THIRD-PARTY EFFECTS AND LABOR ENTITLEMENTS
AN ECONOMIC PERSPECTIVE

by

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LIST OF FIGURES

LIST OF TABLES

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

INTRODUCTION

This inquiry is concerned with "third-party" or "external" effects that pervade the economic dimension of human action. As an instance of these effects, actions in a specific market, the labor market, are isolated and studied. It will be argued that the ubiquity of external effects in the labor relation has been historically recognized by lawmakers as they grappled with the design of optimal legal rules in the context of the labor market. It will be maintained further that economists have failed to approach labor actions in a manner that is both analytic and cognizant of the pervasive interdependence in labor. It is the objective of this dissertation to suggest a framework for considering labor actions which integrates the disparate viewpoints of lawmakers and economists.

The first step toward analyzing the third-party aspects of the labor relation consists of an examination of the evolution of labor law. Part One, "The Framework of Labor Actions," describes this process of legal change from the earliest recorded labor court case in the United States (1806) through recent Executive Orders regulating the employment relation in the public sector. Having described the changes in labor entitlements, the last chapter of Part One searches for evidence of economic principles which may have accompanied such legal change.

In this last objective, the inquiry must acknowledge its methodological orientation. It is a premise of this analysis that economic considerations weigh heavily in the formulation and alteration of basic institutional arrangements. Significant alterations in basic institutional forms, and the accompanying alterations in entitlements, are both informed by a consideration of economic consequences and accompanied by the generation of economic effects. Economics and institutional change are thus inextricably linked.

In this study, law is taken as the predominant institutional form in labor. This is, of course, arguable. The concept "labor" encompasses many subordinate topics in addition to labor law, such as work force participation, discrimination, human capital, and others. Integrating a study of labor law with these other labor topics would have been a much richer analysis. Unfortunately however, it would represent a much more complex study and must remain, for now, on the agenda to be addressed at some future time.

While the concentration of attention on labor law is admittedly a simplification, the law in labor, as in all things, is of paramount importance. An appreciation of the breadth of the role of law can be found in the words of a former president of the American Economic Association, "...jurisprudence forms the background of all associated activity; it provides the framework that limits and controls the exercise of those unconscious premises of action which give character to a civilization. The law is neither a schoolmaster for instruction,

nor a guardian for command; it is rather the expression of the ethical sense of a community crystallized about the problem of common living."[1]

The legal framework of a country is the primary institutional form. The very phrase "legal framework" reflects an implicit acknowledgement of this. The attention of one interested in the institution of labor is thus naturally drawn to the subject of labor law. The importance of economic conceptions to the evolution of labor law is increasing in view of the trend of legal analysis. When law is concerned with the deductive rendering of conclusions based on a given set of well-known legal principles, the primary intellectual device needed is logic. If law comes to be regarded as the weighing of the relative values of alternative social arrangements, then logic is no longer adequate.[2] A decision calculus must be found which will allow the comparison of conflicting states-of-the-world and which will issue a ranking of the states in terms of some desirability standard. Economics has been expected to provide such a criterion. Whereas, "a reader of the opinions delivered by the various judges during the entire period prior to 1842 looking for economic reasoning will find little to reward his search...

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[1]Henry Carter Adams, "Economics and Jurisprudence," in Joseph Dorfman, Editor, Two Essays by Henry Carter Adams, (New York: Augustus M. Kelley, 1969), p. 138.

[2]"The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction upon itself of organized society knowingly seeking to determine its own destinies." Oliver Wendell Holms, "Privilege, Malice, and Intent," in Oliver W. Holmes, Collected Legal Papers, (New York: Harcourt, Brace and Company, 1920; reprint edition, New York: Peter Smith, 1952), pp. 129-130.

[t]he situation was regarded as purely a legal one,"[3] a review of recent court decisions will disclose the use of economic reasoning as a powerful tool on both sides of legal debates. A current economics textbook for law students makes the frank admission - "many areas of law,...bear the stamp of economic reasoning."[4]

The examination of economic principles in labor law in Chapter 3 indicates that lawmakers often adopted a viewpoint of the labor relation which can be called "interdependent." The actions of labor and management were studied in the context of a social group. Labor market conflict could impose hardship upon third parties. It was the duty, then, of the law to arbitrate among the interests of labor, firms, and the public. Common law and early statutory restrictions of "combinations" as injurious to the public welfare are examples of this legal doctrine. Twentieth century labor legislation which aims to protect the flow of commerce by restrictions of employer/employee actions is further illustration of this species of public regulation.

With the legal perspective on third-party effects in labor as a background, Part Two of the dissertation, "The Consequences of Labor Actions," begins by investigating economists' views of the labor relation. A survey of characteristic economic viewpoints of labor indicates that the attitude of lawmakers has no parallel among economists. Although

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[3]George G. Groat, Attitude of American Courts in Labor Cases, (New York: Columbia University Press, 1911; reprint edition, New York: AMS Press, 1969), p. 44.

[4]Richard A. Posner, Economic Analysis of Law, (Boston: Little, Brown and Company, 1972), p. 6.

there exists considerable discussion of the interdependent relationship between the labor parties and their environment, this discussion is never coupled with any serious economic analysis. On the other hand, analytically rigorous economic analysis of the labor market always abstracts from the complexity of an interdependent labor environment. Work in this vein assumes either 1) a partial equilibrium analysis (framework), or, 2) that the effects of labor actions are concentrated upon the parties to the wage agreement.

The concluding chapter of the dissertation suggests a framework for studying actions of labor parties which highlights "external" effects. Borrowing from the literature on "externalities," the chapter demonstrates that there exists a continuum of possible magnitudes of external effects depending on the type of market structure in question. Where there is a highly competitive market in the final product, actions of the labor parties (with respect to each other) are seen to generate the least significant external effects. In contrast, where the market for the final product is monopolistic and there are few substitute consumption possibilities, the potential for the creation of third-party effects is at its greatest. Against this spectrum of possibilities, some hypothetical cases are examined.

CHAPTER 1

INTRODUCTION TO PART ONE

Part One consists of two principal chapters. Chapter 2, A Description of Legal Evolution, attempts a brief narrative of the vast changes which have occurred in the law of the labor market. Chapter 3, Economic Principles in Labor Law, examines the concepts which underlaid the evolution of labor law with particular attention paid to economic principles. Together, these chapters advance the premise that human interdependence, which can be viewed in economic terms, has been important to the development of American labor law.

Chapter 2 is, broadly speaking, an empirical one. While the concept empirical may encompass either experiment or experience, the chapter is concerned with the experience of changes in labor law. The particular data studied are the specific instances of changes in the law. Actual changes in statutory law are well documented. Changes in judicial law (the interpretation of legal codes or of the common law) are somewhat harder to document. The tack employed here (and that used by legal historians) is to analyze the court record of the appellate process. There the judges discuss the reasons why they are passing particular judgements. In their words exists a recording of the circumstances that comprise the factual data.

A researcher of legal change is fortunate in having at his disposal a fairly good record of changes in labor law. Earlier in the 19th century,

most of the changes came from the judicial branch of the government. There is found, in the record of the trials or in the record of the appellate process, a written recording of the changes and the rationale which motivated them.

As an additional source of information regarding changes in labor law the literature in leading law journals of the times will be consulted. It is felt that these articles both reflected changes in judicial thinking and at the same time, informed judicial thought. As the investigation comes into the twentieth century and to the advent of legislative labor law, search will be shifted to new areas. Comments made by lawmakers in the prefaces to the various bills and statutes and in floor debates will be examined. Additionally, the words of prominent statesmen will be examined.

Chapter 3 analyzes changes in labor law from a slightly different perspective. It examines the dialogue surrounding changes in labor entitlements in order to understand the several ways lawmakers viewed the labor relation. Whereas Chapter 2 examines <u>how</u> the law of labor changed, this Chapter examines <u>why</u> such changes occurred. It searches for economic principles motivating changes in labor law. It finds that one characteristic way of viewing the labor relation among lawmakers was to consider it as an "interdependent" phenomena, i.e., one in which the labor parties could impose harm or benefit on the surrounding social group. In fact, the evidence examined in this chapter suggests that for the changes in labor law, the concept of interdependency was important.

The review of labor law evolution in Chapter 2 and this discovery of the importance of interdependency for that evolution in Chapter 3 provide a groundwork on which, in Part Two, economists' views of the labor relation and their concern for interdependency will be evaluated. An examination of the historical context of the labor market which constitutes Part One may be seen as an attempt to be responsive to recent comments by the economic historian, Douglass C. North.[1] He counseled his colleagues to "broaden the questions" that they ask and to "analyze the parameters that the economic theorist takes as given." Tracing through the evolution of labor entitlements, and examining the environment of each changes reflects an attempt to analyze the "parameters" in this spirit.

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[1]Douglass C. North, "The Place of Economic History in the Discipline of Economics," Economic Inquiry, Vol. 14, No. 4 (December, 1976), pp. 461-465.

CHAPTER 2

A DESCRIPTION OF LEGAL EVOLUTION

This chapter begins with a brief mention of the early common law influences on labor law. It continues by describing in order the three stages of legal change in labor. The first stage runs from 1806 through the middle of the nineteenth century. The second stage continues on from the mid-nineteenth century on through the early twentieth century ending around 1929. The last period encompasses the period of New Deal legislation to the present.

Common Law Influences

Even though the United States had achieved its independence from Great Britain, the English Common Law continued to exert an influence over American judicial thought in the nineteenth century. In labor law, this influence was especially noticeable. As an introduction to the judicial law which controlled early labor law in this country, the two main common law doctrines affecting labor will be briefly discussed.

The Doctrine of Conspiracy

The doctrine of conspiracy, when applied to labor cases, held that it was an indictable offense for workers to unite (form a confederacy) in order to obtain an increase in wages or improved working conditions. Combinations of workmen were therefore, per se illegal.

The applicability of the common law doctrine of conspiracy to labor activities may be seen in the following quote from the judge's

words as he charged the jury in the first criminal conspiracy trial in the U.S., the Philadelphia Cordwainers Case, "It is adopted by Blackstone and laid down as the law by Lord Mansfield in 1793 that an act innocent in an individual is rendered criminal by a confederacy to effect it."[1]

The words of the prosecution in this case are even more revealing. "Let it be understood that the present action is not intended to introduce the doctrine that a man is not at liberty to fix any price whatsoever upon his own labor. Our position is that no man is at liberty to combine, conspire, confederate, and unlawfully agree to regulate the whole body of workmen in the city. The defendents are not indicted for regulating their own individual wages, but for undertaking by a combination to regulate the price of the labor of others as well."[2]

The doctrine of conspiracy had both common law and statutory origins.[3] It was believed to have been first articulated in the Edwardian codes of 1304. It was, however, apart from being written, a well-known precept of English common law. The doctrine was thought to have emerged to protect people from false indictments.

There is some indication that during the early period of the application of the criminal conspiracy doctrine to labor, a symmetric

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[1]John R. Commons and Associates, A Documentary History of American Industrial Society, Vol. III, (New York: Russel & Russel, 1958), p. 233.

[2]Ibid., p. 168.

[3]For a discussion of the history and development of the doctrine, see J. W. Bryan, "The Development of the English Law of Conspiracy" in Johns Hopkins University Studies in History and Political Science, Vol. 27, (1909), p. 133-161.

application of the law was in effect with respect to combinations of masters (employers). "Furthermore, this period was characterized by an equality of application of this doctrine to both journeymen and masters. For example, as late as 1821, the Supreme Court of Pennsylvania held that a combination of masters to depress wages was a criminal conspiracy when their effort was directed toward a reduction of wages below what they would be, if there was no recurrence to artificial means by either side."[4]

There also exists evidence from the other side: "The defense further showed that the Master Cordwainers who were behind the prosecution of these eight boot and shoemakers themselves had combined in a society for the purpose of maintaining prices and other mutual protections for themselves, as shown by the journal of the proceedings of the Masters' Society, which contained the record of their first meeting."[5]

The available records which were examined in connection with this study suggested that courts were somewhat quicker to indict workers' combinations than employers' associations. This is consistent with an understanding of the relative ease with which the employers (as opposed to the employees) may form a coalition to ask for protection or favor.

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[4] Commonwealth v. Carlisle, (Pa. 1821). Quoted in Sidney C. Sufrin and Robert C. Sedgwick, Labor Law, Development and Administration Cases, (New York: Thomas Y. Cromwell Co., 1954), p. 19. Full legal reference citations for this and all subsequently cited cases can be found in Appendix A.

[5] Elias Lieberman, Unions before the Bar (New York: Harper and Brothers, 1950), p. 10.

Between 1806 and 1842, there were sixteen trials of workers on charges of criminal conspiracy. Although the workers were usually found guilty, the fines imposed were always small, with the main effect being a stern warning not to become involved in other similar activities. For example, "the present object of the court was rather to admonish than to punish; but an adjudication upon the subject being now solemnly had, it was recommended to them so to alter and modify their rules and their conduct, as not to incur in future the penalties of the law."[6]

The net effect of the strict application of the conspiracy doctrine was to discourage labor unions.

The Doctrine of Restraint of Trade

The doctrine of restraint of trade held that a combination of workers was illegal, not because of its conspiratorial nature but rather because the effect of such a combination was to restrain trade. On the rights of persons to unrestrained access to trade, we can quote from a case being heard before the Queen's bench in England, "at common law every person has individually, and the public also have collectively, a right to require that the course of trade be kept free from unreasonable obstruction."[7]

This doctrine stressed the importance of the "ends" of labor actions while the doctrine of conspiracy stressed the "means."

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[6] From the New York Cordwainers case, in Commons and Assoc., op. cit., Vol. III, p. 385.

[7] Sir William Erle, On the Law Relating to Trade Unions, p. 10, quoted in Alpheus T. Mason, Organized Labor and the Law, (Durham, N.C.: Duke University Press, 1925; reprint ed., New York: Arno Press, 1969), p. 44.

Conspiracy doctrine held labor combinations indictable because they were an attempt to use illicit means, e.g. a combination, to achieve a legal object, e.g. higher wages. Restraint of trade theory held a strike illegal because of its effect; the means employed were not questioned.

A measure of the extent to which these two common law doctrines influenced law in this country is difficult because of conflicting opinions as to the applicability of the common law among the various states. Apparently use of the common law was pragmatic--lawyers and judges saw fit to borrow concepts from the common law when it suited their purposes. There were several states which specifically wrote statutes enumerating the instances where the common law was at least an implied part of all state laws. Some states, such as Massachusetts, stated that the common law was to apply in the absence of any specific Massachusetts law. A common defense against conspiracy charges was that the English common law was inapplicable to the U.S. situation. While the exact extent of influence is uncertain, it is undeniable that the common law had at least some impact on formative U.S. labor law.

Three Stages of Change

Changes in labor entitlements in the nineteenth century were effected primarily by changes in judicial interpretation, "To discover the rights of trade unions, therefore, we look not so much to the statute books as to the opinions of the courts."[8] Although there was

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[8]Mason, op. cit., p. 53.

labor legislation enacted during this time period, (particularly in the last decades), the power of the judiciary was supreme. When state legislatures enacted labor laws which contradicted the spirit of judicial interpretations, such laws were either struck down by the state supreme courts or were rendered unenforceable by the courts. Changes that did occur, as will be seen below, all derived from changing judicial interpretation.

Initial Period of Change (1806-1842)

The researcher in the area of early American labor cases is fortunate to have the benefit of previous scholarship. John R. Commons, in cooperation with various other scholars, compiled original legal documents relating to the early development of labor law. While Commons and his various coauthors furnished narrative and interpretative essays on the cases, it was their careful compilations of the court recordings which are of most value. Since their list of important cases includes all the court cases mentioned in the secondary sources consulted, and some besides, the Commons and Associates recording of significant early labor cases may be taken as definitive.

The labor cases along with their popular and legal names and the dates they were heard, are listed below:

1. Philadelphia Cordwainers (Commonwealth v. Pullis) 1806.
2. New York Cordwainers (People v. Melvin) 1809.
3. Pittsburg Cordwainers (Commonwealth v. Morrow) 1815.

4. Master Ladies Shoemakers (Commonwealth v. Carlisle) 1821.

5. New York Hatters (People v. Trequier) 1823.

6. Buffalo Tailors 1824.

7. Twenty-four Journeymen Tailors (Commonwealth v. Moore) 1827.

8. Philadelphia Spinners (Kennedy v. Treillou) 1829.

9. Baltimore Weavers (State v. Pomeroy) 1829.

10. Chambersburg Shoemakers 1829.

11. Geneva Shoemakers (People v. Fisher) 1835.

12. Hudson Shoemakers 1836.

13. Thompsonville Carpet Weavers 1834-36.

14. Twenty-Journeymen Tailors (People v. Faulkner) 1836.

15. Philadelphia Plasterers (Commonwealth v. Grinder) 1836.

16. Commonwealth v. Hunt 1840, 1842.[9]

One aspect of these early court cases which emerges upon a reading of the list is the inordinate number of shoe or boot (cordwainer) cases. A possible explanation for this is mentioned by Commons. He points out that the period from 1789 to 1804 saw the piece rate for boot manufacture rise from $1.40 to $2.75. Between 1804 and 1835, the period of the

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[9]The court recording of the first three cases is found in Commons and Associates, Vol. III. The remainder are in Commons and Assoc., op. cit., Vol. IV.

burst in activity of labor cases, a reversal in trend was witnessed. Piece work rates fell from $2.75 to $1.12 per boot.[10]

This fall in rates might have been due to emerging competition. The cases recorded involved manufacturing workers, cordwainers, weavers, tailors. There was economic pressure throughout this period for reductions caused by increased competition among the employers. This was the period of incipient industrialization and lines of transportation were slowly opening up among the major cities of the east. Both goods and men were becoming more mobile. Competition emerged as local monopoly power was gradually eroded by intrusion of foreign goods. This competition would explain the reduction in wages reported by Commons.

Contradicting this view advanced by Commons that wage reductions precipitated the strikes is evidence in the records of the cases. Although court testimony did reveal wage reduction before the strikes, in the instances of the first three cases, the Philadelphia, New York, and Pittsburgh cordwainers, the labor actions were taken in pursuit of higher wages.

The Philadelphia Cordwainers - 1806[11]

This first case to be described is exemplary of the cases during the period--the charge was a "conspiracy to advance wages." The bill of indictment charged the defendents with "contriving, and intending

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[10] Ibid., Vol. III, p. 49.

[11] Commonwealth v. Pullis, (1806).

unjustly and oppressively, to increase and augment the prices and rates usually paid."[12] It was further charged that the defendents "did combine, conspire, confederate, and unlawfully agree together,...that they...should work and labour,...but at certain large prices and rates."[13]

Employees in this industry were paid on a piece work basis and normally did their work (construction of the entire boot) at their homes rather than at the place of business of their employer. The development of unions (friendly societies) among the workers of the industry was one of the first cases of the organization of workers in this country.[14]

Their development paralleled the development of employer associations (e.g., Master Cordwainer Association) which was also among the first of any industry.

The journeymen in this first case had suffered a reduction in the rate of 1804. They met and in 1805, decided to present a new price list to the masters. On presentation of the list, the masters refused to agree to the increase and the members of the society went on strike. Leaders of the strike were immediately arrested on a charge of conspiracy and then released, but their arrest was sufficient to break the strike.

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[12] Commons and Assoc., op. cit., Vol. III, p. 62.

[13] Ibid., p. 62-63.

[14] On the early craft unions, Taylor writes: "The first local craft unions to appear in the United States were the Philadelphia Carpenters, 1791; the Philadelphia Federal Society of Journeymen Cordwainers, 1794;... "Albion Guilford Taylor, Labor Problems and Labor Law (New York: Prentice-Hall, Inc., 1950), p. 261.

After the workers had returned to work, the indictments were brought again against the strikers and the trial began. The trial took place in the Mayor's court. The jurors were all small businessmen. There was a political element to the trial consisting of the opposition of the Federalists and the Jeffersonians.[15]

In his charge to the jury the recorder (in a less than objective manner) instructed that the jury need only determine whether the accused had in fact conspired or combined. He stated that the law was clear in its condemnation of such combinations as illegal. In effect, he told them what the law was, and instructed them to determine a fact - had there been a combination.

The jury found the defendents guilty and fined them eight dollars each,[16] plus court costs. In reporting the jury's verdict, the recorder cited for precedent an English case, the case of the Journeymen Tailors.[17] This case was important in a legal sense because it had been brought after a statute had been enacted in England which declared tailors' combinations illegal. The court sustained the prosecution on this case but waived the statute. The verdict was sustained on the

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[15]For a discussion of this first labor case which relates it to the broader aspects of the contemporary political climate, see Walter Nelles, "The First American Labor Case," Yale Law Journal, 41 (1931), p. 165 and Edwin E. Witte, "Early American Labor Cases," Yale Law Journal, 35 (1926), p. 825. A concise, if somewhat romanticized, account is given in Lieberman, p. 4-5.

[16]This was not a substantial sum, even then. For comparison, journeymen made five boots per week at $2.75 per boot.

[17]King v. Journeymen-Tailors of Cambridge, (1721).

strength of the common law. This was taken to indicate that the common law clearly condemned such combinations as illegal.

As in the cases to follow, this Philadelphia case involved the broader question of the applicability of the common law to the U.S. situation. The defense argued (unsuccessfully) that the common law was inapplicable in the case.

In this first case, the workers were held guilty of criminal conspiracy because of their act of combining and striking in a body. A combination was, therefore, prima facie illegal.

The New York Cordwainers - 1809

The second case, the New York Cordwainers,[18] argued in 1809, also involved a strike by members of a cordwainers' society. The bill of indictment again cites the accused for criminal conspiracy and, additionally, of attempting to "impoverish the said Edward Whitness, [another journeyman] and hinder him from following his trade," and "prejudice and impoverish the,...master shoemakers."[19]

The novel point of this trial is that the prosecution changed its line of attack from that used in the Philadelphia case. The patent illegality of combinations was not stressed. Rather it stressed the possible injury which may have resulted from the strike. The prosecution argued, "this conspiracy, unnaturally to force the price of

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[18] People v. Melvin, (1809).

[19] Commons and Assoc., op. cit., Vol. III, p. 254-255.

labour beyond its natural measure, is as dangerous as any kind of monopoly."[20]

It went on to cite acts of monopoly, their similarity to the labor actions, and concluded, "such acts would be against the public good,...and as offenses against the whole community, be subject to public prosecution."[21]

The main line of defense was to question the authority of the English case upon which the Philadelphia decision had been grounded. Counsel for the defense argued: "The book [Modern Cases in Law and Equity] is...the worst book of English reports under which the shelf groans."[22]

In the judge's discussion of the verdict, he conceded the right of workmen to meet and regulate their own affairs, to ask for wages and to work or refuse to work. "That they had equal rights with all other members of the community was undoubted, and they had also the right to meet and regulate their concerns, and to ask for wages, and to work or refuse, but that the means they used were of a nature too arbitrary and coercive, and which went to deprive their fellow citizens of rights as precious as any they contended for."[23]

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[20] Ibid., p. 313.

[21] Ibid., p. 313-314.

[22] Ibid., p. 284.

[23] Ibid., p. 385.

The principal question in this second case was thus over the means employed to raise wages. Were they of a nature too "arbitrary and coercive"? The jury agreed with the prosecution based on the illegality of the means employed by the workmen. The defendents were found guilty and fined court costs plus one dollar each.

