "legally relevant" in order to reach a predetermined outcome. Taken to its extreme, this process of discovering newly relevant facts can produce a new "right" for every new set of facts as, for example, the right of red-headed employers to comprehensive injunctions against left-handed picketers. The *Berry* court retained the illusion that it was preserving existing rights as between unions and employers by inventing the direct-indirect distinction. Subsequent courts paid for that decision by having to resort to increasingly obscure factual refinements in an effort to preserve the appearance of unchanging rights.[95]

Despite the *Berry* court's effort to reduce the conflict of rights to a clear factual question, the breakdown of the absolute barriers around rights continued apace. In *L.D. Willcutt & Sons v. Bricklayers' Benevolent and Protective Union No. 3*,[96] Justice Ham-

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[92] *See* 188 Mass. at 358-59, 74 N.E. at 605-06.

[93] *Id.* at 355-56, 74 N.E. at 604. Consistent with the structure of complementary rights, the *Berry* court identified the rights of the parties but then focused on an employee's right to perform his contract without being disturbed, effectively disregarding the union's rights. *See id.* at 358-59, 74 N.E. at 605-06.

[94] *See Legal Analysis*, *supra* note 40, at 476; Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 711-12 (1916).

[95] *See infra* notes 216-36 and accompanying text.

[96] 200 Mass. 110, 85 N.E. 897 (1908).

mond, after describing the rights of the plaintiff employer, observed:

> The defendants also have rights. They have the right to work or not to work, to sell their labor upon such terms as they see fit and to combine for the purpose of getting more pay or a shorter day. . . .
>
> But not much progress is made by this general statement of the rights of the respective parties. We are still only on the skirmish line. In the jurisprudence of any civilized country there are but few, if any, absolute rights—rights which bend to nothing and to which everything else must bend. . . .
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> . . . .
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> In the case before us, standing opposed to each other are these two rights: The right of the employer to a free labor market, and the right of the striking employés in their strife with him to impair that freedom; and the crucial question is, how far can the latter go?[97]

Only 12 years earlier, the *Vegelahn* court appeared unaware of the possibility of the conflict of rights,[98] and 4 years after *Vegelahn*, Justice Hammond had written about conflicts between "important principles," rather than confronting the issue of conflicting rights.[99] While *Willcutt* was not the first case to address the concept of conflicting rights, it is a remarkably clear assertion of the position that the mere definition of "rights" cannot, of itself, resolve legal conflicts.[100] The *Willcutt* court squarely addressed the problem, stating that "neither the right of the plaintiff to a free labor market nor the right of the union to impose a fine upon its members . . . is to be considered apart from the other, or without reference to any other conflicting right, whether public or private

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[97] *Id.* at 120, 85 N.E. at 901-02. The plaintiff employer was in the construction business. *Id.* at 112, 85 N.E. at 900. The defendant union engaged in what the court characterized as a justifiable strike for, *inter alia*, better wages and shorter hours. *Id.* at 114, 85 N.E. at 898-99. In order to keep union men from returning to work, the union threatened to fine any strikebreakers. *Id.* The plaintiff sought an injunction against the fines. *Id.* The court, in holding for the plaintiff, recognized the employer's "common law right to a reasonably free labor market." *Id.* at 117, 85 N.E. at 900.

[98] *Vegelahn*, 167 Mass. at 97-98, 44 N.E. at 1077. For a discussion of *Vegelahn*, see *supra* notes 64-75 and accompanying text.

[99] Plant v. Woods, 176 Mass. 492, 497-98, 57 N.E. 1011, 1013 (1900). For a discussion of Judge Hammond's treatment of rights in *Plant*, see *supra* notes 77-86 and accompanying text.

[100] *Willcutt*, 200 Mass. at 118-19, 85 N.E. at 901.

. . . ."[101]

Yet, while cases like *Willcutt* and *Berry* presented a court employing the types of political justification for legal decisions that were at the heart of sociological jurisprudence, the same court also continued to engage in simple declarations of rights without justification or explanation. In *Reynolds v. Davis*,[102] decided the same year as *Willcutt*, the court based its decision on a very narrow definition of the union's rights, and held that a strike to force employers to continue what had been an informal, oral closed shop agreement that also gave a worker's committee extensive work-grievance resolution power, was unlawful.[103] The court observed that "forc[ing] the employer to submit to a delegate body of employés his rights under an existing contract by a combination for that purpose is not a justifiable interference with their employer's business."[104] The court did not say *why* the union's action was not a justifiable interference. While this language was intended to provide the rationale of the decision, it was in fact the essence of its conclusion.[105] Although phrased in the terminology of "sociological jurisprudence," the *Reynolds* decision is an example of a court defining new legal rights and relationships under the guise of applying existing rules.

By the first decade of the 20th century, the Massachusetts court no longer had a single clear vision, if it ever had one, of the nature of rights and of their efficacy in generating legal results.

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[101] *Id.*

[102] 198 Mass. 294, 84 N.E. 457 (1908).

[103] *Id.* at 299, 84 N.E. at 458-59. On May 1, 1906, the plaintiffs posted new rules declaring that their shops were going to be operated as open shops. *Id.* Prior to this posting, the plaintiffs had a verbal understanding with the defendant workers concerning wages, hours, and employment of non-union workers. *Id.* at 296, 84 N.E. at 457. Under the old agreement, the unions could establish councils that investigated employee grievances and decided how to solve related problems. *Id.* at 299, 84 N.E. at 458. The unions were authorized to strike if the employer refused to comply with the council's recommendations. By establishing an open shop, the employers effectively rendered the council superfluous. *Id.* The union workers went on a strike that on its face seemed to be an attempt to retain the closed shop, but which the court characterized as aimed at retaining the prior dispute regulation system. *Id.* Although the court conceded that a group of employees may work together "to support a committee to take up individual grievances in behalf of the several members," it held that any further action by this committee, such as compelling the employer to agree to its resolution of grievances via a strike, would be illegal. *Id.* at 300, 84 N.E. at 459.

[104] *Id.*

[105] *See id.* Chief Justice Knowlton characterized the majority's position as being "equivalent to saying that no labor union shall be permitted to do anything to promote the proper objects of its organization." *Id.* at 304, 84 N.E. at 460 (Knowlton, C.J., dissenting).

The direct-indirect distinction was employed wherever possible to allow the court to avoid the issue.[106] When it was not possible to employ that ostensibly factual standard, the court simply moved from one conception of the nature of rights to another. Thus, in *De Minico v. Craig*,[107] the court opted for a relativistic view of rights in deciding that a union could be enjoined from striking to force the employer to fire an unpopular foreman.[108] The court prefaced its discussion by observing that it is for the court to determine whether the intent behind a strike is a legal justification, and stated:

> The plaintiff [foreman] had a right to work and that right of his could not be taken away from him or interfered with by the defendants unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections . . . is not in our opinion a superior or an equal right.[109]

Yet, in 1915, the court advised the Massachusetts Senate that a proposed statute prohibiting railroads from firing employees on the basis of information received, without allowing the discharged worker to confront the informant, violated both the federal and state constitutions since an employer has an *absolute* right to fire its employees.[110]

Twenty years later, the Massachusetts court was still struggling to resolve conflicts of rights by redefining the rights at issue with increasing precision without justifying the redefinitions, as if all that were needed was a perfect template of rights that could be fitted into every factual situation. In *Boylston Housing Corp. v. O'Toole*,[111] the court faced a refusal by union men to work with nonunion men on the installation of an elevator.[112] The general contractor sued both the union and the elevator company.[113] The

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[106] *See infra* notes 200-36 and accompanying text.

[107] 207 Mass. 593, 94 N.E. 317 (1911).

[108] *Id.* at 599, 94 N.E. at 319-20. The court's opinion was not grounded, as it could have been, on an argument that the employer was *immune* from government interference in its dealings with employees. Instead, the court chose to "constitutionalize" employers' private rights.

[109] *Id.* at 599, 94 N.E. at 320.

[110] *In re* Opinion of the Justices, 220 Mass. 627, 631, 108 N.E. 807, 808 (1915).

[111] 321 Mass. 538, 74 N.E.2d 288 (1947).

[112] *Id.* at 547, 74 N.E.2d at 294.

[113] *Id.* at 540-41, 74 N.E.2d at 291. The plaintiff sued for damages and a permanent injunction. The lower court entered an interlocutory decree, temporarily enjoining the union

court found for the defendants on the ground that the only legal obligation that existed between the union and the elevator company was the closed shop agreement, which "contained no provision purporting to bind individual members of [the union] to enter the employment of the defendant . . . [e]levator [c]ompany."[114] The court noted:

> Since no individual member of [the union] was bound by contract to enter the employment of the defendant . . . , no such member . . . had any duty to enter such employment or would be guilty of any wrong to the plaintiff in refusing to enter such employment. . . . This right is not in conflict with or subordinate to the right of the . . . [e]levator [c]ompany, or of the plaintiff, to a "free flow of labor" . . . . Apart from contract, the right of a prospective employer to hire an individual workman who does not choose to be hired is no greater than the correlative right of such individual workman acting singly to refuse to be hired.[115]

In some unexplained fashion, the employer's right to hire those employees it wished to hire, now relabeled as the right to "a free flow of labor," no longer was absolute, and had become equal to the union's right. The possibility of conflict, however, was still steadfastly denied.

Rights and Privileges in Illinois

The Illinois court was not as concerned with the definition of rights as was the Massachusetts court. Nonetheless, Illinois courts engaged intermittently in defining the rights of parties and, like the Massachusetts court, often attached adjectives to the rights attributed to the winning party in an attempt to establish the prevailing rights as both unambiguous and clearly bounded. Thus, in

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from "interfering" with the plaintiff's contract with the elevator company. *Id.* at 542, 74 N.E.2d at 292. Although the elevator installation was completed before the case went to trial on the merits, the plaintiff continued to seek a permanent injunction to prevent union interference with any of the plaintiff's future contracts. *Id.*

[114] *Id.* at 548, 74 N.E.2d at 295. The court noted that the closed shop agreement between the union and the elevator company purported only to prevent the latter from hiring non-union workers, and did not require that union members work only for the elevator company. *Id.* The refusal by union members to do what they were not bound to do therefore was not actionable. *Id.* Moreover, the court stated that the actions undertaken by the union did not constitute a strike, since "[t]he basic element of a strike—the concerted cessation of work by employees for their employer— . . . was absent." *Id.* at 553, 74 N.E.2d at 298.

[115] *Id.* at 549, 74 N.E.2d at 295-96.

1903, in *Christensen v. Kellogg Switchboard & Supply Co.*,[116] an Illinois appellate judge observed:

> Although it may be that no question of wages or hours of labor was involved, the right of men to leave their employment for good reasons or bad reasons, where no contract is broken, is as perfect and complete as is the correlative right of all men to seek employment wherever they can find it, without let or hindrance, whether belonging to labor organizations or not. These are common rights secured by the constitution, which by its terms is established "to secure the blessings of liberty" to all alike.[117]

This passage reinforces the concept of complementary rights from two points of view: first, by describing the rights as "correlative," and second, by implying that they are common to both parties.

In *A.R. Barnes & Co. v. Chicago Typographical Union No. 16*,[118] Justice Cartwright used the same approach as that occasionally employed in Massachusetts, defining the rights of the losing party by ignoring them.[119] *Barnes* reaffirmed an earlier decision which held picketing illegal per se.[120] The *Barnes* court described the right of an employer to replace striking workers as absolute,[121]

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[116] 110 Ill. App. 61, *aff'd sub nom.* O'Brien v. People, 216 Ill. 354, 75 N.E. 108 (1905). In *Christensen*, the union engaged in a strike after the employer refused to sign an agreement that provided for, *inter alia*, employment of union members only and noninterference with sympathetic strikes to protect union principles. 216 Ill. at 356-57, 75 N.E. at 109. An order enjoining striking union members from threatening and carrying out acts of violence against nonstriking or prospective employees was affirmed by the Illinois Supreme Court. *Id.* at 376, 75 N.E. at 115.

[117] 110 Ill. App. at 71-72.

[118] 232 Ill. 424, 83 N.E. 940 (1908).

[119] *See id.* at 431-33, 83 N.E. at 944-45. The Chicago Typographical Union called a strike in an attempt to establish a closed shop and to attain an 8-hour workday. *Id.* at 427-28, 83 N.E. at 941-42. The unions also picketed the plaintiffs' businesses, effectively preventing the plaintiffs from hiring replacements. *Id.* at 428, 83 N.E. at 942. In addition, the union circulated a list of struck shops among the union's affiliated shops and ordered the affiliates to boycott all work sent to them by the plaintiffs. *Id.* at 429-30, 83 N.E. at 942.

[120] *Id.* at 435, 83 N.E. at 944; *see* Franklin Union No. 4 v. People, 220 Ill. 355, 378, 77 N.E. 176, 185 (1906) (picketing by union is an unlawful interference with employer's rights to employ freely and to control his business).

