

1994

The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880-1889

Eric Tucker

Osgoode Hall Law School of York University, etucker@yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works

 Part of the [Labor and Employment Law Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Tucker, Eric. "The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880-1889." *Law and History Review*, vol. 12, no. 2, 1994, pp. 277-339.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

The Faces of Coercion: The Legal Regulation of Labor Conflict in Ontario, 1880–1889

ERIC TUCKER

Until recently, North American labor law historiography has been dominated by the view that the legal regime regulating trade unions and collective bargaining has passed through three stages of development: repression, toleration, and promotion. This evolutionary narrative served the function of justifying current collective bargaining schemes by showing them to be the progressive realization of political and industrial pluralism.¹ Confidence in the narrative, however, is eroding. In part, this is fuelled by the crisis of the current collective bargaining regime. It no longer appears to be able to deliver the goods.² Not coincidentally, critical scholars have also chosen this moment to scrutinize the Whiggish history produced by writers committed to the Wagner Act model and have found it wanting.³

This article is part of a larger study of Canadian labor law before the

1. For example, see A. W. R. Carrothers et al., *Collective Bargaining Law in Canada*, 2d ed. (Toronto, 1986), pt. 1; Charles O. Gregory, *Labor and the Law*, 2d rev. ed. (New York, 1961), 13–17.

2. See Daniel Drache and Harry Glasbeek, *The Changing Workplace* (Toronto, 1992) (Canada); Kim Moody, *An Injury to All* (London, 1988) (United States); *Regulating Labour: The State, Neo-Conservatism and Industrial Relations*, ed. Larry Haiven et al. (Toronto, 1990) (international and comparative).

3. David Brody, "Labor History, Industrial Relations, and the Crisis of American Labor," *Industrial and Labor Relations Review* 43 (1989) makes this link explicitly. The critical literature is vast. See Christopher L. Tomlins, "'Of the Old Time Entombed':

Eric Tucker is associate professor of law at Osgoode Hall Law School, York University, Toronto. He wishes to thank the Osgoode Society and the Osgoode Hall Law School for their support and Judy Fudge, Harry Glasbeek, Doug Hay, Bryan Palmer, the Toronto Labour Studies Group, and two anonymous readers for this journal for their comments on earlier drafts of this article.

advent of statutory collective bargaining, which questions the traditional periodization and the meanings of the categories.⁴ It is often an unarticulated premise that the exercise by employers of their superior economic power, as imparted and structured through the law of property and contract, is not coercion. Rather, the analysis is restricted to direct state coercion, exercised through the criminal law, the police, and the injunction. This framework produces a partial view of the role of law and interferes with an analysis of the strategic choices made by workers and employers. By bringing 'normal' market relations back in, we can more fully examine the nuances of coercion and consent at a given time.

Trade unions in Ontario during the 1880s underwent unprecedented growth as local and national organizations which had disintegrated or become dormant at the end of the 1870s re-emerged and grew, while new organizations, such as the Knights of Labor, took root and reached workers who never had been members of trade unions. Accompanying this upsurge of labor organization was a sharp increase in the number of strikes. There were nearly twice as many strikes in Ontario between 1880 and 1890 as there had been between 1860–1879.⁵ In addition to the strike, workers experimented with other economic tactics, such as the boycott, in an effort to pressure employers into recognizing their unions and agreeing to terms, conditions, and practices acceptable to them. Workers also became active in federal, provincial, and local politics and were successful in having a number of their concerns addressed legislatively.

It might have been expected that this "uprising" of labor would have triggered efforts by employers and state officials to use more direct state coercion, including court actions and vigorous policing, in an effort to contain this movement and limit its effectiveness. Some of this did happen, but it is fair to say that, compared to some other jurisdictions

The Resurrection of the American Working Class and the Emerging Critique of American Industrial Relations," *Industrial Relations Law Journal* 10 (1988); Raymond L. Hogler, "Labor History and Critical Labor Law: An Interdisciplinary Approach to Workers' Control," *Labor History* 30 (1989).

4. Judy A. Fudge, "Voluntarism, Compulsion and the 'Transformation' of Canadian Labour Law during World War II," in *Canadian and Australian Labour History*, ed. Gregory S. Kealey and Greg Patmore (Sydney, 1990), 81; Eric Tucker, " 'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837–77," *Labour/Le Travail* 27 (1991).

5. Bryan D. Palmer, "Labour Protest and Organization in Nineteenth-Century Canada, 1820–1890," *Labour/Le Travail* 20 (1987).

(notably the United States),⁶ their efforts in this direction were relatively modest and only partially successful. It was not until the beginning of the twentieth century that direct state coercion became more widespread and effective.

To explain this, recent discussions about the role of law in shaping the labor movement are joined. In particular, Forbath and Hattam have argued that the difference between judicial supremacy in the United States and parliamentary supremacy in England, combined with other differences in the two nations' forms of government, provides the key to understanding the divergent paths taken by their respective labor movements.⁷ They both explicitly reject the more sociological explanations of American exceptionalism, which have dominated until recently. While a full comparison of Canada, the United States, and England is beyond the scope of this article, my examination of this period suggests that, in their enthusiasm to "bring the state back in,"⁸ Forbath and Hattam have given inadequate consideration to political-economic influences on the level of class conflict, and the ability of employers to maintain their dominance without direct state coercion. For example, the extreme hostility of American employers to trade unions during this period is taken as a given, rather than as something that needs to be explained, and the violent conduct of the police and militia in policing strikes—under the direction of the executive branch of the state, not the judiciary—is not accounted for.⁹ More attention

6. The historical development of the legal regulation of trade unions and their activities during this period has received much attention lately. See William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, 1991); and idem, "Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law," *Law and Social Inquiry* 16 (1991); Victoria C. Hattam, *Labor Visions and State Power* (Princeton, 1993); Daniel R. Ernst, "Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885–1900," *American Journal of Legal History* 36 (1992); Herbert Hovenkamp, "Labor Conspiracies in American Law, 1880–1930," *Texas Law Review* 66 (1988); Leon Fink, "Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order," *Journal of American History* 74 (1987); Haggai Hurvitz, "American Labor Law and the Doctrine of Entrepreneurial Property Rights: Boycotts, Courts, and the Judicial Reorientation of 1886–1895," *Industrial Relations Law Journal* 8 (1986). For an excellent introduction to the new labor law scholarship, see *Labor Law in America*, ed. Christopher L. Tomlins and Andrew J. King (Baltimore, 1992).

7. Forbath, "Courts, Constitutions," and Hattam, *Labor Visions*, chap. 5.

8. Peter B. Evans et al., eds., *Bringing the State Back In* (Cambridge, 1985).

9. See Sanford M. Jacoby, "American Exceptionalism Revisited: The Importance of Management" in *Masters to Managers*, ed. Sanford M. Jacoby (New York, 1991), 173; Melvyn Dubofsky, "Book Review of *Law and the Shaping of the American Labor Movement*, by William Forbath," *Industrial and Labor Relations Review* 45 (1992).

needs to be given to the complex interplay between institutional structures and material conditions and the way they mutually shape the conduct of class relations.

Arguments about how and why law is used coercively cannot proceed in a factual background. There is a real need to clarify the law and, more important, to illuminate its use during labor conflicts in Ontario during the 1880s, because both Canadian labor historians and labor lawyers have largely ignored this period.¹⁰ The three detailed case studies that follow examine exceptional strikes where direct state coercion was used. Aside from the benefit of the paper trails these strikes left, we can see through these studies both what the law was, why it was invoked, and how it responded—or failed to respond—to demands placed upon it. These case studies are supplemented in the conclusion with cumulative data on the incidence of judicial/police interventions in strikes in Ontario during this period.

Legal Starting Points

For most of the nineteenth century and, indeed, for hundreds of years previously, the obligations of servants to masters were enforced through the criminal law. This, as Kahn-Freund noted some time ago, was consistent with a scheme in which the obligation to serve arose from status.¹¹ By the nineteenth century, however, the obligation to serve was derived from the notionally voluntary agreement of the parties, manifested in the contract of employment. Although criminal enforcement of contractual obligations was becoming increasingly anomalous in market regimes, workers were liable to be, and frequently were, prosecuted for breaching their contracts of employment in England and Ontario until the end of the third quarter of the nineteenth century. This was rationalized on the grounds that employers, as propertied people, could answer for their damages in money while propertyless workers could only answer with their bodies. It was also consistent with the hierarchical structure of the master and servant relation, many of whose assumptions

10. For example, historian Bob Russell, *Back to Work?* (Scarborough, 1990) evinces a greater interest in law than most, but omits 1877 to 1900 without comment. Similarly, Bryan Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1880–1991*, 2d ed. (Toronto, 1992) integrates law into his discussion of most periods, but not 1880–95. For a legal example, see Carrothers, *Collective Bargaining Law*, 11–30. I call attention to these gaps not to criticize the authors but to show the need for more work to be done.

11. Otto Kahn-Freund, “Blackstone’s Neglected Child: The Contract of Employment,” *Law Quarterly Review* 93 (1977): 522.

had been imported into the contract of employment, thereby maintaining important continuities between the two regimes largely to the benefit of employers. It was only through extensive labor agitation that simple breaches of the employment contract were decriminalized.¹²

Combinations of workers were also regulated through the criminal law. A series of statutes and judicial decisions dating back to the fourteenth century made it a crime for workers in England to combine for the purpose of increasing wages or shortening hours of work. Moreover, actions taken in support of a combination's objectives, such as placarding and picketing, were also culpable.¹³ The precise status of much of this law in Ontario was never determined conclusively.¹⁴ Nevertheless, when, in 1872, George Brown, publisher of the *Globe*, charged striking members of the Toronto Typographical Union with conspiracy for, among other acts, simply combining for the purpose of shortening hours, the federal government was quick to intervene. It enacted legislation closely modeled on the English *Trade Union Act* (TUA) and *Criminal Law Amendment Act* (CLAA) passed in 1871.¹⁵

Although not without ambiguities, the Canadian TUA immunized

12. The importance of the continuity is emphasized by Karen Orren, *Belated Feudalism* (Cambridge, 1991), 70, where she claims, "the law of master and servant was at the foundation of capitalist development and industrialism. . . ." Also see Christopher L. Tomlins, "The Ties That Bind: Master and Servant in Massachusetts, 1800-1850," *Labor History* 30 (1989). The *Breaches of Contract Act, 1877*, S.C. 1877, c. 35, ended the use of criminal sanctions in Canada except in the circumstances specified in the statute. This happened two years after the enactment of identical legislation in England. On Canada, see Paul Craven, "The Law of Master and Servant in Mid-Nineteenth-Century Ontario," in *Essays in the History of Canadian Law*, vol. 1, ed. David Flaherty (Toronto, 1981), 175. On England, see Daphne Simon, "Master and Servant," in *Democracy and the Labour Movement*, ed. J. Saville (London, 1954), 160.

The rationalization became harder to sustain after direct imprisonment of debtors was abolished, although some commentators persisted. For example, see James Edward Davis, *The Labour Laws* (London, 1875), 8-11, 86-95. There were, of course, other more coercive labor systems operating earlier in the century including slavery and the quasi-military code of discipline of the fur trading companies. Robin Winks, *Blacks in Canada: A History* (Montreal, 1971), 1-113; Hamar Foster, "Mutiny of the Beaver: Law and Authority in the Fur Trade Navy, 1835-1840," in *Glimpses of Canadian Legal History*, ed. Dale Gibson and W. Wesley Pue (Winnipeg, 1991), 15.

13. For a detailed examination of the development of this law, see John V. Orth, *Combination and Conspiracy* (Oxford, 1991).

14. For differing views, see Paul Craven, "Workers' Conspiracies in Toronto," *Labour/Le Travail* 14 (1984) and Tucker, "That Indefinite Area."

15. S.C. 1872, cc. 30, 31. Among the numerous accounts of these events, see Bernard Ostry, "Conservatives, Liberals, and Labour in the 1870's," *Canadian Historical Review* 41 (1960); and Mark Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective," *Ottawa Law Review* 16 (1984).

workers from being prosecuted for common law criminal conspiracy merely because they had joined a trade union whose purposes were in restraint of trade.¹⁶ The CLAA proscribed actions which might be taken during a dispute between masters and workers. Offenses included violence to persons or property, threats or intimidation, and molestation or obstruction. Persistent following, hiding tools, and watching and besetting were deemed to be molestation or obstruction. Because these crimes were broadly defined, and because jurisdiction to try accused workers rested with magistrates who were perceived to be hostile, trade unionists lobbied for repeal of the CLAA. They were partially successful. Amendments to the CLAA defined offenses more narrowly and decriminalized peaceful picketing.¹⁷

Trade union activities were also governed by the general criminal law. Striking workers could be charged with a variety of offenses, including assault, riot, unlawful assembly, and destruction of property.

Private common law was rarely used either to secure a remedy against workers who breached their contracts of employment or to prevent trade unions from forming or acting. Earlier English cases held that trade unions were unincorporated associations that had no identity distinct from that of their individual members. The courts also held that they were unlawful associations because they were formed for an illegal purpose—restraint of trade. Because of this, agreements with employers were legally unenforceable as were contracts between members of the union.¹⁸ This created substantial difficulties for unions seeking to protect their funds, since dishonest officers could not be held liable for breaching their obligations. Intra-union disputes were, in effect, non-justiciable. The TUA provided only partial relief. Section 3 of the act stipulated that agreements or trusts of trade unions should not be void or voidable merely because its purposes were in restraint of trade. This gave unions the ability to protect their funds in court. Section 4, however, declared that most contracts between members of trade unions, including contracts concerning conditions of employment, union dues or penalties, and benefits, were unenforceable.

The civil liability of trade unions and their members to employers had hardly been considered before 1880. The tort of inducing breach of contract was recognized in England in 1853 and followed in Ontario

16. Technically, the immunity only extended to workers who joined a registered trade union. This distinction was ignored in practice and eliminated in the statute consolidation of 1886. R.S.C. 1886, c. 173.

17. S.C. 1875, c. 39; S.C. 1876, c. 37.

18. *Hornby v. Close* (1867), 10 Cox C.C. 393.

in 1879, but neither case involved a trade union or an industrial action.¹⁹ In another case, *Springhead Spinning Company v. Riley*, the employer obtained an injunction to restrain the issuing of placards and advertisements calling on workers not to apply for positions because of a dispute with the union. Vice Chancellor Malins found that the defendants were guilty of issuing criminal threats and of criminal interference that tended toward the destruction of property. His conclusion was based on broad definitions of the crimes of threatening and interfering, as well as a wide interpretation of the scope of property rights. Malins made it clear that he was eager to accommodate employers having disputes with trade unions.

In the meantime I would only make this observation, that by the Act of Parliament it is recited that all such proceedings are injurious to trade and commerce, and dangerous to the security and personal freedom of individual workmen, as well as the security of the property and persons of the public at large; and if it should turn out that this Court has jurisdiction to prevent these misguided misled workmen from committing these acts of intimidation, which go to the destruction of that property which is the source of their own support and comfort in life, I can only say that it will be one of the most beneficial jurisdictions that this Court has ever exercised.²⁰

Malins's broad interpretation of the court's equitable jurisdiction to issue injunctions to protect property from damage was rejected in a subsequent case that did not involve a labor dispute. The court reaffirmed the general principle that injunctions do not lie to prevent crimes or publications of libel.²¹ While this later judgment did not preclude all uses of injunctions in relation to trade disputes, it surely cast considerable doubt on their availability. In any event, neither English nor Canadian employers in the 1870s marched off to the court to explore further the willingness of the judges to use their equitable jurisdiction to enjoin trade union activity.²²

In sum, by 1880 criminal law sanctions for simple breaches of contract by employees had been repealed, trade unions were no longer criminal

19. *Lumley v. Gye* (1853), 2 El. & Bl. 216; *Hewitt v. The Ontario Copper Lightning Rod Co.* (1879), 44 UCQB 287. For an interesting discussion of the gender dimensions of *Lumley*, see Lea S. VanderVelde, "Hidden Dimensions in Labor Law History: Gender Variations on the Theme of Free Labor" in King and Tomlins, *Labor Law in America*, 99.