The Pittsburgh Cordwainers - 1815

The next case, the Pittsburgh Cordwainers[24] was tried in 1815. The situation was identical - a conspiracy charge growing out of a strike for higher wages. Innovations in this case were: the mention of restraint of trade and also an attempted explanation of the phrase "arbitrary and coercive." In the words of the court: "It is not for demanding high prices that these men are indicted, but for employing means to extort those prices. For using means prejudicial to the community. Confederacies of this kind have a most pernicious effect, as respects the community at large. They restrain trade (author's emphasis): they tend to banish many artisans, and to oppress others. It is in the interest of the public and it is the right of every individual, that those who are skilled in any profession, art, or mystery, should be unrestrained in the exercise of it."[25]

While the defendents were found guilty of criminal conspiracy and thus the attitude that unions are per se illegal is continued, the court discussion of the concepts "restraint of trade" and "means

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[24] Commons and Assoc., op. cit., Vol. IV, p. 15-87.

[25] Ibid., p. 81.

prejudicial to the community" adds new dimension to the legal theory. The court judged the means of the confederacy to be unjust. The means "were such as coerced the party, with infinitely greater effect."[26]

Master Lady Shoemakers - 1821

This case involved an association of Master Lady Shoemakers.[27] The case saw the first real questioning of the applicability of the concept of "conspiracy" to labor combinations. The judge went back to the origin of the legal use of the doctrine and traced its development and extension to the case of the labor market. He deduced that the applicability grew out of the observation by the courts that the potential for abuse in the case of groups of persons was much greater than the powers individually. He argued that combinations should not be faulted for their potential for misdeed alone: "It will, therefore, be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act is, in this class of cases, the discriminative circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of

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[26] Ibid., p.

[27] Commonwealth v. Carlisle, (1821).

individuals, and where such prejudice or oppression is the natural and necessary consequence."[28]

While the accused in this trial were the Masters (employers), the principles of common law conspiracy were the same.[29] By making motive the "discriminative circumstance" rather than holding any combination per se illegal, the court here was ahead of its time. Immediately after this case, court opinion reverted to the doctrine of "strict conspiracy" attributed to the English Journeymen-Tailors case.

New York Hatters - 1823

In this case,[30] the court ignored the reasoning of the Master Lady Shoemakers case, and did not hold motive the primary consideration. In the words of the court: "this offense consists in the conspiracy and not in the refusal (to work); and all conspiracies are illegal though the subject matter of them may be lawful."[31]

The Buffalo Tailors - 1824

The sketchy record of this case[32] was taken by Commons and Associates from a newspaper account. The court in finding striking journeymen

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[28]Commonwealth v. Carlisle, quoted in George G. Groat, Attitude of American Courts in Labor Cases, (New York: Columbia University Press, 1911; reprint ed., New York: AMS Press, 1969).

[29]This case supports the contention that conspiracy laws were fairly applied to employers as well as employees.

[30]People v. Trequier, (NY: 1823).

[31]Quoted in Mason, op. cit., p. 63.

[32]Commons and Associates, op. cit., Vol. IV, p. 93-95.

tailors guilty apparently again reverted to the Philadelphia precedent.

The cases remaining before Commonwealth v. Hunt (numbers 7-16 on the list above) did not introduce any substantive legal or economic issues into the debates over labor law. The issues argued and the grounds for the courts' findings were those discussed in the previous cases. The verdicts hovered between the strict doctrine of criminal conspiracy and the somewhat more lenient view that only an illegal object (motive) could render a workmen's combination indictable.

Commonwealth v. Hunt - 1842

Commonwealth v. Hunt is generally considered by legal authorities to be one of the most important of all labor cases. It is further thought to mark a major turning point in the judicial construction of labor law.[33] The final decision in the case was rendered by the Massachusetts Supreme Court, on appeal.

The case grew out of an incident in which a workers' society induced an employer to dismiss a dissident employee (a former society member). The discharged employee lodged a complaint which precipitated a criminal conspiracy charge. The two principal counts against the accused were: (1) that the society was a criminal conspiracy to oppress employers and non-society members, and (2) that the defendents agreed not to work for any employer who employed non-member workers.[34]

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[33] For a contrasting view, see Witte, op. cit., p. 828-829.

[34] A full account of this trial, including background on the political undercurrents, can be found in Lieberman, op. cit., p. 16.

The state supreme court overturned a lower court conviction and declared the workers not guilty on all counts. The chief justice, at that time, was Lemuel Shaw and it was he who delivered the opinion of the court. The opinion was important in several respects. First, it clarified the law: "Without attempting to review and reconcile all the cases,...a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means."[35]

This definition of conspiracy which stressed a scrutiny of both the ends and means of actions has survived the test of history and is today quoted as a standard definition in conspiracy trials.

The opinion also emphasized the importance of motive: "The manifest intent of this association (to gain a closed shop) is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral and social position; or to make improvement in their art; or for other purposes."[36]

In the above, Chief Justice Shaw gave what is considered the first judicial recognition of the useful purposes which a union might serve.

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[35]Quoted in Mason, op. cit., p. 66.

[36]Ibid.

In the first quote, the judge looked to both the means and the natural ends of the combination. Given a lawful objective, the court needs to examine the means used to accomplish the end. "The legality of such an association will depend on the means to be used for its accomplishment."[37]

The judge's attempt to define the word "compel" was also noteworthy. He did not accept the prosecution's charge that the strike to maintain the closed shop was an act of compulsion. The damage to Horne (the dissident employee) was also discussed. He admitted that there was damage to Horne, but he asserted that the damage arose out of honest competition. At this time the Massachusetts court was an acknowledged leader in formulating American law. Of all the states, only New Jersey failed to follow the ruling of Chief Justice Shaw.[38]

Also in the Commonwealth v. Hunt case, the distinction is made between an actionable injury and one which because of the mean is not actionable. Where the injury results from economic agents acting as is customary, the result is deemed not unjust.

The end of the first half of the nineteenth century marks the closing of the initial period of the evolution of American labor law. With the Commonwealth v. Hunt decision, combinations of workers are recognized as having (at least potentially) an acceptable objective and are not, therefore, per se illegal. They may become illegal,

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[37] Ibid., p. 67.

[38] Nicolas S. Falcone, Labor Law, (New York: John Wiley & Sons, 1962), p. 42.

however, when they pursue an offensive objective or when they pursue and inoffensive objective with use of offensive means. While subsequent nineteenth legal action will reveal attempts to revert back to the earlier strict doctrine of conspiracy, the mid-century marks a legal recognition of the rights of unions to form and press their claims against employers and other employees.

Second Phase of Labor Law Development (1850-1929)

The second half of the nineteenth century witnessed the continued evolution of American labor law. The period was characterized by conflict, modification of common law labor doctrines, and by legislative attempts at prolabor enactments.

This section will describe changes in the law of labor by first discussing the modifications to common law labor doctrines, including the development of the injunction as a major tool for employers. Legislative activity intended to improve the position of labor will then be described. The classic labor confrontations of the period will be recounted as they relate to other parts of the section.

The Legacy of the Common Law

In the United States the common law continued its influence upon labor law. It is worthwhile to note, however, that in England the doctrine of common law criminal conspiracy was specifically struck down in its application to labor.[39] Although the strict application

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[39] John R. Commons and John B. Andrews, Principles of Labor Legislation, New York: Harper & Brothers, Inc., 1936) p. 381-382.

of the conspiracy doctrine fell out of favor here,[40] conspiracy charges continued to be brought against workers' combinations up until the end of the century.

During this latter half of the 19th century two substantial modifications to the common law of labor were effected. The first modification which had been initiated in the previous period, and mentioned above, was the abandonment of the strict application of the criminal conspiracy doctrine. As the case of Master Stevedores v. Walsh will demonstrate (see below) the courts had, by 1867, come to the view that combinations were to be judged on their ends and means rather than on the mere fact of their existence. While there were legislative efforts to accomplish this, the actual instrument of change was the court system. As Justice Brandeis, dissenting in the Duplex case (1921) commented: "The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation."[41]

Master Stevedores' Association - 1867

This New York case[42] decided in 1867, involved a strike by journeymen stevedores. Judge Daly, delivering the opinion of the court,

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[40] Mason, op. cit., note 11, p. 77, informs us that after Commonwealth v. Hunt, there were only two instances of courts' holding workers combinations to be illegal because of the mere fact of the combination. Both of these were overruled. See: State v. Barnham, (1894); State v. Donaldson, (1867). Cf., however, Witte, op. cit.

[41] Quoted in Falcone, op. cit., p. 62.

[42] Master Stevedores Association v. Walsh, (1867).

reviewed all prior labor cases in detail. He dismissed the strict application of the conspiracy doctrine citing Commonwealth v. Hunt and Commonwealth v. Carlisle. He reasoned that since one could easily see the possible benefits of an organization of workmen, a combination could not be prima facie illegal. Embracing the spirit of the Commonwealth v. Hunt decision, he looked to the ends and means of the labor combination for evidence of illegality.

On these grounds, however, there was sufficient demonstration by the prosecution that ends and means employed were such as to render the combination a conspiracy.

> "Any association or combination for the purpose of compelling journeymen or employers to conform to any rule to which they are not parties, by the imposition of penalities, by agreeing to quit the service of any employer who employs a journeyman below certain rates, ...is a conspiracy for which the parties entering into it may be indicted."[43]

The decision in this case relied heavily on previous decisions and did little to alter the law. It mainly served to reemphasize the importance of "ends and means."

The Just Cause Doctrine

The second modification to the common law (also effected through the court system) was the development of a distinction between malice

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[43]Quoted in Mason, op. cit., p. 73.

in fact and malice in law. Malice in fact will exist whenever there is ill will toward another such that an injury sustained by another is met with delight and pleasure. Malice in law will only exist when there is malice in fact accompanied by an intentional inflicting of the injury without any justification. The question to be answered by the court then becomes one of determining if the means employed by strikers were justifiable in the light of circumstances. Is there "just cause" for the actions taken in furtherance of their interests?[44] If the right of the workers is equal or superior to the right of the affected parties, there is no recourse at law for the offended parties.

A central theme of this doctrine in its application to labor law is the concept of the rights of access to markets, Millis and Montgomery explain it thus:

> "The initial proposition with which they must start is that everyone is entitled to free, unobstructed access to the commodity market and to the labor market, intentional interference with these rights being prima facie a wrongful act; and this presumption of a wrongful act can be rebutted only by proving that there is just cause for the interference."[45]

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[44]The doctrine known as the "just cause" doctrine was developed by Oliver Wendell Holmes in a famous article, "Privilege, Malice and Intent," Harvard Law Review, Vol. 8, (1894), p. 114.

[45]Harry A. Millis and Royal E. Montgomery, Organized Labor (New York: McGraw-Hill Book Co., 1945), p. 505.

In this quote is seen the crucial link between the "just cause" doctrine of Holmes and the phenomena of the increased resort to the injunction as a device in labor confrontations. The linking concept is the idea of rights of access to markets or "rights to expectancies." Rights of access to markets or expectancies to future profits (business property) were asserted by legal writers to be a class of property rights which the law should protect. Thus, the legality of the ends and means of labor actions hinged on whether such actions unjustly interferred with the rights of employers to product markets or the rights of non-striking employees to the labor market. If labor actions were of such a nature as to interfere with such prior rights, the labor group was acting with "malice in fact." If there was no "justifiable" reason motivating their actions, they were also acting with "malice in law" and their actions were, therefore, indictable.

The Labor Injunction

Based largely on the concept of "rights to expectancies," the labor injunction came to be a popular legal tool[46] to be used by employers in combating labor actions. Witte reports[47] that before March, 1931, there were 508 federal court injunctions issued and 1363 state court injunctions issued. He specifies the breakdown by time period as follows:

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[46]Frankfurter and Greene write that in the latter half of the nineteenth century, the use of the labor injunction "grew in volume like a rolling snowball," Felix Frankfurter and Nathan Greene, The Labor Injunction, (New York: MacMillan Co., 1930), p. 21.

[47]Edwin E. Witte, The Government in Labor Disputes, (New York; McGraw-Hill Book Co., Inc., 1932), p. 84.

28 in the 1880's; 122 in the 90's; 328 in the 1900-1910 period, 446 in the teens, and 921 in the period from 1920 through May, 1931.

In one strike, the railroad shopcrafts strike of 1922, 300 injunctions were issued.[48]

While first applied to labor in 1868[49] in England, its use there never grew. In the U.S. the labor injunction saw its first use in the 1880's. It was not until 1891, however, that a federal court issued a labor injunction. The legal tactic gained its widest popularity after the well-publicized 1894 Pullman Strike (see below). Its use generally involved an employer persuading a court of equity that a particular labor action would irreparably damage business property. The court then issued an injunction which prevented the labor action.

The change in law represented by the use of the injunction in labor was brought about by a change in the legal definition of property. Gradually, courts in the latter half of the 19th century came to define "rights of access" to markets and "expectancies" as property and, thereby, protectable by courts of equity.[50] Since picketing interferes with non-striking employees access to their jobs, the concept of

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[48] G. W. Pepper, "Injunctions in Labor Disputes," American Bar Association Reports, (1924), p. 174.

[49] Springhead Spinning Co., v. Riley, (1868).

[50] An excellent discussion of this can be found in Commons and Andrews, op. cit., p. 383-384. Also see the previous section of this chapter.

property thus also came to embrace rights to expectancies in labor markets.

The rationale for this was articulated in an 1888 case.

> "It cannot be that the strong arm of chancery can be successfully invoked to preserve the accumulations of the rich, and is powerless to protect the capital of the poor, his brain and muscle and power and will to work."[51]

The following court case illustrates the use of the injunction in labor confrontations.

The Pullman Strike

The Pullman strike[52] (1894-95) was indicative of the change in law represented by the use of the injunction in labor disputes. The strike was precipitated by a move to organize all railway employees into one union. In 1893 Eugene Debs began forming the American Railway Union. When the Great Northern Railroad cut wages, Debs called a strike and the union was put to a first test. An injunction was issued against the strike leaders, but the strike continued. Eventually pressure by the railroad customers forced the company to yield and the strike was a success.

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[51] Brace Brothers v. Evans, (1888), quoted in Frankfurter and Greene, op. cit., p. 22.

[52] Several detailed accounts on the Pullman Strike, including one by President Grover Cleveland, along with official statements of George M. Pullman, are reprinted in The Pullman Strike, edited by Leon Stein, (New York: Arno Press, Inc., and the New York Times, 1969).

By 1894, there were 150,000 members in 465 local lodges. A General Managers Association was formed by the employers and was determined to defeat the union.

Pullman, Illinois was a model company town. The Company owned churches, shops, the home of workers, and the town's only hotel. The panic and recession of 1893 affected the Pullman Company. Wages were cut thirty percent, but neither rents on the employees homes nor the dividends for the stockholders were cut at all. Workers formed a union (which affiliated with ARU), a grievance committee, and met with Pullman. They asked that rents be cut and that there be a wage reinstatement.

Three members of the grievance committee were fired. A strike was called. Pullman responded by closing the plant. In June of 1894, the American Railway Union called for a boycott of the Pullman cars. Members of the union were not to inspect, switch, or haul trains with Pullman cars.

As a retaliatory move, the General Managers Association instructed its members to attach the U.S. Mail cars to the Pullman cars. It also fired any workers who refused to work on Pullman cars. This action precipitated a general railway strike.

The charges brought against the union consisted of a charge of conspiracy to obstruct the transportation of the mails, to interfere with transportation, and by threats and intimidation, to prevent employment of persons. An injunction was obtained against all the leaders of the strike. The grounds upon which injunctive relief was

justified were that a failure to enjoin the alleged conspiratorial activities would permit irreparable damage to plaintiff's business property.

The strike leaders were faced with indictments for conspiracy and, in addition, contempt charges growing out of their failure to obey the injunction. The criminal conspiracy charges were dismissed,[53] but not before the strike had been effectively broken. Debs and other leaders were found guilty of contempt and received jail terms.

Final legal action in this case consisted of an attempt to get the U.S. Supreme Court to hear the case by petitioning for a writ of habeas corpus. The defendents maintained 1) that the combination of workmen was not a conspiracy and 2) that if it were, the courts of equity (who issued the injunctions) had no jurisdiction over the matter of a criminal charge. The Supreme Court denied the assertions and refused the writ.

The main impact of the trial was to bring national attention to the use of the injunction in labor disputes. The subsequent increased use of the labor injunction is attributed by some of this attention.

Legislative Activity

The national attention generated by the Pullman strike alerted employers to the injunction as a strategy in labor confrontations. It also served to arouse sentiment in the legislative branch of government for positive prolabor enactments. The period under study in this

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[53] For an account of the unusual events surrounding the dismissal, see: Lieberman, op. cit., p. 37.

section marked the beginning of serious legislative endeavor to enact laws intended to aid the position of workers.[54] One can gain an appreciation of these legislative efforts by looking at the legality of yellow-dog contracts. Yellow-dog contracts are employment contracts which include as a condition of employment, the promise not to join any union. It is easy to see that these contracts made union organizing very difficult. The legal doctrine which held that it was an indictable offense to urge a party to breach a contract with another party, was applied by the courts to restrict attempts to organize employees who had signed these contracts. For example, in the 1917 case of the Hitchman Coal and Coke Co.,[55] the U.S. Supreme Court upheld an injunction which virtually barred UMW members from entering towns where employees of the company lived since they were under yellow-dog contracts.

Throughout the period of the late nineteenth century state legislatures were trying to restrict the use of these contracts. Thirteen states passed laws outlawing yellow-dog contracts. But in 1915, in

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[54]It should be pointed out as an historical note, that the first pro-union legislation was actually passed in New York in 1828. The purpose of the enactment was to restrict the courts' application of the common law. It specified in Section 9 that no conspiracies other than those mentioned would be subject to indictment for criminal conspiracy. The intention of the drafters of the legislation were never fulfilled as the courts instead emphasized section 7 of the Act. This section specified that conspiracies to commit acts "injurious to trade or commerce" were misdemeanors. The courts construed labor combinations as conspiracies under this section. Thus, ironically, this was also the first anti-union statute on the books in the U.S. A full account of this can be found in Mason, op. cit., p. 63.

[55]Hitchman Coal and Coke Co., v. Mitchell, (1917).

Coppage v. Kansas,[56] the Supreme Court ruled that these laws were unconstitutional. After this setback, states devised a slightly different approach. Instead of outlawing the contracts, they were made unenforceable in court, by declaring them contrary to public policy. Wisconsin pioneered this pact in 1929 and it ultimately found enactment in the Norris-LaGuardia Act of 1932 which contained a similar provision.

Another aspect of this process of attempted legislative change can be seen in the legality of anti-discrimination acts. Discrimination against suspected union organizers had traditionally been a powerful tool of employers to combat unions. The anti-discrimination acts made this sort of discrimination illegal. Eight states passed anti-discrimination acts prior to 1900, and in the Erdman Act (1905) the U.S. Congress did likewise. Six of the acts were struck down by the respective state courts and in 1908, the U.S. Supreme Court declared the Erdman Act in violation of the 5th Amendment. In Adair v. U.S.,[57] the court held:

> the right of any person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor."[58]

Legislative attempts to gain pro-labor enactments were more successful in the area of blacklisting. Blacklisting was used by employers to effectively keep union organizers from gaining employment.

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[56] Coppage v. Kansas, (1915).

[57] Adair v. U.S., (1908).

[58] Adair v. U.S., quoted in Mason, op. cit., p. 74.

Known union organizers were blacklisted by employers and refused employment because of their union activities. Various state legislatures made this employer tactic illegal or at least required employers to give discharged employees a truthful statement of the reasons for dismissal. As of 1928, thirty-one states had various forms of anti-blacklisting laws on the books and these laws were not subsequently declared illegal by any courts.

The effectiveness of these laws can be questioned, however. Blacklisting is an activity that is extremely difficult to uncover. Communications between employers regarding certain employees could be very discreet. Despite the laws against such activities, only two successful prosecutions on these grounds were known as of 1931.[59] The extent of the effectiveness of these laws will never be known with precision.

In addition to the legislative steps discussed above, states undertook minor regulation of employers. An example of this was the "anti-Pinkerton" laws. These laws took on various forms but generally, they required that deputized guards be residents of the county or state in which they were being employed. This was intended to discourage the importation of armed guards from out of the areas. Most states had some form of regulation over the hiring of guards.[60]

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[59]Witte, Labor Disputes, p. 215.

[60]Ibid., p. 218.

The Sherman Act

Of the various legislation affecting labor during the period under study, the passage by the U.S. Congress of the Sherman Anti-trust Act (1890) was among the most important. The Act received judicial construction which brought labor combinations under its domain and the effect of the act was to further restrict the activities which labor organizations might undertake in its efforts. Through 1928, approximately eighteen percent of all indictments under the Sherman Act had been against labor unions. Of the 83 labor cases, 51 had been found guilty of violation.

It was stated above that the application of the Sherman Act to labor combinations was a result of judicial construction. It is widely believed that Congress meant to exclude labor organizations.[61] While there are no means by which to test this hypothesis it is undeniable that many members of Congress desired to exempt labor from the Sherman Act. Many, also, did not. Among those who opposed exempting labor was Senator George F. Edmunds, chairman of the Senate Judiciary Committee, and the man most responsible[62] for the bill's final wording.

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[61] See Commons and Andrews, p. 117; Edward Berman, Labor and the Sherman Act, (New York: Harper Brothers Publishing Co., Inc., 1930), p. 10; James A. Emery, "Labor Organizations and the Sherman Law," 20 Journal of Political Economy, (1912) p. 599-612; cf. Mason, p. 120.

[62] For evidence of this see the foreword to "The Interstate Trust and Commerce Act of 1890," North American Review, Vol. 194, No. 673, (Dec. 1911), p. 801, cited in Berman, p. 39.

The Senator recognized an inconsistency in exempting labor. He argued that labor combinations had arisen to combat the combinations of capital and "the whole thing is wrong...so the country had been turned...in the last forty years into great social camps of enemies when they ought to be one great camp of cooperative friends."[63] Parity between capital and labor would remain only if the proposed Sherman Act were applied indiscriminately.

The Danbury Hatters

The case which determined that the Sherman Act applied to labor was the Danbury Hatters Case.[64] Details of the case are worth recounting.

The Danbury Hatters case involved indictments of criminal conspiracy and indictments under the provisions of the Sherman Act. A union had existed among the hatters since 1830, and in 1896 the United Hatters of North America affiliated with the American Federation of Labor. This group had the distinction of being the first union to employ the union label on their products.

The confrontation grew out of attempts to unionize a Danbury, Connecticut hattery. In 1901 union officials requested a meeting with the owners of the hattery. The request was denied. In July of the following year, the union declared a strike on the hattery.

In the confrontation, the owners of the Danbury company were financed with twenty thousand dollars from a group of anti-union hatters.

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[63] Quoted in Berman, p. 24.

[64] Lawlor v. Loewe, (1915).

In January of 1903, with this aid of the non-union hatters, the plant opened with non-union personnel. In retaliation to this, the union declared a boycott on all the products of the hattery.

The Anti-Boycott Association was formed and it sought to hold boycotts illegal and to hold the workers individually responsible for damages that resulted from the boycott. Two actions were filed.

In the first, the owners sought to hold the workers guilty of common law conspiracy, with damages of $100,000. In the second action, the workers were held in violation of the Sherman Act and triple damages were requested which totaled $240,000. Based on these two actions, the applicants also requested that the homes and the bank accounts of the 248 members of the union be attached. The court granted the attachment and throughout the legal battles which raged over the next 12 years, the homes and bank balances of the members remained attached by the court order.

On the initial charge, attorneys for the defense demurred. In 1906, Judge Platt heard the case. He held that there had been no real interference with "means of transportation" or with the product itself, and the charges were dismissed.

The decision was appealed by the plaintiffs to the U.S. Circuit Court of Appeals. That court asked the U.S. Supreme Court for instruction to determine if actions under section 7 (treble damages) of the Sherman Act were appropriate. The court ruled that actions were in order under that provision. This ruling gave considerable weight to the opinion that the Sherman Act was applicable to labor.