[121] 232 Ill. at 433, 83 N.E. at 943-44. Prior to *Barnes*, Justice Cartwright, dissenting in London Guarantee & Accident Co. v. Horn, 206 Ill. 493, 69 N.E. 526 (1903), relied on a concept of absolute rights and contended that the defendant insurance company had an absolute right to cancel its policy with the insured, and that a threat to cancel its policy, for any reason, could not be illegal or give rise to damages, even if done with actual malice. *Id.* at 509, 69 N.E. at 532 (Wilkin & Cartwright, JJ., dissenting). By means of such analysis, the dissenters defined the rights of the respective parties in a manner that simply ignored the rights of the losing party. *See id.* at 511-12, 69 N.E. at 531-33 (Wilkin & Cartwright, JJ., dissenting).

arriving at this conclusion by misreading an earlier case.[122] Although in *Kemp v. Division No. 241*[123] an Illinois appeals court had rejected the contention that the rights of either party to a labor dispute are absolute, the Illinois Supreme Court continued to rely on the concept of absolute rights for approximately 20 years.[124]

As in Massachusetts, the Illinois court would, on occasion, resolve a dispute by defining the rights of one party in terms of the rights of the other. For example, in *Anderson & Lind Manufacturing Co. v. Carpenters' District Council*,[125] one of several cases arising out of major carpenters' strikes in Chicago,[126] Justice Cartwright acknowledged that unions had certain rights, but outlined those rights by taking away everything that was within the court's definition of the plaintiff's rights.[127] The issue was whether a series of strikes against an employer over his use of trim made by a nonunion company violated an injunction against threatening, coercing, or intimidating any person dealing with the company.[128] Affirming the lower court's finding that the strike violated the injunction, Justice Cartwright observed:

> Every man has a right, under the law, to full freedom in the disposal of his labor according to his own will, and the right of workmen to organize for the purpose of promoting their common wel-

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[122] *Barnes*, 232 Ill. at 433, 83 N.E. at 943-44; *see* Mathews v. People, 202 Ill. 389, 401-03, 67 N.E. 28, 32-33 (1903). Justice Cartwright cited *Mathews* for the proposition that an employer's right to replace striking workers was absolute. 232 Ill. at 433, 83 N.E. at 943-44. *Mathews*, however, merely held that state-established employment agencies could not distinguish between employers who sought workers to replace strikers and those who sought new workers for other reasons. 202 Ill. at 401-03, 67 N.E. at 32-33.

[123] 153 Ill. App. 344 (1910), *rev'd*, 255 Ill. 213, 99 N.E. 389 (1912).

[124] *See infra* note 129 and accompanying text.

[125] 308 Ill. 488, 139 N.E. 887 (1923).

[126] In July 1919, the Chicago Carpenter's Union called a general strike against builders who refused to raise the carpenter's minimum wage. Carlson v. Carpenter Contractors' Ass'n, 305 Ill. 331, 332, 137 N.E. 222, 222 (1922). In an effort to promote unionization throughout the entire building industry, the union attempted to compel manufacturers of carpenters' materials to operate union shops by striking builders that used their materials. *See* Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 308 Ill. 488, 489-90, 139 N.E. 887, 889 (1923). The strikes effectively paralyzed the building industry in the Chicago area. *See* Lee, *Problems Which Have Arisen in Recent Labor Decisions in Illinois*, 18 ILL. L. REV. 77, 89 (1923).

[127] 308 Ill. at 496, 139 N.E. at 889-90.

[128] *Id.* at 490-91, 139 N.E. at 888. In 1912, the defendant union was permanently enjoined from directly or indirectly interfering with the plaintiff's business. *Id.* The injunction was directed at the union's repeated orders to its members to stop working for the plaintiff. *Id.*

> fare by lawful means is fully recognized and always maintained by the courts. . . . [B]ut it does not follow from the existence of these rights that no one else has a legal right, which may be disregarded and invaded without committing a legal wrong . . . . It is an *absolute legal right* of every person to carry on any legitimate business, and to make and enforce all lawful contracts in the prosecution of such business. . . .
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> Where it is alleged that a legal wrong has been done, the first question to consider is the right of the party who alleges the wrong, and not to begin with the question whether the alleged wrongdoer would be benefited by his act. . . . If it is found that the right existed, it could only be invaded by one who had an equal or superior right. . . .
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> . . . .
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> The right of the complainant to carry on its business was absolute, and not qualified by any right of the defendants to compel it to operate a closed shop and employ only union labor.[129]

Throughout the first decades of the 20th century, the Illinois court vacillated between a relativistic approach to rights, which necessitated justification of the ultimate decision, and a static view, in which absolute rights existed in a factual vacuum. Thus, in *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union*,[130] the court's treatment of rights was highly static. The court described the nature of the employer's right and stated that "[t]he right to acquire and protect property is an inherent right not given but declared by the constitution," and contrasted this right with what it

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[129] *Id.* at 494-95, 139 N.E. at 889-90 (citations omitted) (emphasis added). The technique of defining one party's rights in terms of the other party's rights could be used to the union's advantage. For example, in Franklin Union No. 4 v. People, 220 Ill. 355, 77 N.E. 176 (1906), the dissent argued that peaceful picketing should be permitted. *Id.* at 384-85, 77 N.E. at 186-87 (Boggs & Scott, JJ., dissenting). The dissent asserted that this conclusion followed logically from the court's description of the defendants' basic rights, the rights to organize and to strike, and the narrow scope of the plaintiff's alleged right to be free from that form of interference was presumed to follow from that description. *Id.* at 384-89, 77 N.E. at 186-88 (Boggs & Scott, JJ., dissenting).

The logical problem in the *Franklin Union* dissent is that it, in effect, elaborated only the first and last parts of a syllogism. The main premise was that workers have the right to organize for certain purposes, and to seek organization by "lawful means." The conclusion that the dissenters wished to draw was that the defendants had acted legally. That conclusion, however, follows only from a second premise, which is the unstated issue of the case: Is picketing one of the lawful means by which a union may organize? The dissenters devoted their intellectual energy to developing a broad, general description of rights without justifying, or even identifying, the fundamental decision as to which facts would be subsumed under the paradigm of rights.

[130] 371 Ill. 377, 21 N.E.2d 308 (1939), *aff'd*, 312 U.S. 287 (1941).

called "[t]he privilege of free speech."[131] Although *Meadowmoor* is illustrative of the static view towards rights, other opinions written after this decision espoused a more relativistic view of rights. For example, a few years after *Meadowmoor,* the court in *Ellingsen v. Milk Wagon Drivers' Union*[132] stated that:

> It is an old maxim of law and justice as well as a living principle of American free government, that one may not assume that his right is so absolute that it may be exercised under any circumstances and without any qualification. All rights that exist in civilized society must always be exercised with reasonable regard for the conflicting rights of others. . . .
>
> This court has long recognized . . . that these controversies cannot occur without causing some damage; that, in a strict sense, any action taken by striking workingmen or pickets . . . is to some extent injury to the employer.[133]

THE CIRCULAR JUSTIFICATION OF LEGAL RULES

It is a virtual commonplace of post-Realist legal thought to criticize decisions rendered in the heyday of legal formalism as the products of hopelessly circular reasoning.[134] Circular reasoning was

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[131] *Id.* at 393, 21 N.E.2d at 316. The majority asserted that an employer's right to contract is not to be limited by the Illinois Anti-Injunction Act to the extent that business would be destroyed and a growth of monopolies would result. *Id.* at 385, 21 N.E.2d at 313. In addition, the court emphatically stated that an employer's right to employ laborers and to engage in business relations is paramount, and that "nothing in the . . . statute . . . prohibit[ed] the issu[ance] of an injunction to restrain boycotting." *Id.* For a more extensive discussion of *Meadowmoor* and the court's interpretation of the Illinois Anti-Injunction Act, see *infra* notes 297-307 and accompanying text.

In Swing v. American Fed'n of Labor, 372 Ill. 91, 22 N.E.2d 857 (1939), *rev'd,* 312 U.S. 321 (1941), the Illinois Supreme Court stated that "[i]t is right for men to earn their living by honest means within the law and it is wrong for others either singly or in combination to prevent such honest labor by any unlawful means . . . ." *Id.* at 96, 22 N.E.2d at 859. *Swing,* however, was reversed by the United States Supreme Court on the ground that it would violate the guarantee of freedom of speech to hold "that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him." 312 U.S. at 325.

[132] 377 Ill. 76, 35 N.E.2d 349 (1941).

[133] *Id.* at 83, 35 N.E.2d at 352. The *Ellingsen* court recognized the defendant union's right to picket stores in a peaceful manner, *id.,* but determined that threats and attempts to coerce by intimidation did not constitute peaceful picketing, *id.* at 86, 35 N.E.2d at 354.

[134] *See* M. COHEN, REASON AND LAW 123 (1950). "Legal Realism" is the name commonly given to the legal movement that followed sociological jurisprudence in the 1920's and 1930's, a movement that generally is credited with applying scientific empiricism, or even positivism, to legal thought. Legal Realists tend to argue that each case must be analyzed both as behavior and in terms of the behavior that the decision process and holding are intended to elicit. They radically reject the idea that "the law" consists of abstract and

indeed utilized by legal formalists in resolving labor disputes throughout the period discussed in this Article.[135] Courts in both Massachusetts and Illinois relied on one obvious device—the concept of "malice"—to decide labor disputes. The Massachusetts court also used the less obvious, but no less circular concept of "the natural laws of business" to justify its labor decisions.

There are two senses in which the word "malice" appears in a legal decision. One sense is both colloquial and factual—an act is malicious if it is malevolent, or performed for unworthy motives of spite or dislike.[136] The second way in which malice reasonably might appear in a legal decision is as a legal category—an act is malicious at law if it is performed without legal justification.[137] In the second case, the term malice is just a shorthand expression for the legal conclusion that the injurious act in question was not justified.[138]

Colloquial malice is not a subject of this Article since in labor cases it rarely was alleged that unions were acting out of simple spite or malevolence.[139] Yet, it was common for judges in the first decades of modern labor law to refer to the actions of unions as "malicious" as if that was a finding of *fact*, in order to support a *legal conclusion* that the union's actions were not legally justified. As the question in these cases, particularly where the issues were of first impression, was whether various union actions were legally justifiable, the conclusion that the actions were unjustified because

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general rules that can be applied to facts in a simple logical process. *See generally* E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 74-94 (1973); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 835-49 (1935).

[135] *See* S. COHEN, LABOR LAW 108-37 (1964); *see also* Doremus v. Hennessy, 176 Ill. 608, 615, 52 N.E. 924, 926 (1898) (a wrongful act is malicious, and a malicious act is unlawful); Martell v. White, 185 Mass. 255, 260, 69 N.E. 1085, 1087 (1904) ("natural laws of business" are foundation upon which right of competition is based); Walker v. Cronin, 107 Mass. 555, 564 (1871) (malicious acts are not justified, and unjustified acts are malicious).

[136] *See* Holmes, *supra* note 23, at 2; Lewis, *Should the Motive of the Defendant Affect the Question of his Liability?—The Answer of One Class of Trade and Labor Cases*, 5 COLUM. L. REV. 107, 110-11 (1905). There are legal refinements of colloquial malice, such as the "actual malice" standard promulgated by the landmark defamation case of New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The *New York Times* Court defined malice as a statement made by a news medium in reckless disregard for the truth. *Id.* However, except to the extent that "reckless disregard" becomes a term of art, at which point "actual malice" shades into "malice at law," this refinement does not represent a wholly separate way of looking at the issue of malice.

[137] *See* C. GREGORY, *supra* note 19, at 94; Freund, *Malice and Unlawful Interference*, 11 HARV. L. REV. 449, 461 (1898).

[138] *See* C. GREGORY, *supra* note 19, at 88-94.

[139] *See* S. COHEN, *supra* note 135, at 102; N. FALCONE, LABOR LAW 43-45 (1962).

they were unjustified, or malicious at law, was hardly satisfactory.

The appeal of the concept of malice, despite its fundamental inadequacy, is apparent for a judiciary that desired to control union activity while maintaining apparent neutrality. The very use of the term malice insured that the party to whom it was applied would lose, since finding for a party that acted maliciously was unthinkable.[140] The use of malice allowed the system to continue to appear to be one of complementary and equal rights, brought into conflict only by behavior which clearly was unacceptable when judged by a standard external to any particular dispute.

The "natural laws of business" device, as employed by the Massachusetts court, was both similar to and dissimilar to malice. Like malice, it was used as a shorthand description of the rights of a party, and constituted an apparently external standard that was circular on its face. Unlike malice, however, this phrase was introduced into labor jurisprudence as a means of creating rights, not as a means of negating them. These devices—malice and natural law—did not *become* circular as they were developed and used; rather, they were never anything else. They are important because they were treated by courts as "external" standards by which actions could be judged, but they never had any content other than that provided by the cases ostensibly relying on them. Their apparent neutrality made them particularly effective at camouflaging the real nature of the decisions of the courts that relied on them.

Malice and The Natural Laws of Business in Massachusetts

The use of malice as an apparent factual finding to disguise a true legal holding was abandoned quite early by the Massachusetts court. It appeared only once in its pure form, in *Walker v. Cronin*.[141] The *Walker* court found the union's behavior in inducing employees to leave a non-union employer to be tortious. As noted above, the court's chief thrust in *Walker* was to distinguish between the no-rights of the union in the given factual situation and the rights of business competitors.[142] However, perhaps because the court recognized that it had defined an employer privilege, and that merely distinguishing the union from a business

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[140] Carlson v. Carpenter Contractors' Ass'n, 305 Ill. 331, 337, 137 N.E. 222, 224 (1922).

[141] 107 Mass. 555, 564 (1871).

[142] For a discussion of the Massachusetts court's treatment of the party's rights in *Walker*, see *supra* notes 46-56 and accompanying text.

competitor did not explain or justify an imposition of liability on the union, the court stated:

> Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuriâ*, unless some superior right by contract or otherwise is interfered with. *But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing* . . . .[143]

The *Walker* opinion is a good example of circular reasoning in the guise of factfinding. The court recognized that some purposes give legal justification to interference between an employer and employees. The issue before it, then, was whether the purpose for which the union induced the plaintiff's employees to quit was such a purpose.[144] The court found that the purpose was not a legal one such as to provide legal justification,[145] and instead of stating its finding as a legal conclusion, it couched it as a factual finding. The act was characterized as malicious and therefore unjustified; it was unjustified and therefore malicious.

By 1900, the Massachusetts court recognized that once colloquial malice had been eliminated from judicial consideration, malice at law could only be part of a legal conclusion, and not a legal argument. In *Plant v. Woods*,[146] the court reasoned:

> 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 plaintiffs to be free from molestation, such as to bring the acts of the defendant under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful . . . .[147]

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[143] 107 Mass. at 564 (emphasis added).

[144] *Id.* at 561.

[145] *Id.* at 566.

[146] 176 Mass. 492, 57 N.E. 1011 (1900).

[147] *Id.* at 502, 57 N.E. at 1015. For a discussion of the facts in *Plant* and the court's treatment of the rights of the parties involved, see *supra* notes 77-86 and accompanying text. *See infra* notes 203-06 and accompanying text (analysis of the *Plant* court's use of the direct-indirect distinction).