20. *Springhead Spinning Company v. Riley* (1868), L.R. 6 Eq. 562-63.

21. *Prudential Assurance Company v. Knott* (1875), L.R. 10 Ch. App. 142.

22. A. W. J. Thomson, "The Injunction in Trade Disputes in Britain Before 1910," *Industrial and Labor Relations Review* 19 (1965-66).

conspiracies per se, much trade union activity was still criminalized—although there had been some relaxation—and employers had not seriously explored the private law jurisdiction of the courts in relation to disputes with their employees.

Case Studies

The Labor Injunction in the Toronto Plasterers' Strike, 1883

The revival of economic activity at the beginning of the 1880s also initiated a new round of conflict between workers and their employers. Yet, despite the increase in strike activity, employers did not, on the whole, exhibit a high level of antagonism toward unions and their activities. Indeed, they seemed to accept a certain level of conflict as an inevitable part of a market system of wage determination. For example, an editorial on the new wave of strikes published in the *Monetary Times*, an important Canadian business journal, noted that while the public had rights that must be protected, “the right to strike cannot be interfered with.”²³ The following week, the journal noted that “the spirit in which the strikes . . . have been carried on shows a great improvement upon former perturbations in the labor market” and that “a spirit of accommodation has been shown on both sides; on which both employers and employed are to be congratulated.”²⁴

The first round of conflict in the Toronto building trades that decade occurred in April 1882, when journeymen carpenters, painters, and plasterers' laborers all went on strike for increased wages. Pickets were sent to various worksites and shops around the city to convince current employees to join the strike, while railway stations and immigrant sheds were watched to intercept replacement workers who might be hired by the employers. The carpenters' strike was by far the largest of the three. Their president, Thomas Moor, cautioned the pickets “not to step beyond the law, but to use only moral persuasion, as one false step would be diligently used by their antagonists against them.”²⁵ His advice was heeded. When the strike was settled four weeks later, on terms favorable to the carpenters, no charges had been laid, and the strikers were complimented by the mayor for their orderliness.²⁶ The painters

23. *Monetary Times*, May 20, 1881, p. 1349.

24. *Ibid.*, May 27, 1881, p. 1385.

25. *Mail*, April 6, 1882, p. 8, col. 4. An earlier caution was reported in *Mail*, April 4, 1882, p. 8, col. 3.

26. *Ibid.*, April 29, 1882, p. 12, cols. 3–4.

settled their strike shortly after the carpenters, also on favorable terms and without incident.²⁷ The Master Plasterers' Association (MPA), however, succeeded in resisting the demands of the laborers who returned to work largely on their employers' terms.²⁸

The tone of the editorial writers at the *Monetary Times* remained philosophical. Disputes over wages were unavoidable since the price of labor had to rise and fall according to the circumstances and employers were no more inclined to offer increases than workers were to volunteer decreases. Workers would be less inclined to strike if they became more sensitive to the realities of the labor market and stopped trying to counteract the laws of supply and demand, but there was little bitterness toward, or fear of, trade unions.²⁹ It was only later that summer that a change of attitude could be discerned. In its first editorial to mention the Knights of Labor, the *Monetary Times* commented on the consolidation of "trade societies" and how this had led to longer strikes during the past spring. Because markets must always be the ultimate determinant of wage levels, this was ultimately disadvantageous to the workers. The editorial writers opined that unions' "power for mischief is at least as great as that for good" and criticized speeches made at a recent labor demonstration in Toronto that called for working-class representation in the legislature.³⁰

There were an unprecedented number of strikes in 1883.³¹ Most strikes were small local affairs. One notable exception was the telegraphers' strike. Under the auspices of the Knights of Labor, the telegraphers had succeeded in organizing a substantial portion of the telegraph operators in both the United States and Canada. When the telegraph companies on both sides of the border refused the unions' demands, a pre-arranged signal to strike went out across the lines on July 16. Although ultimately unsuccessful, the strike brought the Knights of Labor to prominence in Canada.³² It also raised the level of anxiety about trade unions.

27. *Ibid.*, May 2, 1882, p. 8, cols. 2-3.

28. *Globe*, May 9, 1882, p. 8, col. 1.

29. *Monetary Times*, April 17, 1882, p. 1235; *ibid.*, April 21, 1882, pp. 1293-95; *ibid.*, May 5, 1882, p. 1360.

30. *Ibid.*, August 11, 1882, p. 151.

31. Indeed, there were as many strikes in 1883 as there were in 1886, the year most closely associated with labor's uprising in this decade. See Palmer, "Labour Protest."

32. For a detailed discussion of the strike, see Eugene Forsey, "The Telegraphers' Strike of 1883," in *Transactions of the Royal Society of Canada*, ser. 4, 9 (1971): 245. Also see Gregory S. Kealey, *Toronto Workers' Respond to Industrial Capitalism 1867-1892* (Toronto, 1980), 177; and Gerald Grob, *Workers and Utopia* (Chicago, 1969), 61-63.

The *Monetary Times* saw the Knights as “the hidden hand” behind this and other recent strikes. Its earlier fear about the effect of a consolidation of unions was now realized. “The motive for the surrender of autonomy by each separate branch was to gain the power of combined numbers to enforce any demands it might have to make. It was thought that the common purse would be strong enough to enable strikers to hold out longer than they could if each labor section were left to its own unaided efforts. In this belief there was a certain amount of truth.” Not only were the Knights potentially powerful, but they were “going to make war on capital, in the legislative arena, as well as in Trades’ Union rooms.” Fortunately, the Knights were not omnipotent and other groups of workers had refused to obey their orders. “The natural laws of supply and demand” remained triumphant.³³

The telegraphers’ strike also resulted in the publication of an article in the *Canadian Law Times*, a professional journal, on the law of strikes. The author, William Seton Gordon, could not resist the opportunity to express his hostility toward trade unions. The operators were “obstructing for their own purposes a most important channel of business communication, and subjecting the citizens of this country and the United States to the inconvenience and loss entailed by a general strike.” Their effort was futile and, indeed, harmful to themselves. Much like the *Monetary Times*, Gordon firmly believed in liberal economic orthodoxy. “[C]ompetition alone, must, in the end, be permitted to regulate the amount of compensation” and “[t]o annul permanently the effect of an economic law as infallible in its operation as any physical law, may well be deemed a hopeless undertaking.”³⁴

Sandwiched in between these comments was a discussion of the legal liability of telegraph companies to their customers as common carriers and the legal regulation of strikes under common law and statute. Gordon noted that injunctions could be obtained against unions and cited *Springhead Spinning* as a precedent. This was significant because the case had been virtually ignored or forgotten. For example, contem-

33. *Monetary Times*, August 17, 1883, p. 179. See also *Canadian Manufacturer*, August 24, 1883, pp. 607–8, where the Knights are referred to as “socialist and revolutionary” and a “dangerous and most unsatisfactory organization.”

34. William Seton Gordon, “Strikes and Strikers in Their Legal Aspect,” *Canadian Law Times* 3 (1883). Gordon was born in New York and received a B.A. from Columbia University before coming to Canada. He later returned to New York where he continued to practice law. Henry James Morgan, ed., *Canadian Men and Women of the Time*, 2d ed. (Toronto, 1912), 459.

porary English texts on injunctions did not even suggest that strikes or strike activity could be enjoined.³⁵

Plasterers had a long history of union organization both in England and Toronto. Toronto plasterers participated in the first union formed in the city in 1831 but, as with most local unions, their fortunes rose and fell with the economy.³⁶ With the upswing in the economy in the early 1880s, the Operative Plasterers' Association (OPA) re-established a strong presence in the city, as did other building trades' unions. Their employers, typically small contractors in competitive markets, also formed associations.³⁷

In 1883 the OPA had an agreement with the organization of their employers, the Master Plasterers' Association (MPA), which provided that union members were to be paid \$2.50 a day. The union itself had rules restricting admission to qualified journeymen. The MPA became dissatisfied with this arrangement because, in its view, not all members of the union could perform finer work. They wanted two classifications to be created with different wage scales for each. First-class workers would be paid \$2.50 while less skilled workers would be paid \$1.50. Difficulties came to a head in October 1883.

D. Ward was an MPA member who employed five union men, including Higgins. After two or three days' work, Higgins was discharged for incompetence in the performance of fine work and paid at the \$1.50 rate for the time that he had worked. The union ordered the rest of the men off the job until Ward agreed to pay the union rate of \$2.50. On October 11, the MPA met and voted to blacklist the four men who

35. *Springhead* was not cited at all in William Kerr, *A Treatise on the Law and Practice of Injunctions*, 2d ed. (London, 1878). The first mention of an injunction against a union appeared in the third edition (London, 1888), 564–65 in relation to actions brought by members. It was only in the fourth edition (London, 1903) that the heading "trade union" appeared in the index and a new section was added to deal with injunctions to enjoin nuisances connected to trade disputes (241–44). In William Joyce, *The Law and Practice of Injunctions in Equity* (London, 1872), *Springhead* was cited in a section on injunctions in relation to criminal activity. There was no direct discussion of injunctions against unions in any context.

36. In England, local societies came together to create the National Association of Operative Plasterers in England in 1860. See W. Hamish Fraser, *Trade Unions and Society* (London, 1974), 19. An unsuccessful attempt was made to establish a branch of the National Association in Halifax in 1867. In Toronto, they were involved in the United Amicable Trade and Benefit Society of Journeymen Bricklayers, Plasterers, and Masons. Eugene Forsey, *Trade Unions in Canada 1812–1902* (Toronto, 1982), 19, 57, 85, 93–94.

37. According to the *Monetary Times*, April 21, 1882, p. 1294, "The competition between employers to get work is much greater than the competition to get workers."

had walked off Ward's job until a suitable apology was received. They also agreed that any member of the MPA who violated the blacklist would be required to pay a twenty-five dollar fine to the association. The resolution was communicated to the OPA the following day. On October 15, the OPA met and informed the MPA that, unless its resolution was withdrawn by 10 pm on October 17, the OPA would strike all the shops of MPA members. No response was received and fifty-three OPA members struck the MPA.³⁸

The OPA's strike committee set up watches at railway stations and at their employers' shops to guard against the MPA bringing in outside help. It also sought and obtained financial assistance from other local unions and from the Toronto Trades and Labour Council (TTL), which also unsuccessfully attempted to persuade the MPA to accept arbitration.³⁹ The MPA also drew on broader networks of employer solidarity to prevent OPA members from getting work in other building trades or from getting contracts directly from contractors.⁴⁰

The strike began to heat up in its second week when the MPA attempted to import scab labor. The union was mostly successful in defeating these efforts by following MPA recruiters, intercepting the men they hired and convincing or bribing them not to come.⁴¹ On November 7, two members of the MPA, Hynes and Lockwood, hired a plasterer, Mr. Moriarity, and succeeded in getting him to Toronto. The strike committee learned of his presence and sent a delegation, including Jacob Fisher, the OPA's president, to speak to him at his hotel. In their affidavits, Hynes and Lockwood alleged that the union men intimidated Moriarity with threats of violence and forcibly took possession of his tools.⁴²

38. The account is derived from Hynes et al. v. Fisher et al. (1883), 4 O.R. 60; *Globe*, October 18, 1883, p. 6, col. 1; *Mail*, October 18, 1883, p. 8, col. 4.

39. *Globe*, October 19, 1883, p. 6, col. 3; *ibid.*, October 20, 1883, p. 2, col. 4; *ibid.*, October 23, 1883, p. 6, col. 5; *ibid.*, October 24, 1883, p. 2, col. 4; *ibid.*, October 24, 1883, p. 6, col. 1; *ibid.*, October 25, 1883, p. 6, col. 1; *ibid.*, October 26, 1883, p. 2, col. 3; *ibid.*, November 3, 1883, p. 3, cols. 1-2; TTL, *Minutes*, October 19 and November 2, 1883.

40. *Globe*, October 22, 1883, p. 8, col. 4; *ibid.*, October 23, 1883, p. 6, col. 5; *ibid.*, October 26, 1883, p. 2, col. 3.

41. *Ibid.*, October 29, 1883, p. 2, cols. 1-2 and October 30, p. 6, col. 1 (two plasterers from Quebec); *ibid.*, November 1, 1883, p. 6, col. 2 and November 2, 1883, p. 6, col. 4 (three plasterers from Cobourg and Walkerton); *ibid.*, November 6, 1883, p. 6, col. 4 and November 7, 1883, p. 7, cols. 1-2 (plasterer from Guelph); *ibid.*, November 9, 1883, p. 6, col. 4; *Mail*, November 6, 1883, p. 8, col. 4 (plasterer from Galt); *ibid.*, November 7, 1883, p. 8, col. 5 (unsuccessful attempt to intercept two plasterers from Lindsay).

42. *Globe*, November 8, 1883, p. 6, col. 3; Hynes v. Fisher, 61-62.

On November 6, the *Globe* and the *Mail* printed a letter from Hynes defending the position of the MPA. Hynes concluded by threatening legal action. "There are numbers of men throughout the country who want work, and we have it to do, and shall insist upon the strong arm of the law in permitting them to work." Mr. C. Chase, chair of OPA's strike committee, responded. He castigated the MPA for seeking assistance from other employers in the building trades "to crush the manhood" of the "poor plasterers" and challenged the MPA to take legal action. "If we have violated the laws of the land the bosses can take proceedings with pleasure. I am sure they won't insult us by not doing so. . . . He calls on the strong arm of the law for protection. Mr. Hynes can have all the law. We simply want justice."⁴³

On November 9, the MPA instituted an action against the plasterers for damages of one thousand dollars and sought an ex parte injunction. Their lawyer was one of the Blakes, both of whom were leading equity lawyers of the period. Chief Justice Wilson granted the injunction the following day, good until November 13. It restrained the named defendants and their agents from hindering or molesting the plaintiffs as they attempted to hire workers and from intimidating, hindering, or molesting those who were working or who might be willing to work for the plaintiffs.⁴⁴

The *Palladium of Labor* (a newspaper closely associated with the Knights of Labor) perhaps on the basis of the MPA's threat to bring an action, and always ready to get in a jab at the legal profession, published a fictional account of a master visiting a lawyer.⁴⁵ The scene opens with the lawyer, Mr. Briefless, and the client commiserating over the insolence of the lower classes and, in particular, over the refusal of a union to allow the master to pay different wages to good and bad workers. The client complains of this gross violation of the liberty of the subject to engage a man at any price for which he is willing to work. "These unions, sir, are the curse of the country. They should be put down by law." The lawyer agrees but reminds his client that "the scoundrels have votes and are so unprincipled that they might vote against their own party to punish the government that did it."⁴⁶ Their discussion turns

43. Ibid., November 6, 1883, p. 6, cols. 3-4; *ibid.*, November 8, 1883, p. 6, col. 3; *Mail*, November 6, 1883, p. 8, col. 4; *ibid.*, November 7, 1883, p. 8, col. 5.

44. Hynes v. Fisher, 61-63; *Globe*, November 10, 1883, p. 14, col. 1.

45. *Palladium of Labor*, November 10, 1883, p. 2, cols. 4-5.

46. Presumably, this comment refers to the success of Toronto workers in defeating J. J. Withrow, a Liberal candidate in the 1883 elections for Toronto mayor. Withrow was a master carpenter whose activities during the 1882 strike had antagonized labor. Kealey, *Toronto Workers*, 224-25; *Globe*, January 1, 1883, p. 6, cols. 1-3. On the same

to the cause of the visit. The client would like the lawyer to take a case and offers to pay costs plus a ten-dollar fee. The lawyer rejects the offer claiming that it would be unprofessional not to charge the amount fixed by the legal tariff. The client responds by unfavorably comparing Mr. Briefless with more senior members of the bar such as Blake or Dalton McCarthy. "But you see you are only a new beginner in the business and you ought to work cheap at first. Your time is not as valuable as that of a leading professional man." The client says he will take his case to another young lawyer, Mr. Hardup, who he is sure will accept it for ten dollars. The lawyer becomes indignant and threatens that he will have Hardup disbarred by the Law Society for misconduct if he takes the case for less than the tariff. The client is amazed that Mr. Briefless, who just a moment ago had said that a man had a right to sell his labor for whatever he could get for it, is now prepared to interfere with the liberty of the subject. "For all I can see, your Law Society is no better than a trade union." The lawyer denies the analogy, citing the difference between a professional gentleman and a mechanic. The client walks out in disgust, expressing the hope that, if trade unions are ever abolished, they begin with the Law Society.