In 1908, on advice of the U.S. Supreme Court, the Circuit Court ruled that the Sherman Act applied to unions and that Federal Courts had proper jurisdiction in cases involving labor combinations. Twenty months later the trial reached the Federal District Court. In 1910, a jury found the defendents guilty of a restraint of trade and awarded treble damages in the amount of $232,000. The defendents appealed this to a circuit court of appeals.

In 1911 the circuit court reversed the decision on technical grounds and instructed that a new trial be held.

The second trial, again for conspiracy and for treble damages under the Sherman Act, took place. The union was found guilty and charges of $252,000 were levied against the members. The union again appealed this verdict to the circuit court of appeals. The original decision was affirmed. It was again appealed and finally, thirteen years later, the case reached the U.S. Supreme Court. In 1915 after considering it for several months, Oliver Wendell Holmes delivered the opinion. He found that the blacklisting by the employees and the boycott were a combination and conspiracy and were proved. It had previously been held that they could be charged under the seventh section of the Sherman Act, that is, they could be sued for treble damages. The lower court award of $252,000 was, therefore, upheld.

The Danbury Hatters case was important to the historical development of labor law on several points. It determined the applicability of the Sherman Act to labor by declaring boycotts to be in restraint of trade. It reaffirmed that the injunction was a proper tool by which

to restrain labor actions. It demonstrated, in the attachment of the assets of union members, that workers would be individually responsible for actions taken by the group. Above and beyond these legal issues, the case was also important because of the reaction of organized labor that it precipitated. It is widely believed[65] that the Clayton Act with its attempt to exempt labor from anti-trust prosecution was the direct result of labor's political efforts which were set in motion by the Danbury Hatters case.

The Clayton Act

The Clayton Anti-Trust Act, passed in 1914, was intended to change the law of labor. Remember that the Sherman Act had been held to apply to labor, and labor was actively trying to find exemption from anti-trust statutes. The Clayton Act was intended to accomplish this. It was hailed on passage, as labor's "Magna Carta." The main sections of the act were sections 6 and 20. Section 6 contained the phrase, "the labor of a human being is not an article of commerce." It went on to say "nothing in anti-trust shall be construed to forbid labor organizations." Section 20 read: "No injunction or restraining order shall be issued unless extreme cases of irreparable damage are in effect."

On its face then, the Act seemed to shield labor from two popular attacks--the charge of anti-trust violation, with the attendent threat of treble damages, and the attack on freedom of action represented by

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[65]For example, see Lieberman, p. 96-97.

by the labor injunction. Much to the dismay of organized labor, the courts again followed a construction of the Act which prevented it from exempting labor from anti-trust. The following cases illustrates this.

Duplex v. Deering

The case of Duplex v. Deering[66] decided in 1921, settled the law regarding the affect of the Clayton Act upon labor actions. The case originated in labor actions began in 1913. At that time there were only four manufacturers of printing press equipment in the U.S. Three were unionized, had closed shops and paid the union scale. The employees in these unionized shops worked 8 hour days. The fourth manufacturer of printing equipment was a non-union firm, Duplex. Employees at Duplex worked 10 hour days at below the unions scale. Duplex was, incidentally, the smallest of the four firms.

In an attempt to unionize Duplex, the union called a strike at the plant. Of the three hundred workers, only 13 responded. After this disappointing result, the union employed other more indirect routes to apply economic pressure.

Cooperating machinists unions refused to handle the presses made by Duplex, other transportation unions refused to cart the presses, and an agent of the International Association of Machinists, attempted to keep Duplex presses from being exhibited at a trade fair. Because of these perceived interferences with its operations, Duplex took its case to court.

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[66] Duplex Printing Co. v. Deering, et al, (1921).

In defiance of the Clayton Act, the company obtained an ex parte injunction against the union's interfering with its trade, its sales and installation operation. The union was also enjoined from circulating the Duplex name on "unfair" lists. In addition, the complaint charged common law criminal conspiracy.

In 1917 a District court rendered a decision dismissing the complaint and vacating the injunction. Duplex appealed to the U.S. District Court of Appeals; the decree of the lower court was affirmed. The case was appealed to the U.S. Supreme Court which began hearing testimony in 1920. The decision rendered in 1921, was a split decision, 6-3. The decision reversed the ruling of the lower court. The Supreme Court held that business was a property right entitled to protection against "unlawful injury or interference." The court also held that there was a right of injunctive relief. Thus the high hopes which labor held for the Clayton Act were disappointed. The highest court in the U.S. had once again upheld the right of injunctive relief in labor disputes and had invalidated labor's short-lived exemption from anti-trust prosecution.

The practical effect of this setback to legislative attempts at changing the law of labor was to set in motion a determined and sustained political effort on the part of organized labor. The effort consisted of an attempt by labor to "reward its friends and punish its enemies" (Gomper's phrase)[67] in Congress. Many scholars believe that the

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[67]Lieberman, p. 328.

substantial legal changes effected by the Wagner Act were the result of this political effort--"Hence it is fairly clear that it was the political power of the AF of L that achieved the enactment of the NLRA."[68]

The next section examines modern twentieth century changes in the legal environment of labor.

Third Phase of Labor Law Development (1925-1976)

Current national labor policy for the U.S. is founded on four acts of Congress all enacted in this century[69]--the Norris LaGuardia Act, the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act. This section examines the changes in labor's entitlements wrought by these laws. The section is concluded with a brief review of the most recent legal activity relating to labor--the Executive Orders stipulating the rights of government workers.

The Norris LaGuardia Act - 1932

The Norris LaGuardia Act was known by its supporters as the anti-injunction act. Since the injunction had been a most effective tool used to hamper union organizing and union labor actions, organized labor felt that restriction of this judicial power was a necessity.

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[68]Charles O. Gregory, Labor and the Law, (New York: W. W. Norton and Co., Inc., 1969), p. 226.

[69]Commons and Andrews write that the beginning of the twentieth century marks a period of labor law known as the "public benefit" period. See Commons and Andrews, p. 526.

The Norris LaGuardia Act was intended to accomplish what section 20 of the Clayton Act had promised and then failed to accomplish--legislative curtailment of judicial authority. In addition, it attempted to eliminate the use of anti-union (yellow-dog) contracts. The tactic was not to make such agreements illegal as had been tried in the past, but rather to render the agreements unenforceable as contrary to public policy.

The Norris-LaGuardia Act passed Congress by large majorities[70] and was signed by President Hoover in 1932. It is generally thought to have accomplished the goals of its proponents, namely to restrict the sphere of judicial authority. As one scholar stated, "Its chief significance lies in the fact that it simply cancels out a small host of what might accurately be called judicial perversions."[71]

The importance of the Act for labor law can be summarized in four points.[72]

(1) The Area of Economic Conflict

The Case of Duplex vs. Deering[73] had established that workers' area of conflict was to be restricted to disputes between them and their employer. Labor actions against other employers were considered "unlawful injury or interference." The Norris-LaGuardia Act, section 13, (see Appendix A) attempted to change the law on this point. It

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[70] Ibid., p. 142.

[71] Gregory, p. 185.

[72] Commons and Andrews, p. 142-143.

[73] See above, p. 44.

defined a labor dispute broadly to include "any controversy concerning terms or conditions of employment or concerning the association or representation of persons...seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand on the proximate relation of employer or employee." While this did not legitimatize actions such as the boycott, it did specify that non-employees could engage in labor actions in an attempt to unionize a firm, which had been held illegal in Duplex v. Deering.

(2) The Power of the Injunction

The Norris-LaGuardia Act did not go so far as to disallow the use of the injunction in labor disputes. It did, however, stipulate certain procedural guidelines which served to discourage its use. Innovations included (a) temporary restraining orders issued ex parte (without a hearing of both sides) would automatically expire after five days, (b) a bond payment must accompany requests for temporary restraining orders to serve as compensation if those parties enjoined suffer from the injunction, (c) federal courts could no longer issue injunctions.

(3) Restriction of Federal Courts

In addition to the procedural restriction discussed above, the Act specifically limits the Federal courts. It stipulates that no injunction may be issued by a Federal court to interfere with picketing in the absence of fraud or violence.

(4) Policy Declaration

Section 2 of the Act includes the statement: "the public policy of the United States is hereby declared as follows:" followed with a paragraph which describes the plight of the workman and the need for legislative intervention and judicial restraint in labor market situations. While the policy declaration did not itself change the law, it had indirect effects on the legal system. By declaring yellow-dog contracts to be contrary to national policy, it rendered such agreements unenforceable in the courts. The declaration also signalled the beginning of successful legislative intervention in the labor market. Policy declarations of a similar nature are to be found in most subsequent national labor legislation.

Judicial interpretation of the Norris-LaGuardia Act[74] ratified the expressed intentions of the framers of the Act. The Supreme Court, ruling on a similar Wisconsin statute,[75] upheld a judgement which had denied an injunction against picketing. Yellow-dog contracts were no longer enforced by the courts. The legal change had been effected.

Along with the Norris-LaGuardia Act, there was another forerunner of the Wagner Act, the National Industrial Recovery Act which deserves mention here even though it did not withstand judicial

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[74] Edward Lauf et al, v. E. G. Shinner & Co., Inc., (1938); United States v. United Mine Workers of America, (1947).

[75] Senn v. Tile Layers Protection Union, (1937).

scrutiny and was declared unconstitutional in June, 1935.[76] The NIRA was passed by Congress in 1933. Section 7(a) of this Act stipulated that (1) employees must be free to organize and bargain collectively and, (2) employees or prospective employees should neither be required to join company unions nor be prohibited from joining any other union. The National Labor Board, created by the NIRA, attempted to regulate wages, hours, and prices. This Act was beseiged from its passage, with attacks from all quarters. Its imprecise language allowed various interpretations of key passages. As the Act was faltering in the eyes of both advocates and opponents, those who favored a strong national labor policy began to draft replacement legislation. The NIRA was declared unconstitutional in June, 1935 because its regulation of wages and hours was an attempt to control activities only "indirectly related" with interstate commerce. In May of that year, Senator Wagner had introduced in Congress what would become known as the National Labor Relations Act.

The Wagner Act - 1935

The National Labor Relations Act (Wagner Act) passed Congress in 1935 with President Roosevelt's endorsement. The main innovations of the Act were not its stipulation of any new rights given to the employees but rather in its enumeration of the rights no longer allowed to be used by employers--the so-called "unfair labor practices."

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[76] Schecter Poultry Corporation v. United States, (1935).

The intention of these limitations on employer actions was to prohibit employers from actively interfering with workers' organizational activities.

A key part of the Act was the Policy Declaration. It stated that the objective of the Act was to insure that the flow of interstate commerce would not be interrupted by industrial conflict, therefore, it was necessary to institute such laws as were needed to reduce labor confrontations to a minimum. The rationale of the Act also mentioned the fact of an inequality in the bargaining power between the employer and employee, which the Wagner Act intended to remedy.

The Act sought to limit the power of the employers by declaring certain practices to be unfair. The list of "unfair labor practices" included: (a) the encouragement or discouragement of the formation of any labor organization, (b) discrimination in hiring, etc., for reasons relating to union membership, and (c) the refusal to bargain collectively with representatives of employee groups.

The Act established the National Labor Relations Board (NLRB) to implement the provisions of the Act. One of the most important functions of the Board was to investigate and hold hearings whenever there was a representation controversy. One of the problems of Section 7(a) of the NIRA was over proportional v. majority rule representation. The Wagner Act specified that majority rule would determine representation.

The NLRB was instructed by the Act to prevent violation of the provisions of the Act. Toward that end, the Board could issue cease

and desist orders if a hearing revealed violations of Section 8 (the prohibited labor practices). While the Board had no apparatus with which to direct enforcement of its orders, it could petition U.S. circuit courts for legal enforcement.

From its enactment, the Wagner Act came under attack from opponents.[77] The various legal actions against the NLRB threatened to render the Act void by taking away its enforcement arm. It was clear that only a clear and unequivocal declaration of the constitutionality from the Supreme Court could sustain the Wagner Act as an effective legal change. This came in the Jones & Laughlin[78] decision.

The Jones & Laughlin Case - 1937

The case involved charges of employer discrimination and employer interference in labor organizational activities. The NLRB had ordered the firm to cease and desist from such unfair practices, to reinstate workers fired due to their organizational efforts, and to pay the reinstated workers back pay. When Jones & Laughlin refused the order, the Board petitioned a circuit court for enforcement. The circuit court denied the petition, maintaining that the order lay beyond the permissable range of federal power.

In a split decision, (5-4), the Supreme Court upheld the order of the NLRB. It further stated that the Act was constitutional: "We

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[77] A thorough treatment of these legal battles may be found in Richard C. Cortner, The Wagner Act Cases, (Knoxville: University of Tennessee Press, 1964).

[78] NLRB v. Jones & Laughlin Steel Corp., (1937).

think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority."[79] While the Court was delivering this opinion, it also ruled in four other cases which were challenging the Wagner Act from various standpoints.[80] In these cases the constitutionality of the Act was likewise upheld.

Almost exactly ten years in the future, in 1947, Congress would enact the Taft-Hartley Act which began to restrain labor activities. In the meantime, however, organized labor enjoyed a period of its greatest power and influence.

The rights of labor before the law had come quite a distance in a little over one hundred years. Not only could workers combine and undertake such joint actions as the strike and the picket, they could also expect the federal government to protect these rights. In addition to the positive rights of action possessed by employees, there were numerous restraints and responsibilities placed upon the actions of employers. The law required employers to refrain from any interference with employees groups. It also required employers to bargain with employee representatives.

The commerce clause of the U.S. Constitution had been used by the Supreme Court to justify federal regulation of industrial relations.

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[79] Ibid., quoted in Sanford Cohen, Labor Law, (Columbus, Ohio: Charles E. Merrill Books, Inc., 1964), p. 154.

[80] They were: 1) Associated Press v. NLRB, (1937); (2) NLRB v. Friedman-Harry Marks Clothing Co., (1937); (3) NLRB v. Fruehauf Trailer Co., (1937); and (4) Washington, Virginia and Maryland Couch Co., v. NLRB, (1937).

This fact had implications for the law of the labor relation. Whereas before 1937, much labor law activity had taken place in state courts and state legislatures, now the focus of attention shifted almost totally to the federal courts and the Congress. Since almost all commercial activity (and hence labor activity) involved interstate commodities, this broad interpretation of the commerce clause gave the federal government jurisdiction over practically all labor disputes.

Labor in 1937 enjoyed its largest legal capacities. As we will see below, what Congress giveth, Congress may taketh away.

Taft-Hartley Act - 1947

This Act amended the Wagner Act but did not replace it. Whereas the focus of the Wagner Act had been on management practices, the Taft-Hartley Act is chiefly concerned with union practices. The activities of unions had attracted the attention of state legislators soon after the passage of the Wagner Act. In 1939, barely two years after the U.S. Supreme Court had upheld the constitutionality of the Wagner Act, the states of Wisconsin, Pennsylvania, Minnesota, and Michigan adopted laws that controlled union activities.[81]

The strike record of the post-war years contributed to the forces calling for new labor law provisions. In this two year period (1945-1946) 9,735 strikes occurred involving almost eight million

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[81]Benjamin J. Taylor and Fred Witney, Labor Relations Law, (Englewood Cliffs: Prentice-Hall, Inc., 1975), p. 204.

workers.[82] The 116 million man-days of lost production due to strikes in 1946 represented an almost three-fold increase over man-days lost the previous year.[83]

The important features of the Act can be summarized under four headings: 1) unfair labor union practices, 2) rights of employees, 3) rights of employers, and 4) national emergency strikes.

Unfair Labor Union Practices

A number of union practices were restricted or prohibited in the Act. In Section 8(b) six unfair labor practices were stipulated. The most important of these restricted a union's influence over dissident employees. It prohibited direct influence through coercion and indirect influence, through discrimination against dissident employees by the employer.

Provisions of the Act outlawed the closed shop (Sections 7 and 8(a)(3)). A union shop remained legal.[84] Another provision (8(b)(4)) had the effect of restricting secondary boycotts. The effect of this section was also to prohibit "common situs" picketing. In the case of National Labor Relations Board v. Denver Building and Construction

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[82]Ronald A. Wykstra and Eleanour U. Stevens, Labor Law and Public Policy, (New York: Odyssey Press, 1970), p. 207.

[83]Taylor and Witney, p. 211.

[84]A closed shop makes union membership a required condition of obtaining a job. A union shop makes union membership a required condition for keeping a job. Thus a new-hire on a union shop has 30 days (or some other period) in which to join the union or he loses his job.

Trades Council, (1951), the Supreme Court rules that picketing employer A (unionized) in order to persuade him to refrain from dealing with employer B (Non-unionized) was an unfair labor practice.[85]

Rights of Employees as Individuals

The Taft-Hartley Act extended the rights of the employees to refrain from collective bargaining. Language in the Wagner Act had explicitly given a majority of workers the right to obtain collective bargaining. It had been silent about the corollary rights of a majority to reject collective bargaining. The Taft-Hartley Act provided that a majority of workers might either accept or reject the Collective bargaining solution.

The Act further strengthened the rights of dissident employees by stipulating that federal labor legislation should not be construed as prohibiting the passage of state labor legislation even more restrictive of union security. This is the controversial Section 14(b) which gains national attention periodically when its repeal is pursued by organized labor. It has allowed the enactment of "right-to-work" laws by various states. These statutes go beyond the Taft-Hartley Act by outlawing union shops. Union membership may not be a condition of maintaining employment.

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[85]A discussion of the effect of the Taft-Hartley on forms of secondary boycotts can be found in Howard Lesnick, "The Gravamen of the Secondary Boycott," Columbia Law Review, vol. 62 (1962) p. 1363.

Rights of Employers

The Act restored certain activities which had been illegal under the Wagner Act. An employer could now express views about union organization, although he was still constrained from mention of any harm or benefit which "might" accure to an employee because of union organization activities.

An employer could call for representation elections at a time of his choosing. The strategically important timing of an election could previously (under the Wagner Act) only be set by the union's actions. In addition, employers were empowered to file charges of unfair labor practices against unions.

National Emergency Strikes

The most widely known portion of the Taft-Hartley Act is the section which empowers the president to restrain labor actions that "imperil the national health and safety." Under Taft-Hartley injunction procedures, an 80-day cooling-off period may be enforced. This has been done 26 times.[86] The president is further empowered to initiate actions intended to aid in the dispute settlement process. He may appoint a "Board of Inquiry" to act in a fact-finding capacity. The Board (which has subpoena powers) reports its findings to the president who may act further through instructions to the Attorney General.

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[86]Taylor and Witney, Labor Relations Law, p. 217.

Contrary to the predictions of some of its opponents,[87] it does not appear that the Taft-Hartley Act has significantly altered the labor entitlements of the worker. Although its most visible feature is the national emergency injunction provision, the most notable effects of the Act are the prohibition of "common situs" picketing and the provisions allowing states to legislate right-to-work laws. Both of these chief features are generally understood to reflect a direction of national labor policy of curtailing the rights of labor. The last major piece of labor legislation, the Landrum-Griffin Act, continues this direction.

The Landrum-Griffin Act

The objective of the Landrum-Griffin Act was to "provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers to prevent abuses in the administration of trusteeship by labor organizations, and to provide standards with respect to the election of officers of labor organizations, and for other purposes."[88] The Act focuses on the internal practices of unions. It does not represent a significant alteration in the entitlements owned by the average worker. It merely seeks to protect union members from improper practices by union officials.

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[87] The Executive Council of the AFL stated that the Act "seeks to weaken, render impotent, and destroy labor unions," Monthly Labor Review 65 (November 1947), p. 529.

[88] 73 Stat. 519.

The Act resulted from a long period of scrutiny of union activities which began as early as 1900.[89] In the fifties, a Senate Select Committee on Improper Activities in the Labor and Management Field was formed. Under its popular name, The McClellan Anti-Racketeering Committee, it held public hearings and directed much attention to the union improprieties uncovered. It is generally thought that the public opinion generated by the committee was directly responsible for passage of the Landrum-Griffin Act.[90]

The McClellan committee recommended legislation to correct union abuses in several areas including the control of pension, health, welfare, and union funds, the area of rule-making (union democracy), and the activities of middlemen in labor-management disputes. Some of the more important issues which were enacted into law in the Landrum-Griffin act are discussed below.

Bill of Rights for Union Members

The McClellan committee felt that many of the abuses in union organizations could be prevented by the legislation of a "bill of rights" for members. Title I of the Act includes provisions reminiscent of the Bill of Rights to the U.S. Constitution. Although the Act allows union discrimination in the admission of new members, it guarantees equal rights to current members with regard to voting and

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[89] Taylor and Witney, Labor Relations Law, p. 508.

[90] For an interesting inquiry into activities leading to the passage of this Act, see, Alan K. McAdams, Power and Politics in Labor Legislation (New York: Columbia University Press, 1964).

nomination of officials and meeting attendance. The Act gives rights of freedom of speech and assembly to dissident member groups subject to reasonable restriction upon the conducting of business (e.g., limited discussion time for proposals). It requires "democratic" procedures for the increasing of dues, fees, or assessments. The Act protected the right of members to bring suit against the union by prohibiting unions from limiting such rights. Mitigating the effects of these rights enumerated above is the requirement that Title I violations be pursued through civil litigation. No public remedy exists for this class of violations.

Reports, Conduct of Elections, and other Major Topics

The reporting requirements of the Landrum-Griffin Act cover union financial activities, possible conflicts of interest, and administrative practices. Recipients of the reports include the Department of Labor and the Office of Labor-Management. Availability of the reports and other records can be enforced by members through injunction.

The Act establishes procedures for the conduct of elections. The McClellan committee had uncovered numerous abuses in this area. The Act required national union elections every five years, at a maximum, and local elections every three years. Secret balloting was required. There are further requirements as to notification of elections, nominations, and other procedures.

Since several of the more flagrant abuses uncovered by the McClellan committee involved the conduct of local union officials,

a major section of the Act (Title V) dealt with the fiduciary responsibilities of union officials, bonding, and union treasury loan procedures. These financial safeguards were intended to reduce the extent of embezzlement and fraud.

Of the four pieces of labor legislation passed in this century and surveyed above, the Landrum-Griffin Act represented the least significant alteration in labor entitlements. The rights of an employee in relation to his employer were not the main issue of the Act. It dealt primarily with the relationship of the employee/union member and the union official. The court record since passage of the Act indicates that while it has undoubtedly eliminated some of the more flagrant abuses, its total effect on the legal environment of the wage bargains has been minimal.

In the following section, the description of the evolution of labor entitlement is concluded with a discussion of labor law in the public sector.

The Executive Orders

An important ingredient in the environment of the wage bargain for public employees is the identity of the employer--state government or federal. Labor law relating to state and local government employment has been written in state legislatures. Each state has produced a distinct set of laws governing the labor relations of its employees. As federal public sector labor law develops, state laws will probably tend to be patterned after corresponding federal law.

Executive Order 10987

This January, 1962 order dealt with "appeals from adverse action." It set out guidelines and recommendations for a system of appeal for public employees who had sustained an adverse action by their superior. This did not include all labor-management disputes, only those involving a firing, demotion, or some other adverse act.

Executive Order 10988

Issued simultaneously with the above order, this order went considerably beyond it. Section 1 makes membership in employee organizations a right of federal employees in language similar to the Wagner Act. The order reinforces earlier law in that it does not recognize as an employee organization any that "assert the right to strike against the Government of the United States." The order creates classes of recognition for employee organizations based on the proposition of employees belonging. The highest form of recognition is "exclusive recognition," where a majority of employees in a unit have declared their support for a particular bargaining agent. Such an organization may negotiate collective bargaining arrangements on matters relating to working conditions.

The order exempts the FBI, CIA, and other agencies involved in security or intelligence. It also permits agency heads to exempt any persons from its provision if necessary to the "national interest."