Although the blatantly circular use of malice was quickly abandoned by the Massachusetts court, circular logic was soon resurrected in Massachusetts with the development of the more subtle concept of "the natural laws of business" as a justification for labor decisions. *Carew v. Rutherford*[148] had been the first Massachusetts case to discuss "freedom of business," a forerunner of the "natural laws of business" device that would appear in later cases. The *Carew* court held that it was tortious for a union to fine an employer for sending work out of state,[149] and attempted to define the opposing rights of the union and the employer, justifying its decision by stating:

> This principle does not interfere with the freedom of business, but protects it. Every man has a right to determine what branch of business he will pursue, and to make his own contracts with whom he pleases and on the best terms he can. . . . And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions. . . .
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> . . . .
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> Freedom is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, or to threaten him with annoyance or injury, for the sake of compelling him to buy his peace . . . .[150]

The key phrase is in the first paragraph above: "And it is no crime for any number of persons, without an unlawful object in view . . . ." Since the union's actions were neither violent nor unlawful on their face, the sole question was whether the union's object was a lawful one.[151] It was only after the judges determined the outcome, which allegedly was based on "freedom of business," a right common to both parties, that they could determine how the concept of "freedom of business" would govern the union's acts.[152]

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[148] 106 Mass. 1 (1870).

[149] *Id.* at 13-14.

[150] *Id.* at 14-15.

[151] *Id.* at 6-8 (union's actions consisted of threats that if plaintiff refused to pay fine of $500, union members would walk off job). The question for the court was whether the facts constituted an unlawful interference with the plaintiff's legal rights. *Id.* at 9.

[152] *See id.* at 13-14. The court observed that the defendants' intentional acts caused injury to the plaintiff. *Id.* at 13. Therefore, the court opined, the defendants were liable in

Freedom of business was supposed to operate as an abstract, general principle from which the *specific* rights of the union and the employer could be derived.[153] The effort was, at least in *Carew*, unsuccessful because freedom of business had no meaning in this context until the court gave it one through its holding.

The next employment of the concept of the natural laws of business in a Massachusetts decision was not until 1902. Rendered subsequent to Justice Holmes' dissent in *Vegelahn v. Guntner*,[154] Justice Hammond's opinion in *Martell v. White*[155] represented a rediscovering of natural law as a way to rescue the concept of justification from the political and reinstate it in the objective world of legal logic. Justice Hammond wrote:

> The trader has not a free lance. He may fight, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed, in his business, to make free use of these laws.[156]

Justice Hammond clearly was responding to Justice Holmes' argument that issues of justification could be resolved only by an articulated statement of policy,[157] and suggesting the natural laws of business as an alternative ground for decisionmaking.[158] The issue in *Martell*, however, was whether an association of manufacturers could boycott another manufacturer whose behavior threatened it with economic harm.[159] This case determined how the natural laws of business dictated behavior; natural law was not

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tort for the resulting damage. *Id.* at 13-14. Only after establishing the liability of the defendants did the court address the specific rights that the plaintiff allegedly enjoyed, and did so in terms of broad generalities, contrasting modern "freedom of business" with ancient restrictions on workers. *Id.* at 14-15.

[153] *See id.* at 14-15.

[154] *See supra* notes 73-75 and accompanying text.

[155] 185 Mass. 255, 69 N.E. 1085 (1904).

[156] *Id.* at 260-61, 69 N.E. at 1087.

[157] *See supra* notes 73-75.

[158] 185 Mass. at 261, 69 N.E. at 1087-88.

[159] *Id.* at 257, 69 N.E. at 1085-86. The *Martell* court reversed a verdict for the defendants and held that the issue should have been submitted to the jury. *Id.* at 263, 69 N.E. at 1089. The court reasoned that although the object of the boycott was a more favorable competitive market, which was not itself illegal, the coercive means by which this object was effected—the imposition of fines—rendered the issue ripe for jury determination. *Id.* at 262, 69 N.E. at 1087-89.

determined by those laws.[160]

Justice Hammond also wrote the majority opinion in *L.D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3*,[161] a case involving a union that fined members for refusing to join what the court called a lawful strike.[162] After engaging in a prolonged discussion of the nature of the opposing rights, the court held against the union, concluding:

> If the contest be carried on under the rules which regulate the law of supply and demand, leaving those engaged on either side to act under the general and natural laws of business, free from artificial coercion or intimidation as the words are ordinarily understood . . . , then nether [sic] party has the right to complain; but if the coercion or intimidation by threats of a direct personal loss, [is] due . . . to a cause having no natural relation to the situation and entirely inconsistent with the basic principle of freedom of action under the natural laws of business, then there is cause for the complaint.[163]

In *Haverhill Strand Theater, Inc. v. Gillen*,[164] the court once again invoked the natural laws of business. *Haverhill* involved a dispute over whether a union could strike to force the employer to hire a minimum number of workers for a given job.[165] In holding

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[160] *See id.* The court noted that the natural laws of business fostered a competitive market, and stated that a damage award could not be based on the elimination of a competitor alone, but rather, is warranted only if injury results from violation of the rules of competitive warfare. *Id.* at 261, 69 N.E. at 1087-88. The court observed that no justification exists for fraudulent or obstructive interference with another's business. *Id.* at 261, 69 N.E. at 1088. That is, competition alone, notwithstanding its characterization as a natural law of business, cannot justify coercive and illegal acts. *Id.* The circularity of Justice Hammond's opinion is disguised by his apparent confidence that "natural law" makes the sort of fine distinction called for under the facts of the case between acceptable and impermissible forms of competition. Once one gets past that assumption, the fallacy inherent in Justice Hammond's reasoning is apparent: a boycott that is compelled by the use of fines violates the rules of competitive economic warfare and is therefore illegal; because it is illegal, it violates the rules of competitive economic warfare.

[161] 200 Mass. 110, 85 N.E. 897 (1908).

[162] *Id.* at 121, 85 N.E. at 898-99. In a striking example of how some judges characterize certain rights as having special, almost sacred, status, Judge Hammond wrote:

> It is to be premised that the right which the plaintiff seeks to have protected against the acts of the defendants arises from no contract or statute, but out of the . . . large body of rights which have their foundation in the fitting necessities of civilized society.

Id. at 117, 85 N.E. at 900.

[163] *Willcutt*, 200 Mass. at 125-26, 85 N.E. at 904.

[164] 229 Mass. 413, 118 N.E. 671 (1918).

[165] *Id.* at 415-16, 118 N.E. at 672. In *Haverhill*, the plaintiff-theater corporation em-

against the union, Justice Loring stated:

> It is manifest that such a rule is an interference with the plaintiff's right to that free flow of labor to which every member of the community is entitled for the purpose of carrying on the business in which he or it has chosen to embark. The right to the free flow of labor is not an absolute right; it is limited by the right of employés to combine for purposes which in the eye of the law justify interference with the plaintiff's right to a free flow of labor. A combination which interferes with a plaintiff's right to a free flow of labor is legal if the purpose for which it is made justifies the interference with that right. On the other hand, it is illegal if that purpose does not justify the interference . . . . It is . . . settled . . . that the question . . . is a question of law . . . . [166]

The right to a free flow of labor is somewhat more specific than the right to act under the benevolent rules of the natural laws of business, but still lacks enough specific content to carry the weight of the court's decision.[167] Further, it is a Hohfeldian *privilege* rather than a right;[168] elevating it to a right, thus implying a correlative duty of absolute noninterference, requires some justifi-

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ployed a single member of the musician's union. *Id.* The union previously had adopted a rule that required employment of at least five union musicians by any employer who hired a union member. *Id.* The plaintiff sued to enjoin enforcement of the rules on the ground that they constituted an unlawful interference with the plaintiff's right to a free flow of labor. *Id.* at 417, 118 N.E. at 673.

[166] *Id.* at 418, 118 N.E. at 673 (citations omitted).

[167] *See id* at 420-21, 118 N.E. at 674. The court did not define the "right" to a free flow of labor, but rather labeled it a general rule governing the businesses of a given community. *See id.* at 420, 118 N.E. at 673. The particular right to employ whomever one chooses presumably is derived from the general principles of freedom of labor and business. *See infra* note 170. Liability results if injury is caused by interference with specific rights. *See Legal Analysis, supra* note 40, at 476. Although interference with a general principle may result in liability, *see* Carew v. Rutherford, 106 Mass. 1, 14 (1870), it is the violation of the specific rights embraced by the principle that warrants redress, *see id.* at 14-15; Hohfeld, *supra* note 94, at 746 ("the exact nature of . . . rights has been greatly obscured . . . by the habitual tendency to treat a multiplicity of fundamentally similar rights, or claims, as if they were only one").

[168] If the right to the free flow of labor were truly a Hohfeldian right, a correlative duty would be imposed on the union to forbear from interference with that right. *See Legal Analysis, supra* note 40, at 476. The court, however, determined the boundaries of the right to the free flow of labor to be the right of laborers to combine for lawful purposes. 229 Mass. at 420, 118 N.E. at 673. In acknowledging, then, that the employer's right to the free flow of labor is bounded by the right of workers to combine and to refuse to work for an employer, the court engaged in circular reasoning. The employer's right to a free flow of labor both defines and is bounded by the employees' "proper" right to refuse to work; the employees' refusal to work was not proper because it interfered with the employer's right to a free flow of labor.

cation, which the court notably failed to give.[169] Finally, while the phrase "the free flow of labor" is an obvious derivative of the "natural laws of business," the use to which it is put in this passage is somewhat different. The natural laws of business were something to which both employers and workers were subject in Justice Hammond's scheme; the right to a free flow of labor was attributed solely to the employer.[170] What had begun as an attempt to resolve the conflict of rights in the labor field into a harmonious common right had been reduced to yet another method of describing the rights of one of the parties to the dispute, to the exclusion of the other.

Malice in Illinois

In contrast to the courts in Massachusetts, Illinois courts relied on malice as an integral part of legal argument in labor cases for at least 30 years after Justice Holmes' attack on this sort of usage had become standard.[171] The groundwork for the confusion that would be created by the introduction of malice was firmly laid in *Doremus v. Hennessy*,[172] a case frequently quoted in subsequent labor cases,[173] although it actually involved business competition.[174] *Doremus* contains the following oft-quoted passage:

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[169] *See* 229 Mass. at 420-21, 118 N.E. at 673; Hohfeld, *supra* note 28, at 35-38. Hohfeld observed: "The only correlatives logically implied by . . . privileges or liberties . . . are the 'no-rights' of 'third parties.' It would therefore be a *non-sequitur* to conclude from the mere existence of such liberties that 'third parties' are under a *duty* not to interfere . . . ." Hohfeld, *supra* note 28, at 36-37. A privilege may exist without any concomitant rights against third parties. *Id.* at 36. The existence of such rights is "a question of justice and policy." *Id.*

[170] *See* 229 Mass. at 418, 118 N.E. at 672-74. The phrase "right to a free flow of labor" appeared in a Massachusetts decision at least as late as 1947, when the court in Boylston Hous. Corp. v. O'Toole, 321 Mass. 538, 549, 74 N.E.2d 288, 296 (1947), went into some detail in describing that right as the right of a "prospective employer . . . to be free from unlawful interference with the employment of workmen who wish to enter such employment," *id.* at 549-50, 74 N.E.2d at 296.

[171] *See* Pickett v. Walsh, 192 Mass. 572, 581, 78 N.E. 753, 756-59 (1906) (drawing a distinction between lawful and unlawful acts committed in furtherance of competition); Berry v. Donovan, 188 Mass. 353, 356-57, 74 N.E. 603, 604-05 (employing Holmes' analysis to hold a closed shop contract unlawful), *appeal dismissed*, 199 U.S. 612 (1905). *See generally* C. GREGORY, *supra* note 19, at 60-76 (discussing impact of Holmes' *Vegelahn* dissent on subsequent Massachusetts cases).

[172] 176 Ill. 608, 52 N.E. 924 (1898).

[173] *See, e.g.*, A.R. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 432, 83 N.E. 940, 943 (1908); Franklin Union No. 4 v. People, 220 Ill. 355, 380, 77 N.E. 176, 185 (1906); O'Brien v. People, 216 Ill. 354, 372, 75 N.E. 108, 115 (1905).

[174] 176 Ill. at 611-12, 52 N.E. at 925. The plaintiff-laundry owner refused to charge her

> Malice, as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done, to the detriment of the right of another it is malicious, and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition.[175]

A dissenting opinion written 5 years later in *London Guarantee & Accident Co. v. Horn*[176] reveals the confusion created by this tautological concept of malice.[177] Dissenting, Justices Wilkins and Cartwright combined the legal and factual meanings of malice to argue that the issue of malice was irrelevant to the case since malice can be found only where there is an independently "wrongful act," and in *London Guarantee*, there was no "wrongful act."[178]

The dissenters argued that the insurance company had an *absolute* right to cancel an insurance policy at any time and for any reason, and hence that its threat to do so could not be wrongful even if malicious.[179] Ignoring the archaism of the idea of "absolute right"[180] for the moment, there are other problems with the dissent's position. A finding of *factual* malice generally is relevant even where the defendant has a "right"; at a minimum, it cannot

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customers the prices fixed by the Chicago Laundryman's Association, and the defendants responded by forcing the operators of the laundry plants that were doing the plaintiff's work to stop servicing the plaintiff. *Id.* The operators of these laundry plants broke their contracts with the plaintiff, thus destroying her business. *Id.*

[175] *Id.* at 615, 52 N.E. at 926.

[176] 206 Ill. 493, 508, 69 N.E. 526, 531 (1903) (Wilkin & Cartwright, JJ., dissenting).

[177] *See id.* at 509-12, 69 N.E. at 531-32 (Wilkin & Cartwright, JJ., dissenting). The plaintiff, a foreman at a bicycle factory operated by Arnold, Schwinn & Co. (Schwinn), was injured at work while attempting to operate a milling machine. *Id.* at 497, 69 N.E. at 527. Schwinn carried an indemnity policy with the defendant which provided for the indemnification of Schwinn against loss arising from injury to its employees. *Id.* The policy could be canceled by the defendant at any time if proper notice was given. *Id.* When the plaintiff refused the defendant's settlement offer, the agent threatened the manager of the bicycle factory with immediate cancellation of the indemnity policy unless the plaintiff was fired. *Id.* at 495-96, 69 N.E. at 527. The plaintiff accordingly was discharged. *Id.*

[178] *Id.* at 509, 69 N.E. at 532 (Wilkin & Cartwright, JJ., dissenting).