The OPA seems to have viewed the injunction with as little regard as the *Palladium of Labor* viewed the legal profession and its monopoly. Although they retained a senior Toronto lawyer, B. B. Osler, to represent them, picketers continued as they had before the injunction. For example, on November 12, another member of the MPA proceeded to Guelph to hire two plasterers. One man agreed to return with him. On the return trip, two members of the OPA, Alexander McCord and David Jenkins, boarded the train at Carleton station. By the time they reached Union station, the worker had agreed to return to Guelph immediately.⁴⁷

The injunction was continued on November 13, but proceedings were adjourned to permit cross-examination on the affidavits.⁴⁸ The MPA was back in court on November 16, seeking to have McCord and Jenkins jailed for contempt of court for their actions on November 12. Wilson agreed to hear the motion to commit on November 20, although this

page that this fictional account appeared, an editorial appeared calling on workers to blacklist the bosses of the plastering trade and to use the ballot to punish them, as they had done to Withrow. *Palladium of Labor*, November 10, 1883, p. 2, col. 2.

47. *Hynes v. Fisher (McCord and Jenkins Case)* (1883), 4 O.R. 78.

48. There was also a report that the union was going to bring a conspiracy action against the MPA. *Mail*, November 13, 1883, p. 8, col. 2 and November 14, 1883, p. 8, col. 2. There is no record that such an action was commenced.

was later put over in the hope that an amicable settlement could be arranged.⁴⁹

This was not to be the case. Despite the flurry of legal activity the conflict only intensified. On November 19, a skirmish between strikers and scabs resulted in the police being called.⁵⁰ There was another confrontation the following day and one of the scabs, James Jenkins, swore out warrants against two of the striking plasterers, Alexander McCord and Frederick Leach, who were arrested and charged with intimidation. Bail was raised and they were released the same day.⁵¹

Further appearances in Magistrate Denison's police court and before Justice Wilson followed. Wilson heard argument on the motion for contempt and on the injunction. He reserved judgment, but the injunction remained in force.⁵² In police court, matters became more complicated. One of the complainants, James Jenkins, identified two other men present in the courtroom who, he alleged, also participated in the intimidation. The two, Robert Tyndall and Charles Turner, were promptly taken into custody and required to plead to the same charges lodged against McCord and Leach. Tyndall and Turner elected to be tried summarily, but McCord and Leach chose trial by jury.⁵³ The effect of this was that accused were to be treated as if they were charged with an indictable offense. The magistrate ruled that all four would have to be dealt with in this way and heard testimony to determine whether there was sufficient evidence to commit the accused for trial. In the result, Tyndall and Turner were discharged while McCord and Leach were committed to trial at the next Quarter Sessions of the Peace.⁵⁴

49. *Hynes v. Fisher* (McCord and Jenkins); *Mail*, November 17, 1883, p. 12, col. 2; *ibid.*, November 21, 1883, p. 8, col. 1; *Globe*, November 21, 1883, p. 6, col. 2.

50. *Mail*, November 20, 1883, p. 8, col. 2. Also see *Globe*, November 20, 1883, p. 6, col. 2 for an account of a successful interception of a worker from Stratford brought in by Mr. Hynes.

51. The *Mail's* report of this incident concluded with the observation that, "This hostile action on the part of the masters will no doubt create a bitter feeling between the contesting parties and make it all the harder to mend matters when the time comes for a settlement," November 22, 1883, p. 8, col. 2. Earlier, the OPA sought and obtained the support of the TTLC. TTLC, *Minutes*, November 16, 1883; *Globe*, November 17, 1883, p. 14, col. 5.

52. *Globe*, November 23, 1883, p. 6, col. 6.

53. One of the objections of trade unionists to the CLAA passed in 1872 was that it exposed workers to trial by police court magistrates who were perceived to be anti-union. The 1876 reforms gave workers the right to elect trial by jury in a higher court. S.C. 1876, c. 37, s. 3.

54. *Mail*, November 24, 1883, p. 12, cols. 2-3. The information and notes of the testimony before the police magistrate can be found in Criminal Assize Indictments,

Still, the union continued its efforts to keep replacements from taking their jobs. A worker brought in by Mr. Ward, the contractor whose actions had triggered the strike was "persuaded" to return to Guelph and other incoming strikebreakers were intercepted by the strikers.⁵⁵

Wilson delivered his decision in both the injunction and contempt matters on December 4. He found that the union members had "by threats, intimidation or other unlawful means, compelled or induced" Moriarity to give up his contract of service. In reaching this conclusion, Wilson relied on his understanding that in such disputes, it was "the object of each party to compel the other to yield" and that for the union to succeed, it must prevent the masters from hiring replacement workers. "This is the line of warfare so plainly marked out, and so obviously the most effective that can be adopted that it is idle to say it is not followed, nor intended to be followed by the workmen in such a contest."⁵⁶ This finding, however, did not conclude the matter. Jurisdiction to grant an injunction depended on the existence of an interest which the court would protect against illegal conduct. The most traditional view was that only property interests warranted such protection. Wilson rejected this approach. He surveyed recent English case law, including *Springhead* and *Knott*, and concluded that a different position was beginning to emerge. "From these cases the conclusion is . . . that any act done or threatened to be done, injurious to *trade or* property will be restrained."⁵⁷ In any event, Wilson was prepared to find that, "the business of a tradesman must be property."⁵⁸

Once he determined that the court had jurisdiction, Wilson considered whether the court should exercise its discretion to grant the relief sought. If the plaintiff did not come to the court with "clean hands," the court could refuse to provide a remedy. Thus, his focus shifted onto the conduct of the masters. According to Wilson, the men who had refused to continue to work for Ward had "a perfect right to do so."⁵⁹ The masters had acted unjustly and indefensibly in blacklisting the men. "The masters made that which was a workshop squabble a matter of trade war, and the subject one of class strife. They aggravated the difficulty by arraying masters against men, with all the accompanying

York County, Case Files, Ontario Archives (OA), RG 22, Series 392, Box 228, R. v. Leach and McCord.

55. *Globe*, November 23, 1883, p. 6, col. 6; *ibid.*, November 27, 1883, p. 6, col. 2; *ibid.*, November 29, 1883, p. 6, col. 1; *Mail*, November 30, 1883, p. 8, col. 2.

56. *Hynes v. Fisher*, 70.

57. *Ibid.*, 73 (my emphasis).

58. *Ibid.*, 74.

59. *Ibid.*, 74.

bitterness, resentment, ill feeling, and determination for victory engendered in such a contest; and they provoked the strike which followed their ill-judged act." Although the masters had not used violence, they had, in Wilson's view, "used a very effectual means, and quite sufficient power to answer their purpose." Moreover, he equated the conduct of the masters with that of the union. "To say that a fine is not a pressure in the nature of intimidation and force as powerful at times as physical force threatened or actual, is to disregard the ordinary experiences of life."⁶⁰ In the result, Wilson blamed both parties, refused to continue the injunction, and urged them to settle their differences.

On the contempt motion, Wilson found that McCord and Jenkins had knowledge of the injunction and, therefore, were bound by its terms. He also found that they hindered and molested Pickard, a member of the MPA, to prevent him from hiring replacement workers. This was done as part of a scheme devised and systematically followed by the members of the OPA. Yet, despite these findings, Wilson dismissed the motion to commit on a technicality. The injunction had been sought and obtained by the plaintiffs in their personal capacity, not as representatives of all members of the MPA. Pickard was not a named plaintiff in the action and it could not be maintained that McCord and Jenkins had "done any act against the plaintiffs personally by their interference with Pickard."⁶¹

This left the matter of the criminal charges against Leach and McCord. The York General Quarter Sessions of the Peace convened in early December. Leach and McCord were indicted on four counts under the 1876 statute, including using violence, intimidation by using threats of violence, persistently following, and besetting the home and place of work of the replacement workers. In total, nine witnesses were called and the trial lasted for more than a day. After four hours of deliberation, the jury returned without a unanimous verdict. Ten favored conviction while two favored acquittal. As a result, the accused were released on bail and a new trial was scheduled for the next criminal assizes.⁶²

The strike dragged on and employers continued to bring men in while the union attempted to intercept them. Throughout the strike, the plasterers received substantial financial support from other unions, perhaps exceeding one thousand dollars, including two hundred dollars from the TTLC to help pay legal expenses. After the legal actions were

60. *Ibid.*, 75–76.

61. *Hynes v. Fisher (McCord and Jenkins)*, 93.

62. *Mail*, December 8, 1883, p. 12, col. 6; *ibid.*, December 11, p. 8, col. 2; December 12, p. 8, col. 1; *R. v. Leach and McCord*.

disposed, the TTLC also appointed a committee to approach the MPA to see if a settlement could be arranged.⁶³ In mid-December, negotiations between the OPA and the MPA resumed but no agreement was reached by the end of the year.⁶⁴

Leach and McCord were tried at the Criminal Assizes on January 26, 1884. Aemelius Irving, a prominent Toronto lawyer, appeared for the Crown. Again, numerous witnesses were called by both parties, but this time the jury found Leach guilty on all counts except using violence and McCord guilty of persistently following and watching and besetting. They were fined fifty dollars each by Judge Rose. The fines were paid immediately.⁶⁵ This brought to an end all the legal proceedings,⁶⁶ but not the strike. It was not settled until March, 1884, on undisclosed terms.⁶⁷

From a technical standpoint, the MPA's legal strategy succeeded in almost all respects. They obtained an ex parte injunction from the courts within a day of their application, solely on the basis of their affidavits.⁶⁸ From that point on, delay worked in their favor as the union was under a judicial order not to engage in certain activities. It took nearly a month to get the injunction lifted. As well, Wilson's judgment made interference with the right to trade enjoinable, because it was an independently protected legal interest, a new species of property, or both. Legal recognition of a right to trade was an important victory for employers because it provided justification for imposing a broad range of correlative duties on workers that went well beyond those imposed by statute. Finally, the case demonstrated that an injunction could be

63. TTLC, *Minutes*, December 7, 1883; *Globe*, December 10, 1883, p. 6, cols. 1–2. There was some resistance to making this grant and, as an alternative, it was suggested that the TTLC should appoint a committee to solicit unions in the city to pay the plasterers' expenses.

64. *Globe*, December 17, 1883, p. 6, col. 1; *ibid.*, December 19, 1883, p. 6, col. 2; *ibid.*, December 20, 1883, p. 6, col. 1; *ibid.*, December 27, 1883, p. 6, col. 1; TTLC, *Minutes*, December 21, 1883.

65. *Mail*, January 28, 1883, p. 5, col. 5; *ibid.*, January 29, p. 8, col. 1; Criminal Assize Minutes, York Assizes, Winter 1884, OA, RG 22, (unprocessed records), pp. 347, 357–58, 360.

66. The MPA never pursued the damage action, suggesting that its real object was to obtain the injunction.

67. TTLC, *Minutes*, March 21, 1884.

68. Fusion of law and equity had been achieved in Ontario by the *Judicature Act*, S.O. 1881, c. 5. This overcame many of the remedial problems caused by divided jurisdiction. On these developments, see Paul Romney, *Mr. Attorney* (Toronto, 1986), 286–90; Margaret A. Banks, "The Evolution of the Ontario Courts 1788–1981" in *Essays in the History of Canadian Law*, vol. 2, ed. David Flaherty (Toronto, 1983), 518–25.

drawn in terms that would make it binding on all members of a union who had knowledge of it, and knowledge was likely to be inferred from the circumstances. In addition, the action could be brought in a representative form that would protect all members of an employers' association, even though the court ruled that, in this case, the plaintiffs had failed to do so.

Clearly, then, the judgment put powerful legal tools into the hands of employers, even while the judge chastised this particular group of employers for the tactics they adopted. The importance of this was recognized by the *Canadian Manufacturer*, a journal associated with the Canadian Manufacturers' Association, in an editorial on the case which concluded: "This is by far the most important legal decision with regard to strikes yet given in Canada, and will no doubt be pushed to its legitimate conclusion. It may yet revolutionize the whole system of strikes and intimidation in vogue."⁶⁹

Yet, ultimately, the MPA's legal strategy failed and the *Canadian Manufacturer's* hopeful prediction did not come true. Not only did the MPA lose in court, but, even while the injunction was in force, it did not alter the union's tactics. Incoming recruits continued to be intercepted and scabs continued to be pressured. Moreover, the police were not called upon to enforce vigorously the terms of the injunction. Even the motion for contempt and the criminal charge did not break the union's will to resist.

Canadian employers did not flock to the courts to obtain civil injunctions against trade unions until after 1900.⁷⁰ In comparison, American employers during this period became active users of the injunction. There, the first civil injunctions were issued against striking railway workers in 1877 and were used increasingly by employers in the following decades.⁷¹ Why Canadian employers did not follow the example of their American counterparts is a question to which we will return in the concluding discussion.

Law and the "Great Uprising" in Toronto, 1886

Eighteen-eighty-six was a memorable year in North American labor history. In the United States, labor strife reached new heights, culmi-

69. *Canadian Manufacturer*, December 14, 1883, p. 918.

70. The only other nineteenth-century injunction identified to date was obtained by the publisher of the *Toronto World* in 1888 to restrain publication of a boycott notice by the Toronto Typographical Union, No. 91. It attracted almost no attention and, like the *Hynes* case, was not emulated by other employers facing similar difficulties. See Table 1.

71. See Forbath, *Law and the Shaping*, 66-79; 193-98.

nating in the Haymarket riot in which eleven people died and nearly one hundred others were injured. In Ontario, not only were there a record number of strikes, but they were more often conducted by semi-skilled workers against larger employers. Unable to depend on a partial monopoly of skill and lacking a tradition of craft solidarity, these workers adopted different tactics, including mass picketing, to discourage replacements. Employers and state officials committed to maintaining "public order" and the right to do business were particularly concerned by the involvement of large working-class crowds.⁷²

Earlier confrontations between unskilled and the authorities presaged the events of 1886. For example, when the Grand Trunk Railway's (GTR) freight handlers in Toronto struck in the spring of 1882, a large police contingent, including the GTR's own security force, was dispatched to protect replacement workers. The TTLC censured the police authorities for allowing the force to be used as "an engine of intimidation against the men on strike."⁷³

Two disputes in Toronto in 1886 exemplified this newer context of industrial conflict. The first was the strike against Toronto's largest factory, the Massey agricultural implements works. On February 8, between 250–400 of Massey's 700 employees, most of whom were laborers, walked out in protest after five leaders of the factory's Knights of Labor local were discharged. The striking workers were greeted by a large contingent of city police dispatched to protect the factory. The next day, a procession of workers protested this display of force. The leaders of the Knights guaranteed there would be no violence or damage to property and Mayor Howland, who recently had been elected with the Knights' support, promised to intervene. The following day the force was removed. The Police Commissioners met that afternoon and decided that they could not accept a check for one hundred dollars sent by the Massey Company to the Police Benefit Fund "in consideration of the services rendered by the Department at the strike." The commissioners thanked Massey for its kind intentions but stated that to accept the donation "might create a precedent that was not in accord with the rules and regulations of the Force."⁷⁴

The peaceful tactics of the strikers helped sustain community support

72. Jeremy Brecher, *Strike!* (Boston, 1972), 31–50; Paul Avrich, *The Haymarket Tragedy* (Princeton, 1984) (United States); Palmer, "Labour Protest," 73–75 (Ontario).

73. *Globe*, April 8, 1882, p. 10, col. 3. For accounts of the event, see *Mail*, April 6, 1882, p. 8, cols. 4–5; *ibid.*, April 7, 1882, p. 8, col. 4; *ibid.*, April 8, 1882, p. 2, col. 4; *ibid.*, April 10, 1882, p. 2, cols. 1–2; *ibid.*, April 12, 1882, p. 8, col. 3.