Executive Order 11491

This order, issued in 1969, attempted to correct the perceived deficiencies of the prior orders. It provided for secret representation elections rather than the method of signed authorization cards. It required information on union activities to be provided. The reporting requirements here were similar to those required by the Landrum-Griffin Act.

The order created an administrative body to oversee policies and procedures. The body was named the Federal Labor Relations Council (FLRC) and its status with respect to federal employees is similar to the status of the NLRB with respect to private sector employees. The FLRC further acts as an appeals board for disputed matters relating to federal employment.

The executive orders discussed above have modified and shaped the labor entitlements of employees in the public sector. Most of the changes dealt with procedures of conflict settlement or with the rights of employees. Although federal employees now have limited rights of collective bargaining, the most notable feature of public sector labor law is the ban on strikes.

This section concludes the description of the evolution of labor entitlements in the U.S. The time span covered has been considerable--from 1806 to the present. The change in labor entitlements enjoyed by the typical worker has been no less considerable--from the situation where all strikes were indictable conspiracies to the situation today

where virtually all private sector strikes are legal. In the following chapter, using the description of the evolution of labor laws as a background, an attempt will be made to analyze some specific instances of legal changes with the goal of identifying economic principles motivating the changes in labor law.

Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means. The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude, always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing.

Oliver Wendell Holmes

CHAPTER 3

ECONOMIC PRINCIPLES IN LABOR LAW

The above quotation from an opinion[1] by the reknowned jurist Oliver Wendell Holmes should serve to foreshadow the content and aim of this chapter. In the previous chapter the evolution of labor law was described. The chapter traced the changing pattern of labor law from its common law origins, through the period of its judicial reformulation into the twentieth century period of legislative enactments, and up to its present form of administrative law as embodied in the NLRB and the FLRC. This chapter continues the analysis of changes in labor law but takes a slightly different perspective. This chapter will examine somewhat more closely the dialogue surrounding changes in labor entitlements so as to understand better the several ways lawmakers viewed labor relations. Whereas the previous chapter detailed how the law of labor changed, this chapter will inquire why such change occurred. The search for principles motivating the alterations in entitlements will be selective, however. The concern will be with "economic" principles. It is a premise of this analysis that economic conceptions are of primary importance in the alterations of legal institutions.[2]

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[1] Dissenting in Plant v. Woods, (1900).

[2] In the current study, the interesting but complex (and normative) question of whether economics should inform the design of optimal

Chapter 5, below, reviews economists' views of the labor relation, finding a somewhat different perspective on labor problems. Chapter 6 completes the analysis by providing a single framework for merging the disparate viewpoints of the lawmakers and the economists.

The first step toward analyzing the labor relation will consist of recalling some of the viewpoints encountered in the description of legal change in Chapter 2 above. In the first recorded labor case of the Philadelphia cordwainers, the concept of a "natural" price was mentioned in the first quotation as the workmen were charged with attempting to "increase and augment the prices usually paid."[3] This concept was no doubt absorbed by lawyers and judges from the medieval economists' concern with a "just" price and the later concern of classical economists with an objectively determinable "natural" price.

The following quote taken from the New York cordwainers case,[4] testifies to the influence of the classical economist Adam Smith on judicial thought. Counsel for defense argues "And the remarks of the profound and perspicacious Adam Smith are realized here as in

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legal rules is avoided. For a taste of the disparity of views on this question, cf either Posner, Economic Analysis of Law (Boston: Little Brown & Co., 1972) or Calabresi, The Costs of Accidents (New Haven: Yale Univ. Press, 1970) with Hayek, Law Legislation and Liberty, Vol. I, (Chicago: Univ. of Chicago Press, 1973), especially p. 67-71.

[3]Commons and Associates, Vol. III, p. 59. See especially pp. 102, 228, 229.

[4]See above, Chapter 2, p. 19.

Great Britian. There, he observes the master tradesmen are in permanent conspiracy against the workmen."[5]

The second historic labor case, the New York cordwainers, hinted at the concept of monopoly welfare loss. The prosecution argued "this conspiracy, unnaturally to force the price of labour beyond its natural measure, is as dangerous as any kind of monopoly."[6]

The Pittsburgh cordwainers case[7] introduced explicit mention of "restraint of trade" which could result from labor combinations. Restraints of trade by labor combinations were seen by the court as something to be discouraged as "prejudicial to the community."

In the landmark decision of Commonwealth v. Hunt, the court observed the economic harm suffered by Horne (the dissident employee) and by the employer as a result of the strike. It held, however, that the benefits which could accrue to workers from unionism outweighed the harm suffered by non-members.

The Danbury hatters case, which held unions subject to anti-trust prosecution under the Sherman Act was based on an estimation of the economic harm which would result if labor conflicts were allowed to interfere with interstate commerce.

The Clayton Act[8] boldly declared that the labor of a human being was not an "article of commerce."

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[5]Commons and Associates, Vol. III, p. 261.

[6]Ibid., p. 313.

[7]See above, Chapter 2, p. 21.

[8]See above, Chapter 2, p. 43.

The Norris-LaGuardia Act[9] changed labor law fundamentally by redefining the permissable area of economic conflict to include confrontations between employers and non-employee unionists.

The most sweeping of all rearrangements of labor entitlements occurred with the passage of the Wagner Act.[10] The frankly interventionists measures were justified by the observation of an inherent inequality in bargaining power between employers and employees and by the necessity of maintaining the flow of commerce.

As this quick sketch of labor evolution should demonstrate, legal reasoning was usually predicated upon economic principles of one sort or another. It is necessary, however, to go further than merely pointing out the importance of economics to law. The economic underpinnings of legal reform need to be analysed in a manner which will allow a determination of the perspective taken by lawmakers in handling problems of labor actions.

The first step toward analyzing the labor relation will consist of identifying and offering, as categories, two different viewpoints of the wage bargain--the "simple setting" and the "interdependent setting." The genesis of these viewpoints lies in the previous chapter where courts were viewed as attempting to determine the effective extent or range of influence or labor actions. It was noted that lawmakers characteristically considered the wage bargain

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[9]See above, Chapter 2, p. 46.

[10]See above, Chapter 2, p. 50.

either in complete isolation (the simple setting) or in the context of other related factors (the interdependent setting). In the following section the simple setting is discussed.

The Simple Setting

In the simple setting the employer-employee relationship was considered in isolation from the encompassing social structure. The determination of individual wages was a matter of agreement by the two parties. As one judge put it, "In the case of labor, between the man who seeks the employment of a man who wants to employ him [the fixing of wages] is a matter of agreement and must always be."[11]

An Industrial Struggle

The employer and the employee were pictured as engaged in an industrial struggle. The struggle was a natural and competitive one which did not usually require interference by the courts or the legislators. "Rivalry between individuals cannot perceptibly disturb the equilibrium of society. They will fall within the limits of fair competition."[12]

Not all thought the struggle fair, however. Some held that strikes were themselves illegal, since they contained an element of intimidation, "the purpose of a strike is to extort,...some concession from the master,...all strikes are [therefore] illegal."[13]

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[11] Judge Drummond in the 1877 decision of King v. Ohio & Miss. Railway Co., quoted in Groat, p. 71.

[12] Groat, p. 43.

[13] Cogley, p. 3,223.

In this simple viewpoint, combinations on the side of labor amounted to an attempt to interfere with the natural forces of the market. Since wages were a matter of agreement, attempts by workers to combine and bring pressure on the masters for higher wages amounted to an attempt to regulate wages unilaterally. A strike was, therefore, to be condemned because workers had "no right to dictate to their employers what they shall receive,..."[14] The courts saw the situation as analogous to a consumer trying to set the price of a good that he is trying to buy, "You cannot go into the store of a merchant in this city and say, I will give you such a price for an article, and leave the money and remove it from the store."[15] This likening of the employment relation to the relation between a customer and a retailer is modern in its resemblance to a similar analogy used in one recent discussion of theories of the firm.[16]

This aspect of the simple setting which emphasizes the natural struggle between the employer and the employee figured in an important legal theory that was mentioned earlier - "just cause" theory.[17] The central theme of this doctrine, as explained above, is that "everyone is entitled to free, unobstructed access to the commodity

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[14] King v. Rlwy., p. 71, Groat.

[15] Ibid.

[16] Alchian, A. & Demsetz, H., "Production, Information Costs, and Economic Organization," American Economic Review, Vol. 62, No. 5 (12/72).

[17] See above, p. 3.

and to the labor market, intentional interference with these rights being prima facie a wrongful act."[18] The defense against charges of wrongful action was to demonstrate that the action had a "just cause."

In the struggle of two businessmen over market share, there is a constant inflicting of damage by one on the other. To draw customers away from a competitor is prima facie a wrongful act, but it can be defended by the assertion that the right to compete fairly for business is a prior right. There is "just cause" for the taking of a customer. Seen in this light, the damage done by striking workers to their employer may be defended by proving that there was just cause for the infliction of the damage. As natural opponents in the struggle over shares of the joint product, the employer and the employees might inflict severe damage upon each other, yet remain within their rights.

Proof of damage not being sufficient for the condemnation of labor actions, the courts needed to determine if the means used by the striking workers were "justified." Thus, this doctrine often shifted back the focus of the courts to the motive and intent or the means used by labor in its confrontations with employers. It was possible for the "just cause" doctrine to be cited by either side in a court battle but with differing conclusions as to the legitimacy of the workers' actions. In the first two applications of the "just cause" theory[19] the majority and minority of the state supreme

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[18] Millis and Montgomery, p. 505.

[19] Vegelahn v. Guntner, (1896); Plant v. Woods, (1900).

court both cited the theory but with obviously differing conclusions.

According to the "natural struggle" view of the labor relation, actions on the part of one side might harm the other side but to the benefit of others so that on net, society suffered no loss by the labor actions. In the Hudson shoemakers case, counsel for the defendents argued that "Although (the masters struck) sold less, yet other masters sold more. The same number were made and consumed... I cannot comprehend how an injury to the trade of one part and a corresponding benefit to another part, can operate to the injury of the whole."[20]

Equality of Right

In the context of this "simple setting" view of the labor relation, a fair struggle between the forces of labor and capital requires that the two parties have an equality of right before the law. Ad hoc intervention in the interest of either side was to be condemned. When the U.S. Supreme Court declared the Erdman Act to be unconstitutional, it was stated in no uncertain terms that: "The right of a person to sell his labor upon such terms as he deems proper is, in essence, the same as the rights of the purchaser of labor from the person offering to sell it. So the rights of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense

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[20] Commons and Associates, IV, p. 303-307.

with the services of such employee... The employer and employee have an equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[21]

Another aspect of this simple setting is its implicit assumption that all persons involved in the wage bargain are equal. Support for this is no doubt the judicial (and ethical) norm that all are to be "equal before the law."

There are, however, both human and non-human "persons." Non-human persons consist of organizations that have obtained juristic personality. The "equality-before-the-law" norm does not have as much intuitive appeal in the case of non-human persons, such as, most notably, corporations. This line of reasoning lay behind arguments that the law should actively encourage the formation of labor unions since law had promoted, or at least allowed to be established, large corporations which could represent themselves before the law as persons.

Law and the Maintenance of Balance

From Holmes we have a most eloquent statement of the need for a balanced and fair framework within which employers and employees (capital and labor) can bargain. The following quote is from his dissenting opinion in the case of Vegelahn v. Guntner.[22]

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[21] Adair v. U.S., quoted in Mason, p. 74.

[22] Vegelahn v. Guntner, Mass, (1896). This is also one of the first cases where he articulated from the bench, the "just cause" doctrine.

In the opinion, he was arguing that the courts had permitted industrialization to generate the concentration of power among producers, and the courts, in fairness should now abandon conservative attitudes toward combinations and should allow (or even encourage) worker organizations to gain power. This was necessary to maintain balance in the industrial struggle.

"One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other hand is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."[23]

In this simple setting, interference by the legal system which did not have as its object, the preservation or restoration of an "equality of advantage" was unjustified. When the Indiana legislature passed minimum wage legislation, the Indiana Supreme Court struck it down arguing that such laws interfered with "the operation of natural and economic laws."[24]

From this perspective, problems with labor actions resulted when the balance of power between the two factors was disturbed. Thus, boycotts were illegal to the court if they enabled the workers to gain

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[23] Ibid.

[24] Street v. Varney Electrical Supply Co., quoted in Cortner, p. 5.

inordinate power over employers. They were condemned when they represented "an attempt by a large body of working-men to control, by means little if any better than force, the actions of employers."[25]

As the above discussion may suggest, this view of the labor relation as one of a simple conflict between the two factors of production was especially prevalent in the early court cases. This fact may explain, in part, the early anti-union bias of the court decisions. The early strict application of the conspiracy doctrine was based on a fear of the massing of power, which had been rooted in the early common law. Combinations gained power at the expense of the power of the confederates, and by some synergistic phenomenom, the aggregated power exceeded that of the constituents. As Dicey explained: "Whenever men act in concert...they tend to create a body which,...from the very nature of things, differs from the individuals of whom it is constituted...A body, moreover, created by combination... limits the freedom of its members, and constantly tends to limit the freedom of outsiders. Its combined power is created by some surrender of individual liberty on the part of each of its members, and a society may from this surrender acquire a strength far greater than could be exercised by the whole of its members acting separately."[26]

A massing of power which occured in an organization of persons was necessarily evil since it could upset the natural balance among

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[25] State v. Glidden, (1887).

[26] Dicey, p. 154. See also Dicey, "Combinations," Harvard Law Review, Vol. 17, p. 511.

members of society. The function of the doctrine of conspiracy was to inhibit such concentrations of power. Thus, the doctrine of conspiracy was used to curtail labor combinations. There was one problem with this application of the common law doctrine of conspiracy to labor, and that was its implicit assumption that the other parties involved in the industrial struggle were equally bound by the common law from engaging in combinations. To many observers, this was not the case. Some pointed to the concentrations of capital which had been promoted by legal changes allowing monopoly privileges to corporations and investing corporations with juristic personality. To restrict labor combinations where other combinations had been allowed even promoted was inconsistent. In the words of one judge: "It ignores the fact that in every line of trade and business, combination is the tendency of the age."[27]

The words "combination is the tendency of the age" bear repeating and reflecting upon. If the perceived role of the courts was to maintain balance among the participants in the natural industrial struggle over shares of the joint product of industry (and this is the contention above), then if combination became "the tendency of the age," the courts' role becomes one of preserving parity by insuring that the tendency to "combination" proceeded evenly across sectors. Thus, the legal system sheds its essentially defensive posture of striking down all upsetting combinations and assumes, in an offensive, activist manner, the task

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[27]Dissenting by Judge Minturn in Geo. Jonas Glass Co., v. Glass Blowers, (1911).

of maintaining balance among the various (now combined) factors. The end of "social equilibrium" justifies the formerly illicit means of combinations.

The legal outlook described in this section is thus not inconsistent with the interventionist character of twentieth century labor law, given combination among some (non-labor) factors in the society.

There is an economic aspect of this "simple setting" legal viewpoint which remains to be discussed before we proceed to the "complex setting." It involves the concept of competition across markets, i.e., between the buyers and sellers of labor services. As one legal writer put it, "It is now coming to be acknowledged that in a controversy between employers and workmen in respect to wages, hours, etc., both parties have the rights of business competitors, in the broad sense. There is a conflict of temporal interests between buyers and sellers of labor; in general, 'whatever one party gains the other loses'."[28]

Implicit in this view is the assumption that there is some range of indeterminacy over which the parties to the transaction can haggle. This indeterminancy or bargaining range is necessary for a struggle to exist. Determinate outcomes would obviate any bargaining. In a competitive market, the "auctioneer" would call out a labor market-clearing price about which there could be no debate. Thus, the economic underpinning of the simple setting is seen to be the assumption of an imperfectly competitive market, where monopoly (monopsony) power exists.

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[28] Harvard Law Review, Vol. 20, p. 356.

Employers and employees are assumed to be on the contract curve. There are no allocational implications from wage bargaining, only distributive ones. National labor policy consists of insuring that the point at which the final deal is struck is "fair" based on some normative criteria.

Unions, once prohibited, are now encouraged by this view of the labor relation. This is seen in the words of Chief Justice Hughes in the labor case which upheld the constitutionality of the Wagner Act,: "We said that (unions) were organized out of the necessities of the situation; that he was dependent ordinarily on his daily wage for the maintenance of himself and family, that, if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer."[29]

While the lawmakers assumed the task of maintaining fair competition, they were distrustful of "excessive" competition. In house debates on the Sherman Act, the lawmakers felt that combinations of labor were for self-protection. In the words of Representative Stewart: "Why do laborers organize and combine to put up the price of labor, and so enhance the cost of everything to the consumer? Because of excessive competition...I think labor is justified, where competition is excessive ...in entering into combinations for self-protection."[30]

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[29] NLRB v. Jones & L. Stl., quoted in Falcone, p. 195.

[30] Cong. Rec., Vol. 21, p. 5956.

Likewise, combinations of certain commodity sellers, where precipitated by the forces of excessive competition, could be justified on this view, "I understand that the Farmer's Alliance - and I think they were right,...entered into a sort of combination to withhold their products from the markets and enhance their prices."[31]

One economic underpinning of the simple setting viewpoint, the assumption of imperfect competition, was discussed above. The second major economic principle supporting the simple setting should now be apparent. When lawmakers confine the span of their attention to the labor market, to the exclusion of environmental factors including other markets, they are engaging in partial (dis)equilibrium analysis. In contrast, a general disequilibrium analysis of labor actions would have to consider the relationship between the labor market and other markets in the economy. A partial disequilibrium labor viewpoint may be sustained by the contention that all or most of the effects of labor actions accrue to the contesting parties. A general disequilibrium framework would be called for where it was believed that labor actions involved adjustments in behavior in other areas or markets.

In the simple setting view of the labor relation, lawmakers were employing "partial analysis." The other legal perspective characteristically taken by lawmakers regarding labor was to analyze the wage bargain as one part of a complex interdependent economic system which corresponds to a more "general analysis."

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[31] Ibid.

Conflict Grown Complicated - Introduction of Third Parties

In the last section, it was seen that courts and legislators often viewed the labor relation separate from the encompassing social structure. The employer and employee struggled in isolation for shares of the product of their joint labor. This section discusses the characteristic way of viewing the labor relation which considers the "context" of the wage bargain. This viewpoint gives attention to the interaction of the employers and employees with other members of society. Because this viewpoint explicitly considers the interdependency of labor actions with all other sectors in the economy, we have labelled it the "interdependent setting."

In the simple setting, the parties were naturally dependent in their capacities as buyer and seller of labor services. This section seeks to embed the wage bargain in a general framework where labor actions may impinge on the actions of third parties such as competitor labor, the potential consumer, and competitors of the producer.

This section makes two points: 1) that lawmakers explicitly considered the all-pervasive interdependencies of the wage bargain in a manner that economists have not, and 2) that legal and economic doctrines which supported certain labor entitlements in the "simple setting" case, are inappropriate from the standpoint of the interdependent setting.

Labor's Interdependency

Discussions of the labor relation which take the "interdependent" viewpoint are not limited to modern court opinions. In the first

recorded labor case (the Philadelphia cordwainers) there is a statement which indicates a concern for the indirect effects of labor actions. In that case, the defendents are accused of "contriving, and intending unjustly and oppressively, to increase and augment the prices and rates usually paid."[32]

In the simple setting, gains to the journeymen of raising the wages are matched by losses of the master cordwainers. Society remains in balance and there are no allocative effects of higher wages. In the complex setting, the wage bargain takes place within some social structure and effects of a wage hike may be widespread. To "augment the prices and rates usually paid" is no longer a matter solely of distributional consequence within the exchange. When it is understood that the masters and others (e.g., consumers) will change their behavior in response to wage actions, the potential allocative significance becomes apparent.

The concept of economic interdependency can be even more clearly seen in the case of Hudson Shoemakers. In this case, tried in 1836, Counsel for defense made explicit mention of the ways that other sectors would react to labor actions. He was especially persuasive in his observation of the alternative actions available to those who bear the cost of some labor action. "If the journeymen tailors, by means of their combinations get the prices of their work so high that we

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[32]Commons and Associates, Vol. III, p. 62.

cannot afford to pay them, we shall not go without clothes, we shall make them ourselves as you do now and for the same reason, because it is our interest to do so. Nor will our whole city be without bread, because the journeymen bakers are extravagant in their demand. We will make it ourselves, as many of us do now."[33]

The defense was arguing here that there was in fact no net injury by the strike of the shoemakers. Other sectors of the economy adjusted to the strike and total welfare was not reduced. "To justify a conviction the injury must be to the trade of the whole community. Although [the employers struck] sold less, yet other masters sold more."[34] According to the defense, the prosecution had failed to prove that the community had been injured. By pointing to the adjustments made by other sectors in the economy, the defense maintained that there had been no "injury to the whole." "I cannot comprehend how an injury to the trade of one part and a corresponding benefit ot another part, can operate to the injury of the whole."[35] Although one may fault counsel for his failure to mention the welfare implications for the other sectors of switching from the most preferred to the second best alternative, one must commend his understanding of the interdependency of an economic system.

The common law doctrine of restraint of trade was based on an implicit acknowledgement that an impediment to the flow of commerce

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[33]Commons & Assoc., Vol. IV, p. 303-307.

[34]Ibid.

[35]Ibid.

would harm all, as well as on the common law right of each person to pursue his calling without interference. Although court opinions were usually couched in terms of moral disapproval of the means employed in some labor actions, the efficiency element growing out of a perceived economic interdependence was often implicit in the arguments of the contesting attorneys or in the opinion of the presiding judge. Language typical of the attitude of earlier legal writers can be found in the case of the New York cordwainers where the prosecutor condemned restrictive labor actions by declaring that "such acts would be against the public good,...and as offenses against the whole community be subject to public prosecution."[36]

The Public Interest

This theme of the public as a "third party" with standing runs continuously through the history of the evolution of labor law. In the case of Commonwealth v. Carlisle,[37] the opinion held that: "a combination is criminal wherever the act to be done has a necessary tendency to prejudice the public." In this case, the phrase "to prejudice the public" meant to "depress the wages of journeymen below what they would be, if there was no recurrence to artificial means by either side." While the reasoning of the opinion is circular (What are artificial means? Those that prejudice the public?) it is still possible to infer something from it. The court saw the evils of

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[36] Ibid., Vol. III, p. 314.

[37] See the discussion at Chapter 2, p. 22.

"unnatural interference" as net welfare losses to the economic system, the efficient functioning of which required an absence of such obstructions.

In the Sherman Act,[38] Congress proclaimed "that every contract, combination...or conspiracy, in restraint of trade or commerce..., is hereby declared to be illegal." This act, which was held to be applicable to labor combinations implied a public entitlement to unrestrained, competitive markets, and the benefits that accrued therefrom.

The Norris-LaGuardia Act[39] the anti-injunction act, which was the first of four major legislated labor law changes in this century, acknowledged labor's interdependent setting in a number of ways. In section 2, the Act declared the public policy of the U.S. to be to assist the laborer who, "unorganized,...is commonly helpless to exercise actual liberty of contract and...to obtain acceptable terms and conditions of employment." The issuance of labor injunctions by Federal courts, a common practice at that time, was seen by Congress as an upsetting force in labor relations. The Act restricted such interference not merely in the name of the affected laborers, but in the name of society, all whose members would presumably benefit from the greater powers of worker "self-determination" resulting from the Act. Thus, justification for the Act lay in the net social benefit which would accrue from its passage. The interdependency of the labor sector with the other sectors of the economy was evident in the philosophy of the Act.

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[38]Act of July 2, 1890, 26 Stat. 209, as amended.

[39]Act of March 23, 1932, 47 Stat. 70.

In the Senn case,[40] the legal definition of the allowable area of economic conflict becomes crucial. The Supreme Court, in effect[41] upheld the constitutionality of the Norris-LaGuardia Act in this case by justifying the broad definition of "the allowable area."