[179] *Id.* at 509, 69 N.E. at 532 (Wilkin & Cartwright, JJ., dissenting). The majority acknowledged that one may threaten to terminate a contract between himself and another in the exercise of a lawful right, and that a discharged employee has no cause of action against the party making the threat even though that party had a malicious motive. *Id.* at 499-502, 69 N.E. at 528-29. However, the Illinois court required that the party who secured the discharge of the employee be in competition with that employee in the same trade or organization. *Id.* at 502-03, 69 N.E. at 529-30. Notably, the court created this rule by referring to principles of competition inherent in free business, and then failed to justify it. *See id.*

[180] *See supra* notes 34-35 and accompanying text.

be assumed that an act which normally is lawful remains so when performed with actual, factual malice. A finding of *legal* malice, however, can almost never be irrelevant, although it can be wrong. Since such a finding amounts to a legal conclusion that the injurious act was performed without legal justification, arguments concerning legal malice are always relevant to the question posed in *London Guarantee* of whether a defendant's injurious acts were justified. The confusion created by the *Doremus* court's treatment of malice allowed the dissenters in *London Guarantee* to focus on the question of malice and bypass their actual quarrel with the majority as to whether the acts of the insurance company were justified.

The irony of the dissent's position in *London Guarantee* is apparent in a subsequent opinion authored by Justice Cartwright. In *A.R. Barnes & Co. v. Chicago Typographical Union No. 16*,[181] Justice Cartwright, reaffirming the Illinois rule that picketing was illegal per se,[182] stated:

> In the case of *Mathews* . . . the right of an employer whose workmen have gone upon a strike to contract with other laborers to fill their places was declared to be an absolute legal right . . . . It follows that any interference with that right, whether by threats or intimidation, or by persuasion, *accompanied by actual malice*, is a legal wrong.[183]

Justice Cartwright's introduction of "actual malice" is confusing, as is his loose use of the term "absolute right." If the employer's right to contract with new workers to replace those on strike were truly absolute, the union's motive in interfering with that right would be irrelevant and any interference would be illegal.[184] Similarly, the dissenting opinion in *London Guarantee* ap-

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[181] 232 Ill. 424, 83 N.E. 940 (1908).

[182] The first case that appeared to state a rule that picketing was illegal per se was Franklin Union No. 4 v. People, 220 Ill. 355, 380, 77 N.E. 176, 185 (1906). In *Franklin*, the court referred to Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 520, 77 N.W. 13, 22 (1898), which explicitly held that picketing was illegal per se in Michigan, *id.* The court also cited Vegelahn v. Guntner, 167 Mass. 92, 92, 44 N.E. 1077, 1077 (1896), which held that picketing outside the plaintiff's place of business constituted interference. 220 Ill. at 380, 77 N.E. at 185. *But cf.* Fenske Bros. v. Upholsterers' Int'l Union, 358 Ill. 239, 246-47, 193 N.E. 112, 117 (1934) (peaceful picketing never held unlawful per se in Illinois).

[183] *Barnes*, 232 Ill. at 433, 83 N.E. at 943-44 (emphasis added). For a brief discussion of the *Mathews* case, see *supra* note 122.

[184] An absolute right is an enforceable claim to another's performance or forbearance. *Legal Analysis*, *supra* note 40, at 476. The necessary correlative of an absolute right is the general duty of everyone not to prevent the exercise of that right. *Id.* It generally is recog-

peared to state that even if the union were acting within *its* rights when it formed the picket line, its motive would have been irrelevant.[185] Indeed, the *London Guarantee* dissent would have entirely eliminated malice from consideration, since a well-meaning defendant may not interfere with the superior rights of a plaintiff, and Justice Cartwright in effect advocated that even an ill-intentioned defendant may interfere with a plaintiff's *inferior* rights. However, such an analysis requires a reasoned determination of why certain rights should prevail, a determination that Justice Cartwright neatly side-stepped by introducing the artificial "factual" malice finding.[186] That the finding *was* artificial is apparent from the fact that the case was cited thereafter for the proposition that unions do not have a general right to picket, regardless of their motivation.

In *Carlson v. Carpenter Contractors' Association*,[187] one of the many cases that followed the Chicago carpenters' strike, the concepts of legal and factual malice once again were confused.[188] *Carlson* involved an action against a contractors' association brought by two plaintiffs, one a union carpenter who was laid off because of the defendant's refusal to sell materials to anyone who employed union labor, and one who was forced to stop building a house because he employed union labor.[189] The appellate court held for the plaintiffs in a decision containing a long and convoluted discussion of the "primary purpose" of the defendants' actions, progressing in a hopeless tangle from the defendants' malice to their economic interest to what constitutes permissible legal interests and back again to malice. In affirming, the Illinois Supreme

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nized that interference with such a right, even for a lawful purpose, results in liability on the part of the person interfering. *See* Walker v. Cronin, 107 Mass. 555, 563-64 (1871) (one who violates universal right to employ workers is liable for damages even though acts were committed for lawful purpose).

[185] *See London Guarantee*, 206 Ill. at 508-12, 69 N.E. at 531-33 (Wilkin & Cartwright, JJ., dissenting).

[186] *Id.* (Wilkin & Cartwright, JJ., dissenting).

[187] 305 Ill. 331, 137 N.E. 222 (1922).

[188] *See supra* note 126.

[189] As a result of the Carpenters' Union boycott, the construction industry virtually was shut down. *Carlson*, 305 Ill. at 333, 137 N.E. at 223. The only businesses remaining in operation were those willing to pay union scale. *Id.* at 332, 137 N.E. at 222. In response, the largest employers "locked out" all union members. *Id.* To make the lockout effective, the employers persuaded suppliers of building materials to boycott anyone employing union labor. *Id.* at 333, 137 N.E. at 223. Many small employers and independent contractors, such as the plaintiff, who were willing to pay union wages, were forced to halt their building projects. *Id.* With construction at a standstill, many union members lost their jobs. *Id.*

Court attempted to clarify the lower court's rationale by stating that a court's primary consideration should be the nature of the plaintiff's rights rather than the rights or motives of the defendants.[190] The supreme court's rationale was similar to that of Justice Cartwright in *Barnes*:

> These rights [to dispose of one's own labor and to invest capital as one pleases] being clear, any one who invades them without lawful cause or justification commits a legal wrong . . . . *Damage inflicted by the use of intimidation, obstruction, or molestation with malice is without excuse* . . . . No persons . . . have the right to directly or indirectly interfere with or disturb another in his lawful business or occupation or for the sake of compelling him to do some act which in his own judgment his own interest does not require. Losses willfully caused by another from motives of malice to one who seeks to exercise and enjoy the fruits and advantages of his own enterprise, industry, skill, or credit will sustain an action.[191]

The introduction of the concept of malice in *Carlson* served no judicial purpose. The court simply obscured its initial discussion of justification for invading legal rights by examining motivation and malice. Certainly, the court failed to heed its own admonition that focusing primarily on the defendant will only confuse the determination of the issues.

Not only is the introduction of the term malice into the *Carlson* opinion inconsistent with the court's own argument, but it is unclear whether the court is discussing legal or factual malice. If the court intended legal malice, the argument is tautological; if it intended factual malice, the argument is unsupported by the facts. This confusion, however, may have served a purpose. A finding of malice at law, when applied to a novel fact pattern, requires an explicit holding on the scope of the defendant's rights; a finding of factual malice does not. Holdings that relied on an unsupported finding of factual malice while equating it with legal malice may have represented a compromise position. Such a holding saved the *Carlson* court from declaring that the defendants had a general "no-right" without specifying exactly what their general rights were.[192] The requirement of factual malice, combined with an un-

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[190] *Id.* at 335, 137 N.E. at 224; *see Barnes*, 232 Ill. at 433, 83 N.E. at 945.

[191] *Carlson*, 305 Ill. at 338, 137 N.E. at 224 (emphasis added).

[192] *Compare* Plant v. Woods, 176 Mass. 492, 498, 57 N.E. 1011, 1016 (1900) (Holmes, J., dissenting) (advocating shift to consideration of defendant's rights) *with* L.D. Willcutt &

clear reference to legal malice, left open the question of the exact scope of the defendants' rights. This seems to be a particularly plausible explanation of the court's action in *Carlson*, where the *employer* was the party found to be malicious; the finding of factual malice helped the court avoid a decision that would have limited employers' *general* rights while admitting that this employer had simply gone too far. It is, thus, a good example of the use of a factual malice finding as a middle ground between rights and no-rights.

This discussion of malice was, however, the last one of this form to be found in Illinois. In a later case arising out of the same strike, Justice Cartwright himself recognized that factual malice seldom is an important factor in untangling the legal rights and wrongs involved in a labor dispute. Justice Cartwright wrote in *Anderson & Lind Manufacturing Co. v. Carpenters' District Council*:[193]

> The substantial argument is that the defendants had a right to do anything they saw fit for the purpose of strengthening or protecting the labor union at large . . . .
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> . . . If an evil motive does not make a lawful act unlawful, it is equally true that what may be regarded as a good motive will not make an unlawful act lawful.[194]

In examining the application of the concept of malice in these cases, it appears that there was some third meaning attributed to the concept of malice—not apparent on the surface—other than the colloquial or legal, which might have saved it from circularity, at least in the judges' minds. As stated before, malice primarily was used to mediate the rights attributed to both sides in labor disputes which might otherwise have seemed to be blatantly political conflicts.[195] There appears, however, to be more to malice than this rather instrumental function. The passion with which the judges appealed to findings of malice makes it difficult to believe that *they* did not believe it to have a real meaning. One explanation may be that malice represented a metaphor for actions which ran counter to the judiciary's construct of "good" industrial behav-

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Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3, 200 Mass. 110, 113-14, 85 N.E. 897, 899 (1908) (union has right to strike by lawful means for higher wages and shorter hours).

[193] 308 Ill. 488, 139 N.E. 887 (1923).

[194] *Id.* at 497, 139 N.E. at 890.

[195] *See supra* text accompanying notes 139-40.

ior.[196] The actions of unions or "bad" employers were not in themselves malicious or purely spiteful, but they were *like* acts of malice in that they attacked "good" industrial relations. In other words, picketing was equated with the *malicious* destruction of someone's business because such labor activities did not coincide with the judiciary's personal visions of how industrial society should operate. However, the judges could keep their personal visions private by use of the word "malice." The word malice, as attributed to the losing party, put him in the category of clear evildoers without requiring the judges to recognize that malice must be directed at something.

INDEFENSIBLE DISTINCTIONS

More common than the utilization of blatantly circular logic was the establishment of an apparent but misleading factual line to distinguish between the types of actions that frequently occurred in the labor cases. The courts labeled actions on one side of the line "legal" and those on the other side "illegal."[197] This process seems like a paradigm of legal decisionmaking, and indeed these cases are not as superficially confusing as are the malice or rights cases discussed above. The problem was that the lines drawn were and are difficult to justify substantively,[198] and impossible to apply with any consistency to the many different factual situations that gave rise to suits.[199] As the courts faced increasingly complex fact patterns, the distinctions that once seemed clear tended to evolve into conclusory formulas. The distinctions stated an intelligible, if often unjustified, rule. Since these rules lack justification,

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[196] *See* Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 308 Ill. 488, 497, 139 N.E. 887, 890 (1923) (use of coercion by threatening loss of business is not tolerable behavior); *see also* Carpenters' Union v. Citizens' Comm. to Enforce Landis Award, 333 Ill. 225, 240, 164 N.E. 393, 401 (1928) (actions of a committee comprised of businessmen not involved in dispute is improper interference).

[197] *See, e.g.*, Kemp v. Division No. 241, 255 Ill. 213, 230-31, 99 N.E. 389, 396 (1912) (lawful primary object of union solidarity achieved by proposed strike compelling discharge of non-union employees as opposed to illegal strike solely to injure third parties); Berry v. Donovan, 188 Mass. 353, 356-57, 74 N.E. 603, 605-06 (unlawful strike for indirect benefit of strengthening union for future controversies differs from legal strike to obtain direct, legal benefits of improved working conditions), *appeal dismissed*, 199 U.S. 612 (1905).

[198] *See* N. FALCONE, *supra* note 139, at 45.

[199] *See, e.g.*, E. WITTE, *supra* note 78, at 20-21. *Compare* Pickett v. Walsh, 192 Mass. 572, 583, 78 N.E. 753, 758-59 (1906) (union may strike to obtain work normally given to another union) *with* Folsom v. Lewis, 208 Mass. 336, 338, 94 N.E. 316, 317 (1911) (unlawful for union to strike to obtain monopoly of labor market).

however, the decisions relying on them *became* unintelligible. Each factual situation appeared to generate its own rules, a situation that renders meaningless the very concept of ordered rules. Indeed, with no principled way to delimit the "rules," they became statements of legal conclusion masquerading as findings of fact, just as the malice rule had always been.

Massachusetts: The Direct-Indirect Distinction

In *Berry v. Donovan*,[200] the Massachusetts court first established the rule that certain union actions were permissible if intended *directly* to achieve "legal" aims such as shorter hours, better working conditions and higher wages, but impermissible if they would lead only *indirectly* to the achievement of these aims.[201] The decision was remarkable for its forthright acknowledgement of political concerns. The court observed:

> 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. But when [an] action is directed against the other, primarily for the purpose of doing him harm and thus compelling him to yield to the demand of the actor, and this action does not directly affect the property, or business, or status of the actor, the case is different, even if the actor expects to derive a remote or indirect benefit from the act.
>
> The gain which a labor union may expect to derive from inducing others to join it, is not an improvement to be obtained directly in the conditions under which the men are working, but only added strength for such contests with [the] employers as may arise in the future. An object of this kind is too remote to be considered a benefit in business, such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it. If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of all the industries of the country. . . . The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly. It therefore does not justify causing the discharge,

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[200] 188 Mass. 353, 74 N.E. 603, *appeal dismissed*, 199 U.S. 612 (1905).