74. Toronto Board of Police Commissioners, *Minutes*, February 10, 1886. For a general account of the strike, see Kealey, *Toronto Workers*, 196–99.

for their cause. One newspaper wrote, "The strikers, so long as they conduct themselves in a peaceable and orderly manner, as we have no doubt they will, are entitled to the sympathy and support of the community in the position they have taken."⁷⁵ When the skilled molders and tool-room machinists joined the strike, Massey acceded to the workers' demands.

The second dispute involved the Toronto Street Railway Company (TSR). The strike has been described in detail elsewhere and so the focus here is on the role of the police and the courts.⁷⁶ The dispute was caused by the TSR's requirement that all employees sign the "ironclad," a contract that prohibited union membership. When the TSR heard that some of its men joined the Knights, it moved to fire those involved. Cabmen arriving at work on Wednesday morning, March 10, 1886, found a cluster of police gathered outside and the assignment boards blank. They were called individually to take out carts, but most refused. Later that morning as the stable hands arrived, the cabmen attempted to persuade them to join the strike. Mathew Maloney, one of the cabmen actively engaged in this action, was identified as a ringleader by Edward Franklin, the superintendent of the TSR. At his suggestion, Major Frank Draper, the Chief of Police who was present at the scene, sent one of his officers to arrest Maloney.⁷⁷ Later that morning, nearly three hundred striking workers marched to the Knights of Labor headquarters and remained there most of the day, taking little or no part in the ensuing actions on the street.

A large crowd, numbering in the thousands, gathered in support of the strikers. The few cars that were sent out did not make much progress. Teamsters blocked their way and the non-union drivers were taunted with shouts of "scab" and "rat." In one case, people in the crowd unhitched the horses and led them back to the stables. In another, a car that had been mounted by two police officers was seized, pushed by the crowd, and later abandoned. No further arrests, however, were made that day. By the late afternoon, the TSR gave up its efforts to maintain any service.

The following day, the TSR renewed its efforts to dispatch whatever cars it could with the workers who remained behind and the newly

75. *News*, February 9, 1886, p. 2, col. 2.

76. See Desmond Morton, *Mayor Howland* (Toronto, 1973), 44-56; Kealey, *Toronto Workers*, 200-209; David Frank, "Trouble in Toronto: The Street Railway Lockout and Strike, 1886" (unpublished).

77. The account of the arrest is derived from the testimony of Draper and Franklin given before Police Magistrate Denison on March 19 and 22, 1883. York Criminal Assize Files, OA, RG 22, Series 392, Box 237, R. v. Maloney.

recruited ones. Again, the way was blocked by large crowds and coal wagons placed on the tracks. The striking TSR workers, however, continued to maintain a low profile, for which they were complimented. The mood of the crowd was less jovial than it had been the day before. Some people threw frozen mud, ice and stones at the cars and the police. The police response was moderate. Two young boys who had been employed as stable hands, John Landers, aged 13, and James Ryan, aged 12, were arrested for pelting the crowd and police, but little effort was made to beat back the crowds.⁷⁸ Again, the TSR abandoned its effort to maintain service.

In the meantime, both the union and the employer were complaining about the local authorities' handling of the strike. A deputation of Knights met with Chief Draper on Wednesday and with Mayor Howland on Thursday. They objected to the assignment of additional officers to protect the company's property and to the arrest of Maloney. They also demanded that the city take action against the TSR because it was in breach of its duty to provide service. Draper promised to act as fairly as possible between the parties⁷⁹ while Howland expressed sympathy with the men's cause, but advised them to behave in an orderly manner. "Let there be no disturbance or injury of property," he warned. "I cannot stand for one moment between any of you and the law."⁸⁰ Senator Frank Smith, the owner of the TSR, complained about the lack of police protection and threatened to bring an action against the city for damages. Howland responded by threatening to hold the TSR liable for not fulfilling its obligations to the city under its charter and for any injuries arising out of the disturbance. He blamed Smith for the trouble because of the TSR's interference with the legal liberty of their employees to join a trade union.⁸¹

Sympathy for the cause of the union did not, however, extend to the street disturbances. On Thursday, Mathew Maloney was arraigned before Denison, charged with conducting himself in a disorderly manner. A motion by N. G. Bigelow, Maloney's lawyer, to have the charges dismissed on a technicality was refused because, in Denison's view, if the accused had been disorderly, he should be punished. Bigelow's objections and legal arguments mattered little to Denison, an arrogant man who saw it as his duty and right to administer substantive justice according to his own views and intuitions, rather than on the basis of

78. *News*, March 11, 1886, p. 4, col. 2; *World*, March 12, 1886, p. 5, col. 5.

79. *Mail*, March 11, 1886, p. 2, col. 1.

80. *World*, March 11, 1886, p. 1, col. 1; *News*, March 11, 1886, p. 4, cols. 2-4.

81. *World*, March 12, 1886, p. 5, col. 4.

law and evidence.⁸² Before adjourning the case so that prosecution witnesses could be secured, Denison made it clear that “it is necessary that the police should disperse the mobs on the streets in order that citizens may be able to go peaceably to their occupations.”⁸³

At the meeting of the police commissioners on Thursday afternoon, Mr. Shipley, solicitor for the TSR, complained about the lack of police protection. A unanimous board ordered the police chief to dispatch such force as might be necessary the following morning to enable operations to resume.⁸⁴ Following the meeting, Senator Smith told reporters that the Police Commission actually had taken control of the operation of the railway until the difficulties were over.⁸⁵ The *World* strongly supported the commissioners’ decision. “The maintenance of law and order is a far more serious matter to the city of Toronto than a mere dispute between a concern and its men. If a crowd can rule the street whenever it sees fit, where is it all going to end?”⁸⁶

The following morning squads of police lined the streets. When the crowds would not yield, the officers charged with batons swinging. A recently created unit of mounted officers assisted.⁸⁷ Confrontations between police and the crowd continued throughout the morning, resulting in at least nine injuries to the police and many more to people in the crowd. At least fifteen people were arrested and charged with various offenses including disorderly conduct, obstruction, and assault. Of those arrested, only one, John Oakes, was a street car employee.

The Police Commission met at 1:30 that afternoon to consider the situation. Because the officers were exhausted it was decided to withdraw them from the streets at 3:00, but to offer protection to the TSR the next morning. A delegation of aldermen appeared to complain about

82. Colonel George T. Denison, *Recollections of a Police Magistrate* (Toronto, 1920), 9–13. Denison was also a racist. See chapter 8, entitled “The Negro Element.” Also see Gene Howard Homel, “Denison’s Law: Criminal Justice and the Police Court in Toronto, 1877–1921,” *Ontario History* 73 (1981): 176; David Gagan, *The Denison Family of Toronto* (Toronto, 1972), 44–92. Denison’s informal approach was not uncommon among the lower rungs of the judiciary and reflected an older model of urban justice in which maintaining public order took priority over the determination of individual rights. Philip Girard, “The Rise and Fall of Urban Justice in Halifax, 1815–1886,” *Nova Scotia Historical Review* 8(2) (1988).

83. *News*, March 11, 1886, p. 4, col. 4.

84. Toronto Board of Police Commissioners, *Minutes*, March 11, 1886.

85. *Globe*, March 12, 1886, p. 8, col. 3.

86. *World*, March 12, 1886, p. 2, col. 1.

87. It is unclear what role, if any, Denison played in the unit’s creation, but it is noteworthy that he was an army officer and the author of a book on cavalry tactics. See Gagan, *Denison Family*, 45–52.

the assertion made by Smith that the board had taken over the operations of the railway. The commissioners firmly denied they had agreed to such an arrangement and Judge McDougall, the chair of the board, drafted an angry letter to Smith. "I must disclaim any intention on the part of the Board to assume any greater responsibility or control over your affairs than over the affairs of any other Citizen who complains of being interrupted in the enjoyment of his civil rights by force and violence. We will endeavour to protect your company and all other ratepayers who properly make claims upon the Police for protection."⁸⁸ The last item of business was the question of whether it was necessary to swear in one hundred special constables or call out the militia in aid of the civil power. On the basis of Police Chief Draper's assessment, the board decided not to take either of these measures, but indicated that it would not hesitate to do so if the circumstances required it. After the meeting adjourned, Mayor Howland issued a proclamation calling upon the citizens of Toronto to give free passage to the cars of the TSR and not to assemble or congregate in crowds in the streets on which the lines ran. The proclamation warned them that anyone caught interfering would be prosecuted according to the law.⁸⁹

That same afternoon, a number of aldermen arranged a settlement under which the TSR agreed to take back all the men. Although it appeared to some as if the TSR had unconditionally surrendered, the question of whether the workers would be allowed to join a union was not clearly resolved. This would soon lead to a second strike in May.

In the days that followed, Denison dealt harshly with the men who had been arrested. He found most guilty and imposed substantial fines, ranging from twenty to thirty dollars. His message was clear. "The peace of the city must be preserved at any cost. No organization would be allowed to establish mob law as long as there was an officer of the peace in the Dominion."⁹⁰ Mathew Maloney was singled out for special treatment. Initially charged with disorderly conduct, when Maloney was brought before Denison on the Monday after the strike was settled, the charge was changed to intimidation, an indictable offense. When Maloney's lawyer objected to the indictment because it failed to identify the persons who were the alleged targets of his misconduct, Denison

88. Toronto Board of Police Commissioners, *Minutes*, March 12, 1886.

89. *News*, March 13, 1886, p. 3, col. 4. Judge McDougall also informed the press that he was determined to demonstrate that mob rule would not be tolerated. *World*, March, 13, 1886, p. 1, col. 4.

90. *Mail*, March 15, 1886, p. 8, col. 2.

Figure 1. *Grip*, March 20, 1886, p. 9.

THE BATTLE ENDED.

THE GALLANT SENATOR CAPITULATES TO THE KNIGHTS OF LABOR.

granted another adjournment to permit an amendment.⁹¹ Evidence on the amended indictments was subsequently heard and Denison committed Maloney to trial. He was freed on one hundred dollars bail.⁹²

Denison's antipathy toward the strike, and especially the street actions in support of it, was shared by at least two Ontario Supreme Court judges. Chief Justice Cameron opened the Napanee assizes on Monday, March 15. In his address to the grand jury, Cameron turned his attention to the recent events in Toronto. He noted that the TSR had felt that it was in its interests not to hire anyone who was a member of a "trades union or labor organization which interferes with the individual liberty of men themselves." Perhaps the company exhibited a "want of discretion" in summarily dismissing the men who violated their agreement but, in Cameron's view, "they acted within the right that the law gave them: because, I presume, there is nothing clearer to the mind of any man of common sense than that every man . . . can make just such bargain as he pleases. . . ." While recognizing that workers could agree among themselves not to work except under certain conditions, Cameron regretted that, "unfortunately they do not stop there, and when they are exercising that undesirable right they generally go beyond that

91. *Globe*, March 16, 1886, p. 8, col. 4.

92. *R. v. Maloney*; *News*, March 22, 1886, p. 4, col. 2.

limit and interfere with and infringe upon the rights of others and they do wrong and overstep their privilege, and that is the danger there is to the community in these organizations." The grand jury, in its presentment, concurred with Cameron's view that "stringent legislation should be provided for the prevention of labor strikes and the injury to the public interests relating therefrom."⁹³ Cameron made similar remarks at the Frontenac assizes in Kingston the following Monday.⁹⁴

Justice Galt also commented publicly on the events in Toronto at the opening of the York assize at which Maloney's case was to be heard. Galt agreed that workers had the right to join trade unions for the purpose of agreeing on wages, but warned that "they must not attempt to force others into doing as they wish, nor must they use any obstruction or follow other workmen around for the purpose of intimidation. There were instances of this during the late car troubles, and it was a perfect disgrace to the city to see cars filled with policemen to enable the company to run their cars."⁹⁵ Despite these comments, the grand jury refused to indict, presumably because they did not think there was sufficient evidence to bring the case to trial.⁹⁶

A rather unusual debate over the propriety of these grand jury addresses ensued.⁹⁷ The *News* thought Cameron's address to the Napanee assize was "a little too much like making a stump speech."⁹⁸ Cameron took the unusual step of responding to the criticism in his opening address to the Kingston assizes the following week. He suggested that the *News* was "perhaps ignorant of the functions of a judge, and the subjects on which he had a right to express an opinion."⁹⁹ The *News* subsequently denied they were questioning his right to express himself "on any conceivable subject upon which he sees fit to dilate in his charges. . . ." However, when a judge "advances views which are biased or unsound, the press has the right of comment and criticism."¹⁰⁰ None of this deterred Cameron who continued to express his views to grand juries at various stops during the spring assizes.¹⁰¹

93. *World*, March 16, 1886, p. 1, col. 8. For a more abbreviated and slightly different account of Cameron's comments see *Napanee Standard*, March 19, 1886, p. 3, col. 3.

94. *Globe*, March 23, 1886, p. 2, col. 4.

95. *News*, April 21, 1886, p. 4, col. 4.

96. *R. v. Maloney*; *Globe*, April 22, 1886, p. 8, col. 1.

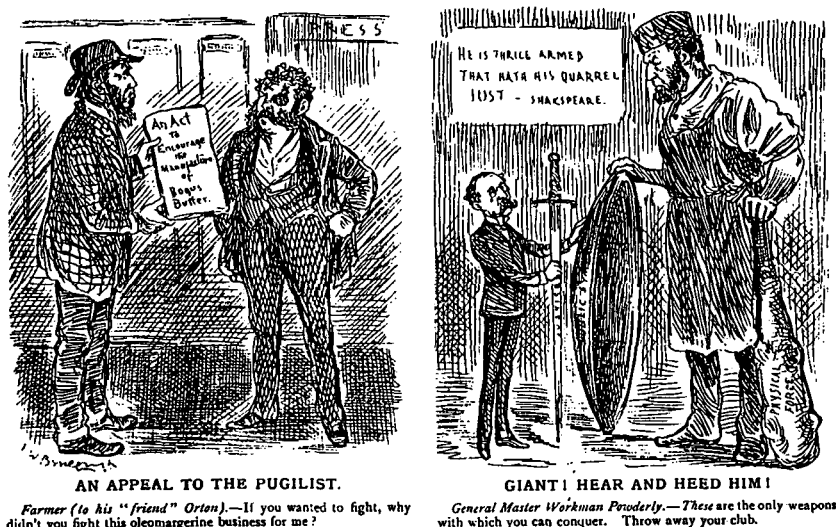
97. On the practice and content of grand jury addresses in Ontario from 1830-60, see Patrick Brode, "Grand Jury Addresses of the Early Canadian Judges in an Age of Reform," *Law Society Gazette* 23 (1989).

98. *News*, March 18, 1886, p. 2, col. 2.

99. As cited in *News*, March 25, 1886, p. 2, col. 1.

100. *Ibid.*

101. For example, James R. Brown, chair of the Legislative Committee of the Oshawa

Figure 2. *Grip*, April 24, 1886, p. 10.

The *Canadian Law Times* was more circumspect in its comments. Referring generally to grand jury addresses during the spring assizes, it noted that, "a great many subjects have been placed before [juries], upon which they have been asked their opinions—not a little, we fancy, to their astonishment. A jurymen might well be surprised to be asked by a Judge what he thought of the relations of capital and labour. . ."¹⁰² Editorial opinion, although by no means unanimous, was generally sympathetic to the strikers' cause but strongly against violence.¹⁰³ Even the *News*, which provided the most favorable coverage of the strike, consistently warned that violence and disorder would alienate public opinion.¹⁰⁴ Indeed, a cartoon (see figure 2) published by the *Grip* a

Trades and Labour Council—and future factory inspector—critically reported upon Cameron's charge to the grand jury at Whitby. See *News*, May 15, 1886, p. 6, col. 3.

102. *Canadian Law Times* 6 (1886): 284–85.

103. For example, see *Hamilton Spectator*, March 6, 1886, p. 2, col. 1; *ibid.*, March 12, 1886, p. 2, col. 1; *World*, March 12, 1886, p. 2, col. 1; *Monetary Times*, March 19, 1886, p. 1068. *Canadian Manufacturer*, March 19, 1886, p. 163, expressed particular foreboding about the involvement of the Knights because they were trying "to bring about a general combination of the trade. What it all is to end in no one can foresee."