The labor confrontation involved Senn, a small contractor, and a tilelayers union. Senn had refused to allow the unionization of his shop because of a particular provision of the Union procedures which prohibited contractors from working alongside their employees. Since his was a small operation and he was used to working with his helpers or journeymen, he requested exemption from this rule. The union refused to make an exception and picketed his business. His attempts at injunctive relief were rejected by state courts who pointed to the anti-injunction statute. He appealed their verdicts to the Supreme Court who ruled on the validity of the statute.

The complexity of this situation can be seen in the fact that the quarrel did not involve Senn and his employees. His working site was picketed by union members who worked for other contractors. The court upheld their actions, "The unions acted, and had the right to act as they did, to protect the interests of their members against the harmful effect upon them of Senn's action...The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce

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[40] Senn v. Tilelayers, (1937).

[41] The case involved a Wisconsin statute which had been modeled after the Norris-LaGuardia Act. Legal opinion considered the finding of the court here fully applicable to the Act.

an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands - so to endeavor although none of his employees is a member of a union."[42]

Thus in the courts' eye Senn, an employer, could visit harm on other workers. This view can be strongly contrasted with the "simple setting" view where (the courts would have argued) Senn's relationship was solely or predominantly with his own employees. A court adopting the "simple setting" viewpoint would quickly enjoin the picketing of Senn's business as unjustified interference. This court would deny the existence of any meaningful relationship between Senn and union journeymen of other employers.

The Norris-LaGuardia Act asserted such a relationship. It stated, in section 13(c): "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[43] Congress had accomplished through the Norris-LaGuardia Act, a redefinition of the allowable area of economic conflict. A realization of labor's interdependency had been instrumental in this redefinition.

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[42]Quoted in Falcone, p. 118.

[43]Ibid.

Language in the Wagner Act[44] mirrored the language of the Norris-LaGuardia Act and continued the line of reasoning used in the earlier legislation. Section 1 declared: "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."[45] Later in Section 1 a rationale is provided: "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining."[46] Thus the institution of collective bargaining is promoted through legislation in order to eliminate obstructions to the flow of commerce. Whereas in the "simple setting" the labor struggle involved the employer and the employees, all of society is now brought into the conflict since all of society benefits from unobstructed commercial activity.

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[44] Act of July 5, 1935, 49 Stat. 449.

[45] Ibid.

[46] Ibid.

In the Taft-Hartley Act[47] we again find mention of the "public stake" in the wage bargain. Section 1(b) reads in part: "It is the purpose...of this Act...to promote the full flow of commerce and... to define...practices on the part of labor and management which...are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[48]

In the Act is also found the first mention of the rights of government employees. Section 305 restricts the rights of public employees: "It shall be unlawful for any individual employed by the United States...to participate in any strike."[49] While no rationale is furnished for this specific restriction on labor's rights, we can conjucture that, of all employees, federal workers are "particularly affected with the public interest" and must, therefore, be prohibited from striking and injuring the public. This topic will be further discussed later.[50]

In the fourth major labor law Act of this century, the Landrun-Griffin Act of 1959,[51] the necessity for legal change is again justified by reference to the "public interest" as legislators perceived it.

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[47] Labor Management Relations Act - 1947, Act of June 23, 1974, 61 Stat. 136.

[48] Ibid.

[49] Ibid.

[50] See the discussion in the last section of Chapter 6.

[51] 73 Stat. 519.

Section 2(b) justified the Act on the grounds that it was necessary to protect the "rights and interests of employees and the public generally."[52] Section 2(c) listed and condemned four actions which had the "effects of burdening or obstructing commerce."[53] The theme of the "public interest" or the "general welfare" permeates the law of labor in the twentieth century. Actions in the labor market affect the "flow of commerce" and the "flow of commerce" affects every segment of the social structure. The interdependence of labor and management with the remainder of society is manifest in the language of the enactments. A realization that the actions of labor and management impinge on the welfare of third parties does not, however, rescue the courts from having to decide law on the basis of relative rights. The next section discusses the problem of determining a priority of rights in the context of an interdependent labor setting.

Priority of Rights

In the "simple setting" view of the labor relation, the legal system attempted to arbitrate the interests of two parties - the laborers and their employers. In the interdependent setting, the interests of third parties must be considered and any arbitration (a court decision is essentially an arbitration) necessarily involves at least three conflicting sets of rights. In the opinion, written by Frankfurter, in the case of Ritter's cafe,[54] the court describes

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[52] Ibid.

[53] Ibid.

[54] Carpenter's Joiners Union v. Ritters Cafe, (1942).

the "clash of interests": "The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has, therefore, been compelled to throw its weight into the contest...And every intervention of government on this struggle has in some respect abridged the freedom of action of one or the other or both...The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces had not previously been doubted."[55]

The case of Ritter's Cafe is relevant, additionally, for its role in the evolution of the labor law doctrine of the rights of picketing. In an earlier case[56] the Supreme Court seemed to hold the position that picketing was a form of expression and thus was protected by the First Amendment. "Stranger picketing"[57] could not be restrained. Subsequent decisions gradually eroded First Amendment protection for picketing. The case of Meadowmoor Dairy[58] held that the presence of the threat of violence could bar First Amendment protection for picketing. The Swing decision[59] reiterated this. The Ritter's Cafe case further eroded the Thornhill doctrine by declaring that picketing must be confined to the

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[55] Ibid.

[56] Thornhill v. Alabama, (1940).

[57] Stranger picketing is the picketing of an employer who is not a party to any current labor dispute.

[58] Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., (1941).

[59] AF of L v. Swing, (1941).

industry directly related to the labor conflict. More recent decisions have given state courts greater latitude in restricting picketing actions for reasons both of interpretations of state policy[60] and of private property.[61]

The evolution of the rights of picketing parallels the evolution of other rights in the labor market. What was once virtually an absolute right now becomes a conditional right. Picketing actions, as well as other labor actions, must now always be evaluated with the interests of others in mind. The labor market has been fully integrated with other sectors of the economy. This explicit consideration of the interaction of the labor market with other markets of the economy may be interpreted as a move toward a more general (dis)equilibrium analysis. The partial analysis of the simple setting is replaced by a broader view which looks for the involvement of third parties (parties other than the employer and employee).

In the interdependent setting, legal condemnation of combinations can be carried a step further. Rather than merely citing combinations as *prima facie* unlawful, courts mention the specific ends which obtain due to combination. The unnatural raising of the price of labor or any other commodity by combination passes along specific hardship (costs) to the eventual consumer.

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[60] *Hughes v. Superior Court of the State of California*, (1950).

[61] *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, (1967).

The famous comment by Chief Justice Erle to the effect that all persons and the public as well, have the right to expect that the course of trade be kept free from restraint was previously noted. This doctrine, along with a discussion which indicates a reliance on the concept of third parties, is found in the Danbury Hatters case. There the judge explained that "The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes."[62]

In the case of Pickett v. Walsh, the opinion reflected the dependence of the legality of boycotts upon the effects on third parties. Here the labor actions were condemned because they represented "a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in (the union's) favor."[63]

While injury to third parties was important to the question of the legality of particular labor actions, the existence of indirect injury to third parties did not itself make specific labor actions illegal. The prevailing opinion in the Willcutt case stated this "A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be directly affected thereby."[64] With reasoning similar to the "just

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[62] Lowe v. Lawlor, quoted in Groat, p. 95.

[63] Pickett v. Walsh, quoted in Groat, p. 74.

[64] Willcutt & Sons Co. v. Bricklayers' Union, Massachusetts 1908, 85 N.E., 897.

cause" doctrine, the means are used in this case to justify the ends. In general, however, a greater recognition of labor's interdependent setting was accompanied by greater emphasis on the ends of labor actions - the particular results which would be reasonably expected to flow from certain actions in the labor market.

It might be instructive for purposes of understanding differences in the two characteristic views of the labor relation to take a particular labor action and examine how legal doctrines concerning this labor action vary under the "simple" and the "interdependent" settings. In the next section doctrines concerning the right to strike under the two legal viewpoints are examined.

The Right to Strike

In the preceding parts of this chapter two characteristic ways of viewing the labor relation were identified: the "simple" and the "interdependent" settings. One implication of this distinction is that the two views may generate differing conclusions regarding a specific legal problem when confronted with an identical set of facts. This section examines some evidence relating to this. Briefly, the simple setting seemed to suggest a less active role for courts (and lawmakers) in the labor market. Where the complex, interdependent setting of the wage bargain was explicitly considered, a greater role for legal intervention was recommended. This principle is illustrated by examining legal doctrines concerning the right to strike.

In the simple setting viewpoint there was an inherent bias against anything which interferred with the contractual relation of employer

and worker. The interest of society was served by allowing the two industrial combatants to struggle over the wage bargain. There was no way for the law to intercede on the side of one without incurring an obligation to the other. This orientation can be seen in the case of Adair v. U.S., where the Erdman Act was declared unconstitutional. The court stated: "The right of a person to sell his labor upon such terms as he deems proper is, in essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the rights of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee... The employer and employee have an equality of rights and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[65]

The simple setting viewpoint saw the workman's right to strike as virtually absolute: "It is perfectly lawful for any man...to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct his own business in his own way,...And...the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice."[66]

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[65] Adair v. U.S., p. 174-175.

[66] Bohn Manufacturing v. Hollis, p. 1119.

Elsewhere, "It is not the duty of one man to work for another unless he has agreed to and if he has so agreed, but for no fixed period, either may end the contract whenever he chooses."[67] Whereas in the earliest period of labor law history, all combinations had been illegal as conspiracies, throughout most of the nineteenth century and the early twentieth century, strikes were considered legal: "We should now say that all strikes are legal; that is, all plain and simple combinations to quit work when there is no breach of a definite time-contract in so doing, and where it is not complicated by any element of boycott."[68] Some even held to the extreme position that strikes could never be illegal: "A strike is a combination to quit work; and a strike can never in and of itself be illegal. It does not need to be justified. The absolute right to quit work, which necessarily exists in a free constitutional government construed on individualistic principles, is guaranteed by our Constitution and cannot be abridged by legislative, executive, or judicial power."[69]

While this court asserted the absolute right to strike, most courts did not adopt this extreme position. In the case of Dorchy v. Kansas, the court articulated the more common view that "neither the common law nor the fourteenth amendment confers the absolute right to strike."[70]

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[67] National Protective Ass'n v. Cumming, p. 369.

[68] Stimson, Handbook to the Labor Law in the United States, quoted in Groat, op. cit., p. 78.

[69] Albro J. Newton Co. v. Erickson, p. 951.

[70] Dorchy v. Kansas, p. 86.

Restrictions upon the absolute right to strike stemmed initially from a concern over the rights of third parties. Restraints upon the right to strike of seamen exemplifies this. Before the 1915 enactment of La Follette's Seamen's Act, mari-time workers could not void their contracts and strike, even if their vessel was in port.[71] Abandonment of a train by its crew had been held illegal for similar reasons.[72] In both these cases the conflict between workers and their employers could potentially impose great costs on outside parties. The law sought to protect disinterested parties from hardship. When the full context of the wage bargain was considered, it became apparent that labor actions might affect a wide range of people in the society. Thus, it was argued that "the public" had an interest in the proceedings of industrial conflict.

Employing reasoning similar to the doctrine of Munn v. Illinois,[73] the courts held that workers in an industry "peculiarly affected with the public interest" could be restrained from striking.[74]

Earlier, in the labor conspiracy trials of the nineteenth century, condemnation of labor actions was rationalized on grounds that such combinations tended to "prejudice the public"[75] or were "against the

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[71]See Robertson v. Baldwin, p. 326.

[72]See Clements v. U.S., p. 206.

[73]In this landmark case, the Supreme Court sanctioned governmental regulation of private business. The rationale provided by the court was that a business which is "peculiarly affected with the public interest' must necessarily submit to being controlled by the public authorities.

[74]See Wilson v. New York, and People v. UMW.

[75]Commonwealth v. Carlisle.

public good."[76] Such pronouncements reflect an attitude in which the "public" is a third party to the wage bargain.

Both the Sherman and Clayton Anti-trust Acts which were held applicable to labor as well as capital combinations, were justified on the basis of economic interdependence. Since the flow of commerce benefitted all, obstructions due to combined labor or capital were to be discouraged as a matter of public policy. While the Wagner Act enlarged labor's right to strike through its curtailment of employers' "unfair labor practices," the Taft-Hartley Act severely restricted the rights of labor in cases of "national urgency." This quick review of some changes in entitlements in labor law should reinforce the earlier deductively-rendered conclusion that the two viewpoints of the labor relation may generate differing sets of optimal legal rules.

This section concludes Part I of the dissertation. Chapter 2 described the evolution of labor law from 1806 to the present. In the preceding sections of this chapter, dialogue surrounding important changes in labor's entitlements was examined and two characteristic views of the labor relation were identified - the "simple" and the "interdependent" settings. Part II continues the study of third party effects and labor entitlements by examining economists' discussions of the labor relation (in Chapter 5) and by searching for references to third-party effects in the labor market. Few are found. It is found that, in general, the characteristic viewpoint of economists is one of

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[76] New York Cordwainers.

the simple setting. In Chapter 6, the disparate viewpoints of lawmakers and economists are integrated within a single conceptual framework.

CHAPTER 4

INTRODUCTION TO PART TWO

Part One reviewed the evolution of labor entitlements and examined the various economic principles that accompanied legal change. It was observed that lawmakers were fully aware of the ability of the parties to the wage bargain to impose costs on third parties and the public at large. The realization amounts to an acknowledgement in the law, of the "interdependency" of the wage bargainers and society. In this Part, the concern with the interdependency of labor market interests is continued.

Chapter 5 attempts to sample economists' views of the labor relation. The survey of economic doctrines of labor is concerned with any mention of labor market participants' ability to affect their environment. It is found that the lawmakers' concern with the "context" of the wage bargain is not matched by economists.

In Chapter 6, Labor Market Externalities, the activities of labor market participants are seen to generate effects which accrue to third parties. By considering labor relationships in terms of the theory of externalities, a framework is suggested which can integrate the disparate viewpoints of lawmakers and economists.

CHAPTER 5

ECONOMIC DOCTRINES OF THE LABOR RELATION

The objective in this chapter is to sample economists' views of the labor relation so that these may be compared with views of law-makers seen in earlier chapters. Because the interrelationship between law and economics is one of the themes of this study, the review of labor economics doctrines is restricted to the period of substantive labor law change which was examined earlier - 1806 to the present. The review will be additionally selective in three ways.

First, since those labor doctrines which heavily influenced (found enactment in) law are of particular importance, search of the economic literature will be concentrated on mainstream doctrines. This assumes that mainstream views inform legal change. Radical critiques affect legal change by their influence on mainstream opinions.

Secondly, the review will focus more on the central themes of the various labor doctrines than on details of the theories. The task of analyzing the theoretical detail associated with the various subtopics such as collective bargaining, wage differentials, etc., is left to the labor specialist.

Thirdly, in keeping with the overall theme of the relationship between third-party effects and labor entitlements, the review of labor doctrines will be concerned with assumptions about the relationship

between the industrial disputants and their environment. Hopefully, this focus will allow a contrast between the characteristic viewpoints of lawmakers and economists.

The first explicit mention of "third-party" or "external" effects has been traced to the writings of Alfred Marshall[1] although a clear recognition of consumption externalities (which he called "inappropriable utilities") is seen in the earlier writings of John Bates Clark.[2] Searching for reference to such effects among the writings of earlier nineteenth century labor economists is not likely to yield very much. Accordingly, the review of labor doctrines will concentrate on the works of twentieth century economists. The review of Nineteenth Century labor doctrines is limited to an examination of several widely known works. These works are searched for mention of the interests of third parties or a recognition of the interdependent setting of the wage relation. Among the more recent writers there is a search for explicit mention of "third-party effects," "externalities" or "interdependencies."

Labor Doctrines

The review of earlier labor doctrines benefits from the scholarship of Joseph Dorfman. His multi-volume work, The Economic Mind in

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[1]See E. J. Mishan, "The Postwar Literature on Externalities: An Interpretative Essay," JEL (1971), p. 1; Two Essays on Externalities in Supply, James R. Marchand, Unpublished Ph.D. dissertation, (1973), p. 4.

[2]John Bates Clark, The Philosophy of Wealth, (Boston: Ginn & Co., Publishers, 1887; reprint edition, New York: Augustus M. Kelley, 1967).

American Civilization[3] is invaluable to the researcher in economic doctrines and was consulted in the present study. One early work mentioned by Dorfman as representative of the "southern tradition of laissez-faire"[4] was Thomas Cooper's Lectures on the Elements of Political Economy. Dorfman considered this work "one of the influential American college textbooks that made the 1820's a landmark in the development of American economic thought."[5] A scanning of the table of contents reveals two chapters (out of thirty-one) dealing with the subject of labor. The latter of these consists principally of a discussion of the theoretical weakness of Adam Smith's distinction between productive and unproductive labor. In the other chapter, "Labour and Wages," Cooper discusses natural v. market labor price, the complementarity of capital and labor and the benefits flowing from the division of labor.

The Philadelphia Cordwainers case[6] finds mention in the chapter. Cooper criticized that decision which held the combined workmen guilty of conspiracy: "But all these legislations and decisions are needless;

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[3]Joseph Dorfman, The Economic Mind in American Civilization, (New York: Viking Press, 1946).

[4]Ibid., p. 527.

[5]Thomas Cooper, Lectures in the Elements of Political Economy, (Columbia, S.C.: M'Morris and Wilson, 1830; Reprint edition, New York: Augustus M. Kelley, 1971), p. 5.

[6]See the discussion above at Chapter 2, p. 16.

let the masters and the journeymen settle their own bargains, and they will settle them much sooner than a court of law."[7] He sees combination as a natural and frequent result of competition. In his words: "Do not masters every where take advantage of the market against purchasers,"[8] and thinks the best tactic for the legal system is to allow the parties to decide the question of wages between themselves.

His viewpoint is one of the simple setting with a twist. Whereas it was noted in Chapter 3 that lawmakers argued that labor combinations should be discouraged since they upset the balance of the "natural struggle," Cooper is maintaining that, combinations being pervasive, the legal system should allow all factors to combine equally. Full freedom to concentrate will preserve a fair struggle. His reasoning here foreshadows that of Holmes of a half-century later in the case of Vegelahn v. Guntner (1896). In the opinion, Holmes argues that courts should allow (even encourage) worker combinations in order to maintain a balanced struggle. He writes: "Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart if the battle is to be carried on in a fair and equal way."[9]

In his discussions of wage determination, Cooper emphasizes two factors--the forces of supply and demand and the level of subsistence.

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[7] Ibid., p. 103.

[8] Ibid.

[9] See the discussion at Chapter 3, p. 74-75.

In describing how these forces acted in the process of wage determination, no mention was made of labor's interdependency with its environment. There was no recognition of the "public interest" in the wage bargain which characterized the "interdependent" setting. The framework was one of partial analysis.

Another leading nineteenth century economics book that went through many editions was Amasa Walker's The Science of Wealth.[10] Chapter 4 of this work is titled "Labor Combinations." Here, Walker argues that lawmakers should promote a balanced industrial struggle. Regarding the position of workers and employers, he writes: "Each is perfectly free, and the competition is simply between labor and capital."[11] This attitude is the "competition across markets" theory which we discussed earlier.[12] It implies an indeterminate range of bargaining over which the parties can "compete." It does not take into account the existence of third-party effects.

Elsewhere, in language similar to that found in Cooper, Walker discusses the need for a fair struggle: If the [capitalist] is permitted, and even authorized and encouraged, to combine with his

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[10]Amasa Walker, The Science of Wealth, 7th ed. (Boston: Little, Brown and Co., 1874; Reprint edition, New York: Kraus Reprint Co., 1969). About this text, Schumpeter says: Science of Wealth must be mentioned as a representative performance. Perusal of the book will give the reader a good idea of what this economics then had to offer. Hist. of Economic Analysis, p. 519, n. 9.

[11]Ibid., p. 269.

[12]See the discussion at Chapter 3, p. 78 .

fellows in order to enhance the power and profits of capital, it is equally the right of the laborer to do the same, and equally the right of the legislator to give him any facilities for doing this he may justly demand."[13]

It is interesting to note that while Walker shared Cooper's belief in the desirability of a "fair" struggle between labor and capital, his policy recommendations were exactly opposite. Whereas Cooper had cautioned against any legal intervention in the wage bargain, preferring instead to allow natural forces to work, Walker saw it as the "duty of the legislator" to assist the laborer by positive enactments. The apparently similar conceptual frameworks of these two economists can be distinguished by their differing predictions as to what would obtain in a natural state. Both want fairness in outcomes. Cooper reveals a "process" orientation in believing that a fair struggle will on the whole, generate fair outcomes. Walker wants fair outcomes and instructs lawmakers to so arrange the rules that fair outcomes will result, revealing an "end-state" orientation. As was pointed out above,[14] the simple setting viewpoint may be construed to either recommend or discourage legal intervention in the labor market.

For a last sample of nineteenth century economic views of the labor relation, a work by John Bates Clark is examined. His first important work, The Philosophy of Wealth, was widely read and helped

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[13] Ibid.

[14] See the discussion at Chapter 3, p. 70.

establish him as "one of the five or six great Anglo-Saxon theorists of the nineteenth century."[15]

Clark saw the question of distribution of wealth as a "conflict of interest between the capitalists and laborers."[16] For Clark, an ideal distribution would obtain under free competition, however, competition was not the norm in industrial relations.[17] In his view, "solidarism, or the tendency of both labor and capital to aggregate"[18] tends to inhibit the competitive mechanism.

Clark felt that a "maximum of justice in distribution is attained where the brute forces [of bargaining strength] are evenly matched."[19] He points to the decline in wages suffered after the civil war as the result of the inequality between combined capital and unorganized labor. Trade unions could restore the equality of balance between labor and capital but did so at the expense of competition among the workers.

Clark comes closest to mentioning the interdependency of the labor environment when he discusses the labor boycott. He condemns

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[15] E.R.A. Seligman, Essays in Economics, (New York: Macmillan Co., 1975) p. 151.

[16] Clark, op. cit., p. 108.

[17] Clark devoted a chapter to "Non-Competitive Economics" in which he argued that "competition is no longer adequate to account for the phenomena of social industry," ibid., p. 203.

[18] Clark, p. 110.

[19] Clark, p. 132.

the use of the boycott because, "In slightly benefitting a class, it inflicts a large injury upon society."[20] Without specifically mentioning it, Clark seems to be thinking in terms of some net welfare criteria. A boycott damages employers and consumers by an amount greater than the gains obtained by workers.

Except for this condemnation of labor boycotts, Clark does not mention the interdependency of labor actions. His approach to labor is that of a theorist, with a minimum of interest in institutional relationships. He never discusses the legal environment of the wage bargain. In terms of the distinction developed earlier, Clark can be classified as having had the "simple setting" viewpoint of labor.

Early in this century labor economics began to develop into two broad schools, one analytic and the other institutional. The institutional school is associated with the writings of John R. Commons among others, and is concerned with questions relating to non-pecuniary effects of trade unions, collective bargaining, personnel management, and social insurance. The other approach is rooted in "Marshallian analysis"[21] of the labor sector. Labor is treated as an input in the

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[20] Clark, p. 142.