[201] *Id.* at 357-58, 74 N.E. at 605-06. For an overview of the facts in *Berry* and an analysis of the Massachusetts court's treatment of the rights involved, see *supra* notes 87-95 and accompanying text.

> by his employer, of an individual laborer working under a contract.[202]

The court's ultimate holding was clear; the "directness" of benefit to the union was the standard against which harmful union actions were to be judged. The *Berry* holding is consistent with the somewhat elliptical treatment of the issue of direct and indirect benefits in the earlier case of *Plant v. Woods*, in which strikes to achieve a closed shop were declared illegal.[203] While the terms "direct" and "indirect" were not used in that decision, the concepts were implicit both in the majority opinion[204] and even more so in Justice Holmes' dissent:[205]

> 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. . . .
>
> I differ from my Brethren in thinking that the threats were as lawful for this . . . purpose as for the final one to which strengthening the union was a means.[206]

In *Folsom v. Lewis*,[207] the next major case in which the Massachusetts court utilized the direct-indirect distinction, the court treated the standard promulgated in *Berry* as an established rule.[208] Like *Plant*, *Folsom* involved a strike to impose a closed shop.[209] The court stated simply:

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[202] 188 Mass. at 358-59, 74 N.E. at 605-06.

[203] *Plant*, 176 Mass. at 502, 57 N.E. at 1015. For a brief summary of the facts in *Plant* and an examination of the Massachusetts court's treatment of the parties' rights, see *supra* notes 77-86 and accompanying text.

[204] 176 Mass. at 498-99, 57 N.E. at 1013. The majority stated that the right of labor to compete for maximization of job benefits is protected and that injury to any party resulting from this competition "is *damnum absque injuria* . . . ." *Id.* at 498, 57 N.E. at 1013. (emphasis added). Nevertheless, the court found that injury that results outside the gamut of lawful competition would not be condoned. *Id.* The court held that the union's objective was to gain a general advantage rather than a specific improvement in wages, hours, or working conditions, and that such an objective was unlawful. *Id.* at 502, 57 N.E. at 1015.

[205] *Id.* at 504, 57 N.E. at 1015 (Holmes, C.J., dissenting). In his dissent, Chief Justice Holmes agreed with the majority that the union's objective was "not directly concerned with wages" but was "one degree more remote." *Id.* at 505, 57 N.E. at 1016 (Holmes, C.J., dissenting). He argued, however, that such conduct was justified as preliminary to the attainment of the direct goals of the union. *Id.* at 505, 57 N.E. at 1016 (Holmes, C.J., dissenting).

[206] *Id.* (Holmes, C.J., dissenting).

[207] 208 Mass. 336, 94 N.E. 316 (1911).

[208] *Id.* at 338, 94 N.E. at 317.

[209] *Id.* at 337-38, 94 N.E. at 316-17.

> Conduct directly affecting an employer to his detriment, by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain. Strengthening the forces of a labor union . . . is not enough to justify an attack upon the business of an employer by inducing his [employees] to strike.[210]

The courts in *Folsom* and *Berry* drew a genuine distinction between purposes that are adequate to justify the defendants' actions and those that are not.[211] There were, however, at least two problems with the line drawn. First, as Justice Holmes noted in his *Plant* dissent, there appears to be no apolitical reason for the distinction.[212] Second, the distinction that seemed clear in the paradigmatic polar cases of a strike by current employees to better their working conditions and a strike to impose a closed shop could not be applied cleanly in the increasingly complicated cases that the courts began to encounter as unions became more successful.[213] Intended as a clear factual standard, it became just another formula for stating the court's conclusion. To apply the distinction, the court either had to deal with the very political questions that the distinction was intended to circumvent, in essence, to turn it into a "fact" like "malice," or simply to state flatly that it was the rule and affirm it as if it were self-executing, not indeterminate.[214] In concrete terms, the directness test failed to establish any objective or apolitical standard for deciding labor dispute cases because, except in the paradigm cases, the judgment as to what types of benefits were "direct" rested on exactly the same grounds as the ultimate judgment as to whether the union had acted legally.[215]

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[210] *Id.* at 338, 94 N.E. at 317.

[211] *See id.*; *Berry*, 188 Mass. at 358-59, 74 N.E. at 605-06.

[212] Plant v. Woods, 176 Mass. 492, 504, 57 N.E. 1011, 1016 (1900) (Holmes, C.J., dissenting), *see also* Warm, *A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation*, 23 MINN. L. REV. 255, 265-66 (1939) (noting that courts use social and economic factors to determine justification in labor cases); Wyman, *The Maintenance of the Open Shop*, 17 GREEN BAG 21, 26-27 (1905) (political considerations discussed in light of *Plant*).

[213] *See, e.g., infra* notes 220-29 and accompanying text.

[214] *See, e.g.*, Fairbanks v. McDonald, 219 Mass. 291, 297, 106 N.E. 1000, 1001 (1914) (union actions declared malicious at law); *see also* United Shoe Mach. Corp. v. Fitzgerald, 237 Mass. 537, 541, 130 N.E. 86, 88 (1921) (union interference with employer's "yellow dog" contracts held unjustified); Ames, *How Far an Act May be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411, 418 (1905) (motive of employees who strike is a factor in determining legality of strike).

[215] *See, e.g.*, Minasian v. Osborne, 210 Mass. 250, 251-52, 96 N.E. 1036, 1038 (1911); L.D. Willcutt & Sons Co. v. Bricklayers' Benevolent & Protective Union No. 3, 200 Mass.

What was intended to be a preliminary factual finding was transformed into a legal conclusion.

Two decisions in 1914 illustrate this dilemma. In *Hoban v. Dempsey*,[216] a longshoremen's union unsuccessfully challenged a contract between another union and a number of shippers.[217] The contract required the companies to employ only members of the defendant union unless the union could not provide enough workers.[218] Writing for the court, Justice Rugg reasoned that the case fell within the ambit of *Pickett v. Walsh*,[219] in which the court had held that a union could lawfully strike in order to require all work on a given job to be done by union members.[220] Justice Rugg distinguished *Folsom*, which he cited for the broad proposition that "strike[s] or other compulsion to procure a closed shop" were illegal.[221] This conjunction of cases destroyed the factual distinction stated so firmly in *Folsom*. The benefits of enforcing a closed shop agreement on particular jobs, such as in *Pickett*, or on all future jobs, as in *Hoban*, are no more "direct" for the union workers than those of striking to attain a general closed shop agreement such as that in *Folsom*. It is worth noting that the court *could have*, but did not, make a legitimate factual distinction in the manner of the *Berry* decision between the *Pickett* defendants, who were attempting to monopolize existing particular projects, and the *Hoban* defendants, who would appear to wish to monopolize an entire labor market. Indeed, this sort of distinction may have been contemplated by the courts in some later cases which seemed to reject the precedents of *Pickett* and *Hoban*.[222] The court, however, failed to

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110, 113-14, 85 N.E. 897, 899, 901 (1908).

[216] 217 Mass. 166, 104 N.E. 717 (1914).

[217] *Id.* at 168, 104 N.E. at 717-18.

[218] *Id.* at 168, 104 N.E. at 717. The plaintiff union in *Hoban* complained that the contract between the defendant union and shippers would adversely affect its ability to secure employment with shippers. *Id.* at 168, 104 N.E. at 718.

[219] 192 Mass. 572, 78 N.E. 753 (1906).

[220] Hoban v. Dempsey, 217 Mass. 166, 168, 104 N.E. 717, 718 (1914). In *Pickett*, members of the defendant unions had been hired by a general contractor to lay bricks and stones. 192 Mass. at 575, 78 N.E. at 755. The unions adopted a rule stating that union members would refuse to do any more bricklaying and masonry if the additional job of "pointing" the brick and stone was not given exclusively to union members. *Id.* at 576, 78 N.E. at 755. The general contractor and pointers who were members of neither the bricklayer's nor the mason's union brought an action seeking to enjoin the union from implementing a strike and causing non-union pointers to lose their jobs. *Id.*

[221] 217 Mass. at 171, 104 N.E. at 719; *see Folsom*, 208 Mass. at 338, 94 N.E. at 317.

[222] *See, e.g.*, Fairbanks v. McDonald, 219 Mass. 291, 297, 106 N.E. 1000, 1001 (1914); *infra* notes 230-36 and accompanying text.

identify the decisive factual distinctions among these cases, seeming to pull its characterizations of various acts as either direct-legal or indirect-illegal out of thin air. In each instance, work may be diverted from non-union to union workers, employers may be constrained in who they may hire and how much they pay to get a particular job done, thereby enhancing the ability of the organized workers to assert their demands for lawful benefits.[223] Justice Rugg's reliance on *Pickett* and *Folsom* illustrates the indeterminacy of the directness test. The actions undertaken in *Pickett* and *Hoban* were declared to be for "direct" benefits simply because they did not fit cleanly into the model of strikes for "indirect" benefits posited in *Berry* and *Folsom*.[224]

Justice Rugg attempted to distinguish *Berry* from *Hoban* by asserting that *Berry* turned on the fact that the plaintiff had been discharged.[225] This distinction, however, is a misreading of *Berry*, since that case did not hinge on the plaintiff's discharge.[226] The crux of *Berry* was not the immediacy of the harm to plaintiff, but rather the nature of the benefit to the defendant.[227]

The court made two further related attempts to explain the *Hoban* decision. After setting forth the facts of the dispute, the court observed:

> The uncontradicted direct testimony was to the effect that the dominant motive on the part of both parties was to gain benefits for themselves and in no sense to harm the plaintiffs. . . . [I]t is plain from [the] summary of testimony that the finding that there was no purpose to injure the plaintiffs or to compel them to join the defendant union was supported by [the] evidence.[228]

Citing the *Folsom* decision with approval, Justice Rugg concluded

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[223] *See* F. MARSHALL, A. KING & V. BRIGGS, JR., LABOR ECONOMICS: WAGES, EMPLOYMENT, AND TRADE UNIONISM 357 (1980); L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 465-69 (1978); Warm, *supra* note 212, at 287-95; Note, *Right of Labor Unions to Strike for the Enforcement of the Closed Shop*, 13 COLUM. L. REV. 66, 68 (1913).

[224] *See* Berry v. Donovan, 188 Mass. 353, 358-59, 74 N.E. 603, 605-06, *appeal dismissed*, 199 U.S. 612 (1905). The *Berry* court labeled as indirect the benefits gained through action directed against another party "primarily for the purpose of doing him harm, and thus compelling him to yield" to the union. *Id.* at 358, 74 N.E. at 605. While the union activities in *Hoban* and *Pickett* arguably were undertaken to attain the indirect benefit of strengthening the unions, the court apparently refused to label the activities indirect because they were not intended primarily to harm the employers.

[225] *Hoban*, 217 Mass. at 170, 104 N.E. at 719.

[226] *Berry*, 188 Mass. at 359-60, 74 N.E. at 606.

[227] *Id.* at 358-59, 74 N.E. at 605-06.

[228] *Hoban*, 217 Mass. at 169, 104 N.E. at 718.

that "a different situation is presented by a voluntary and unforced agreement, freely made solely for the mutual advantage of the contracting parties, which does not effect the discharge from employment of anyone."[229]

The first quotation illustrates the commonly confused interplay between the directness test and malice, and the second connects the directness test with cases dealing with the natural laws of business and the free flow of labor. Both show ways in which the simple "factual" directness test became unmoored from its factual roots in complex cases, as extraneous arguments were brought in to bolster decisions that rested on uncertain grounds. In *Hoban,* in fact, the testimony of the steamship company defendants made it clear that their reason for contracting with one union was their fear of continued labor unrest which they had experienced in the past when they dealt with several other unions, and hence, their actions were "compelled" by much the same fears that compel the settlement of a strike. "Compulsion" was not the key to *Folsom* any more than discharge was the key to *Berry.* Further, defendant's *motives* should have played no part in determining whether actions were direct-legal or indirect-illegal. Each of Justice Rugg's explanations for the court's *Hoban* decision took it farther from the very standard on which it supposedly rested.

Later that year, the court in *Fairbanks v. McDonald*[230] distinguished *Pickett* and *Hoban,* relying heavily on the directness test.[231] The court, finding for the plaintiffs, who had been discharged at the union's behest,[232] wrote:

> [The defendants] intended to compel the plaintiffs' employers to discharge the plaintiffs and to refuse to give to the plaintiffs any further employment, and that this was done, not for the purpose of securing for the members of the defendants' union all the work that was to be had from these employers, but to deprive the plaintiffs of employment and make it impossible for them to obtain their livelihood by their labor, unless they should become members of the defendants' union upon whatever onerous terms

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[229] *Id.* at 171, 104 N.E. at 719.

[230] 219 Mass. 291, 106 N.E. 1000 (1914).

[231] *Id.* at 297, 106 N.E. at 1001. The court classified as allowable competition a union's demand for either all or none of the work, such as occurred in *Pickett* and *Hoban,* while finding the union activity in *Fairbanks* to be a direct, malicious attack on the plaintiffs. *Id.*

[232] *Id.* at 297, 106 N.E. at 1000. The plaintiffs—members of a local union—sought to restrain the defendants, a rival union affiliated with a national union, from forcing an employer to discharge the plaintiffs. *Id.*

> the latter should choose to impose. . . .
>
> The defendants did not say to their employers, "You must give us all your work or none of it," as they might have done without exceeding the limits of allowable competition. They required their employers to refuse absolutely to employ the plaintiffs, for the purpose of putting upon the latter an unfair pressure.[233]

Since it was settled in Massachusetts that certain types of action in support of closed shops were legal,[234] so long as they did not fit into the paradigm of a strike for a closed shop,[235] the court was compelled to make a further distinction between permissible types of actions that were "directly" for a closed shop, and ones that worked to that end only indirectly through applying pressure on recalcitrant workers to join the union.[236]

The genesis of the directness test in *Berry* was the political judgment that certain actions made unions too strong to be toler-

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[233] *Id.* at 297, 106 N.E. at 1000-01 (citations omitted).