104. "Nothing is won by violence; be good-natured and steady, and the victory is with those who have right on their side." *News*, March 12, 1886, cited in Frank, "Trouble," 35.

month after the events (and with an eye on events in the United States) perhaps best captured this sentiment.¹⁰⁵

Leaders of the strike were careful to distance themselves from the action on the streets and emphasized that it was not the strikers or the Knights of Labor who were directly responsible for the disorder. Yet, they objected to the strong police presence because of the implication that the strikers were likely to be violent and disorderly. The Knights lodged formal protests against the use of force on the last day of the strike, when the police waded into the crowds swinging their clubs and charging on horseback.¹⁰⁶ The two labor newspapers published at the time, both associated with the Knights of Labor, also expressed a different perspective than that of the mainstream media. The *Palladium of Labor* did not cover the strike itself, but Phillips Thompson, a lawyer turned journalist writing under the *nom de plume* Enjolras, wrote two columns in April in which he reflected upon the broader implications of these events.¹⁰⁷ In the first, Thompson addressed the question of responsibility for the disturbances and the reaction of the state.

Put the responsibility where it belongs. Whenever there is long continued and deep-seated injustice—wherever human rights are defied and trampled upon, there will be aroused a spirit of resistance which sometimes may overpass its legitimate bounds and find vent in actions which no reasonable or humane man can approve. . . . But we do say that however misled or inconsiderate or even criminal some actions done in the heat of the conflict between Labor and capitalism may be, the responsibility for those actions rests on the individuals, and the system which provoked them.

Thompson denounced “unjust judges, such as Cameron and Denison”

105. Earlier, *Grip*, April 3, 1886, p. 3, endorsed Powderly’s call to the Knights not to strike without proper authorization. Referring to his threat to resign unless the practice stopped, the *Grip* quipped, “If Powderly goes off, it will probably blow up the whole concern.”

106. The Police Board found no fault with the conduct of the men. Indeed, they authorized Chief Draper to grant members of the force two days leave each in recognition of their special service. The Board also endorsed Chief Draper’s tactics. Toronto Board of Police Commissioners, *Minutes*, March 16, 1886; *Globe*, March 18, 1886, p. 8, col. 1; TTLC, *Minutes*, March 19, 1886.

107. Thompson began his career as a police court reporter for the *Telegram* and worked as reporter for the *News* during the TSR strike. See Russell Hann, “Brainworkers and the Knights of Labor: E. E. Sheppard, Phillips Thompson, and the *Toronto News*, 1883–1887,” in *Essays in Canadian Working Class History*, ed. Gregory S. Kealey and Peter Warrian (Toronto, 1976), 35; Jay Atherton, “Introduction” in Phillips Thompson, *The Politics of Labor* (1887; reprint Toronto, 1975); Ramsay Cook, *The Regenerators* (Toronto, 1985), 152–73.

for throwing blame upon the workers while failing to denounce the “tyrannical course of the monopolists. . . . [T]hey clearly show bias in favor of wealth and social position. . . .” Mayor Howland, by way of contrast, was complimented because he “looked . . . behind the great street mob who violated the letter of the law . . .” and saw “a swollen corporation who violated the spirit of justice.” In Thompson’s view, “the despot and oppressor . . . have force and law on their side . . .” while “capitalists and the pampered, overpaid officials . . . would place the courts, the police, the militia, all at the service of capitalism . . . to coerce and punish the toiler when he has been driven into an attitude of resistance.”¹⁰⁸

Two weeks later, Thompson published a more general critique of the legal system. Jury verdicts based on the real merits of the case were defeated on points of law, and democratic legislation was stymied by the judges through their “power to twist the plain intention of the legislators into the very opposite.” He virtually dared the judges to cite him for contempt. Their background as lawyers meant they were men “whose minds are trained in a narrow groove . . . and who are accustomed to hire out their glib tongues to plead any case without regard to its justice.” They became judges not because of their professional merit, but in reward for faithful service to the governing party. To remedy this, Thompson advocated the election of judges for fixed terms of office. “Then, perhaps, we should have less of that evident bias to the side of power and authority—less subserviency to the wealthy and influential than are now sometimes observable in the occupants of our judicial positions.”¹⁰⁹

A second labor paper, the *Canadian Labor Reformer*, did not begin publishing in Toronto until after the strike. When, however, some months later Denison requested that his salary be increased from thirty-five hundred to four thousand dollars, his conduct during the TSR strike came under fire. It was alleged that he would have called out the militia but for restraining influence of Mayor Howland and that his disposition of the strike-related cases “left the impression on the minds of many that he was not above using the power his position gave him for the purpose of crushing the labor movement.”¹¹⁰ The paper also published

108. *Palladium of Labor*, April 3, 1886, p. 1, cols. 1–3.

109. *Ibid.*, April 17, 1886, p. 1, col. 1–4.

110. *Canadian Labor Reformer*, July 31, 1886, p. 6. Later, in the context of a debate over private police, the paper complained that the Board of Police Commissioners was not accountable to the people because only one of its three members was elected. *Ibid.*, October 30, 1886, p. 3–4.

a comment by James R. Brown, chair of the legislative committee of the Oshawa Trades and Labour Council, criticizing the judges who, instead of declaring that ironclads violated the law against slavery, fined workers who protested against it for interfering with the liberty of the subject. "That is the working of that wonderful thing called law."¹¹¹

Workers' perceptions of the law and its role in these events are harder to decipher. The strikers were kept away from the disturbances by their leaders. Yet, according to one Knight interviewed by the *Globe*, "had these men been left to follow the bent of their own inclinations under the aggravated circumstances forced on them by the company, disagreeable results might have ensued."¹¹² The actions of the thousands of people who gathered in the streets during the three days of the strike perhaps is the best evidence of popular attitudes that we have. Drawing on the work of E. P. Thompson, David Frank argued that the "moral economy" of the Toronto working-class crowd included support for the right of the workers to join a union, scorn for scab workers, and anger directed at the TSR for breaching its public trust by locking out its employees.¹¹³ Clearly, the crowd also demonstrated a willingness to breach the peace and defy the authorities, to at least a limited extent, but generally avoided serious violence.

In sum, workers acting in solidarity with the strikers were prepared to break the law in support of what they believed was a just struggle. Labor leaders were wary of such activity, but they were prepared to explain it as a response to injustice. Labor journalists and intellectuals articulated a wide-ranging critique of the legal system and, in particular, the judiciary. Law and justice diverged substantially when it came to class issues. Moreover, law itself was understood not as a unitary system. Rather, a distinction was drawn between democratic law (the law of the jury and the legislature) and undemocratic law (the law of politically unaccountable judges and police commissioners, a majority of whom were judges). Democratic law could produce substantive justice while the law of the judges protected and reproduced class rule. It followed that reformers should struggle to establish more democratic law and legal and police administration.

111. *Ibid.*, July 31, 1886, p. 10. In another article discussing a recent pronouncement by an American judge on the illegality of boycotting, the author, Victor Drury, a prominent member of the Knights in New York, asserted that some Canadian judges held similar views. He asked rhetorically, "Are judges impartial administrators of equal and impartial justice? or are they officials appointed to maintain class supremacy?" *Ibid.*, May 29, 1886, p. 6.

112. *Globe*, March 12, 1886, p. 8, col. 4.

113. David Frank, "Trouble in Toronto," 48.

By May the illusory nature of the settlement became apparent as Smith resumed firing employees who joined the Knights and required new hires to sign the ironclad. In response, the TSR workers struck. This time the authorities made it clear from the outset that disorder would not be tolerated. Mayor Howland issued a proclamation forbidding gatherings on the street during the strike and a strong police presence was immediately established.¹¹⁴ The police were quick to arrest those who interfered with the operation of the street cars or who just called the drivers "rats," and Denison meted out harsh penalties to those brought before him.¹¹⁵

Although trade union leaders and the labor press denounced this repressive turn,¹¹⁶ they too seemed anxious to avoid a repetition of the street actions and adopted a strategy that reduced the chance of physical confrontation. They established a cooperative bus service, owned and operated by the strikers, and urged the public to boycott the TSR. This, however, was only partially successful in avoiding conflict and ultimately failed to bring the TSR to accept the union. Sporadic outbursts of violence continued. The most serious incident occurred during a procession of strikers and their supporters escorting buses that had arrived from Kingston for the cooperative. Violence erupted when the procession encountered TSR cars driven by scabs. Rocks were thrown and windows were smashed. Despite efforts by the union executive to stop the outburst, an estimated thirty to forty TSR cars were damaged before order was restored.¹¹⁷

The most likely explanation for the increased concern of both public

114. *World*, May 10, 1886, p. 1, col. 1.

115. At least nineteen people were arrested in the early days of the strike. Fines ranged from one to thirty dollars. See, *World*, May 13, 1886, p. 1, col. 5; *ibid.*, May 14, 1886, p. 1, col. 3; *ibid.*, May 15, 1886, p. 1, col. 1; *News*, May 10, 1886, p. 4, col. 4; *ibid.*, June 3, 1886, p. 4, col. 4.

116. D. J. O'Donoghue, a leader of the Knights, denounced Denison and the Police Commission for their actions at a public meeting in St. Lawrence Hall, *World*, May 20, 1886, p. 1, col. 4; the TTLC condemned the excessive fines meted out by Denison and complained to the Attorney General, TTLC, *Minutes*, May 21, 1886; the *Canadian Labor Reformer*, May 29, 1886, p. 9, parodied Denison by reporting an apocryphal case in which a horse that stopped on a street car line was threatened with arrest and told it would be fined twenty to thirty dollars for obstruction. In a more serious vein, the paper cautioned, "[I]awlessness never did good to any cause, and the gamins and others who threw stones at the cars couldn't well employ themselves in a way more harmful to the cause of the men."

117. *Mail*, May 26, 1886, p. 8, col. 3; *ibid.*, May 27, 1886, p. 8, col. 2; *ibid.*, May 28, 1886, p. 8, col. 1. On the failure of the strike, see Kealey, *Toronto Workers*, 208–10 and Gregory S. Kealey and Bryan D. Palmer, *Dreaming of What Might Be* (Toronto, 1987), 122–26.

officials and trade unions leaders over violence was the events in Chicago at the beginning of the month. Police fired on striking workers at the McCormick factory on May 3, killing four and wounding many others. The following day, a bomb was tossed at a contingent of police sent to break up an anarchist rally being held in Haymarket Square, killing one officer instantly and injuring fatally seven more. The police opened fire, wounding at least sixty fellow officers, killing seven or eight in the crowd, and wounding thirty or forty more.¹¹⁸ This concern was made explicit by Judge McDougall in his charge to the grand jury at the opening of the General Sessions of the Peace in Toronto on May 11. After reviewing the law regarding strikes and lockouts, he warned, "For the safety of society it was necessary that the law should be enforced. . . . The civilized world had been shocked by the action of the strikers in Chicago, and although he had no fear that such things would ever happen in Canada, yet it was evidence of what might occur if the laws were not rigidly enforced."¹¹⁹

Boycotts and Conflict in the Hamilton Building Trade, 1888

Although the word "boycott" was first coined in 1880, the practice of cutting off social and economic relations with people who violated community norms was not. The source of the word, and the immediate inspiration for the use of the tactic by labor in the 1880s, derived from the struggles between Irish tenants and their landlords. These struggles were supported by the Land League, which enjoyed a large following among Irish immigrants in North America, many of whom were actively involved in local labor organizations.¹²⁰ Some of the leading labor reformers in Toronto, including Daniel O'Donoghue, Phillips Thompson, and A. W. Wright, were members of the League's local branch.¹²¹

Boycotting was attractive to labor organizations in the 1880s because it was perceived to meet a current need. The effectiveness of strikes and picketing was limited, especially in industries that did not rely on relatively small pools of artisan labor. Physically obstructing or interfering with scab labor or damaging employers' property were not only

118. The most thorough account of these events is Averich, *Haymarket Tragedy*, chap. 14. Recognition of the impact of Haymarket on local events is seen in the *News*, May 10, 1886, p. 2, col. 1.

119. *Mail*, May 12, 1886, p. 8, col. 3.

120. For the Irish background and influence, see Michael A. Gordon, "The Labor Boycott in New York City, 1880-1886," *Labor History* 16 (1975) and Harry W. Laidler, *Boycotts and the Labor Struggle* (1913; reprint New York, 1968), 23-26.

121. Kealey and Palmer, *Dreaming*, 313-16.

illegal and likely to result in police intervention, arrests, fines, and coercive legislation,¹²² but these tactics also lacked legitimacy in the wider community and among large segments of the working class and their leaders. For these and other reasons, the Knights had long favored arbitration as an alternative to strikes, but were confronted by the unwillingness of most employers to submit disputes to arbitration voluntarily and of the state to pass laws that compelled them to do so.¹²³ Boycotting was attractive, because it was seen to provide an alternative means of imposing economic pressure on employers and on other workers who would not maintain solidarity. Moreover, it created a mechanism through which broad community solidarity could be mobilized in support of the claims of a particular group of workers. Indeed, high levels of craft, class and community consciousness, and solidarity were crucial to the success of boycotts. This source of strength, however, was also a point of vulnerability, both because broader solidarity could be difficult to build and sustain and because the involvement of “third parties” in the dispute was alarming to many and provided ammunition for attacks on the legality of this activity.¹²⁴

Boycotting was not just an activity in which workers engaged. Employers combined to boycott workers through the creation of blacklists. For example, after the 1882 carpenters’ strike, Toronto employers refused to hire Thomas Moor, one of the union’s leaders. In addition, it was the decision of the MPA to boycott members of the OPA, which, in the words of Chief Justice Wilson, “made that which was a workshop squabble a matter of trade war.”¹²⁵ Boycotts were also increasingly used by capitalists in intra-class conflict during this period. Enterprises formed associations and sought to quash competition from non-members by,

122. Confrontations in Quebec City between union and non-union dock workers in 1887 led to the hasty enactment of criminal law making it an offense to interfere with persons working on a ship or in connection with loading or unloading it (S.C. 1887, c. 49). The law was vigorously opposed by the unions and their legislative supporters, but without success. For an instructive look at the attitudes of the politicians, see Canada, House of Commons, *Debates*, June 17, 1887, p. 1075; *ibid.*, June 20, 1887, pp. 1153–55; *ibid.*, June 22, 1887, pp. 1229–33.

123. Kealey and Palmer, *Dreaming*, 330–39.

124. On the importance of these solidarities, see Gregory R. Zieren, “The Labor Boycott and Class Consciousness in Toledo, Ohio,” in *Life and Labor: Dimensions of American Working-Class History*, ed. Charles Stephenson and Robert Asher (Albany, 1986), 131. On the law’s approach to third-party interference, see Orren, *Belated Feudalism*, esp. 135–144.

125. Kealey, *Toronto Workers*, 327 and *Hynes v. Fisher*, 75. For further examples, see *Canada Investigates Industrialism*, ed. Gregory S. Kealey (Toronto, 1973), 134, 188–90.

for example, threatening to boycott suppliers who continued to have dealings with them. Although critics were quick to point to the hypocrisy of employers who denounced labor's use of the boycott but were silent when they were the perpetrators, it was not until the end of decade that analogous behavior by capital was to become an important legal and political issue.¹²⁶

Labor boycotts took various forms. One was the consumer boycott, which sought to pressure employers by reducing demand for their products. Often this tactic was used where a strike could not halt production. It was tried in the second round of conflict with the TSR. In that case, because the boycotted product was a monopoly service upon which many were dependent, it was necessary to provide alternative transportation if the boycott was to have a chance of success. This made the exercise much more difficult and, ultimately, it was unsuccessful.