[21] "Marshallian Analysis" was, to Alfred Marshall, no more important than a concern with the institutional aspects of the labor condition. Clark Kerr develops this theme in Marshall, Marx, and Modern Times (Cambridge: The University Press, 1969). For a recent variation on the theme, see Theodore Lewitt, "Alfred Marshall: Victorian Relevance for Modern Economics" Quarterly Journal of Economics, Vol. XC (Aug. 1976). pp. 425-443.

productive process not unlike the complementary inputs of raw materials and machinery and equipment. The diversity of these approaches can be demonstrated by examining writings in these schools. The early analytic branch of labor economics is represented by the works of Marshall, J. R. Hicks, and A. C. Pigou.[22]

Marshall's approach to labor[23] tempered theory with fact. He thought that certain facts distinguished the labor market from commodity markets and these features "though not fundamental from the point of view of theory, are yet clearly marked, and in practice often very important."[24] One important feature of the labor market was the existence of an "advantage in bargaining" which existed "more often on the side of the buyers than on that of the sellers in a market for labour."[25] He also cites the fact that the seller of labor has only one unit of labor to offer whereas on commodity markets sellers typically have many units to dispose of.

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[22]Representative views can be found, respectively, in: Marshall--Principles of Economics, Eight Edition, (London: MacMillan and Company, Ltd., 1936) and Economics of Industry (London: MacMillan and Company, Ltd., 1892); Hicks--The Theory of Wages (London: MacMillan and Company, Ltd., 1963; First Edition 1932); and Pigou--The Economics of Wealth, Fourth Edition (London: MacMillan and Company, Ltd., 1938).

[23]On Marshall's stature as a labor economist, Clark Kerr writes: "Marshall was the first labour economist of note and might be called the greatest of all in the English and American tradition. More has flowed from his concerns over a longer period of time than anyone else, more than from the Webbs or Commons." Op. cit. p. 44.

[24]Marshall, Principles, p. 336.

[25]Ibid.

Hicks also sees labor as just another commodity in most respects: "The theory of the determination of wages in a free market is simply a special case of the general theory of value. Wages are the price of labour; and thus, in the absense of control, they are determined, like all prices, by supply and demand."[26] Although labor is treated by Hicks as a commodity, and thus amenable to analysis by traditional economic tools, there is also room for a special theory of wages because "both the supply of labour, and the demand for it, and the way in which demand and supply interact on the labor market, have certain peculiar properties."[27] The demand for labor is unique because it is a derived demand. The difficulties of the supply side stem from the fact that "'labour' is a two-dimensional quantity, depending both on the number of labourers available, and upon their 'efficiency'."[28]

For Pigou, the important characteristic of a labor market is that the debate between buyer and seller is about rate of pay, leaving the quantity to be exchanged unspecified. Thus the perverse case might occur where a higher rate may actually hurt labor by causing much less labor to be purchased.

Pigou analyzed the labor market with traditional economic tools. In a chapter entitled "An Analytical View of Industrial Peace," Pigou

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[26]Hicks, p. 1.

[27]Ibid.

[28]Ibid., p. 1-2.

employed (neo)classical reasoning to contrast the opposition of labor unions to employer associations with the opposition between two trading nations. His discussion of a range of indeterminateness in the wage bargain was based on an analysis and subsequent relaxation of, the assumption of perfect competition. While no determinate solution was reached because there was (is) no "theory of bargaining," the analytical methods of economics were still the best available for an inquiry into the workings of a labor market.

Discussions by these writers of the bargaining aspects of the wage relation was always accompanied by mention of the imperfectly competitive nature of the labor market. Hicks employed the model of limited competition based on locational monopoly--"where there is only one employer whom a particular labourer can work for, save at great sacrifice and expense of transference, and where there is only one man, or one set of men, whom that employer can secure to work for him, it is perfectly evident that there is a possibility of great indeterminateness in the wages paid."[29] Hicks felt, however, that this was not a common case.

The analytical nature of his approach to labor economics becomes clear as he argues that "although this market is one of the most imperfect with which we have to deal, demand and supply do influence wages even here, in however halting and irregular a fashion."[30] Hicks

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[29] Ibid., p. 61.

[30] Ibid., p. 65.

thus sees certain labor markets as being imperfectly competitive. But even they are amenable to economic analysis. Although a market may be in disequilibrium[31] it is "haltingly" moving toward equilibrium and because of this, may be viewed in terms of its supply and demand conditions.

For Pigou the bargaining of workers and employers stemmed from "conditions of bilateral monopoly" which imply "an element of theoretical indeterminateness."[32] Pigou is critical of the expenditure of resources for bargaining which he feels creates, at best, no net social product. To the extent that efforts spent bargaining reduce efforts spent "improving the organization of...factories...the social net product even of the earliest does of resources devoted to bargaining may be, not merely zero, but negative."[33]

Marshall too attributed bargaining to the existence of bilateral monopoly--"If the employers in any trade act together and so do the employed, the solution of the problem of wages becomes indeterminate; and there is nothing but bargaining to decide the exact shares."[34]

The early analytical economists' treatment of labor market bargaining as a species of bilateral monopoly can be contrasted with

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[31]"[T]he equilibrium labour market,....could never exist; it is merely a convenient abstraction." Op. cit., p. 136.

[32]Pigou, op. cit., p. 200.

[33]Op. cit., p. 201.

[34]Principles, p. 627.

the early institutionalists' treatment of bargaining as a matter of power relations. The index to Commons and Andrews' Principles of Labor Legislation[35] contains no references to "bargaining" although there are several references to the phrase "bargaining power."

There were three references to the "labor market" in that work. In one the authors discussed the laborer's right to withhold his labor from the market and his rights to seek employment in a market. In the second reference they comment on the inefficiency of labor markets--"'Help Wanted' scrawled on a piece of cardboard, is the symbol of inefficiency in the organization of the labor market."[36] Focus here is on the market as an institution of matching job seekers with employee seekers. The importance of institutions of job search to unemployment levels was well understood by these writers. The third reference to labor markets concerns other institutions surrounding the wage bargain. The authors explain that the basis for legal changes in labor has been changed in the organization of industry and in the attitude of the public toward the workplace.

In discussions of the workings of the labor market, early institutionalists did not apply the analytical tools of their contemporaries. There was little of supply and demand analysis contained in the treatments of labor problems. The rigorous calculation of the Marshallian

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[35] John R. Commons & John B. Andrews, Principles of Labor Legislation, (New York: Harper & Brothers, 1936).

[36] Ibid., p. 5.

tradition contrasts with the less rigorous but more empirical tradition of the institutional labor economists. Partial equilibrium analysis of labor markets of the Marshallian economists is replaced by the more general, if less precise analysis of the institutionalists. In the institutionalists' concern with the environment of the wage bargain, there is an explicit recognition of the interdependency of labor. This recognition, however, was never coupled with economic analysis.

Similarly, analytical economists were aware of the problems of the indirect effects of actions in the labor market[37] but did not concentrate their analytic tools in this area. Early labor economics thus recognized the interdependency of labor, much as lawmakers did, yet were unable to apply contemporary tools of economic analysis to the problem. As will be seen below, later versions of labor economics, fared little better in this respect.

Among contemporary labor economists, intellectual focus is on the theoretical aspect of the labor relation. The characteristic perspective views the labor relation in isolation from the encompassing social structure. The name which this approach has adopted is

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[37] For example, Pigou implicitly recognized the interdependence of workers in his observation that only the rate and not the quantity, of compensation was usually negotiated. Elsewhere, he makes explicit his understanding of third-party effects of labor actions: "in some degree, all stopages of work inflict an indirect injury upon the national dividend by the reactions they set up in other industries, in addition to the direct injury that they carry in themselves" Pigou, op. cit., p. 142.

"analytical labor economics." It deals with problems of the allocation (and compensation) of labor, the labor-leisure choice, and human capital theory. A recent collection of essays[38] honoring a leader in this tradition presents a good representation of the orientation of analytical labor economics. The titles of contributions to that volume reveal such topics as "A Life-Cycle Model of Earnings," "Fertility Response to Child Mortality," and "Residential Location and Labor Supply." The lack of attention given to institutional questions is noted in an introductory essay by Albert Rees in which he distinguishes analytical labor economics from the "institutional" school. The institutionalists, he writes, "devoted their attention largely to trade unionism, and collective bargaining, to labor law,...."[39]

Current analytical labor economics is not devoid of understanding of interdependency in the labor market. For example, two articles in this volume[40] deal explicitly with problems of the effects of the legal environment. Yet both of these articles are concerned with the effects of the legal rules upon the welfare of the affected labor parties. The interdependency of labor actions (in a given legal

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[38]"Essays in Labor Economics in honor of H. Gregg Lewis," Journal of Political Economy, Vol. 84, no. 4, Part 2, (August, 1976).

[39]Albert Rees, "H. Gregg Lewis and the Development of Analytical Labor Economics," in "Essays in Labor Economics in honor of H. Gregg Lewis," p. 53.

[40]Jason Mincer, "Unemployment Effects of Minimum Wages," pp. S87-S104, Finis Welch, "Employment Quotas for Minorities," pp. S105-S139.

environment) with the welfare of outside parties is not recognized. Nor is attention given to the welfare implications of a change in the legal environment, for both the parties to the wage bargain and third parties. This broader view which considers the walfare of "outsiders" as well as the labor parties was the view taken by lawmakers who attempted to arbitrate among the various interested parties. It has no counterpart in contemporary analytical labor economics.[41]

As a positive note, it should be pointed out that certain analytical labor economists are aware of the need for a consideration of the broader institutional aspect of labor in their own work. At a recent session of the American Economic Association annual meetings, devoted to "The Economics of Labor--An Assessment of Recent Research," the noted labor economist George E. Johnson admits " the analysis of the effects of various institutional rigidities,...is not well developed."[42]

Later he paraphrases D. Hamermesh in suggesting that it might be desirable for "some of the resources presently devoted to the refinement of the new labor economics to be reallocated to a consideration

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[41]Labor studies from other disciplines show a similar orientation. A recent example from sociology examines the effects of outsiders upon the labor parties - see Robert Nathan Stern, "The Community Context of Industrial Conflict," unpublished doctoral dissertation, Vanderbilt University (1975).

[42]"Economic Analysis of Unionism," American Economic Review, vol. LXV, no. 2 (May, 1975), p. 23.

of some of the problems considered by the old [institutional] labor economics."[43]

The institutional variety of labor economics, like the Marshallian variety, has its modern day equivalent. The school is known as the "institutional labor" school, or sometimes as the "industrial relations approach." It survives mainly in business schools or in schools of industrial relations although most college textbooks on the subject of labor economics reflect this approach.[44]

While this school is concerned with the environment of labor actions, the concern lacks the breadth of the earlier institutionalists. Most discussion revolves around the institution of collective bargaining and its effects upon labor and management. The topic "wage determination" which has occupied much attention of labor economists[45] (of both schools) reflects the orientation of modern labor economists. Attention is focused inward, upon the welfare of the labor market participants. Their well-being is (mutually) dependent on the outcome of the wage bargain. The well-being of other (third) parties and its dependence upon the wage bargain, as well as upon other labor market

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[43] Ibid.

[44] See, for example, Lloyd G. Reynolds, Labor Economics and Labor Relations, 5th Edition, (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1970); F. Ray Marshall, Allan M. Carter, and Allan G. King, Labor Economics, 3rd Edition, (Homewood, Illinois: Richard D. Irwin, Inc., 1976).

[45] See John T. Dunlop, ed., The Theory of Wage Determination, (London: MacMillan & Co., Ltd. 1964); and Campbell R. McConnell, Perspectives on Wage Determination, (New York: McGraw-Hill Book Co., 1970).

actions, while occasionally referred to,[46] is not given serious attention.

Research of the literature in labor economics has so far failed to yield perspectives on the labor relation comparable to those of lawmakers. One possible reason for this, given the empirical focus of most modern economics, might be the difficulty inherent in measuring "third-party" effects in labor markets. Surprisingly, the few instances of explicit consideration of the interdependence setting of labor, to be discussed below, were apparently inspired by these measurement difficulties. In these works, which constitute the only serious attempts to discuss third-party effects of labor actions from an attitude similar to that of lawmakers, the authors developed various rating schemes to measure the economic effects of the strike.

In the fifties, in response to claims by labor's critics that national policy should impose greater restrictions upon strike activities, measurement of strike effects was attempted by Chamberlain and Schilling.[47] In a previous work[48] the authors had devised a rating scheme for estimating the real costs of a strike by assessing its impact on consumers of the struck product and suppliers of the struck

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[46]"Strikes often cause inconvenience to another neutral party, the consuming public," Reynolds, op. cit., p. 468.

[47]Neil W. Chamberlain and Jane Metzger Schilling, The Impact of Strikes (New York: Harper & Brothers, Publishers, 1954).

[48]Neil W. Chamberlain and Jane Metzger Shilling, Social Responsibility and Strikes (New York: Harper and Brothers, Publishers, 1953).

firm. In this work, Chamberlain and Schilling apply the methodology to three major industries--coal, steel, and rail.

Consideration of the total impact of a strike forced the authors to look beyond worker and management welfare. In a manner reminiscent of lawmakers, these economists considered the interests of the "public"--"By public is meant all of those who are not themselves party to the strike relationship but who are affected by that relationship, all those whose welfare is influenced by the strike except for the union and management members directly involved in it."[49] The discussion of the impact of labor conflict on the welfare of outsiders shows an appreciation of the third-party effects of labor actions unmatched in the writings of other labor economists.[50] The focus, however, was institutional rather than analytic. The bulk of the work consisted of an attempt to offer a way of measuring strike effects. Except for brief discussions early in the works, there was no elaboration of the economic implications of labor interdependence. The existence of "third-party" effects was acknowledged but not discussed in any critical fashion.

Several recently published works have examined labor interdependence from a narrower focus than the present study. The interdependence of wages was the subject of one such paper.[51] It

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[49] Chamberlain and Schilling, The Impact of Strikes, p. 6.

[50] See, especially, the discussion of "substitutability" in The Impact of Strikes, p. 18-20.

[51] Robert J. Flanagan, "Wage Interdependence in Unionized Labor Markets," Brookings Papers on Economic Activity, Arthur M. Okun and George L. Perry, ed., (1976), No. 3, p. 635-681.

discusses and attempts to measure the interdependence among labor contracts due to a spillover process whereby wage gains by one group influence wage determination in other neighboring labor groups. Competitive pressures from potential worker migration are the forces which drive such spillover effects. The effects are pecuniary. There have also been studies of the interdependence of employment in connection with analyses of the effects of inflation.[52] As in the work cited above, these studies are concerned with the case of wage interdependence.

The importance of the role of information was stressed in another recent article which dealt with wage interdependence.[53] The extent to which the wages of worker B could affect the reservation wage of worker A was seen to depend upon the amount of information about B's wages in the possession of A. Models of firm demand for labor and worker supply were examined, using comparative statics, to determine the effects of interdependence of wages. The implications of standard theory of factor demand in the long run were not disputed by any of the analysis. Short run behavior of both suppliers and demanders of labor services was seen to exhibit non-standard results - the effects of a

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[52]See, for example, Frank Brechling, "Wage Inflation and the Structure of Regional Unemployment," Journal of Money, Credit, and Banking, Vol. 5, (February, 1973), part 2, p. 355-379.; Lester D. Taylor, Stephen J. Turnovsky, and Thomas A. Wilson, The Inflationary Process in Noth American Manufacturing, University of Toronto, Institute for the Quantitative Analysis of Social and Economic Policy, (1972).

[53]Daniel S. Hamermesh, "Interdependence in the Labour Market," Economica, Vol. 42, (November, 1975), pp. 420-429.

change in relative wages becomes unclear. In terms of the present study, the paper shared a concern with interdependence in labor and it approached the phenomena with contemporary tools of analysis. What it lacked was any mention of a more general interdependence in the labor market of which wage interdependence was only one instance. The article also made no mention of the "externality" or "third-party" dimension of the situation.

Third-party effects of a strike were the subject of a recent article[54] on the West Coast dock strike of 1971. The author is concerned with the loss of output and employment in Hawaii caused by the strike. The method was to construct an econometric model of the Hawaiian economy. Differences between projected output and employment values and those actually experienced were attributed to the strike. The bulk of the study consisted of the empirical estimations. Methodologically, the paper was an attempt at measurement of economic consequences, not a theoretical discussion of the third-party effects.

The socially costly effects of the strike were assumed to consist of "three additive components": (1) the loss of output, (2) the loss in social welfare resulting from the price increase, and (3) the loss due to increased uncertainty."[55] Beyond this assertion, the author did not discuss the theoretical dimensions of third-party effects in the

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[54]Moheb A. Ghali, "On Measuring 'Third Party' Effects of a Strike," Economic Inquiry, Vol. XI, No. 2 (June, 1973), p. 214-227.

[55]Ibid., p. 215.

labor market. Since the piece was mainly empirical, the simplicity of the theoretical treatment of third-party effects may be excused.

Another relatively recent work which considers the indirect effects of labor actions is written by Malcolm Fisher.[56] Like the previous work, this study is primarily concerned with measurement of the full cost of strikes upon the social environment. The author never generates any figures for costs of strikes but talks at length about the complexities involved in measurement. Much of the study consists of a compilation of labor dispute statistics for various European countries. For the present inquiry the prime contribution of this work is the author's attempt to identify the effects of work stoppages with the injured third parties. A table showing the distribution of effects is reproduced below.

Fisher has given much more thought to the possible third-party effects than the previous authors. This table demonstrates several things. First, it shows the wide range of parties potentially injured and benefitted by a work stoppage. Effects run to consumers, suppliers and competitors. The "public stake" is seen to be a complex, multi-faceted concept. Secondly, the table demonstrates the diversity of interests within the various groups. In the author's words, "sides never have homogeneous interests."[57]

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[56] Measurement of Labor Disputes and their Economic Effects, (Paris: Organization for Economic Co-operation and Development, 1973).

[57] Ibid., p. 195.

Aggregation of welfare effects is thus not only difficult globally, it is seen to be equally difficult within traditional groups. This has implications for class analysis.

While this work reflects an awareness of third-party effects in the labor market, it does not link up this observation with any of the theoretical literature on externalities. Neither have any of the previous labor economic discussions found in the present study. It does not appear that labor economists have realized that the "indirect" or "third-party" effects present in the labor contract can be viewed as instances of externalities. Writers in the "externality" literature have not appreciated this either. A review of current research in this area has revealed a single instance of mention of the labor market as a market where external costs and benefits are relevant.

In "Pecuniary and Technological Externality, Factor Rents, and Social Cost,"[58] Dean A. Worcester analyzes externalities and market structures. He finds that the magnitude of welfare losses of externalities is crucially dependent upon the type (pecuniary v. technological) of externality and the structure of the industry under study. One of the market structures investigated is a monopsony market where labor actions generate external effects. The author's concern with labor is secondary. Various labor actions are not discussed. Labor is merely one instance of production externalities, which are his main concern. As in the previous several works, no serious attempt is made to

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[58] American Economic Review, Vol. 59 No. 5 (December, 1969), pp. 873-85.

Table 1. Third Parties

EFFECTS ON THIRD PARTIES	UNANTICIPATED PROFIT
Firms	Change
Producers of substitute products	U
Producers of complementary products	D
Producers of complementary inputs for disputant firms	D
Producers of substitute inputs for disputant firms	U
Business users of substitute products	D
Business users of complementary products	U
Business users of the product of disputant firms	D
Workers	
Workers in substitute product firms	U
Workers in complementary product firms	D
Workers in firms relying on disputing firm's product	D
Workers in firms using complementary inputs	U
Workers in firms using substitute inputs	D
Workers who possess substitute skills	U
Workers who possess complementary skills	D

D means adverse effect on group on balance.
U means favourable effect on group on balance.

(Source: Malcolm Fisher, Measurement of Labour Disputes and Their Economic Effects, p. 195)

integrate the third-party effects of various labor actions with externality theory.

The preceding review of labor doctrines has shown that economists have typically considered the labor relation in isolation from the encompassing social environment. Even the institutional labor economists have not displayed an awareness of the interdependent conditions in the labor market to match that of lawmakers seen in Chapter 3. The failure of labor economics to incorporate the "complex setting" viewpoint of lawmakers is known to the profession.[59] One may speculate on the causes of the neglect,[60] however, such is not the object of this study. It is sufficient for present purposes to have established a disparity in perspective of the labor relation between the designers of legal rules and professional economists. The observation that one might have, a priori, expected this is undeniable but does not mitigate the importance of the disparity in views. As long as legal institutions are manipulated by lawmakers on the basis of known effects, the economist may contribute his own perspective by offering an explication of the varied and indirect ways in which

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[59]"The inadequacies of partial equilibrium analysis (and the dangers of omitting interdependencies so acutely exposed by Keynes) are obvious enough to labour economists," John Corina, Labour Market Economics, (London: Heinemann Educational Books, 1972), p. 10.

[60]Inherent limitations of the tools of analysis (neoclassical economics) or the overwhelming professional acceptance of the Popperian falsafiability/measurability criteria suggest themselves immediately.

economic effects flow throughout a social system. In the chapter that follows, the indirect effects of labor actions are examined as instances of "externalities."

CHAPTER 6

LABOR MARKET EXTERNALITIES

There are a variety of actions available to parties in the labor market. In the first section of this chapter, the most important labor actions are described. Activity in the labor market originates with one or both of the parties to the wage bargain. Once initiated, however, actions in the labor market have repercussions which extend far beyond the employee/employer area. In the second section of the chapter, some of the distant parties who receive those effects are discussed. Economic effects of labor actions extend outward in both time and space. The importance of this was well understood by lawmakers who were seen (in Chapter 3) to struggle with the complexities of economic interdependence. In Chapter 5 some evidence was examined which showed that this concern has not been matched by economists. The third section below attempts to integrate the disparate viewpoints of lawmakers and economists by discussing labor market interdependencies in the framework of economic externalities. This is done by viewing the consequences of labor actions as instances of external or third-party effects. The terminology and theoretical system developed by economists to deal with externalities are adapted to labor in several suggestive cases. As an application of the theory, the last section looks at the labor market for public employees. It is found to be an

instance where the interdependence between the labor market participants and their environment is especially strong.

In describing labor actions, only actions taken by parties to the wage bargain in the context of the labor market will be considered. This omits actions taken elsewhere (e.g. in the political sphere) even though the significance of these actions for the labor market is recognized. Continued lobbying efforts by organized labor and industrial concerns demonstrates the returns to such non-market actions.

Discussion will also be limited to the peaceful and non-violent actions of the labor market participants. While aggressive acts have played an undeniable part in the development of labor law (acts of abuse by company guards and sabotage by strikers are well documented), they are ignored here. Violent confrontations are much less frequent now than before and no longer play a significant part in dispute settlement. Concern in the present study is with the economic harm which each of the parties can visit upon the other. Another proviso exists in the fact that only the economic effects of labor market actions will be discussed. The other dimensions to human action (e.g. ethical, psychological) are necessarily ignored in this dissertation.

Labor Actions

The most important (if least mentioned) action taken in the labor market is the action of forming the labor relationship - the offer and acceptance of the labor contract. This action is indicative of cooperation in the labor market. The contract may be of a stated duration or it may be open ended. An open-ended labor contract may be

interpreted as either a quasi-contract of indefinite duration or as a series of contracts of short duration (e.g. a single day or a payperiod in length), each of which involves an implicit offer and acceptance.

Once initiated, a labor relation is terminated by an act of severance. The strategic importance of this act cannot be over-estimated. Under the category of severence actions come the actions most indicative of conflict in the labor market - the strike and lockout. Severance may be initiated by either party. Employer actions include the firing and laying off of workers as well as the lockout. Employee severance actions include both the quit and the strike. Employee actions may further be distinguished by noting that unlike employer actions, they may be taken by individuals or in concert with strikingly different results for the labor relationship. As a sub-category of severance, striking may be viewed as a conditional or temporary quiting. While the employee is no longer at the work site, he retains certain rights over the job. In this, the strike is similar to the lay-off where the worker also retains certain rights over the job.

In addition to these primary actions in the labor market, there are a number of secondary actions which warrant discussion. First in importance among these is an action which usually accompanies a strike, the picketing action. This action involves public notification of the act of striking. It serves to alert both potential replacement workers and potential customers of the existence of a labor dispute. While picketing is related to the act of severance, it actually seeks to

intervene between the employer and other parties. To the extent that it is successful in notifying potential replacement workers of the rights of the striking workers, it may be seen as impinging on the (potential) act of offer and acceptance between the employer and other workers.