[234] *See, e.g.*, Hoban v. Dempsey, 217 Mass. 166, 169, 104 N.E. 717, 718 (1914) (union may enter into mutually beneficial contract with an employer where only injury suffered is the competitive loss suffered by rival union); Pickett v. Walsh, 192 Mass. 572, 584, 78 N.E. 753, 758 (1906) (union has a right to compete against rival unions for work by engaging in a strike or by threatening to strike); Berry v. Donovan, 188 Mass. 353, 362, 74 N.E. 603, 607 (conceding that in some instances action designed to create a closed shop may be justified), *appeal dismissed*, 199 U.S. 612 (1905).

[235] *See* Folsom v. Lewis, 208 Mass. 336, 337, 94 N.E. 316, 317 (1911) (industry wide strike for closed shop is unlawful); *see also* Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 388, 48 N.E.2d 1, 4-5 (1943) (outsider strike for closed shop in which employees played no part is unlawful).

[236] Fairbanks v. McDonald, 219 Mass. 291, 297, 106 N.E. 1000, 1001 (1914). Another case that distinguishes *Pickett* by using a direct-indirect analysis is Haverhill Strand Theater, Inc. v. Gillen, 229 Mass. 413, 118 N.E. 671 (1918), wherein the court held that a strike to force an employer to hire a minimum number of workers was illegal:

> [I]n [*Pickett*] the contractor wanted the pointing done. The peculiarity of the case at bar is that the work which the defendants have combined to force the plaintiff to give to them is work which the plaintiff does not want done; not only that, but it is work which if done at the plaintiff's expense will cause him pecuniary loss. . . . The question is whether a combination by a union for the purpose of getting work for the members of it *in this indirect way* is a justifiable interference with the plaintiff's right to a free flow of labor.

Id. at 419, 118 N.E. at 673-74 (emphasis added). Though the union's conduct differed from that of the union in *Pickett*, the substantive issue in both was the same: Can an employer be forced to pay more money than he wishes in order to have a given job done? *Id.* It is not clear what the court meant by the union "getting work for the members . . . in this indirect way," *id.* at 419-20, 118 N.E. at 674, since there was nothing indirect about what the union did in *Haverhill*. The term "indirect" was detached from both its normal meaning and from its original legal usage; the "factual" standard had actually become purely a legal conclusion.

ated, and that one could distinguish factually those powerful indirect actions from permissible and less threatening direct ones. As the foregoing discussion illustrates, however, subsequent courts reasoned backwards from the *conclusion* that disputed actions were too effective to the *argument* that they were "indirect," and then moved forward again to the very conclusion with which their analysis had begun.

Trade Disputes in Massachusetts

In 1913, the Massachusetts Legislature enacted the Peaceful Persuasion Act (The Massachusetts Act),[237] which deprived the Massachusetts courts of the power to issue injunctions against certain kinds of action in cases involving "trade disputes."[238] The Massachusetts Act, however, failed to define "trade disputes."[239] As a result, the Supreme Judicial Court, in a series of cases, held that the Massachusetts Act did not change the common-law rule that only strikes arising out of a dispute between an employer and his own workers concerning the wages, hours, and conditions of work were protected.[240] Thus, the directness test continued to play a major role in Massachusetts labor law even after passage of the New Deal legislation. For example, in *Simon v. Schwachman*,[241] the court issued an injunction against peaceful picketing by a meat cutters union of a retail meat dealer who employed non-union labor at wages below union scale.[242] The court wrote:

> In this case the acts of the defendants are not justifiable

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[237] MASS. GEN. LAWS ANN. ch. 149, § 24 (West 1982). The Massachusetts Act was modeled after the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1976).

[238] *See* MASS. GEN. LAWS ANN. ch. 149, § 24 (West 1982).

[239] *See id.*

[240] *See, e.g.*, Fashioncraft, Inc. v. Halpern, 313 Mass. 385, 388, 48 N.E.2d 1, 4 (1943) (non-employee union strike to attain closed shop unlawful); Quinton's Market, Inc. v. Patterson, 303 Mass. 315, 317, 21 N.E.2d 546, 548-49 (1939) (injunction barring non-employee union picketing concerning working hours); Simon v. Schwachman, 301 Mass. 573, 579, 18 N.E.2d 1, 4 (1938) (picketing for union recognition and closed shop by non-employee union unlawful).

[241] 301 Mass. 573, 18 N.E.2d 1 (1938).

[242] *Id.* at 574, 18 N.E.2d at 6. In *Simon*, the union sought a contract that would have instituted a closed shop, increased employee wages, and shortened working hours. *Id.* at 570, 18 N.E.2d at 2-3. The picketing was done during business hours, but with only one picket at a time, and without banner, sign or placard. *Id.* at 575, 18 N.E.2d at 3. There were no disturbances, threats, or coercive acts, but the pickets recited slogans stating that the store treated labor unfairly and advocated boycotting the store. *Id.* The plaintiff claimed that the picketing was damaging to its business. *Id.*

> under the common law of this Commonwealth even with the peaceful persuasion act added, because there is no lawful trade dispute recognized by that law. By our common law, the right to strike and maintain pickets against an employer is deemed the right of his employees only. . . .
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> . . . The statute omits to change the substantive law of torts . . . .[243]

The next year, in *Quinton's Market, Inc., v. Patterson*,[244] the court granted an injunction against a union that was picketing to force a non-union employer to observe Wednesday as a half-holiday.

> It is . . . settled that in order to justify the infliction of intentional injury and to escape the liability which follows from the ordinarily tortious quality of such an act, the right of their own which the defendants claim to exercise must bear a direct, and not a merely remote or secondary, relation to their own lawful advantage. . . .
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> . . . .
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> . . . No sound argument can be made that the words "lawful trade dispute" as they appear in the amended section were intended to include disputes that at common law could not lawfully become the subject of combination or to change the established rule that the statute applied only where there was an existing "lawful" dispute.[245]

Thus, it is possible to trace the development of the directness test from its sociological jurisprudence-influenced roots in *Berry* in 1905, through its progressive "legalization" in the 1910's, to its eventual formalization by the 1930's. What had begun as a politi-

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[243] *Id.* at 577, 579, 18 N.E.2d at 4-5. Tying the concept of direct benefits to the term trade dispute was not unique to the 1930's. It had appeared at least as early as 1914, in Burnham v. Dowd, 217 Mass. 351, 104 N.E. 841 (1914), which involved a classic secondary boycott. The crux of the court's decision was its statement that "[t]he defendants have no real trade dispute with the plaintiffs. No one of the members of the union is . . . employed by the plaintiffs." *Id.* at 356, 104 N.E. at 843. Similarly, the court in Martineau v. Foley, 225 Mass. 107, 113 N.E. 1038 (1916), stated:

> There is nothing in the allegations to the effect that the plaintiffs were in dispute with employés or with the [defendant] union, and so far as may be inferred, the action of the defendants as members of their union, was taken with a purpose to cause damage to the plaintiffs because of their relation to unionism, with the motive to thereby strengthen the local union and place it in better position to assert its demands for a union shop.

Id. at 109, 113 N.E. at 1039.

[244] 303 Mass. 315, 21 N.E.2d 546 (1939).

[245] *Id.* at 317, 319, 21 N.E.2d at 548-49.

cal/factual standard has become an abstract legal one, used to counteract legislation seemingly designed explicitly to change the legal rules.[246]

Illinois Courts and Primary Purpose

In Illinois, a concept was developed which was similar to the Massachusetts "direct/indirect" distinction, although the terms used were somewhat different. The Illinois courts discussed the "primary purpose" of union activity, a phrase which neatly combined and confused the arguments about the economic effect of union actions with arguments regarding their motives. Thus, even more than in Massachusetts, the Illinois court mixed arguments about malice with those about direct or indirect benefit to unions and their members to create an ostensible factual standard which was, in fact, no standard at all. For example, in *A.R. Barnes & Co. v. Typographical Union No. 16*,[247] the court, holding that picketing in support of an otherwise lawful strike was illegal per se,[248] began its rationale with a reference to the union's "actual malice," and ended by contrasting combinations "for the purpose of obtaining lawful benefits" and those "which have for their immediate purpose the injury of another."[249] The "immediate purpose" language suggested that a picket line was comparable to a strike for a closed shop in that both would directly harm the employer and

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[246] In Fashioncraft, Inc. v. Halpern, 313 Mass 385, 48 N.E.2d 1 (1943), the court observed: "Whatever advantage might in general accrue to trade unionism by the acquisition of a closed shop arrangement with an employer, there is not sufficient relationship between the aim sought and the self interest of the strikers to justify the intentional infliction of harm on another." *Id.* at 388, 48 N.E.2d at 3. Six years later, in Reeves v. Scott, 324 Mass. 594, 87 N.E.2d 833 (1949), the court noted:

> The distinction between a demand by a union that an employer give members of the union all his work in their trades, . . . and a demand upon an employer with whom the union has no trade dispute that he see to it that members of the union are substituted for nonunion men who are working for one with whom the employer has business relations . . . is clear. . . . The first demand is lawful and enforceable against the employer, but the second is illegal and unjustified, being directed against a stranger to the controversy to compel him to compel another to yield to the union's demands.

Id. at 600, 87 N.E.2d at 836. By the time *Reeves* was decided, the Massachusetts court appeared to have lost all sense of the underlying political nature of the distinctions being drawn, and to have appealed to the direct-indirect distinction as one of logic and nature rather than one of economic and political thrust.

[247] 232 Ill. 424, 83 N.E. 940 (1908).

[248] *Id.* at 435-36, 83 N.E. at 944-45.

[249] *Id.* at 437, 83 N.E. at 945.

only ultimately, as opposed to immediately, benefit the workers.[250]

Nowhere was the confusion between malice and indirect benefits more apparent than in the Illinois Supreme Court's disposition of *Kemp v. Division No. 241*.[251] In *Kemp*, the plaintiffs, former members of the defendant railway engineers' union, had left the union in a dispute over the use of union funds for political purposes.[252] The defendant called a strike to enforce its closed shop agreement with the employer and succeeded in obtaining the plaintiffs' discharge.[253] The appellate court, holding against the union, observed:

> The acts and measures against which relief is sought . . . were an effort to drive complainants from their business, not by underbidding them, not by doing the same work better or more cheaply, nor by refusing to work with them for good and sufficient causes, but were malicious interference and intimidation exerted on their employer for the purpose of inflicting injury and causing losses to complainants . . . .
>
> Nor do we think the acts complained of can be justified on the plea that they were done for the good of the union or its members as suggested above.[254]

The appellate court's position was that the benefit for which the union struck—strengthening the union through a closed shop—was too remote to provide legal justification for acts interfering with

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[250] Another explanation for the Illinois court's position is that it confused the issues of immediate *harm* to plaintiffs with immediate *benefits* to defendants, as did the Massachusetts court on occasion. In some subsequent cases, the court would more clearly declare a defendant's actions unlawful because they interfered directly with a plaintiff's rights, when the real concern was, at least ostensibly, with the attenuation of defendant's benefits. *See, e.g.*, Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 308 Ill. 488, 139 N.E. 887 (1923). This confusion is related to the misconstruction of malice and the directness test, since it was easy to consider as malicious a defendant who caused an immediate and easily identifiable harm.

[251] 153 Ill. App. 344, *rev'd*, 255 Ill. 213, 99 N.E. 389 (1912).

[252] 255 Ill. at 215, 99 N.E. at 390.

[253] *Id.* at 216, 99 N.E. at 390-91. The plaintiffs argued that the threatened strike was unlawful because it involved a union grievance against former union members who were not in direct competition with the union. *Id.* at 226, 99 N.E. at 394. The supreme court ultimately agreed that the union's proposed actions were "remote" from a matter of direct competition but concluded that they were still "kindred" to direct competition in that the internal strengthening of the union itself would enable labor "to make a successful effort to maintain or increase their wages or to enforce such demands as have been held to be proper." *Id.*

[254] 153 Ill. App. at 375-76.

the plaintiffs' rights.[255]

The supreme court rejected the argument that the defendants had acted with malice toward the plaintiffs and reversed the appellate court on the grounds that "the primary object of the combination [was] to further the interests of the organization and improve and better the condition of its members."[256] The appellate court had kept its consideration of malice and primary economic motive separate, arguing chiefly that the benefit for which the union was striking—a closed shop—was too remotely related to acceptable benefits to justify a strike.[257] The supreme court's decision, however, combined its treatment of malice and immediacy of benefits:

> If it is proper for workmen to organize themselves into such combinations as labor unions, it must necessarily follow that it is proper for them to adopt any proper means to preserve that organization. If the securing of the closed shop is deemed by the

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[255] *Id.* at 376. The appellate court, relying extensively on Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906), found that the absence of a trade dispute was fatal to the defendant's claimed right to strike. 153 Ill. App. at 378. The court acknowledged that if the controversy were between employers and employees and involved a genuine trade dispute, the union would possess a right to strike the employer. *Id.* In this particular instance, however, the court held that no trade dispute existed and that interference with the disgruntled employees' right to work was not permissible. *Id.* at 379. The court noted that this case fell outside the parameters of allowable competition, since the purpose of the union's actions in enforcing the closed shop was not to compete with the plaintiffs, but maliciously to inflict injury on them. *Id.* at 374-75. The court regarded the combination of laborers to prevent employers from employing others as a "despotic and tyrannical" violation of a laborer's indefeasible right to choose work freely. *Id.* at 370. Equally as important, however, was the court's view that the benefit that would accrue to the union, had its action been successful, was remote in relation to the immediate and possibly irreparable injury to the resigning union members. *Id.* at 376.