Consumer boycotts were more likely to succeed in competitive industries, as the printers' unions discovered. Newspapers were especially vulnerable to the boycott as both the newspaper itself and its advertisers could be targeted. One of the first newspaper boycotts was declared by the Toronto Typographical Union (TTU) against the *Telegram* after its publisher, John Ross Robertson, fired three printers for joining the union in 1882. Numerous unions called on their members to support the boycott.¹²⁷ Although this boycott was unsuccessful, the printers continued to use the tactic. In 1884, boycotts were declared against the *Globe* and the *Mail* in Toronto and the *Free Press* in London.¹²⁸

In 1888 the TTU declared a boycott against the *Toronto World* after it locked out its compositors. This time, the employer reacted by going to law. They retained William Seton Gordon, author of the 1883 article

126. *Palladium of Labor*, September 6, 1884, p. 4, cols. 2-3 ("It all depends on whose ox is being gored."). On employer combinations, see Michael Bliss, *A Living Profit* (Toronto, 1974), chap. 2 and "Another Anti-Trust Tradition: Canadian Anti-Combines Policy, 1889-1910," *Business History Review* 57 (1973); Russell Smandych, "The Origins of Canadian Anti-Combines Legislation, 1890-1910," in *The Social Basis of Law*, 2d ed., ed. Stephen Brickey and Elizabeth Comack (Halifax, 1991), 35.

127. See *Mail*, April 4, 1882, p. 8, col. 4 (TTU); *ibid.*, April 7, 1882, p. 2, col. 2 (TTL); *ibid.*, April 10, 1882, p. 2, col. 2 (boilermakers); *ibid.*, April 12, 1882, p. 8, cols. 3-4 (coopers, seamen, journeymen tinsmiths and laborers); *ibid.*, April 13, 1882, p. 8, col. 4 (bricklayers and stonemasons); *ibid.*, April 17, 1882, p. 8, cols. 4-5 (painters); *ibid.*, April 21, 1882, p. 8, cols. 4-5 (cigarmakers); TTL, *Minutes*, May 19, 1882. On printers' boycotts generally, see Kealey, *Toronto Workers*, 91-95; Sally F. Zerker, *The Rise and Fall of the Toronto Typographical Union 1832-1972: A case study of foreign domination* (Toronto, 1982), 95.

128. See Kealey, *Toronto Workers*, 91-92; *Palladium of Labor*, June 21, 1884, p. 8, col. 1.

published in the *Canadian Law Times* on the law of strikes, to obtain an injunction restraining the union from issuing a circular proclaiming a boycott. An interim order was issued by MacMahon J. and, three weeks later, he made it permanent with the consent of the union's lawyer. Faced with this restriction, the union movement developed other responses. The TTLC refused to allow reporters from the *World* to attend its meetings and urged its members to follow suit until such time as the *World* made an honorable settlement with the TTU. Also, to circumvent the injunction, lists of newspapers printed with union labor were recommended with no mention being made of boycotted ones.¹²⁹

This latter strategy resembled the union label campaigns, first utilized by cigar makers on the west coast of the United States in the 1870s to discourage employers from hiring Chinese workers. By 1880 the union label was adopted by the Cigar Makers' International Union, the body to which most Ontario locals were affiliated.¹³⁰ When unionized cigar makers in Hamilton declared a boycott of cigars without the union label in 1885, their employers responded by forming the Cigar Manufacturers' Association. Members agreed not to hire union labor and to pay five hundred dollars liquidated damages for breach of the agreement. This contract was enforced by the court in an action brought against a member who broke ranks. In the end, however, the workers' boycott proved so effective that the Association gave in and re-hired the unionized workers.¹³¹

Another tactic used in some labor disputes was the political boycott. In the case of newspapers, workers could be called upon not to vote for candidates endorsed by a newspaper having a dispute with the union. This occurred in the course of a dispute between the TTU and the *Mail*. Numerous unions supported the printers' action and in that case Manning, the incumbent mayor endorsed by the *Mail*, was defeated by Howland. One month after the election, the *Mail* settled with the

129. *Globe*, July 17, 1888, p. 1, col. 5; *ibid.*, July 18, 1888, p. 3, col. 4; *ibid.*, July 19, 1888, p. 8, col. 4; *ibid.*, July 20, 1888, p. 8, col. 2; *ibid.*, July 26, 1888, p. 8, col. 2; *ibid.*, August 2, 1888, p. 8, col. 2; *ibid.*, August 8, 1888, p. 8, col. 1; *ibid.*, August 15, 1888, p. 8, col. 2; *World*, July 19, 1888, p. 2, col. 1; *ibid.*, July 24, 1888, p. 2, col. 1; *ibid.*, July 26, 1888, p. 1, col. 7, p. 2 col. 1; *ibid.*, July 27, 1888, p. 2, col. 1; *ibid.*, August 15, 1888, p. 1, col. 4; TTLC, *Minutes*, August 17, 1888; Kealey, *Toronto Workers*, 95.

130. Laidler, *Boycotts*, 60–62.

131. *Schrader v. Lillis* (1886), 10 O.R. 358. Also see, *Hamilton Spectator*, October 6, 1885, p. 4, cols. 1–2; Ontario, Legislative Assembly, "Annual Report of the Bureau of Industries 1885" in *Sessional Papers* (1886) at cxxxiv.

union.¹³² Employers with political ambitions were also vulnerable to the political boycott. Recall that Withrow, a master carpenter, lost the 1883 Toronto mayoral election partly because of labor opposition triggered by his actions in the 1882 carpenters' strike. In addition, during the plasterers' strike of 1883, the *Palladium of Labor* urged its readers to "black-list" the employers "so that when they come around, all smiles and suavity, asking for the workingman's votes, one or two, or perhaps twenty years hence, they may be known and treated as enemies."¹³³

Finally, there was the embargo that, in its classic form, involved a refusal by a group of workers employed by one company to handle materials produced by another company. For example, transportation workers might refuse to handle goods produced by a manufacturer with non-union labor. In effect, this allowed strong unions in one sector to use their leverage to aid their weaker brothers and sisters. Another form of the embargo was used to maintain union solidarity and discipline. Union members might threaten to strike an employer who refused to terminate the employment of a person who refused to join or had been expelled from the union.

Political boycotts and the threat that unions might form their own parties, were never legally controversial tactics, however much they might be regretted by employers.¹³⁴ The various forms of economic boycotts, however, came to be viewed in a different manner. Initially, employers scoffed at union-organized economic boycotts. For example, the *Monetary Times* described the boycott against the *Telegram* and the merchants who advertised in it as an "absurd attempt."¹³⁵ By the mid-1880s, as the practice became more widespread and effective, employers began to take it far more seriously. The *Monetary Times*, in response to a consumer boycott allegedly instigated by the Iron Moulders Union against non-union employers, declared that it was "a significant and menacing circumstance to find retaliation . . . tak[ing] such a diabolical form."¹³⁶ In a subsequent editorial, the boycott was denounced as "a modern engine of compulsion" and reference was made to the 1882 boycott against the *Telegram* as well as contemporary boycotts in

132. Kealey, *Toronto Workers*, 92–93.

133. *Palladium of Labor*, November 10, 1883, p. 2, col. 1.

134. For example, in the context of the 1887 Dominion elections, *Canadian Manufacturer*, February 18, 1887, pp. 99–100, published a letter denying the need for, and pointing out the danger of, class representation. For an earlier expression of the same sentiment, see *Monetary Times*, August 11, 1882, p. 151.

135. *Monetary Times*, May 5, 1882, p. 1360.

136. *Ibid.*, December 18, 1885, p. 685.

the United States.¹³⁷ Similarly, the *Canadian Manufacturer* reprinted an interview with an anonymous Toronto banker published in the *World*. The banker bemoaned, "that King Boycott rules Toronto today." He reported that capitalists and employers would be meeting shortly to devise a plan to resist boycotts and that they easily could raise one to two hundred thousand dollars for this purpose.¹³⁸

Canadian employers were kept informed of the efforts of their American counterparts to obtain legal redress. The first American cases to reach the courts arose out of consumer boycotts in New York City in the spring of 1886. One of these, the boycott against Mrs. Gray's bakery, became a rallying cry for those hostile to the boycott. Over one hundred trade unionists were arrested and charged with a variety of crimes including conspiracy, coercion, and extortion.¹³⁹ The accused were tried after the Haymarket incident by Judge Barrett who "aimed above all to establish unequivocally that the labor boycott could be punished as a crime of conspiracy."¹⁴⁰ While Barrett conceded that workers enjoyed the right to join trade unions, to strike, to beseech non-union workers not to take their jobs, and to ask the public to respect their boycotts, any attempt to injure the business of a recalcitrant employer, even indirectly through pressure on others to boycott it, or to punish a strikebreaker, was an indictable conspiracy.¹⁴¹

The *Mail* welcomed the indictments and was quick to distinguish between the action of the TSR in dismissing its employees for joining a trade union and the action of a union in boycotting. Employers, except in the unusual case of the blacklist, did not attempt to prevent their former employees from working elsewhere, while striking workers "attempt to impede or put an end to their former employer's business by intimidating non-union men who are willing to sell their labor to him, or by using threats to prevent the sale or purchase of his goods . . ."¹⁴² The labor press took a different view of the matter. The *Palladium of Labor* characterized the New York prosecutions as "a judicial outrage" and emphasized their unfairness by noting that employers were never charged for blacklisting, which was the equivalent of a boycott. This

137. *Ibid.*, April 30, 1886, p. 1239.

138. *Canadian Manufacturer*, May 21, 1886, p. 289.

139. See Gordon, "Labor Boycott," 218-29; Laidler, *Boycotts*, 82-85.

140. Hurvitz, "American Labor Law," 322. For an extended discussion of the legal reasoning, see *ibid.* at 309-24.

141. *People v. Wilzig*, 4 N.Y. Crim. 403 (1886) and *People v. Kostka*, 4 N.Y. Crim. 429 (1886).

142. *Mail*, May 21, 1886, p. 4, cols. 3-4. For an earlier comment, see *Canadian Manufacturer*, April 16, 1886, p. 228.

kind of abuse of judicial power, the paper continued, fostered the growth of anarchism. The following week another editorial denounced unelected state officials and especially “the judges and police magistrates, who hold life offices and are independent of and irresponsible to the people, known to lose no opportunity of showing their contempt and hatred of the working-class.”¹⁴³ The *Palladium of Labor* later reported that one of the establishments involved was still being boycotted, despite the actions of capitalists in making its open manifestations illegal. “The working classes are not going to give up the most effective weapon that has yet been discovered for striking terror into the souls of capitalist tyrants quite so easily.”¹⁴⁴

Employers, while perhaps not terrified, were concerned that unions were using the leverage they obtained from the boycott to interfere with their prerogatives. For example, later that summer the *Canadian Manufacturer* reprinted an article from the *Chicago Times* criticizing the conduct of the Knights in a dispute with a plumbing contractor in New York: “Believing that he was the owner of the establishment, and that in this country a man has a right to manage his own property and conduct his own business, . . . he refused to obey the Powderly mandate. . . . [I]n obedience to the laws of Powderly, the faithful subjects of that American despot left the shop and proceeded to apply the boycott penalty.”¹⁴⁵

American employers, buoyed by their success in New York, pressed criminal charges against boycotters in other states and found sympathetic courts in Connecticut, Vermont, and Virginia. Their decisions hampered the ability of trade unions to apply nonviolent economic pressure against employers.¹⁴⁶ These decisions, reported in the local business and legal press, may have influenced Canadian employers and their lawyers.¹⁴⁷ The *Canadian Manufacturer* shifted the focus of its critique of unions. Instead of emphasizing how unions interfered with

143. *Palladium of Labor*, July 10, 1886, p. 4, col. 1; *ibid.*, July 24, 1886, p. 3, col. 2.

144. *Ibid.*, July 31, 1886, p. 4, col. 1.

145. *Canadian Manufacturer*, August 6, 1886, p. 217.

146. *State v. Glidden*, 55 Conn. 46 (1887); *State v. Stewart*, 59 Vt. 273 (1887); *Crump v. Commonwealth*, 84 Va. 927 (1888); Hurvitz, “American Labor Law,” 324–28; Ernst, “Free Labor, the Consumer Interest.”

147. For example, see *Monetary Times*, March 25, 1887, p. 1128 (quoting *Bradstreets*, “The broad ground upon which the courts proceed in those cases is that associations formed with the design of interfering by overt acts with the freedom of employers in proper control and management of their business are illegal.”). Also, see *Canadian Law Times* 8 (1888): 122, 279 (noting American law journal articles on the subject); *Canada Law Journal* 24 (1888): 491 (reporting decision in *Crump*).

the rights of employers to manage their enterprises, it began to complain that unions interfered with the rights of individuals to work. This theme first emerged in an editorial entitled "A National Disgrace." It began by reprinting a story from the *Toronto News*, which told the tale of a poor soul who, having fallen behind on his union dues, was barred from working until they were paid. He was on the verge of hopelessness when the Salvation Army intervened and paid off his dues. The *News* treated the incident humorously. "That's the kind of Christianity I like. We can't have too much of it in this country." The *Canadian Manufacturer*, however, saw the matter differently. "That such a species of terrorism exists in our midst is a national disgrace. . . . The falsity of the pretensions of these men is becoming apparent to the general public, and the veil of hypocrisy which has heretofore shrouded their nefarious practices from the public gaze is now being torn asunder."¹⁴⁸

Judge Cameron, who already distinguished himself as an outspoken supporter of employers during the TSR strike, was quick to take up the same line of attack. In April 1887, he was in Hamilton on the civil assizes. One of the cases before him was *Dean v. Ontario Cotton Mills*,¹⁴⁹ one of the first cases to be decided under the recently enacted *Workmen's Compensation for Injuries Act*.¹⁵⁰ During the trial, an allegation was made that the Knights brought the action as a test case. Cameron, in his address to the jury, dismissed the issue, but then commented: "Speaking for myself individually, I do not think there is a more dangerous organization in the community than the Knights of Labor; . . . the principle promulgated by the order is an interference with individual liberty, and the greatest blessing a people can enjoy is that each man is at liberty to do just what he pleases as long as he does not interfere with the rights of anybody else."¹⁵¹

148. *Canadian Manufacturer*, May 6, 1887, p. 271.

149. (1887), 14 O.R. 119.

150. S.O. 1886, c. 28.

151. Reported in *Hamilton Spectator*, April 28, 1887, p. 4, col. 1 and reprinted in *Canadian Manufacturer* as part of its "National Disgrace" editorial. In the particular case, Judge Cameron non-suited the injured worker on the theory that the worker had voluntarily assumed the risk of injury. On appeal, the non-suit was set aside on the theory that mere knowledge of the risk did not give rise to a legal presumption of the risk being voluntarily assumed. That was a question of fact for the jury to decide. For a discussion of the background to, and importance of, this case, see Tucker, "The Law of Employers' Liability in Ontario 1861-1900," *Osgoode Hall Law Journal* 22 (1984). It is notable that, prior to becoming a judge, on numerous occasions Cameron defended railway companies being sued by their injured workers. As a judge, he always ruled in favor of employer defendants. See Tucker, *Administering Danger in the Workplace* (Toronto, 1990), 56-57.

The labor press anticipated and responded to this new line of attack. The *Canadian Labor Reformer* decried the hypocrisy of those who criticized the Knights for interfering with the individual liberty of workers when the whole industrial system made it “necessary [for them] to get the permission of some land or money king before they can earn a living.”¹⁵² It also reprinted Cameron’s comments and criticized him for meddling in matters unrelated to the case before him and beyond his competence.¹⁵³ A letter writer found irony in Cameron’s criticism of unions when he himself was a member of profession that would blackball a lawyer “humane enough to plead a poor man’s cause at a cheap rate.”¹⁵⁴

The *Canadian Manufacturer* was undeterred and soon found a local cause célèbre in Edward Buscombe, a bricklayer who had a long history of conflict with the bricklayers and masons’ union. According to the union, Buscombe had taken work in Buffalo during a strike there in 1884, but had been induced to quit work, join the union, and accept strike money. Soon afterward, however, he scabbed again and, after repeated refusals to join the striking workers, he was suspended by the union and fined ten dollars. He remained in Buffalo for some time and next appeared in Hamilton as an employee of the city, along with other non-union men, on the construction of a waterworks conduit in June 1887. A union delegation demanded that he be discharged. The Board of Works initially refused, but after the union men were pulled from the job, they complied. Buscombe, however, was re-hired shortly thereafter and the union took no action until the end of August when it sent a delegation, headed by David Gibson, to renew its complaint with the city engineer and a number of aldermen. They intimated that, unless Buscombe and the other non-union bricklayers were discharged, the union men would be withdrawn from all city construction projects, including the new city hall. Alternatively, Buscombe would be permitted to re-join the union if he paid the costs incurred in his case and his back dues, which together totalled 125 dollars. No action was taken.¹⁵⁵

Buscombe was clearly not the sort of man who would back down from a fight. He wrote a letter to the *Hamilton Spectator* denying he had ever scabbed or joined the bricklayers’ union. Rather, he had gone to Buffalo and waited until the strike was broken. Then he, along with

152. *Canadian Labor Reformer*, April 23, 1887, p. 5.