The boycott is another secondary labor action which may exist in several forms. A primary boycott occurs when workers encourage potential customers of the struck firm to take their business elsewhere. A secondary boycott attacks the relationship between the struck employers and other employers with whom he does business. Typically this involves a strike against a supplier of the principal struck firm. It requires the cooperation of the suppliers' workers. Both types of boycotts have as their objective the imposition of costs upon the struck firm which will (hopefully) compel a favorable resolution of the dispute.

Certain variations on the above actions also constitute labor tactics. For example, the offer of an employment relation can be conditional, the terms of which may have great importance to the contracting parties. An offer of employment which includes the requirement that the employee promise not to join any union organization is an example of such a conditional offer. This is known as the yellow-dog contract and it was rendered unenforceable by the Norris-LaGuardia Act. An employee tactic corresponding to this is the offer of employment conditional upon the promise by the employer not to hire any non-union personnel. This tactic results in a "closed shop" contract and was outlawed by the Taft-Hartley Act.

Blacklisting is a labor action related to the boycott. It may be attempted by either party. On the employer side, blacklisting occurs when information about some particular worker (e.g. that he is a union organizer) is passed among other employers. On the employee side, blacklisting a firm for its behavior attempts to discourage workers from securing employment there and may seek to discourage potential customers of the firm. In this second objective blacklisting becomes the means for obtaining a boycott.

Interested Parties

Every labor market is surrounded by parties whose economic welfare is dependent upon the conduct of the labor parties. These interested parties constitute an economic environment for the labor relation. Actions of the labor market participants may be felt both upstream and downstream. Upstream factors include all who supply any product or service to the firm. This includes both material and labor suppliers. Downstream factors include all who use the product for consumption or as an input in further production.

Upstream Factors

All parties with whom the employer has dealings are potentially influenced by actions between the employee and employer. When a labor dispute interrupts the production process, other non-related factors find their relevant demand conditions altered. For example, firms supplying materials which are complementary to the factor on strike may lose sales which cannot be recovered in the future.

Alternatives facing such firms include, as a minimum, the expenditure of search cost in finding another buyer for the product who will pay the same price. When discounts are necessary to sell the extra merchandise, additional costs representing wealth transfers are incurred.

Firms supplying products which are substitutes for the factor on strike also find their demand conditions altered. To the extent that substitution can mitigate the effects of the work stoppage, purchases from the producer of the substitute product will be increased. Rationing must occur in the short run with the attendent wealth transfers to those holding inventories. Suppliers of labor services in markets other than the one experiencing the work stoppage are likewise affected. The direction of the change in demand will depend upon the nature of the relationship (substitute or complementary) between these other labor suppliers and the one which is being withheld.

The web of interdependence includes still other firms - competitors whose products are substitutes and non-competitors whose products are complements. A work stoppage at a given firm will cause its customers to go elsewhere for their needs. The firms which are sought for these supplies are faced with altered demand conditions. They must, in the short run, ration their supply among the excess of buyers. To the extent that price is used as the rationing mechanism, there will be windfall gains among these producers of substitute products.

Providers of products which are complementary to the product being struck are similarly involved. The direction of their fortune however,

is identical to that of the struck firm. If supplies of the struck product fall off, they too experience a reduction in sales.

Downstream Factors

When an action taken in the labor market results in a suspension of business, regular customers of the business face a loss in welfare. If future consumption rates cannot be adjusted to gain back the lost consumption, any curtailment constitutes a non-recoverable loss. To minimize such losses, customers are forced to locate alternative sources of the product. Finding alternative sellers requires the passage of time if not the expenditure of search costs. Futher losses may result when alternative supplies are forthcoming only at higher prices. To the extent that alternative suppliers raise their prices in the face of rising demand, and this seems likely, the effects of the labor action are distributed still further throughout the economic system. Regular customers of the alternative sellers must also pay higher prices if they are to maintain their rates of consumption. The only other alternative open to them is the location of other, alternative suppliers which would entail still further losses. It is possible that the chain of effects continued on almost indefinitely although the magnitude of the effects declines rapidly.

The ability of labor actions to influence the environment is seen to be omnipresent. The influence, however, is not distributed evenly throughout the environment. Some parties are more interested than others. The extent of interest is dependent upon the magnitude of the potential damage which could be sustained due to actions of the

labor parties. The amount of damage potentially sustainable is derived from, among other things, the nearness of close substitutes for the product of the business experiencing the work stoppage. The presence of a close substitute means that customers may divert their consumption with a minimum of time or search expense. The lack of a close substitute, as in the case of a product sold under near monopoly conditions, means that customers have to invest considerable resources into the location of an acceptable alternative supply. The extent of damage to upstream factors is dependent upon the availability of alternative markets for the product previously purchased by the firm shut down. Where specialized product is being supplied, the likelihood exists that significant supplies may accumulate during the work stoppage. Where a standard, shelf-type item is being supplied, it is likely that the excess product can be easily disposed of. Only an investigation of the unique circumstances surrounding a particular case can determine the probable extent of damage from a given labor dispute.

An Example

For an example, consider the web of relationships surrounding a city transit system. A work stoppage caused by labor actions of either of the parties will have multiple effects which cannot be averted. The loss may not be mitigated by increased consumption rates in the future. Upstream factors in this case include suppliers of energy and other operating supplies. Downstream factors include the transit riders.

The primary parties to the wage relation are the employees and the employer. All other parties are third-parties. There is virtually no

market institution by which they can affect the activities of the labor parties. Yet their economic welfare is dependent upon actions taken by the labor parties. They are not indifferent to the outcome of labor negotiations.

Substitute forms of transportation (such as taxi cabs) which are not involved in the dispute will feel the crush of increased demand. Other alternatives to the transit system, such as private cars, will be utilized. Even the remote alternative of not commuting (renting a room within walking distance of work) will be taken by some.

While the employees of the transit system are most obviously idled, other unemployment effects are less obvious. Employees of the distributor of supplies for the transit system may be laid off for the duration of the work stoppage. The energy supplier to the transit system finds his largest user idled. While in times of shortage this might be a welcome event, the most likely case is that the energy supplier is forced to stockpile his raw materials or find, at some cost, alternative buyers for the product.

As the list of affected parties grows, so does the realization that their economic welfare, although dependent upon actions taken by the parties to the wage bargain, is not considered in the labor negotiations. The decision calculus of the labor market participants does not include a consideration of their interests. Furthermore, there are reasons to assume that they cannot adequately represent their own interests before the labor parties. The costs of organizing a coalition of interested parties to attempt to promote industrial harmony

would be large in relation to be benefits any one third-party might hope to realize. Free rider behavior would also act as a bar to effective action on the part of the affected parties. Legal doctrines which imposed restrictions upon labor market activities may be interpreted as an attempt to protect the interests of these affected third-parties. In the section which follows, the lawmakers' recognition of the interests of third-parties is coupled with the economists' analysis of externalities.

Labor Externalities - Background

Every human being is surrounded by a web of relationships which includes, at least potentially, every other human being. Each human action has consequences which may influence all subsequent actions, if only by a negligible amount. The fact that the strength of the relationships and the importance of the consequences decline rapidly as one moves outward from the individual often obscures this phenomena of inter-relatedness. In earlier sections of this dissertation, it was shown that courts and lawmakers, in attempting to "do equity" were forced to consider this interdependency of labor interests. Economists have for the most part, avoided having to contront the fact of pervasive labor interdependency. In partial equilibrium analysis, the avoidance is explicit and a fundamental feature of the methodology. In general equilibrium analysis, the avoidance is less explicit.[1] In

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[1] In a note appearing at the end of a chapter devoted to "producers" in a classic work of general equilibrium theory, Debreu admits that among the "phenomena that the.... analysis does not cover ... is (1)

this section, labor actions are portrayed as instances of external or third-party effects in an attempt to propose an analytical framework for the consideration of labor interdependency.

While economic theorists have been unable to incorporate general interdependency into their analyses, specific instances of interdependent actions have been examined. Most notably, the problems of environmental "externalities" and externalities as instances of "market failure" have gained attention. The interest that some economists have shown in these fields has prompted one observer to suggest that the field of externalities "warrants the demarcation of a new field of specialization within the broader terrain of welfare economics."[2] In light of the scrutiny which the subject of environmental and public

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external economies and diseconomies, i.e., the case where the production set of a producer depends on the production of other producers (and/or on the consumption of consumers)," Gerard Debreu, Theory of Value, (New York: John Wiley & Sons, Inc., 1959) p. 49.

Baumol points out this avoidance in his review of the contribution of activity analysis to welfare economics. Citing the major works of Arrow and Debreu, he cuations that "one must nevertheless continue to entertain reservations as to the significance of this... for welfare analysis... [I]n order to for the proof to hold,...all externalities must be ruled out," William J. Baumol, Welfare Economics and the Theory of The State, Second Edition, (Cambridge: Harvard University Press, 1967), p. 11; See Debreu, op. cit., and Kenneth J. Arrow, "An Extension of the Basic Theorems of Classical Welfare Economics, "Proceedings of the Second Berkeley Symposium on Mathematical and Statistics and Probability, (Berkeley: University of California Press, 1951).

[2]E. J. Mishan, "The Postwar Literature on Externalities: An Interpretative Essay," Journal of Economic Literature, Vol. IX, (March, 1971), p. 1.

goods - related externalities have received, it is unfortunate that no single unifying theory or research program has yet emerged. On the definition of externalities, a logical starting point in any discussion of the subject, there are numerous contenders. Many writers believe that an externality relationship is brought about by the economic interdependences of various interests or actions.[3] A recent review of definitions of externalities notes that "definitions..have concentrated largely on the elements of interdependence among production or utility functions."[4] In production, "if the shape or position of [a firm's production function] depends in any way upon the character or scale of operations of any other firm in the economy, we shall say the external effects are present."[5]

This association of externalities with interdependence is criticized by some as incomplete since "almost all economic activities affect

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[3]Interdependence has been seen to result from both the activities and the consumption bundles of others. This analysis adopts the more general configuration of "activity" interdependence since, consumption being an activity, the effects of various allocations in the commodity space are subsumed within the set of feasible activities.

[4]Baumol, op. cit., p. 24.

[5]J. de V. Graaff, Theoretical Welfare Economics, (Cambridge: University Press, 1971), p. 18. Elsewhere, "The problem of externalities concerns the interdependence that emerges when individual units are aggregated with consequences not predictable under theorems derived from the individual units." Sherman Krupp, "Analytic Economics and the Logic of External Effects," American Economic Review, Vol. 53 (May, 1963), p. 222, and "Firms in competitive industries generally impose externalities on each other through interdependencies in their input or output prices." Charles J. Goetz and James M. Buchanan, "External Diseconomies in Competitive Supply," American Economic Review, Vol. 61, No. 5, (December, 1971), p. 883.

others."[6] It is suggested that an additional attribute necessary for an effect to be an externality is a lack of the means of compensation.[7] "An externality consists of the interdependence together with the lack of accompanying compensation."[8] Others point to still a third feature of externalities as the distinguishing characteristic - their unintentional nature. Mishan argues this point forcefully - "The essence of the common conception of an external effect,...turns on its incidental character," and "[t]he effect on other's welfare,...is always an unintentional product of some otherwise legitimate employment."[9]

External effects have been characterized then, by: 1) their reflection of economic interdependence, 2) the lack of a means of appropriately internalizing them through price (market) responses,

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[6] Baumol, op. cit., p. 25.

[7] See Meade's early designation of the externality of relationship between bee-keepers and apple-farmers as an instance of an "unpaid factor of production" in James E. Meade, "External Economies and Diseconomies in a Competitive Situation," Economic Journal, Vol. 62 (March, 1952), pp. 54-67.

[8] Baumol, Loc. Cit., Elsewhere, "The misallocation occurs when externalities are not properly accounted for." Andrew Whinston, Price Coordination in Decentralized Systems, Doctoral Dissertation, Carnegie Institute of Technology, (June, 1962), Chapter 2, p. 41, quoted in Baumol, p. 25.

[9] E. J. Mishan, "The Relationship between Joint Products, Collective Goods, and External Effects," Journal of Political Economy, Vol. 77 (May/June, 1969), p. 343. Also, "the essential feature of the concept of an external effect is that the effect produced is not a deliberate creation but an unintended or incidental by-product of some otherwise legitimate activity." "The Postwar Literature on Externalities: An Interpretative Essay," Journal of Economic Literature, Vol. IX, (March, 1971), p. 2.

and 3) their incidental or unintended nature. A consideration of labor actions will reveal them to display all three of these distinguishing characteristics. As a way of examining labor externalities, several of the seminal contributions to the theory of externalities will be briefly commented on.

The construction of a model which portrays utility or production interdependence can provide the starting point for a discussion of externalities. Utility[10] interdependence is most generally portrayed where the utility of one person is dependent upon the activities of another. In symbols, the utility of A, U^A, is dependent upon his own actions X_1^A through X_n^A and also upon some activity, X_m^B, of another individual B, or

$$(1) \qquad U^A = U^A(X_1^A, X_2^A, \ldots X_n^A; X_m^B).$$

This formulation is general enough to encompass several previous categorizations of external effects. For example, Marshall introduced the concepts of <u>external</u> and <u>internal</u> economies.[11] As each firm expands its output in a growing industry, marginal factor costs might decrease through, for example, the development of a skilled labor pool. One firm's demand for skilled labor conveys external economies upon other firms who also demand skilled labor. This situation can be reinterpreted

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[10]For ease of exposition, the analysis hereafter will be concerned with utility interdependence. This should entail no loss in generality.

[11]Alfred Marshall, <u>Principles of Economics</u>, Eighth Edition, (London: MacMillan and Company, LTD., 1936), p. 266.

in terms of labor actions. If a pooling of resources benefits the demanders, it likewise benefits the suppliers. Consider the motivation behind a small manufacturing concern which moves its operation into a "surplus labor area" to obtain lower labor costs or higher labor quality. With respect to any one individual, the existence of the pool is clearly beneficial - without the other potential workers, no employment would be forthcoming from that source. One's utility is thus dependent upon the activities of others.

Marshall's second category of external effects, internal economies, refers to changes within firms whereby the productivity of factors increases as the firms expand. This resembles economies of scale. It was Jacob Viner who first elaborated upon this distinction and suggested the dichotomy of "pecuniary" and "technological" external effects. The origin of increased factor productivity was seen to exist in either falling factor prices or in production efficiencies (changes in the shape of the production function) - "internal economies...may consist either in relations of the technologinal coefficients of production or in reductions in the prices paid for the factors as the result of increases in the amounts thereof purchased."[12]

Viner's dichotomy, although developed in the context of production theory, can be interpreted in terms of utility theory and in terms of labor actions. In competitive supply, a firm increases its market

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[12]"Cost Curves and Supply Curves," Zeitschrift for Nationalokonomie, Vol. III, (1931), reprinted in Kenneth E. Boulding and George J. Stigler, Readings in Price Theory, (Chicago: Richard Irwin, Inc., 1952), p. 213.

share at the (at least partial) expense of the market shares of its competitors. This is a pecuniary externality.[13] It is efficient, however, since the way in which the innovator firm gains its increased market share is by offering its product at a lower market price. This is due to its ability to produce the product at a lower average cost. Presumably, its gain exceeds the loss of the other firms and the welfare of the community is enhanced. This is, of course, small consolation to the marginal firm whose demise the innovator firm has precipitated.

In a labor context, the case of the New York Cordwainers furnishes an example. In that case, a dissident employee incurred the disfavor of union members by working for a rate below the union scale. To the extent that he did work that had previously been done at the union scale, the dissident worker imposed costs on his fellow workers. By increasing his "market share," he diminished their relevant market (demand) conditions. His actions may additionally have touched off competition among his fellow workers which, by transforming a cartel into a competitive market, by "chiseling," decreased the expected value of their future earnings. From a different standpoint, their successful prevention of his action would raise (or preserve) the expected value of their future earnings and impose costs on him.

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[13]"Firms in competitive industries generally impose externalities on each other through interdependencies in their input or output prices," Charles J. Goetz and James M. Buchanan, "External Diseconomies in Competitive Supply," American Economic Review, Vol. 61, No. 5, (December, 1971), p. 883.

Another example of pecuniary external effects in labor is found in the case of Senn v. Tilelayers. In this case, the labor action grew out of the refusal of one contractor, Senn, to obey a union rule which forbade employers to work alongside their employees. Senn's action was interpreted as threatening to the other union contractors in the area and their workers. The economic self interest of the other workers led them to picket his business. If the action of his working alongside his employees allowed him to gain a competitive advantage over other contractors, he might capture their business and thereby reduce the expected value of their future earnings. His practice was (at least in the expectation sense) imposing external costs upon his competitors. Their actions were simply intended to preserve their market positions. In doing so, his competitors were likewise imposing external costs on Senn. To the extent their pickets were successful in dissuading customers from engaging Senn as a contractor, Senn suffered a reduction in wealth (a cost).

Meade's 1952 paper[14] which dealt with external economies and the competitive situation, accepted Viner's dichotomization. Meade was interested in "cases where what is done in one industry reacts upon the conditions of production in the other industry in some way other than through the possible effect upon the prices of the product."[15] The choice to ignore those external effects which were pecuniary in

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[14]James E. Meade, "External Economies and Diseconomies in a Competitive Situation," Economic Journal, Vol. 62 (March, 1952).

[15]Ibid., p. 56.

nature established a precedent which has been followed fairly consistently in articles written since then.

Meade begins with a formula for general interdependency in production not unlike the formula developed above for interdependency in consumption. He discusses the case where two firms are related by both input and output interdependence. The output of one firm, x_1, is seen to depend upon its inputs of land, l_1 and capital, c_1, and also the inputs, l_2 and c_2 as well as the output, x_2 of the other firm. The general form then, is:

$$(2) \qquad \begin{aligned} x_1 &= F_1 (l_1, c_1, l_2, c_2, x_2) \\ x_2 &= F_2 (l_2, c_2, l_1, c_1, x_1) \end{aligned}$$

From this general form, Meade developed his own dichotomy. His objective in the article was to distinguish between two types of externalities, "unpaid factors of production" and "creation of atmosphere." In explaining the first of his classes of externalities, Meade employed the now-famous example of bee-keeping and apple farming. By increasing their production of apples, the apple farmers were unwittingly increasing the production of honey by providing more food for the bees. Apple blossom pollen is a factor of production for honey. It is, however, an unpaid factor. He presented this relationship, formally, as a reciprocal one:

$$(3) \qquad x_1 = H_1 (l_1, c_1, x_2)$$

$$(4) \qquad x_2 = H_2 (l_2, c_2, x_1)$$

In describing the contrasting type of externality, Meade used the example of rainfall and farming. The amount of rainfall in a given area might be influenced by activities of lumber companies. Intensive foresting over a large area might, through its impact on average temperature, increase rainfall in the area. Thus the activities of producers in one industry might have an impact on the welfare of producers in another industry. Once the action is taken, however, the rainfall becomes "atmosphere" for all farmers. There is jointness in consumption. One farmer's enjoyment of the new higher rainfall does not influence the enjoyment of any other farmer. While "[b]oth a factor of production and an atmosphere are conditions which affect the output of a certain industry,"[16] an "atmosphere" has the additional quality of being available for all without competition for its benefits.

Meade's categories of external effects would exist for labor actions whenever the actions of one worker could influence the welfare of another worker, in a manner other than through a price effect. Worker A's output would affect the output of worker B, yet A remains unpaid. This situation involves all three of the distinguishing characteristics of externalities: there is interdependence, A's contribution to the productivity of B is unintentional, and A is not compensated for his actions. For an empirical example of this situation, consider the small group of scientists laboring in the fifties on the problem of the nature of the DNA molecule. There was interdependence - the

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[16] Ibid., p. 61.

production of ideas or theories of each group was not independent of the production of ideas of the other groups. There was also an unintentional element to their actions - the primary concern of each was to discover the nature of the molecular structure of DNA. The fact that the ideas of each group, when published, benefited the efforts of other groups was considered a necessary evil which must sadly accompany the act of publication. Further, there was no compensation by the benefited to the benefactor. This example of the externalities of labor actions also demonstrates the public-goods aspect of the knowledge, per se. In fact, the public-goods aspect of knowledge reflect the interdependence of research effort.

Mead's second type of externality, the creation of atmosphere, involved interdependence of a multiplicative nature:

$$(5) \qquad x_1 = H_1 (l_1, c_1) A_1 (x_2).$$

The multiplicative term $A_1 (x_2)$ means that there is a functional relationship between, the output of the other industry, x_2 and the production relation, H_1 of the first industry as well as between x_2 and the output x_1, of the first industry. In other words, the output of the other industry may not only affect the height of the marginal product curves of the two input factors, l_1 c_1, it may affect the interrelationship of the two inputs. Davis and Whinston take this multiplicative relationship and the functional non-separability that

it implies as the point of departure for their article on externalities.[17]

In their article which attempted to integrate the theory of externalities and certain game-theoretic notions such as dominance, the authors developed the distinction between separable and non-separable cost functions.[18] Like Meade, they limit their discussion to the case of technological externalities. In their terms, an interdependent relation is separable if and only if the cost function of firm A can be expressed as the simple summation of some function of the output x_A, of firm A and some function of the output x_B, of the other firm, or formally,:

$$(6) \qquad C_A\ (q_A,\ q_B) = C_2\ (q_A) + C_3\ (q_B).$$

The contrary case of non-separable functions, and the one that Meade termed "creation of atmosphere" is expressed:

$$(7) \qquad C_A\ (q_A,\ q_B) = C_2\ (q_A) \cdot C_3\ (q_B).$$

Operationally, the firm with a separable cost function can still maximize its profit based on unique marginal cost conditions. Whatever

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[17] Otto A. Davis and Andrew Whinston "Externalities, Welfare and The Theory of Games," Journal of Political Economy, Vol. 70, No. 3 (June, 1962) pp. 241-262.

[18] For a discussion of this article which questions the appropriateness of using cost functions as the discriminant factor in determining separability and thus dominance, see W. David Montgomery, "Separability and Vanishing Externalities," American Economic Review, Volume 66, Number 1, (March, 1976) pp. 174-177.

the amount of externality that it receives from the benefactor firm, there is still some unique output decision. The amount of externality that it receives will determine the level of its profit but not its output decision. On the other hand, the firm with the non-separable cost function faces an ambiguous marginal cost relation that depends on the level of externality which it receives. Its optimal output decision will depend on the magnitude of the externality. There is thus a conjectural element to its decision. Davis and Whinston reason that this implies the game theoretical concept of "non-dominance." In terms of welfare economics, the non-dominance renders traditional attempts at tax/subsidy adjustment no longer optimal. In terms of labor actions, non-dominance makes decisions as to optimal effort levels, in the face of externalities, more difficult. With separable cost (production) functions, workers may determine their efficient effort levels. The impact of any externality would raise or lower their marginal productivity (hence their remuneration). Non-separable functions introduce the conjectural element into effort decisions. The optimal level of effort will depend on the amount of the externality.

The effect of the conjectural element in decisions relating to work effort may be seen in the case discussed above of research teams of scientists striving toward a common objective with the necessity of making interim public reports of their progress. In the allocation of their effort, the researchers are forced to make some guess about the amount of information which they will receive from published reports of other research teams. The optimality of their decisions can only be determined ex post by an examination of the amount of the external

effect (benefit) received. Their decisions could be considered truly optimal only in the (unlikely) case that they had correctly forecast the type of information which other research teams released.