[256] 255 Ill. at 234-35, 99 N.E. at 397. Noting that neither threats nor actual violence had occurred, the supreme court concluded that there was no evidence of malice toward the plaintiffs. *Id.* at 225, 99 N.E. at 394. The court determined, therefore, that the intent to injure was not the primary object of the union's actions, but rather, the union's goal was to seek better working conditions by establishing a closed shop. *Id.* at 225-26, 99 N.E. at 394. In the opinion of the court, a union effectively can fight for better wages and hours only by preserving the unity of the organization. *Id.* at 226, 99 N.E. at 394. Moreover, the court noted that since laborers, unless otherwise bound by contract, have the constitutional right to terminate their employment for any reason, organized laborers can vocalize their refusal to work unless their non-union counterparts will be discharged. *Id.* at 219-20, 99 N.E. at 392. Thus, the court indicated, those who have incidentally been injured by a union's exercise of this absolute right have no legal redress. *Id.* at 220, 99 N.E. at 392.

[257] 153 Ill. App. at 643. The dissenting opinion on the appellate level echoed Justice Holmes' dissent in Plant v. Woods, 176 Mass. 492, 505, 57 N.E. 1011, 1015 (1900) (Holmes, C.J., dissenting), by asking rhetorically: "But shall the courts say that the purpose of securing more remote benefit will not be a justification for acts not in themselves tortious . . . ?" 153 Ill. App. at 643.

> members of a labor union of the utmost importance and necessary for the preservation of their organization, through which, alone, they have been enabled to secure better wages and better working conditions, and if to secure that is the primary object of the threat to strike, even though in the successful prosecution of the object of the combination injury may result incidentally to non-union men through the loss of their positions, that object does not become unlawful.[258]

The court, then, found as a matter of fact that the "primary object" of the strikers was to preserve and strengthen their organization, and not to injure non-union plaintiffs. Thus far, the decision was clear, if inadequately explained. The opinion, however, continued:

> This case partakes of none of the elements of a boycott. The primary object of a boycott being to inflict injury upon another has universally been held to be illegal. Here the primary object of the combination is to further the interests of the organization and improve and better the condition of its members. Whatever injury may follow to others is merely incidental.[259]

This is blatant nonsense. Harm to the plaintiffs and help to the union are equally the object of boycotts and strikes for a closed shop.[260] Boycotts were, however, an even less direct way of strengthening the union than strikes for closed shops,[261] and it appears that that is what the supreme court had in mind. The court, however, applied language seemingly concerned with motive to an analysis more concerned with effects, thereby effectively obscuring the real grounds for the decision.

In *Carlson v. Carpenter Contractors' Association*,[262] the case

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[258] 255 Ill. at 226-27, 99 N.E. at 394.

[259] *Id.* at 234-35, 99 N.E. at 397. The Illinois court's construct of primary purpose constituted a concept similar to the directness test adopted by the Massachusetts court in Berry v. Donovan, 188 Mass. 353, 74 N.E. 603 (1905), under which only union activities intended directly to achieve legitimate labor objectives, such as more favorable hours, wages and working conditions, were legally permissible. Although the Illinois court confused the issue of directness with malice, it closely paralleled the Massachusetts rationale by holding that actions contributing only indirectly to the attainment of legitimate labor goals would not be allowed. *See, e.g.*, Kemp v. Division No. 241, 255 Ill. 213, 225-26, 99 N.E. 389, 394 (1912); A.R. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 431, 83 N.E. 940, 943 (1908).

[260] Kemp v. Division No. 241, 255 Ill. 213, 234-35, 99 N.E. 389, 397 (1912).

[261] *See* Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363, 1364 n.5 (1962) (strike is nothing more than a type of boycott).

[262] 305 Ill. 331, 137 N.E. 222 (1922).

involving two brothers who suffered economic harm because of their support of the carpenters' strike, the appellate court's decision contained a similarly confused discussion of the primary purpose of the defendants' actions. Chief Justice Thompson, writing for the supreme court, suggested a wholly different mode of attack, attempting to combine a rights analysis like those discussed above[263] with a directness test. Chief Justice Thompson stated:

> The apparent confusion that exists in the law as declared in adjudicated cases in the different jurisdictions is due largely to a faulty mode of approach. Whenever a court permits itself to be led afield into a discussion of the rights of the defendant in tort actions and to become entangled in the subtleties connected with the phrases "primary purpose" and "legal justification," it is apt to have its attention diverted from a consideration of the question whether plaintiff's rights have been invaded by the doing of the act charged.[264]

Despite his lofty rhetoric, Chief Justice Thompson further wrote that "[n]o persons . . . have the right to directly or indirectly interfere with or disturb another in his lawful business or occupation or for the sake of compelling him to do some act which in his own judgment his own interest does not require."[265] This assertion is legally unsound. Strikes had been legal in Illinois for decades[266] and each legal strike is an interference with or disturbance of another to compel him to do some act which in his own judgment his own interest did not require. The real ground for the decision was that this defendant did not benefit directly from harming this plaintiff. Thus, while Chief Justice Thompson appeared to reject the primary purpose analysis and the direct-indirect distinction, his decision rested on exactly that analysis and that distinction.[267]

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[263] For a discussion of the *Carlson* court's treatment of the parties' rights, see *supra* text accompanying notes 190-92.

[264] 305 Ill. at 336, 137 N.E. at 224.

[265] *Id.* at 338, 137 N.E. at 224.

[266] *See, e.g.*, Kemp v. Division No. 241, 255 Ill. 213, 225-26, 99 N.E. 389, 394 (1912) (dictum) (strikes are permitted when main objectives are to benefit the interests of the organization and to improve the position of its membership); Wilson v. Hey, 232 Ill. 389, 396, 83 N.E. 928, 929 (1908) (dictum) (labor union has right to boycott an employer). *See generally* C. GREGORY, *supra* note 19, at 52-82 (discussion of judicial holdings on legality of strikes in New York and Massachusetts).

[267] While Chief Justice Thompson seemed to focus his argument on the issue of the superiority of the plaintiffs' rights to those of the defendant, a closer examination reveals that the *Carlson* rationale emphasized the indirectness of the business relationships existing among the opposing parties. The court stated that John Carlson, the union carpenter, had

Chief Justice Thompson's decision was, in fact, the first Illinois application of the directness test to refute a plaintiff's argument that the defendant benefited directly from the plaintiff's injury, without confusing the question with assertions of malice.

In *Brims v. People*,[268] the court held that a strike against an employer because he was using trim manufactured by a non-union company violated an injunction against "threatening, coercing or intimidating" any person dealing with the company, reasoning once again that the primary purpose of the strike was injurious because its value to the union was only indirect.[269] The court quoted language written by Chief Justice Taft of the United States Supreme Court when he was a Federal district court judge regarding a strike somewhat similar to that at issue in *Brims*:

> The one combination [a strike] . . . was lawful, because it was for the lawful purpose of selling the labor of those engaged in it for the highest price obtainable, and on the best terms. . . . But the employés of defendant companies are not dissatisfied with the terms of their employment. So far as appears, those terms work a mutual benefit to [the] employer and [the] employed.[270]

In *Carpenters' Union v. Citizens' Committee to Enforce the Landis Award*,[271] the last and most complicated of the cases arising out of the carpenters' strike, the lower court introduced yet another interpretation of the distinction between "direct" and "indirect" actions.[272] In addressing the question of which of the de-

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no express contractual obligation to the defendant that would justify interference by the Contractors' Association with Carlson's ability to procure outside employment. Carlson v. Carpenter Contractors' Ass'n, 305 Ill. 331, 337, 137 N.E. 222, 224 (1922). Chief Justice Thompson also noted that Oscar Carlson, the independent builder, was denied access to building materials simply because he continued to employ union members, a denial which exceeded the legal perimeters established for permissible lockouts. *Id.*

[268] 226 Ill. App. 505, *aff'd sub nom.* Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 308 Ill. 488, 139 N.E. 887 (1923).

[269] *Id.* at 520.

[270] *Id.* at 518 (quoting Toledo, A.A. & N.M. Ry. v. Pennsylvania Co., 54 F. 730, 738 (N.D. Ohio 1893)).

[271] 244 Ill. App. 540, *rev'd*, 333 Ill. 225, 164 N.E. 393 (1928).

[272] 244 Ill. App. at 540. The massive building trades strike which had given rise to the earlier cases was settled by an arbitration award by Judge Kenesaw Landis. However, several unions, including the carpenters' union, had not agreed to be bound by the award, and rejected it when it was finally made. *Id.* at 549. In response, the contractors organized to enforce the award, and in 1921, an organization of local businessmen not directly connected with the building trades was formed to support the contractors—the Citizens' Committee. *Id.* at 550. One of the Committee's practices that gave rise to this suit was the pressuring of

fendant Citizens' Committee's actions were *per se* enjoinable, the lower court wrote:

> We are of the opinion that when the defendants attempted to extend their influence to the bankers of the city, and thereby cut off the supply of money . . . they were attempting to injure the carpenters, . . . by making a "raid in the rear." The making of the building loans had nothing directly to do with either the amount of work to be done or the supply of labor to do it. It had nothing to do with any of the questions in controversy between the union employers and the organized employers and could have no legitimate effect upon the competition which existed between those two groups over such questions. It, therefore, tended, without legal justification, to interfere with the freedom to which both owners and independent contractors were entitled, in negotiating for the loan of money.[273]

This opinion implies that anyone could do anything that "operate[s] directly and immediately on the subject matter of . . . controversy." The defendants in *Citizens' Committee* were not the employing contractors, nor were some of them involved in the building trades at all.[274] These defendants clearly were not involved in a "trade dispute" with plaintiffs, nor were they in a position to benefit directly and immediately from their coercive actions. The court's conclusion as to what kinds of actions might be enjoined, however, completely ignored the status of these defendants, and appears to hold that *only* those actions that directly harm the plaintiff are unlawful.[275] Of course, had such logic ever been applied to similar union action in other cases, almost everything done by the unions would have been deemed legal.[276]

In reversing the lower court, the supreme court dealt summarily with the distinction that the lower court drew between the dif-

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banks to refuse or withdraw mortgages on any property worked on by union carpenters. *Id.* at 550. The lower court held that the Committee's activities concerning mortgages were enjoinable, but that the union did not come to the court with clean hands. The court therefore refused to issue an injunction. *Id.* at 591.

[273] *Id.* at 570-71.

[274] *Id.* at 549. The Citizens' Committee was comprised of representatives from various organizations, including the Chicago Association of Commerce, the Illinois Manufacturers' Association, the Western Society of Engineers, the local chapter of the American Institute of Architects, the Chicago Real Estate Board, the banks of the city, and other business groups. *Id.* at 549-50.

[275] *Id.* at 602-04.

[276] Striking and picketing to attain closed shops directly harm employers and, hence, under a "direct harm to the plaintiff" test, necessarily would be declared illegal.

ferent types of actions undertaken by the Citizens' Committee.[277] The supreme court focused its attention on the Citizens' Committee's role in the dispute, rejecting the lower court's novel theory that any direct harm is justified, stating:

> Competition . . . does not include all conflicts of temporal interest, and does not apply in the case of the efforts of a stranger to a controversy between employers and employees, in regard to their business relations, to compel the action of either or to injure either for the purpose of compelling him to yield to the other the absolute legal right to manage his own business in his own way.[278]

The primary purpose test in Illinois was never given the clear factual basis and policy justification that the directness test was given in Massachusetts.[279] Further, while the Massachusetts test was only occasionally confused by combining it with an analysis of the defendant's motives, that confusion was common in Illinois.[280] Nonetheless, malice and primary purpose analysis were intended to address different things.[281] The primary purpose test was, in fact, much the same as the directness test: if the primary purpose of the defendant's acts was to achieve "lawful benefits," then the action was lawful; if it was to achieve ends which would only remotely contribute to attainment of lawful benefits, then it was "malicious" and unlawful. The additional step introduced by the primary purpose language, declaring the defendant's motives to be pure or impure, added no substance to the analysis or conclusion. Hence, the analysis suffered exactly those problems discussed above in connection with the directness test.[282]

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[277] 333 Ill. at 244, 164 N.E. at 400.

[278] *Id.* at 246, 164 N.E. at 400-01.

[279] *Compare* Carlson v. Carpenter Contractors' Ass'n, 305 Ill. 331, 336, 137 N.E. 222, 224 (1922) (primary purpose concept interferes with court's consideration of plaintiff's rights) *with* Berry v. Donovan, 188 Mass. 353, 359, 74 N.E. 603, 605 (1905) (strike to obtain direct benefits of improved working conditions is valid).

[280] *See, e.g.*, Kemp v. Division No. 241, 255 Ill. 213, 219, 99 N.E. 389, 392 (1912) (employee has right to protection from malicious interference caused by another employee, unless interference is consequence of exercise of some legal right); Brims v. People, 226 Ill. App. 505, 522-23 (1922) (people have right to organize for their own benefit, but not to injure others), *aff'd sub nom.* Anderson & Lind Mfg. Co. v. Carpenters' Dist. Council, 308 Ill. 488, 139 N.E. 887 (1923).

[281] The malice test focuses on the intent of the actor to injure another, *see, e.g.*, Doremus v. Hennessey, 176 Ill. 608, 615, 52 N.E. 924, 926 (1898), whereas the primary purpose doctrine focuses on the motives of the actor, *see, e.g.*, Fenske Bros. v. Upholsterers' Int'l Union, 358 Ill. 239, 247-49, 193 N.E. 112, 116-17 (1934).

[282] *See supra* notes 216-36 and accompanying text.

The Anti-Injunction Act in Illinois

Like Massachusetts, Illinois passed an anti-injunction act (the Illinois Act).[283] In the early cases interpreting the Illinois Act, the Illinois court was more prepared than its Massachusetts counterpart to view the legislation as having changed the common-law rules. Ultimately, however, the court went beyond the Massachusetts court in reviving old rules to emasculate the Illinois Act.