153. *Ibid.*, April 30, 1887, pp. 5, 7.

154. *Ibid.*, May 7, 1887, p. 6.

155. *Hamilton Spectator*, August 24, 1887, p. 4, col. 2; *ibid.*, August 27, 1887, p. 4, col. 1; *ibid.*, September 1, 1887, p. 4, col. 2.

union men, had taken jobs. Gibson had attempted unsuccessfully to have him discharged and this was the cause of the bitter feelings. Buscombe derided Gibson for being a full-time business agent, or walking delegate, who wore a white collar, smoked a big cigar and was paid \$3.20 a day. "Friend Gibson, put on your colored shirt again and go to work like an honest man. Your laundry bill will never be paid by me."¹⁵⁶

The *Canadian Manufacturer* took up Buscombe's cause. On September 2, an editorial, entitled "Has the Poor Man Any Friends?" recounted Buscombe's story and concluded: "The case is one of cruel, unjustifiable and outrageous boycotting and it remains to be seen if the city authorities dare discharge this humble laboring man at the insolent dictation of the honorable (?) Knights of Labor. . . . The public is interested in knowing whether the municipal governments of the country are conducted in the interests of the people generally, or on the dictation of insolent and overbearing trade unions."¹⁵⁷ Two weeks later another *Canadian Manufacturer* editorial, this time entitled "The Ethics of Tyranny," denounced "the fastidiously ethical tyrants of the Labor Unions [who] have no ethical, moral or legal right to deprive any man of his job . . . even if he is in arrears of dues to his union and refuses to pay up."¹⁵⁸

Inspiration for the next step in the campaign was provided by a decision of Judge Barrett in New York, arising out of one of the previous spring's boycotts. Members of the Knights refused to work with a non-union foreman who was alleged to have discharged a union member. The Knights involved were arrested and charged with criminal conspiracy. Judge Barrett rejected the defense lawyer's argument that the union's actions fell within the scope of a statutory immunity. Rather, he held the exemption only applied to strikes for wages, not to strikes conducted for other purposes. The *Canadian Manufacturer* reported the decision, noted the similarity of Buscombe's case, and called upon the authorities to charge Gibson and the other union delegates who demanded his discharge with criminal conspiracy. "The law clearly acknowledges the right of workmen to strike and quit work when they see proper, but it does not countenance or permit the strikers or any acting for them to conspire to drive other workmen from their occupation merely because they are obnoxious to them."¹⁵⁹

156. *Ibid.*, September 6, 1887, p. 1, cols. 1-2.

157. *Canadian Manufacturer*, September 2, 1887, p. 149; *ibid.*, p. 152 for two further items attacking trade unions.

158. *Ibid.*, September 16, 1887, p. 184.

159. *Ibid.*, October 7, 1887, p. 221. The case under discussion was *People ex rel. Gill v. Smith*, 5 N.Y. Crim. 509 (1887).

Later that fall, the union resolved to boycott any newly contracted jobs until Buscombe was fired.¹⁶⁰ When the city complied, the *Canadian Manufacturer* repeated its call for criminal prosecution: "The action of these union men is clearly a conspiracy to deprive an innocent man of the rights and privileges guaranteed him by law. Has the poor man no friends who will appeal to the law in his behalf, and have these conspirators arrested, tried, convicted and encased in striped clothing in the penitentiary? Such is the punishment for conspiracy."¹⁶¹ Its campaign continued through the winter and spring. The *Canadian Manufacturer* sought unsuccessfully to have the matter taken up by the Royal Commission on Relations Between Labour and Capital when it arrived in Hamilton in mid-January 1888 to hear evidence.¹⁶² It also found another local victim of union oppression, Mrs. Farr, who had fallen on the street and broken her arm while on her way to work. She had been forced to take up domestic employment to support her family, it was alleged, because her husband, a non-union bricklayer, was prevented by the union from obtaining sufficient work during the season. The *Canadian Manufacturer* once again called for these "heartless wretches" to be prosecuted, and when Leonora Barry, an organizer for the Knights of Labor, came to speak in Toronto later that spring, the paper appealed to her "noble womanly instincts" and called upon her to investigate "the systematic oppression that brought so much suffering and distress upon your sister, Mrs. Farr, and upon her little children."¹⁶³

Early that spring, the dispute over Buscombe was swept into a larger conflict. Laborers at Hancock's quarry struck over hours of work. Hancock replaced the striking workers with non-union laborers. Laborers and masons laying a new foundation at a project in Hamilton quit work because the stone was coming from Hancock's quarry. The Builder's Exchange, an organization of Hamilton contractors (whose president, incidentally, was Hancock), retaliated by locking out all union workers employed by any of its members.¹⁶⁴

For the bricklayers and masons' union, one of the outstanding issues

160. *Hamilton Spectator*, November 4, 1887, p. 2, col. 4.

161. *Canadian Manufacturer*, November 18, 1887, p. 330.

162. *Ibid.*, December 2, 1887, p. 371; *ibid.*, February 3, 1888, pp. 77-78, 82; *ibid.*, March 2, 1888, pp. 154, 157; *ibid.*, March 16, 1888, p. 184.

163. *Ibid.*, January 20, 1888, p. 46; *ibid.*, April 20, 1888, pp. 260-61. Two months later, the *Canadian Manufacturer* quietly reported that Mrs. Farr's husband was, and had been for years, a member in good standing of the bricklayers' union. *Ibid.*, June 15, 1888, p. 409.

164. *Hamilton Spectator*, April 26, 1888, p. 4, col. 3; *ibid.*, April 28, 1888, p. 4, col. 3; and Bryan Palmer, *A Culture in Conflict* (Montreal, 1979), 86-87.

in the strike was the closed shop. This was particularly important because the city had re-hired Buscombe. It was alleged that, at a meeting held on April 19, the union passed a resolution forbidding its members from working on the new city hall under threat of a fifty-dollar fine.¹⁶⁵ This was denied in a letter to the *Hamilton Spectator* a few days later, but on April 27, William Mitchell and William Littlejohn, the alleged mover and seconder of the motion, were arrested and brought before the magistrate, charged with criminal conspiracy. A preliminary hearing was held the following day. Two witnesses, John Watson and James Guthrie, both former members of the union who had been present at the meeting, gave evidence confirming that the resolution in question had been passed. On the basis of their evidence, Mr. Mackelcan, Q.C., the lawyer acting for Buscombe, was given permission to amend the summons by adding David Gibson as a defendant. The three defendants were committed for trial at the next assize and released on bail. The *Canadian Manufacturer* fully reported the proceedings.¹⁶⁶

The addition of Gibson as a defendant gave the case an even higher profile than it might otherwise have enjoyed because, in addition to his position with the union, Gibson was a leading figure in the Hamilton Trades and Labour Council and a member of the Executive Committee of the Trades and Labor Congress of Canada (TLC).

The assize of the Quarter Sessions of the Peace opened on June 12, 1888, with Judge Sinclair presiding. In his address to the grand jury, Judge Sinclair sketched the factual background of the case. He also expressed his personal opposition to boycotts, saying they were antagonistic to the principles of law and morality. The grand jury indicted the defendants and a motion by Mr. Lynch-Staunton, counsel for the defendants, to quash the indictment on the grounds that boycotting was protected by the 1876 statute was set aside.¹⁶⁷

165. R. v. Gibson et al. (1889), 16 O.R. 705.

166. *Hamilton Spectator*, April 28, 1888, p. 4, col. 2; *ibid.*, April 30, 1888, p. 4, cols. 1-2; *Canadian Manufacturer*, May 4, 1888, p. 297. The presence of a Q.C. representing Buscombe's interests at the police court proceeding, in addition to the involvement of the local crown prosecutor, Mr. Crerar, suggests the possibility that *Canadian Manufacturer* or sympathetic employers may have been directly involved in the prosecution, but this is speculative.

167. *Hamilton Spectator*, June 13, 1888, p. 4, col. 1; *ibid.*, June 15, 1888, p. 4, col. 2. It should be recalled that the *TUA* of 1872 provided that members of unions could not be convicted of criminal conspiracy merely because the purpose of their combination was in restraint of trade. The 1876 criminal law statute extended that immunity by precluding prosecution for an act committed for the purpose the trade union, unless the act was an offense indictable by statute or punishable under the other provisions of the 1876 statute. (S.C. 1872, c. 30, s. 2; S.C. 1876, c. 37, s. 4.) In 1886, the federal

The trial began on June 19. The jury was selected from the rural districts "to obtain an unprejudiced and unbiased adjudication."¹⁶⁸ The prosecution called Watson and Guthrie who repeated their earlier testimony. At the close of the prosecution's case, Lynch-Staunton renewed his motion to dismiss. Sinclair again ruled against him, remarking that the way the union had conducted its business was decidedly anarchistic and did not come within the statute.¹⁶⁹ The following day the defense opened its case, calling Piggott, the city hall contractor, to establish that he, and not the union, had composed the resolution and caused it to be published in the *Hamilton Spectator*.¹⁷⁰ The judge refused to allow this line of questioning on the ground that it was irrelevant whether a resolution boycotting Buscombe had been before the union. The defense then called twenty-one witnesses who testified that a boycott resolution was not passed at the union meeting. Their credibility was strongly challenged in cross-examination by the prosecutor and, from the bench, Sinclair questioned the men about whether they felt their oath to the union was inconsistent with their oath to tell the truth in court.

Lynch-Staunton, in his jury address, challenged the credibility of the prosecution's witnesses and defended trade unionism as the only way workers could protect themselves against monopoly. He alleged that the whole case was a conspiracy on the part of employers to frighten and browbeat workers into submission. Crerar, the prosecutor, began his address by attacking the credibility of the union's witnesses. Although he acknowledged that workers could legally band together to fight monopoly, he insisted that, in this case, the union had united to tyrannically oppress Buscombe, a poor working man. Following Crerar's address to the jury, Sinclair instructed the jury. According to the *Hamilton Spectator's* reporter, "it was strongly in favor of the prosecution." Sinclair informed the jurors that they did not have to find that the resolution was passed to convict; they merely had to find that the resolution was

statute books were revised and the 1876 provision on prosecution for criminal conspiracy was re-enacted, in a slightly modified form so that, at the time of the Gibson prosecution, section 13(2) provided: "No prosecution shall be maintainable against any person for conspiracy to do any act, or to cause any act to be done for the purposes of a trade combination, unless such act is an offence punishable by statute." R.S.C. 1886, c. 173. Lynch-Staunton's argument was that the boycott against Buscombe was an act for the purposes of a trade combination and that there was no statute under which boycotting was an offense.

168. *Hamilton Spectator*, June 21, 1888, p. 4, cols. 1-2.

169. *Globe*, June 21, 1888, p. 1, col. 6.

170. Piggott was known to be a rabid opponent of craft union restrictions. Palmer, *A Culture in Conflict*, 76, 87.

proposed, seconded, and supported. He again cast doubt on the credibility of the defense witnesses, suggesting that the jury should consider whether they were likely to adhere too closely to obligations imposed on them by class. Finally, Sinclair instructed the jury to ignore the legal question raised by counsel. The role of the jury was to decide whether the tyrannical act had occurred and that a higher court would say whether it was a conspiracy according to law. The jury deliberated for half an hour and returned a verdict of guilty against each of the three defendants.¹⁷¹

The defendants appeared before Sinclair the following day. Lynch-Staunton requested an adjournment to give him more time to decide whether to appeal the decision on the point of law raised. Sinclair granted leave, and also disclosed that he had received a telegram from an influential Brantford man requesting that he “season justice with mercy.” He indicated that he thought such communications improper and that he would not be swayed by them. Despite this, he also made it clear he did not intend to deal harshly with the prisoners. Rather, he would vindicate the law by passing a nominal sentence.¹⁷² The defendants, however, appealed and sentencing was put over pending the outcome.

The appeal was not argued until that November. The union retained the services of B. B. Osler, Q.C.¹⁷³ Osler’s argument was the same as the one made by Lynch-Staunton at trial. Even if the alleged acts had been committed (this was denied), no prosecution for conspiracy could be maintained because of the immunity given by the 1876 statute. At worst, it was a conspiracy for the purpose of a trade combination not punishable by statute. Crerar, for the Crown, argued that the boycott of Buscombe was not, in law, for the purpose of a trade combination and that the common law offenses continued to apply. In support of the later proposition, he cited an old English case on criminal combinations, *R. v. Eccles*, and drew the court’s attention to the three leading American cases on the criminality of boycotts, *Glidden*, *Stewart*, and *Crump*. In reply, Osler referred to *Hynes*.¹⁷⁴

The court did not deliver its judgment until February 4, 1889. The

171. *Hamilton Spectator*, June 21, 1888, p. 4, cols. 1–2.

172. *Ibid.*, June 21, 1888, p. 4, col. 1.

173. Recall that Osler represented the union in the litigation arising out of the plasterers’ strike/lockout. He was also singled out for special attention by the *Canadian Labor Reformer*, June 26, 1886, p. 6, in an article that criticized lawyers in general and Osler in particular as “inquisitorial bullies.” The immediate impetus for this was a case in which Osler cross-examined a female witness so ruthlessly that she reportedly fell into a violent hysterical fit.

174. *R. v. Gibson*, 708–9.

three judges were unanimous in upholding the verdict. The most comprehensive judgment was delivered by Chief Justice Armour. In his view, what the defendants conspired to do was not a protected activity within the meaning of section 13 because it was not done for the purpose of a trade combination—the regulation of relations between masters and workers. Rather, the defendants were actuated by malice against Buscombe and had conspired to deprive him of his employment. Armour would not accept that action taken to establish or maintain a closed shop involved the regulation of relations between masters and workers. In support of his legal conclusion, Armour cited the American boycott cases and two English cases, *Parnell* and *Mogul*, neither of which directly related to labor boycotts.¹⁷⁵ Once outside the ambit of the immunity, workers could be charged with a common law criminal conspiracy and the acts complained of did not have to be independently punishable by statute.

In a concurring judgment, Street took a somewhat softer approach than Armour's. For him, the characterization of the purpose of the boycott was not a question of law, but of fact. It was for the jury to determine whether the acts committed by the defendants were done for the purpose of the combination, or for the malicious purpose of injuring Buscombe. This difference was an important one. Because the behavior could readily be characterized either way, Armour's per se approach deprived unions of the opportunity of bringing themselves within the immunity of the statute by arguing self-interest, a defense that the English court in *Mogul* had specifically preserved. Falconbridge, the third judge, did not take a position on this issue, and so no firm holding could be derived from the case.¹⁷⁶

This left unresolved a number of questions regarding the scope of permissible trade union action. First, there was the question of the closed shop. Could a trade union insist, under threat of a strike or boycott, that only union members be hired? Second, could a union engage in what is now call "secondary" action? That is, could a trade union strike an employer with whom it was not having a dispute, to pressure another employer with whom it was? The broadest interpre-

175. *Ibid.*, 713. The two English cases were *R. v. Parnell* (1881), 14 Cox C.C. 508 (setting out the parameters of criminal conspiracy) and *Mogul S.S. Co. v. McGregor* (1888), 21 Q.B.D. 544 (a civil conspiracy case still winding its way through the appellate system. At this stage, the court had held that a combination of traders to keep a monopoly for themselves was not unlawful so long as its purpose was to benefit its members and not to ruin competitors).

176. *R. v. Gibson*, 713–15.

tation of *Gibson* was that it criminalized boycotts in support of a closed shop. A narrower one was that it only affected cases of secondary action.