Throughout the above discussions there has been a latent ambiguity which it is necessary to face. The ambiguity originated in the general formulation of utility interdependence, which stated that the utility of individual A was dependent upon the activity of individual B at some level of activity. That formulation did not specify the range of values that the variable representing the external effect might assume. There is a range of feasible values that the activity of B could take on, some of which will effect the utility of individual A and some of which will not. The first attempt to clear up such ambiguous notions in the theory of externalities was made in an article that proposed to "clarify the notion of externality by defining it rigorously and precisely."[19]

In that article, which was concerned with technological externalities, an extensive categorization was developed. The general formulation of interdependency is similar to those seen above. The utility of an individual A is dependent on some activity Y, of another individual B, as well as on his own activities, X_1 through X_m, or:

$$(8) \qquad U^A = U^A(X_1, X_2 \ldots X_m; Y_1)$$

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[19] James M. Buchanan, and William Craig Stubblebine, "Externality," Economica, Vol. 29, (November, 1962), pp. 371-84.

This activity interdependence is evidence of an externality, in the authors' categorization. A marginal externality exists when small changes around some given value of Y_1 affect the utility of individual B, or,

$$(9) \qquad \frac{\partial U^A}{\partial Y_1} \neq 0.$$

Conversely, an infra-marginal externality exists where small changes in around some given value of Y_1 do not affect the utility of B, or

$$(10) \qquad \frac{\partial U^A}{\partial Y_1} = 0,$$

and the general interdependency condition holds. Although the given value of Y_1 is not marginally relevant, there are some Y_1 values where marginal externalities exist. Thus "while incremental changes in the extent of B's activity, Y, have no effect on A's utility, the total effect of B's action has increased A's utility."[20]

A condition of this sort in the instance of labor actions may be visualized. Where a resource pool has been established, as when, for example, highly skilled technicians[21] are gathered in a given geographical area, employers are drawn to that area to conduct interviews due to the lower search costs and the prospect of lower reservation wage levels. With respect to any given worker, there is an advantage to the existence of the pool. In the absence of the other workers, it is

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[20] Ibid., p. 373.

[21] The case of aerospace workers serves as the source of this example.

unlikely that employers would come to the area recruiting. In terms of the category of externalities due to Buchanan and Stubblebine, each worker imposes an infra-marginal external economy on his fellow workers. It is interesting to note here that the situation described could include both the infra-marginal external economy and a marginal diseconomy. To the extent that each worker is a supplier of labor services, he is reducing the available demand facing all other workers. Their utility is not independent of his actions as a supplier of labor. Hence the situation contains both infra-marginal external economies (in the existence of the pool) and marginal external diseconomies (in the aspect of a competitive supply).

The existence of infra-marginal external effects is not normally sufficient to generate a desire by the affected party (B) to modify the output of Y_1, simply because there are no marginal benefits to so doing. In the case of marginal externalities, further clarification is in order before determining whether the existence of the externality is sufficient to motivate a change in the behavior of either the benefited or benefactor party. Marginal externalities may be defined as potentially relevant, where "the activity, to the extent that it is actually performed, generates any desire on the part of ... party A to do modify the behavior of the party empowered to take action (b)."[22]

Formally, this definition involves an examination of marginal relations of U^A and Y_1 around some equilibrium value ($\bar{Y}_1$) of the externality, or:

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[22]Buchanan and Stubblebine, op. cit., p. 373.

$$(11) \qquad \left.\frac{\partial U^A}{\partial Y_1}\right|_{Y_1 = \bar{Y}_1} \neq 0.$$

Infra-marginal externalities may also be considered potentially relevant if the contemplated changes in activity (Y_1) are sufficiently large. In the case of the labor resource pool, a worker might consider bribing the other workers to remain if they threatened to leave as a group, since their leaving as a group would constitute a large change in the value of the externality.

The final step in the categorization of externalities offered by Buchanan and Stubblebine considers the conditions under which a potentially relevant externality may bring about a change in the behavior of the affected parties. Relevance depended on the existence of a desire to change behavior - Pareto-relevance occurs when it can be predicted that such behavior will occur. For a potential change to occur, it is necessary that the affected party be able to compensate the externality-generating party. In such a case the externality-generating party must be at least no worse off, and the affected party will presumably, be better off. Hence the action is a Pareto-superior move. Conditions which generate such a move are Pareto relevant. In Pareto equilibrium, all such gains to trade are exhausted.

A Pareto-relevant externality could exist in the case of teams of research scientists laboring toward some common objective. If marginal changes in the output of team A with respect to some particular

experiment were crucial to team B's progress on some part of the problem, team B would face a potentially relevant externality. If team B valued the research output higher than A (i.e. if team B's marginal rate of substitution in consumption between Y_1 and some tradeable commodity exceeded the marginal rate of production transformation between Y_1 and the tradeable commodity for B), then a Pareto-relevant externality would exist. Pareto equilibrium would be reached by the consumation of an exchange between teams A and B. The labor of team B would be "purchased" by team A. In Pareto equilibrium, all such interactions would have been completed and there would remain no Pareto-relevant externalities.

Labor Externalities - An Interdependent Framework

With the above discussion of various taxonomies and concepts of external effects as a background, an attempt can now be made to discuss some simple cases of labor actions in a model which highlights the third party effects. The following discussion is intended to be suggestive rather than exhaustive since the possibilities for interactions among the members of a community are too numerous to list. The interactions discussed are to be taken as representative of general classes of interactions that are possible. Imagine a community of five members consisting of: two workers, A and B, one owner of the community's dominant firm, F, one owner of a rival firm, R, and a customer, C, who consumes the product of the firms. At the most general level, all these parties have interdependent utility functions. Their

utility is dependent on their own actions and the actions of the other members of the community.

$$
\begin{aligned}
U^A &= U^A(a,b,c,f,r) \\
U^B &= U^B(.....) \\
U^C &= U^C(.....) \\
U^F &= U^F(.....) \\
U^R &= U^R(.....)
\end{aligned}
\tag{12}
$$

This formulation does nothing more than reflect the general interdependence of a community. The vehicle of the interdependence is not specified. Effects of one member's actions may be transmitted through price signals (pecuniary externalities) in a manner reminiscent of Walrasian general equilibrium interdependence, or the effects may be direct, physical (technological) external effects. At this level of abstraction, it is not necessary to distinguish between the two means of transmitting external effects.[23]

The general formulation states that activities of each of the members of the community may at some (as yet unspecified) level affect the utilities of all members of the community. Taking the equilibrium (observed) levels of the activities (denoted as $\bar{a}$, $\bar{b}$, $\bar{c}$,

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[23]At least one writer has recognized the fundamental equivalence of pecuniary and technological externalities - "any technological economy or diseconomy can be converted into a pecuniary one by appropriate pricing of inputs," Dean A. Worcester, "Pecuniary and Technological Externality, Factor Rents, and Social Costs," American Economic Review, Volume 59, (December, 1969), p. 884.

and so on) as starting points, it is necessary to determine if small changes in activity levels around the equilibrium levels produce external effects. Where, for example,

$$(13) \qquad \left.\frac{\partial U^A}{\partial b}\right|_{b = \bar{b}} = 0,$$

there are no such marginal externalities. If there is an inequality, as in the case

$$(14) \qquad \left.\frac{\partial U^A}{\partial b}\right|_{b = \bar{b}} \neq 0,$$

there is evidence of marginal external effects. Given that (14) holds, it still is unknown whether the external effect acts upon U^A directly or through its effect on marginal utility of A's own activity. Where

$$(15) \qquad \left.\frac{\partial \left(\frac{\partial U^A}{\partial a}\right)}{\partial b}\right|_{b = \bar{b}} = 0,$$

the activity of worker B effects A directly. This is the separable case where there is a unique activity optimum for A. Where

$$(16) \qquad \left.\frac{\partial \left(\frac{\partial U^A}{\partial a}\right)}{\partial b}\right|_{b = \bar{b}} \neq 0,$$

the activity of B affects the marginal utility of A's activity. Here the conjectural problem arises as A's optimal activity level depends on the activity of B. This is the case of non-separability.

If (13) holds, and there are no marginal externalities, the utility interdependence may be based on the existence of an "infra-marginal" external effect. This occurs where the total effect of B's action from the first units through the last (at $\bar{b}$) has been non-zero. An infra-marginal external economy, for example, exists when

$$(17) \qquad \left.\frac{\partial U^A}{\partial b}\right|_{b = \bar{b}} = 0, \text{ and } \int_0^{\bar{b}} \frac{\partial U^A}{\partial b}\, db > 0.$$

It may also be the case that there exists some extreme value of B's activity (b^{max}) in excess of the equilibrium value, where B's activity begins to effect A's utility. This case of a "supra-marginal" externality would describe situations where marginal external effects could occur only at extremely high levels of an activity. It would exist when,

$$(18) \qquad \left.\frac{\partial U^A}{\partial b}\right|_{b=b^{max}} \neq 0 \text{ and } \int_0^{b^{max}} \frac{\partial U^A}{\partial b}\, db \neq 0.$$

even though the condition

$$(19) \qquad \left.\frac{\partial U^A}{\partial b}\right|_{b=\bar{b}} = 0 \text{ and } \int_0^{\bar{b}} \frac{\partial U^A}{\partial b}\, db = 0$$

holds.

The various labor actions listed at the beginning of this chapter can now be discussed with the above formulations of labor interdependence as a background. The actions most indicative of conflict in the labor market were the strike and the lockout. The strike involves the

curtailment of the activities of workers A and B. A lockout consists of the refusal of the employer F to accept the labor of the workers. In either case, to the extent that the demand (supply) for the factor is less than perfectly elastic, the interruption of exchange will involve a loss on the other party. The relationship between the workers and the firm is, however, a direct one. Actions taken by one have immediate and direct effects upon the other party. While they have the ability to impose costs on each other, these costs are not external effects. There is no externality relationship between them.

It is when the labor parties are considered in the context of the community that the opportunities for external effects arise. Consider the welfare of the rival firm, R. The occasion of a strike/lockout action between F and its workers means that R will see its demand conditions altered. There will be rationing of limited supplies and the accompanying transfer of wealth to R as a result of the disruption of F's business. In terms of the notation used above, although it may be true that small changes in activities a, b, and f around their equilibrium levels do not affect the utility of R, or

$$(20) \qquad \frac{\partial U^R}{\partial a}\bigg|_{a=\bar{a}} = 0; \qquad \frac{\partial U^R}{\partial b}\bigg|_{b=\bar{b}} = 0; \qquad \frac{\partial U^R}{\partial f}\bigg|_{f=\bar{f}},$$

the existence of infra-marginal externalities is revealed when large changes (such as a strike/lockout would entail) are considered. Thus, in this example,

$$(21) \qquad \int_0^{\bar{a}} \frac{\partial U^R}{\partial a}\, da \neq 0; \quad \int_0^{\bar{b}} \frac{\partial U^R}{\partial b}\, db \neq 0; \quad \int_0^{\bar{f}} \frac{\partial U^R}{\partial f}\, df \neq 0.$$

The welfare of the customer, C, is likewise not invariant to the fact of a strike/lockout. The impact on C's utility will approximately mirror the impact of the labor dispute on R. As R receives rents due to the increased demand for his products, C pays those rents to preserve his necessary supplies of the consumption good. For the customer, it may be true that marginal externalities exist, or

$$(22) \qquad \left.\frac{\partial U^C}{\partial a}\right|_{a=\bar{a}} \neq 0; \quad \left.\frac{\partial U^C}{\partial b}\right|_{b=\bar{b}} \neq 0; \quad \left.\frac{\partial U^C}{\partial f}\right|_{f=\bar{f}} \neq 0,$$

as well as the infra-marginal effects -

$$(23) \qquad \int_0^{\bar{a}} \frac{\partial U^C}{\partial a}\, da \neq 0; \quad \int_0^{\bar{b}} \frac{\partial U^C}{\partial b}\, db \neq 0; \quad \int_0^{\bar{f}} \frac{\partial U^C}{\partial f}\, df \neq 0.$$

Given that the actions of A and B with respect to the firm, F, affect the welfare of C, a third-party, it may be possible to make a rough prediction about the extent of injury or benefit that C faces. As a final background comment on the framework of interdependent labor actions sketched out above, and as a prelude to the concluding section of this chapter, "an illustration," some comments on market structures are necessary.

In the above discussion of labor interaction, no market structure was specified. It was assumed, implicitly, that each firm and each worker possessed some degree of market power. It should be acknowledged now that the <u>degree</u> of market power possessed is of primary importance

in determining the extent of third-party effects. To appreciate this, imagine a continuum of possible market structures for the final product of firms F and R. At one extreme, firms F and R are part of a purely competitive market characterized by numerous firms who supply a similar, if not identical, product. At the other extreme, firms F and R constitute the entire supply of the consumption good, and in addition, assume they have decided to act in concert to maximize joint profits. They are, in effect, a monopolist. Consideration of these polar cases of 1) no market power and 2) the maximum attainable market power, will demonstrate that a continuum of degrees of market power is analytically identical to a continuum of possibilities of labor externalities. In the purely competitive case, the availability of ready substitutes minimizes the inconvenience the consumer is subject to in the event of a labor conflict that curtails production and delivery of the consumption good. In the monopolistic case, the absence of any close substitute insures that any work stoppage will impose significant costs on the consumer. The extent of potential third-party effects from labor conflicts would depend, then, on the degree of market power in the final product. Symbolically, an index of consumer dependence on the labor parties, E, is some positive function of P, an index of the degree of market power, or

$$(24) \qquad E = E(P), \text{ with } \frac{\partial E}{\partial P} > 0.$$

The continuum of interdependence can also be portrayed graphically. The locus of points extending from the origin in Figure 1 below relates E, consumer dependence on the actions of labor parties to P, the extent of market power enjoyed by the producer firm. The shape of the curve is conjectural. However, a limit exists when the producer is monopolistic and has a maximum of market power.

Given some degree of market power, there are additional factors which will further determine the extent of external effects accruing to parties outside the labor market. Consider the possibilities for storage of the commodity. Where storage is possible, consumption of goods purchased earlier is a substitute for consumption of goods purchased now. Since the untoward effects of a labor dispute are due to the lack of available alternative supplies in the case of the existence of market power, the ability to stockpile can mitigate the third-party effects of a production stoppage.[24]

Another spectrum of possible degrees of interdependence can be developed. Where alteration of consumption patterns is feasible and storage not prohibitively expensive, one would expect the possibilities for labor externalities to be minimized. Where storage is not possible, the magnitude of labor externalities is greater. Using stockpiling and storage to offset the effects of production stoppage

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[24] See: C. L. Christenson, "The Theory of the Offset Factor: The Impact of Labor Disputes Upon Coal Production," American Economic Review, Vol. 43, (September 1953) pp. 513-547.

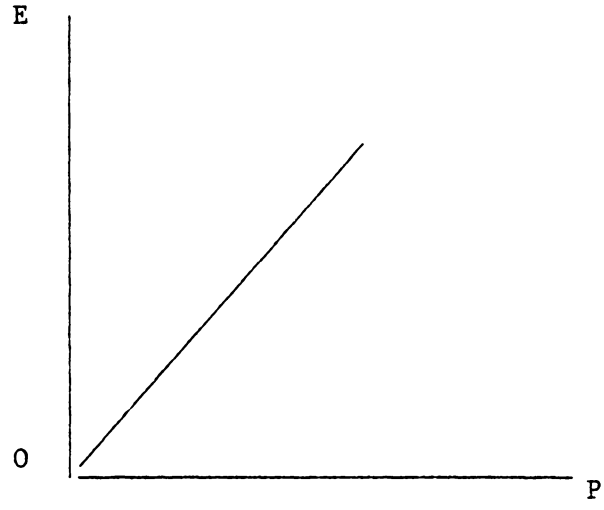

FIGURE 1

MARKET POWER AND CONSUMER DEPENDENCE

would depend on the existence of information about upcoming labor conflicts. Since information is costly and at least some of the stockpiling endeavors will be disappointed, uncertainty would entail a cost. Thus stockpiling could mitigate, not eliminate, labor externalities.

This discussion of storage possibilities can be broadened to encompass other characteristics of consumption goods. The degree of perishability will be closely related to the possible magnitude of third-party effects. The practical inability to stockpile perishable goods creates the opportunity for considerable external costs. It is noteworthy that agricultural workers rarely engage in work stoppages during harvest time. This tradition is an implicit acknowledgement of the degree of economic loss that would result from labor actions at the harvest time of the year and the negative-sum nature of any such strategic labor market actions.

A distinction can also be made between consumption goods and consumer services. When a firm supplying services is threatened with a labor conflict, its customers have little ability to engage in strategic actions. Opportunities for storage are non-existent although some possibilities of altering consumption patterns (as in early mailing of Christmas packages when labor problems threaten postal service) may exist. Other things equal, the service industries would therefore be associated with higher expected magnitudes of labor externalities.

Elasticity of supply for the final product is an additional factor influencing the degree of potential third-party effects resulting from a work stoppage. Supply is highly elastic when a change in price would call forth a more than proportionate increase in amounts supplied. A condition of inelastic supply, on the other hand, would exist when increases in amounts supplied required a more than proportionate increase in price. When supply is relatively inelastic, any reduction in market supply due to a suspension of operations of one producer would be filled in by increased production of other producers at higher prices. The increase in production of the remaining firms would require a more than proportionate increase in selling price. Hence consumers in an industry with highly inelastic supply must pay higher prices to maintain rates of consumption if part of the industry ceases operations. Labor actions which result in work stoppages in such industries could potentially impose greater costs on consumers than in industries with highly elastic supply condition.

An Illustration

A labor dispute which results in the temporary suspension of operations imposes a cost on the regular customers of the firm. As the result of actions to which they are third-parties, the customers are required to forgo their most-favored consumption in favor of what was previously their second choice. In the hypothetical case

of pure competition, the existence of a perfectly elastic supply of a homogeneous product shields them from welfare loss. In the empirically relevant case of a community in which limited alternatives provide the community members with some market power, the shift to a (previously) second-best alternative will involve a reduction in the welfare of the consumer. Methods for predicting the extent of injury based on the degree of market power and the ability of consumers to engage in strategic actions such as storage were discussed above. To illustrate the methods, consider the effects of a labor conflict in the public sector where, by definition, there is monopolistic provision. The provision of secondary education, where public provision exercises a near-monopoly status, will serve as an example. This case is also illustrative of the instance of a service, where storage is not possible.

Consider the labor conflict arising from the failure to renegotiate a contract. A strike or lockout would result in an interruption of service. Since there is general interdependence in the community, (12 is satisfied), the community members are not indifferent to the conduct of the labor parties. Industrial cooperation will contribute to the welfare of all members in the community, just as specialization generates an external economy for the community.[25]

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[25]Worcester lists general specialization as a cause of pecuniary externality. On the basis of Tullock's remark that "[e]xternalities can arise either from action or failure to take action," one can conclude that a cessation or interruption of specialization will

There is present, however, more than just general interdependence. It is possible to further specify the relationship between consumers of the service (students) and the joint inputs (teachers and administrators) to the production of the service. Even in the case where there are no marginal externalities, i.e., changes in the level of output (of teaching services) around equilibrium levels have no measurable impact on student welfare, the drastic change in the level of provision which would accompany a complete work stoppage would affect community welfare. There would always be infra-marginal external costs where a labor conflict precipitated a school closing.

Several factors would intensify the loss borne by consumers in this illustration. The pricing of public services is normally thought to differ from that of the market counterpart. Price is constrained to an average cost level which is below the hypothetical monopoly price. An estimation of loss based on consumer surplus foregone by the interruption of provision which assumed a market price would require modification. A recognition of the unique pricing system would require an upward revision in the estimation of the magnitude of the labor externality. The presumably greater consumer gain from collective provision would entail a correspondingly greater loss from the interruption of provision.

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entail a pecuniary diseconomy. See Worcester, p. 58 and Gordon Tullock, Private Wants, Public Means: An Economic Analysis of the Desirable Scope of Government, New York: Basic Books, Inc., 1970, p. 72.

In this illustrative case, the ability of consumers to take strategic actions is limited. While there is no outright prohibition on competitive supply of secondary education, the current fiscal arrangement insures that alternative suppliers can service a few high demanders at most. The fact that education is a service and cannot be stockpiled in anticipation of labor conflict is likewise important in determining the magnitude of loss.

A Summary

This dissertation has been concerned with "third-party" or "external" effects that pervade the economic dimension of human action. As an instance of these effects, actions in a specific market, the labor market, have been isolated and studied. In earlier chapters, the evolution of labor law was traced. Legal change from the earliest recorded U.S. court cases to the most recent Executive Orders was described. Throughout that description, the importance of the community context of the wage bargain was noted. In subsequent chapters, economic principles that accompanied legal evolution were examined. Legal debate surrounding significant changes in labor entitlements was reviewed. It was found that lawmakers often adopted a viewpoint of the labor relation which can be called "interdependent." The actions of labor and management were studied in the context of a social group. Labor market conflict could impose costs on third parties. The recognized duty of the legal system was to arbitrate among the interests of labor, firms, and the consuming public. Common

law and early statutory restrictions of combinations as injurious to the public welfare were seen as examples of this legal attitude. Twentieth century labor legislation which aims to protect the flow of commerce by restrictions of employer/employee actions is further illustration of this species of public regulation.

With the legal perspective on third-party effects in labor as a background, the second part of the dissertation began by investigating economists' views of the labor relation. A survey of characteristic economic viewpoints of labor indicated that the attitude of lawmakers had no parallel among economists. In the rare instances where attention was devoted to labor interdependency, it consisted of an examination of the effects of the environment on the outcome of the wage bargain. Although the ability of the community to influence labor actions was thus recognized, there has been little economic analysis of the ability of labor actions to, in turn, influence the welfare of the community. Economists have more typically considered the labor relation in isolation from the encompassing social environment. It was found that even the "institutional" labor economists have not displayed an awareness of the interdependent conditions in the labor market to match that of lawmakers.

The preceeding portions of this final chapter have attempted to suggest a framework for the consideration of labor actions which highlights their third-party effects. This was done by discussing labor market interdependencies in terms of economic externalities.

The terminology and theoretical system developed by economists to deal with "external" effects were adopted to labor. Several suggestive cases were discussed. Tentative rules for predicting the degree of potential labor externalities were mentioned. The analysis is not intended to be exhaustive of the subject of labor externalities. A treatment which fully integrates externality theory with a particular area of human action, as in labor actions, must remain on the agenda for future research. The goal of the present research has been to argue that an application of externality theory to labor actions is desirable and to prove, through some tentative treatments, that such an application is feasible.

A new framework for considering labor actions has been proposed. An elaboration upon that framework, with a drawing out of implications for organizational/institutional design thus suggested, will hopefully follow.

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APPENDIX A

LIST OF COURT CASES

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Edward Lauf et al v. E.G. Shinner and Co. Inc. 303 U.S. 323 (1938)
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THIRD-PARTY EFFECTS AND LABOR ENTITLEMENTS
AN ECONOMIC PERSPECTIVE

by

Charles Breeden

(ABSTRACT)

This dissertation is concerned with "third-party" or "external" effects that pervade the economic dimension of human action. As an instance of these effects, actions in a specific market, the labor market, are isolated and studied.

In the first part of the dissertation, the evolution of labor law in the United States is traced from the earliest recorded labor court case in 1806 through the present. In examining the dialogue surrounding changes in labor entitlements, it is found that the ubiquity of external effects in the labor relation has been historically recognized by lawmakers as they grappled with the design of optimal legal rules.

The second part begins with an examination of economists' views of the labor relation. A survey of views indicates that economists have failed to approach labor actions in a manner that is both analytic and cognizant of the pervasive interdependence in labor.

The concluding chapter of the dissertation attempts to integrate the disparate viewpoints of lawmakers and economists by viewing labor actions in a manner which highlights the external effects.

Borrowing from the literature on "externalities," the chapter demonstrates that there exists a continuum of possible magnitudes of external effects in labor.