Initially, although the theme of direct and indirect benefits appeared in the Illinois cases, it was not nearly as dominant as it was in the Massachusetts discussion of "trade disputes." In the first major case interpreting the Illinois Act, *Fenske Brothers v. Upholsterers' International Union*,[284] the court looked to the *Kemp* decision, in which the generally conservative Illinois court of the 1910's recognized a legal interest of a union in strengthening its own organization, for an understanding of the meaning of "remote" benefits.[285] Referring to *Kemp*, the *Fenske* court interpreted the direct-indirect distinction as being solely between malicious and economically motivated acts.[286] Indeed, the court not only stated that acts "to further the interests of the organization"[287] are legally justified, but also argued that *every* case in which union actions were enjoined involved either malevolence or violence on the part of the union.[288] The court analyzed the cases that on their face outlawed peaceable picketing, "explained" that each *really* enjoined "combinations . . . which have for their immediate purpose the injury of another,"[289] and concluded that peaceful picket-

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[283] ILL. ANN. STAT. ch. 48, § 2a (Smith-Hurd 1969). The Illinois Anti-Injunction Act of 1925, commonly referred to as the Anti-Injunction Law, was designed to make lawful certain acts enumerated in the statute, such as strikes and peaceful picketing prompted by a dispute concerning terms or conditions of employment. Fenske Bros. v. Upholsterers' Int'l Union, 358 Ill. 239, 246, 193 N.E. 112, 115 (1934). Unlike the Norris-LaGuardia Act, the Illinois Act neither specifically delineates actions not subject to restraining orders or injunctions nor defines disputes concerning terms and conditions of employment. *Id.*

[284] 358 Ill. 239, 193 N.E. 112 (1934). In *Fenske*, several locals of the Upholsterers' International Union of North America picketed 12 furniture manufacturers in response to the manufacturers' refusal to accede to the union's demand that the manufacturers operate closed shops. *Id.* at 243, 193 N.E. at 114. The manufacturers sought to enjoin the union's actions and to have the Illinois Act declared unconstitutional. *Id.*

[285] *Id.* at 247, 193 N.E. at 116 (citing Kemp v. Division No. 241, 255 Ill. 213, 99 N.E. 389 (1912)).

[286] *Fenske*, 358 Ill. at 247, 193 N.E. at 116. For an analysis of the supreme court's use of the direct-indirect test in *Kemp*, see *supra* notes 251-61 and accompanying text.

[287] 358 Ill. at 249, 193 N.E. at 116.

[288] *Id.* at 249-50, 193 N.E. at 117.

[289] *Id.* at 248, 193 N.E. at 116.

ing had never been unlawful per se in Illinois.[290] Moreover, the court observed that the governance of labor conflict was best left to the legislature, which had spoken clearly on the subject of picketing, and that "[i]nasmuch as the Legislature had a right to legalize acts of peaceable picketing and peaceable persuasion," it necessarily followed that the Act was constitutional.[291]

Three years later, in *Schuster v. International Association of Machinists*,[292] the Appellate Court of Illinois considered the question of the existence of a trade dispute[293]—the same point that the Massachusetts court was entertaining at that time. In *Schuster*, the plaintiff employer maintained that picketing is legal only when a labor dispute exists within the meaning of the Illinois Act, and that the defendant union's attempt to organize the plaintiff's open shop did not constitute a labor dispute.[294] The court held for the defendant union on two grounds. First, the court pointed out that the federal anti-injunction act included attempts to organize open shops among the actions that could not be enjoined in federal courts, adding that "no sound reason is advanced why the public policy of this state as to the matter under consideration should not be in accord with the public policy of the federal government . . . ."[295] Second, the court indulged in a more lengthy and impassioned free speech argument, which, without ever mentioning the rather dry and technical concepts of direct or remote benefits, appears in fact to have been partly directed to the substantive meaning of that distinction as applied to unions:

> [The plaintiff] persists in his refusal to deal with a labor union and yet he resents as an infringement of his rights the disclosure by that union to the public . . . of his antagonism to organized

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[290] *Id.* at 249, 193 N.E. at 117.

[291] *Id.* at 257, 193 N.E. at 120.

[292] 293 Ill. App. 177, 12 N.E.2d 50 (1937).

[293] *Id.* at 182, 12 N.E.2d at 52.

[294] *Id.* at 183, 12 N.E.2d at 52. The defendant's representatives unsuccessfully attempted to solicit the employee automobile mechanics to join the union. *Id.* at 179, 12 N.E.2d at 51. Union members began picketing the shop during business hours in an effort to force the plaintiff to close his shop by inducing his employees to join the union or by discharging those who refused. *Id.* The plaintiff obtained a temporary injunction restraining the defendants from picketing and from publicly espousing their opinion that the plaintiff was unfair to organized labor. *Id.* at 181, 12 N.E.2d at 51-52. At trial, the plaintiff maintained that the picketing was not within the ambit of protection afforded by the Illinois Act because it did not concern terms or conditions of employment within the parameters of an employee-employer relationship. *Id.* at 181, 12 N.E.2d at 52.

[295] *Id.* at 184, 12 N.E.2d at 53.

> labor. His position that, notwithstanding his antagonism to the union, the law must silence the voice of organized labor lest he may suffer any ill consequences as a result of his attitude, is untenable. . . . What inalienable right has an employer who is unfair in the eyes of organized labor to the favor of the continued patronage of its members and friends?[296]

In *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union*,[297] however, the supreme court approached the Illinois Act in much the same way as the Massachusetts court interpreted the Massachusetts Act. The case involved a boycott and a picket line established by the defendant union against the plaintiff, a non-union company.[298]

The court recognized the employer's common-law right to do business without unauthorized interference, and then observed:

> The foundation of the action is not necessarily the intent to injure . . . . The controlling feature is the malice which accompanies the intent to injure, which is manifested by the doing of an unlawful act, and for such purpose the injuring of the person in the enjoyment of his right to do business or to have employment is the unlawful act which, coupled with acts accompanying it, create the cause of action.[299]

The court acknowledged that, as between employer and employee, "there has been a modification, and, in many instances, a complete

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[296] *Id.* at 193-94, 12 N.E.2d at 56-57. The majority also noted the futility of organizing labor if such organizations are precluded from expanding their membership absent the employees' manifest intent to organize. *Id.* at 199, 12 N.E.2d at 59. Hence, if first amendment freedoms are to be protected, the court reasoned, it is essential that unions be permitted to "use all lawful propaganda to enlarge their membership." *Id.* (emphasis omitted) (quoting American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)).

In addition, the court recognized the competing rights and privileges of the litigants. 293 Ill. App. at 199, 12 N.E.2d at 59. The majority opined, however, that because the plaintiff's right/privilege to operate a non-union shop is not absolute, the union must also be allowed to exercise its competing right/privilege to publicize its consequent regard for him as unfair. *Id.*

[297] 371 Ill. 377, 21 N.E.2d 308 (1939), *aff'd*, 312 U.S. 287 (1941).

[298] *Id.* at 379-80, 21 N.E.2d at 310. The plaintiff dairy company employed non-union labor and operated under a different system of delivery than the union vendors. *Id.* Consequently, the non-union vendors were able to sell their product at lower prices than union vendors, thereby causing economic injury through lost employment to the latter. *Id.* When the union began peacefully picketing the stores that purchased the non-union delivered milk in response to the dairy's refusal to unionize, the Illinois Supreme Court issued a permanent injunction against picketing. *Id.* at 396, 21 N.E.2d at 317.

[299] *Id.* at 382, 21 N.E.2d at 311.

change in the rule of the common law."[300] The court quoted language from *Fenske*, however, stating that combinations for the immediate purpose of injuring another were illegal and defined the union's actions as such a combination.[301] Finally, the court concluded:

> It is the specified acts in a labor dispute between parties, that come within the act, and the act does not purport to prevent persons or corporations not parties to a labor dispute from protecting their business or property by injunction. The act does not prohibit injunctions in all matters which affect employment, but only in labor disputes which affect employment. A careful reading of the act discloses it was intended to apply in cases where employees have a dispute with their own employer relative to terms and conditions of employment, or where similar questions are involved in a labor dispute between several groups of employees and employers.[302]

The direct-indirect distinction, which the *Fenske* case had seemed to abolish, was revived in the *Meadowmoor* treatment of "labor disputes," and once again tied to the malice standard.[303] The substance of the standard had changed somewhat. *Fenske*, by adopting the *Kemp* rule that a strike for a closed shop by the employees of a plaintiff-employer was "direct" as "the common law" standard, had modified it.[304] The form of the distinction, however,

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[300] *Id.* at 382-83, 21 N.E.2d at 312. Prior to the passage of the Illinois Act, even peaceful picketing of an employer by employees concerning the terms and conditions of employment was unlawful. *See* Schuster v. International Ass'n of Machinists, 293 Ill. App. 177, 182, 12 N.E.2d 50, 52 (1937). Subsequent to the enactment of the statute, however, decisions that denied statutory protection to questionable labor disputes acknowledged the absolute protection from injunctive interference enjoyed by lawful employer-employee controversies. *See, e.g.*, 2063 Lawrence Ave. Bldg. Corp. v. Van Heck, 305 Ill. App. 486, 486, 27 N.E.2d 478, 479 (1940) (absent employer-employee relationship between disputants, statutorily unprotected secondary boycott is established by picketing activities), *aff'd in part*, 377 Ill. 37, 35 N.E.2d 373 (1941); Maywood Farms Co. v. Milk Wagon Drivers Union, 301 Ill. App. 607, 607, 22 N.E.2d 962, 963 (1939) (affirming injunction of picketing activities on the ground that there was no dispute between plaintiff corporation and employees).

[301] 371 Ill. at 383, 21 N.E.2d at 312.

[302] *Id.* at 384, 21 N.E.2d at 312.

[303] *Id.* at 382, 21 N.E.2d at 313-14.

[304] In Ellingsen v. Milk Wagon Drivers' Union, 377 Ill. 76, 35 N.E.2d 349 (1941), the Illinois Supreme Court noted that the United States Supreme Court, in affirming *Meadowmoor*, and in reversing Swing v. American Fed'n of Labor, 372 Ill. 91, 22 N.E.2d 857 (1939), *cert. denied*, 309 U.S. 659 (1940), *rev'd*, 312 U.S. 321 (1941), conclusively established peaceful picketing as a lawful means by which to induce a non-union employer to "close" or "open" shop. *Ellingsen*, 377 Ill. at 81-82, 35 N.E.2d at 354. According to the opinion of the majority, this is also true in the absence of an employer-employee relationship. *Id.* at 82, 35

remained essentially unchanged. A dispute between a union and a non-union employer was, by definition, not a labor dispute; a picket line or boycott established other than in the course of a labor dispute was, by definition, indirect; a strike or boycott for indirect benefits was malicious. Thus, since the legislature could not have intended to legitimate malicious acts, it did not intend to legitimate strikes or boycotts by a union against one not a union employer.[305]

At least as late as 1947, the terms of the Illinois Act discussion remained the same, and the substantive content of the direct-indirect distinction was still confused in Illinois. The following quotation, taken from *Dinoffria v. International Brotherhood of Teamsters & Chauffeurs Local Union No. 79*,[306] illustrates the court's continuing uncertainty as to the significance of the distinction upon which it still relied:

> It has been repeatedly held that it is an actionable wrong to directly or indirectly interfere with or disturb another in his business without lawful cause or justification for the sake of compelling him to do some act which in his own judgment his own interest does not require.[307]

N.E.2d at 352.

[305] 371 Ill. at 385-86, 21 N.E.2d at 313-14.

[306] 331 Ill. App. 129, 72 N.E.2d 635 (1947), *cert. denied*, 335 U.S. 815 (1948). In *Dinoffria*, union representatives sought to compel the plaintiffs, who were self-employed owners and operators of an Illinois service station, to join the Teamsters Union and to comply with the union's operating procedures. *Id.* at 131-32, 72 N.E.2d at 636. When the plaintiffs refused, union supervisors instructed other union members to stop making deliveries and, as a result, the station ran out of fuel. *Id.* at 133, 72 N.E.2d at 637.

The court determined that although workers may combine for the primary purpose of furthering the interests of a labor organization, under the circumstances, the union could not obtain such a benefit by compelling plaintiffs, who had hired no employees, to become union members. *Id.* at 135, 72 N.E.2d at 638.

[307] *Id.* at 142, 72 N.E.2d at 641. Despite the apparent abolition of the direct-indirect distinction in Fenske Bros. v. Upholsterers' Int'l Union, 358 Ill. 239, 259-60, 193 N.E. 112, 120 (1934), subsequent cases continued to rely on it to varying degrees and in varying circumstances, *see, e.g.*, Naprawa v. Chicago Flat Janitors Union, Local No. 1, 315 Ill. App. 328, 344, 43 N.E.2d 198, 205 (1942) (union not enjoined from interfering with operation of building in which owner acted as janitor when purpose of activity is to influence other union members and the public), *appeal dismissed*, 328 Ill. 124, 46 N.E.2d 27 (1943); *see* 2063 Lawrence Ave. Bldg. Corp. v. Van Heck, 377 Ill. 37, 40, 35 N.E.2d 373, 374 (1941) (secondary boycott is an "indirect illegal boycott"); *see also* Maywood Farms Co. v. Milk Wagon Drivers' Union, 313 Ill. App. 24, 26, 38 N.E.2d 972, 973 (1942) (although secondary boycott is not illegal, under certain circumstances, it may be enjoined).

CONCLUSION

This Article is intended largely as an exercise in description—it tells what happened, and only to a lesser extent hypothesizes why. Certain conclusions, however, are unavoidable from the simple study of the "what." Formal legal logic generally is considered in modern law schools to be a faintly obscure historical movement, belonging to the near-infancy of American jurisprudence. If it is considered at all outside the halls of legal history classes, it is considered as a somewhat quaint forerunner to better-reasoned and more reasonable modern legal decisions. Yet the paradigm of formalism—the conception of legal disputes as involving simple conflicts of rights that can be resolved by a proper understanding of those rights, and the application of mechanical rules of logic to these properly understood rights—has never been fully abandoned, and even the most patently inadequate constructs of formalism have a disturbing way of popping up in modern, post-Realist law as fundamental principles. Stripped of their outmoded justifications, these principles appear to modern legal practitioners as foregone conclusions: the basic axioms upon which legal argument rests. Yet a careful study of the history and development of such "fundamental axioms" must lead us to ask whether there is any reason, other than tradition, for accepting them as valid, and to wonder whether there might not be some other alternative ways of looking at legal questions. The simple study of history cannot, of itself, answer the question of what alternatives exist, but it must force us at least to ask that question.