Perhaps because it was ambiguous, the decision received little comment at the time.¹⁷⁷ Frederic Nicholls, secretary of the Canadian Manufacturers' Association and publisher of the *Canadian Manufacturer*, expressed his satisfaction with the result of the case when he spoke to the Association's annual general meeting in March. He also announced that the men had been sentenced to three months imprisonment. This punishment, he thought, was rather too severe. Although ignorance of the law was no excuse, Nicholls thought more leniency was due because the law had been unclear prior to this decision. Workers in the future, however, would be deterred from making the same mistake.

In fact, the convicted workers had not yet been sentenced and, for that reason, Nicholls' comments scandalized the legislative committee of the TTLC. It accused him of fabricating the story of the three-month sentence for the purpose of pleasing his audience and of hypocrisy for his expression of regret at the severity of the sentences.¹⁷⁸

Sentencing actually occurred in June at the next assize. Sinclair reminded the defendants and the community of the events that gave rise to the charges and reviewed the judgments of the higher court. He sternly lectured the defendants about their misconduct and the evil it would cause if not deterred by law. "If such conduct as yours were to be permitted no man would be safe and honest labor could only be exercised at the will of a trade union." As to the matter of sentence, Sinclair used the occasion to vindicate the majesty of the criminal law. "But the law is not disposed to evince towards you the same sort of justice that you were prepared to mete out to Buscombe. . . . [T]he retributive justice of that [criminal] law is not vengeance, but example." Its object was to teach the men and the community "that there is a higher duty towards your fellow men than persecution" and the judge hoped this would be the last time a court would be called upon to pass judgment on laboring men in these circumstances. A five-dollar fine was imposed.¹⁷⁹

177. Only the *Hamilton Spectator* commented. It took the broadest view of the decision, saying that it ruled that all boycotting was illegal in Canada. This was clearly wrong. Other papers, including the *Globe*, *Mail*, and *Canadian Manufacturer*, which reported the decision, provided no interpretive commentary. See *Hamilton Spectator*, February 5, 1889, p. 4, col. 5; *ibid.*, February 5, 1889, p. 4, col. 4; *Globe*, February 5, 1889, p. 6, cols. 1-2; *Mail*, February 5, 1889, p. 3, cols. 1-2; *Canadian Manufacturer*, March 1, 1889, pp. 144-45; *ibid.*, March 15, 1889, p. 179.

178. *Mail*, March 16, 1889, p. 10, col. 5.

179. *Hamilton Spectator*, June 15, 1889, p. 4, cols. 1-2; *Canadian Manufacturer*, June 21, 1889, pp. 392-93, reprinted the sentencing proceedings without comment.

This brought the legal case to an end, but not the controversy. Organized labor and its friends were quiet while the case was before the courts but, even before sentence was passed, the campaign to reform the law had begun. The story is complicated because of the uncertainty of the law after *Gibson*, the growing conflict within the Knights of Labor between Conservative and Liberal party supporters, and the competition between Blake and Macdonald to claim the mantle of the worker's friend.¹⁸⁰

The TLC convention in September 1888, reacted to the legal proceedings in two ways. The first was defensive, reflecting the chilling effect of the prosecution. This manifested itself in a discussion over a resolution to issue a warning that a company seeking to re-locate was hostile to organized labor. Fears were expressed that such a resolution might expose the Congress to charges of conspiracy. Gibson, one of the defendants and a delegate to the Congress, moved that the resolution be referred to the executive with power to act as it sees fit. The resolution passed.

The second response was proactive. Alf Jury moved that the Congress should petition Parliament to amend the conspiracy laws "to prevent their application to labor disputes, where no actual damage is done to person or property." Speaking in support of the resolution, Jury did not refer specifically to the Hamilton prosecution, but noted a number of recent cases "in which the laws against conspiracy had been interpreted by prejudiced judges so as to include under their operation alleged offenses in which no injury could be shown to have resulted to either person or property." The resolution was adopted unanimously.¹⁸¹ During the next session of Parliament, John Wilson, a Liberal opposition member from Elgin, introduced an amendment to reverse the effect of Armour's judgment in *Gibson*.¹⁸² He proposed to insert the italicized words so that the statute would read: "No prosecution shall be maintainable against any person for conspiracy *in refusing to work with or for any employer or workingman, or for doing any act or causing any act to be done for the purpose of a trade combination, unless such act is punishable by statute.*" Wilson referred directly to the *Gibson* judgment and argued that workers should be free to refuse to be employed by or with any one who is obnoxious to them. His amendment would have decriminalized the primary boycott for a closed shop, but might still

180. See Kealey and Palmer, *Dreaming*, 248–76; Kealey, *Toronto Workers*, 267–68; Bernard Ostry, "Conservatives, Liberals, and Labour in the 1880's," *Canadian Journal of Economics and Political Science* 27 (1961).

181. TLC, *Proceedings* (1888): 19, 23.

182. House of Commons, *Debates*, March 11, 1889, p. 524.

have left the union vulnerable to prosecution for a secondary boycott, or for any other action which a court or jury determined was not done for the purpose of a trade combination.

Trade union lobbying around this reform was hampered by factional fighting. Two of the lobbyists, Carey, the TLC's president, and O'Donoghue, chair of the TTLC's legislative committee, had strong Liberal party connections and, presumably, worked closely with Wilson.¹⁸³ The other labor lobbyist was R. R. Elliot, a Conservative Party supporter, appointed by the Canadian Legislative Committee of the Knights of Labor.¹⁸⁴ This led to a divided effort. In his report for the year, Elliot explained that he had laid a certified copy of the evidence taken in the Gibson trial and a copy of the judge's charge to the jury before John Thompson, the Minister of Justice. Because at the time sentences had not yet been pronounced, he had not asked for any action to be taken. Then, when the sentences were given, they were so unexpectedly light that Elliot had not seen any need to request the minister's intervention. In commenting on Wilson's bill, Elliot deflected any criticism that might have been leveled at the failure of the Conservative government to take appropriate action. He noted that "owing to the looseness with which it was drawn and the fact that its introduction was delayed by its promoter till such time that it could not possibly pass during that session, it was not seriously entertained."¹⁸⁵

Regardless of the internecine fights among the labor lobbyists, as an opposition bill, Wilson's proposed amendment stood no chance of passage. He withdrew it after Thompson promised to introduce a measure embodying its intent in the next session.¹⁸⁶ Needless to say, Elliot's performance infuriated the Liberal wing of the labor lobby.¹⁸⁷ At the TLC convention that fall, Alf Jury moved, seconded by David Gibson, that the Congress petition the government to enact Wilson's proposed amendment.¹⁸⁸

183. *Mail*, March 16, 1889, p. 2, col. 6; *Mail*, September 5, 1889, p. 4, col. 7; *ibid.*, p. 5, cols. 1-3. Wilson had worked closely with the Knights during the previous session. *Report of the Legislative Committee of the Knights of Labor* (1888).

184. This committee had been created one year earlier. Its lobbyist in the first year was Alf Jury and he worked closely with the TLC and the TTLC. However, for the 1889 parliamentary session, A. W. Wright, a leader of the Knights of Labor and a Conservative Party supporter, outmaneuvered O'Donoghue and convinced Powderly to appoint Elliot. Kealey and Palmer, *Dreaming*, 256-64.

185. *Report of the Legislative Committee of the Knights of Labor* (1889), 11-12.

186. *Mail*, September 5, 1889, p. 4, col. 7.

187. Alf Jury publicly criticized Elliot in, *Globe*, April 26, 1889, p. 12, col. 3.

188. TLC, *Proceedings* (1889). The Congress also elected David Gibson to its Ontario Executive Committee.

The speech from the throne for the 1890 legislative session promised legislation affecting the working classes and the government's address expressed the view that a political response to labor's discontent was required if violence and further inter-class strife was to be avoided. Reference was made to the great strike in England and the war between labor and capital in the United States; the speaker, Mr. Pope, urged the passage of legislation that would "prove to the workingmen that their best friends are within these legislative halls, and that we are prepared to protect the laborer, the honest, industrious worker, and to appreciate his citizenship as much as the citizenship of any other class which exists in Canada."¹⁸⁹

On February 7, Thompson introduced Bill 65 to amend the criminal law. In addition many other matters, including provisions making it a criminal offense for an employer to seduce a female employee, the bill proposed that a section 13(2) be amended as follows:¹⁹⁰ "No prosecution shall be maintainable against any member of a trade combination, for conspiracy to do any act or to cause any act to be done, or to neglect, or refuse, or omit to do any act, or to cause or procure the neglect, refusal or omission to do any act, unless such act, or such neglect, refusal or omission, as the case may be, is an offence punishable by law." It is unclear what effect this amendment would have had. Although it removed the words "for the purpose of a trade combination" from section 13(2), it would have allowed prosecution for acts punishable by law, not just statute. In effect, this would have allowed judges to continue to apply the common law of criminal conspiracy without first having to find that the acts committed were not "for the purpose of a trade combination." As a result, boycotts in support of a closed shop and secondary action could be treated as criminal conspiracies so long as courts took the view that such acts were punishable by law.

Trade union lobbyists realized that Thompson's proposal was unsatisfactory and pressed to have it altered so that prosecutions would be permitted only in cases where acts were punishable by statute. This change, in conjunction with the elimination of the phrase "for the purposes of a trade combination," would have immunized trade unionists from charges arising under the common law of criminal conspiracy. For this reason, Thompson rejected their proposal as he believed that conspiracies to commit common law crimes and particularly "boycotting in

189. Canada, House of Commons, *Debates*, January 16, 1890, p. 3; *ibid.*, January 17, 1890, p. 7.

190. Bill 65, *An Act further to amend the Criminal Law*, 4th Sess., 6th Parl., 1890, s. 18; and House of Commons, *Debates*, February 7, 1890, p. 342.

its most malignant phase” should remain liable to prosecution.¹⁹¹ So, by second reading, one month later, Thompson proposed a compromise. Bill 65 was amended so that it changed section 13(2) in exactly the way Wilson had proposed the year before. The intended legal effect of the change was to legalize primary action in support of a closed shop, but to leave open the possibility of criminal conspiracy charges being brought if there was a secondary boycott or other action courts found offensive.

When the amendment was discussed in committee, Edward Blake, the leader of the Liberal opposition, reasserted the claim that he, not Macdonald, was the worker’s true friend. He reviewed the legislation of the 1870s, emphasizing the broad scope of the immunity granted in the 1876 act, passed while the Liberals were in power. He argued that the 1886 revision had reduced the scope of that immunity by broadening the definition of prosecutable offenses from those only indictable by statute to all statutory offenses. He called for the restoration of status quo ante. In reality, however, this was an insignificant point that would not have greatly reduced labor’s exposure to prosecution. Nor would this proposed rewording have responded to the secondary action aspect of the *Gibson* decision. Judges and/or juries would still be able to determine whether a particular action was undertaken to advance the purpose of the combination. If it was not, the union would be exposed to the full reach of common law criminal conspiracy.

Thompson, in his response to Blake, asserted that he had been lobbied by labor organizations and consulted with them in drafting the bill. In his view, the protection being offered trade unions went beyond what their representatives had indicated was acceptable. Blake and Laurier suggested that, perhaps, labor organizations and their advisers misunderstood the technical issues and that Thompson should do what is right, not just what is requested. Thompson rejected the suggestion and the bill was passed.¹⁹²

Clearly, Elliot had worked closely with Thompson and the Conservatives and, presumably, had indicated his acceptance of the final draft. He either misunderstood its effects, however, or chose not to disclose its limits for in his report to the Knights of Labor he asserted, “The effect of this will be to prevent the prosecution of workingmen on strike under the common law, and, as the statutes expressly state the right of workingmen to combine in labor organizations and to strike when they deem it advisable, they cannot now be interfered with in the Dominion

191. House of Commons, *Debates*, April 10, 1890, pp. 3163–64.

192. *Ibid.*, April 15, 1890, pp. 3372–79; *ibid.*, April 16, 1890, pp. 3459–60; S.C. 1890, c. 53, s. 19.

of Canada unless they commit some act of violence.”¹⁹³ Liberal Party supporters in the labor movement backed Blake, and thanked him for trying to restore all the protection afforded by the 1876 statute.¹⁹⁴ They gave no credit to the Conservative government, even though the law it passed was identical to the one the TTLC supported the previous session. Perhaps they misunderstood the legal significance of the various proposals or their deliberations were driven by partisan political considerations. In either event, labor did not put up a strong, united front to secure the broadest immunity possible.

Employers seemed to have ignored entirely the maneuvering over the amendment to section 13(2). None of the participants in the House of Commons debates indicated they had been lobbied by business interests on this question. Even the *Canadian Manufacturer*, which had led the campaign for criminal prosecution in the *Gibson* case, was silent on this aspect of the government’s bill. Instead, it focused all its energy on that part of the bill that made factory owners liable to prosecution for seduction of female employees. “Why should the Minister alienate the respect of a respectable element for the sake of obtaining the beslobberment of the Knights of Labor?”¹⁹⁵ Is it possible that employers became so obsessed with the criminal seduction provisions that they overlooked reform of criminal conspiracy law? This is unlikely. Perhaps the *Canadian Manufacturer* recognized that Thompson’s amendment would not prevent trade union members from being prosecuted for conspiracy to commit common law crimes and this was sufficient for them.

In any event, employers once again found that the invocation of the law to gain an advantage in a trade dispute produced mixed results. The court opened a common law door to the use of more coercive legal strategies by employers of the sort that had become common in the United States, but labor still exercised sufficient political clout to get legislation enacted to shut it, at least partially. Ontario employers, how-

193. *Report of the Canadian Legislative Committee of the Knights of Labor* (1890).

194. *Mail*, April 19, 1890, p. 12, cols. 6–7. The depth of this confusion or partisanship was reflected in the lobbying of the TTLC around amendments to the draft criminal code produced by the federal government in 1891. See F. C. Cribben, secretary TTLC, to Sir John Thompson, minister of justice, June 4, 1892, NAC RG 13 A1 341/1894/14. Lynch-Staunton seemed to have a better grasp of the real weaknesses of the 1890 amendment and sought to clarify that concerted refusals to work would not be criminal conspiracies, regardless of their purpose. See George Lynch-Staunton to the deputy minister of justice, May 13, 1891, NAC RG 13 A1 492/1891. My thanks to Professor Desmond Brown for bringing these documents to my attention.

195. *Canadian Manufacturer*, May 2, 1890, pp. 292–93.

ever, did not try to exploit the space that remained for the operation of the law of criminal conspiracy. At most, only one other conspiracy case was brought against workers in Ontario to the end of the century.¹⁹⁶

Conclusion

Assessing the role of law in the labor conflicts of the 1880s presents many challenges. Certainly, we find figures such as Police Magistrate Denison who behaved like stock characters in historical dramas whose scripts conform to prior expectations about the hostility of judges to workers' collective action. As these case studies reveal, however, the record is almost always more ambiguous and complex than that. Judge-made and statutory law were not infinitely malleable instruments through which the ruling classes could directly exert their authority over a passive working class.

In none of the cases we examined was the outcome totally one-sided. In the plasterers' strike an injunction was obtained, but the judge ultimately exercised his discretion to discontinue it and found workers charged with contempt not guilty on a technicality. Moreover, not only did the strikers pay little heed to the injunction, but it was not strictly enforced by the police, although two workers were convicted of breaching the 1876 act. In the Toronto Street Railway lockout and strike, the police used force to clear the crowds and the courts punished a number of people who obstructed the street railway's operations. But given the potential for violent confrontation during street car strikes,¹⁹⁷ the actual level of coercion exercised was modest and it did not bring victory to the employer, at least not initially. Finally, members of the masons' union were convicted of conspiracy for boycotting city projects until Buscombe was fired, but one year later the law was amended to immunize trade unionists from prosecution for refusing to work with another employee. The government, however, was not prepared to preclude all prosecutions for conspiracies to commit common law crimes.

The complex relation of the law to industrial conflict becomes even more apparent when we consider that the case studies involved exceptional events. As a general matter, direct state coercion occurred infre-

196. This occurred in the Windsor tailors' strike in 1891. The report is unclear as to the charges. *Labor Advocate*, September 18, 1891, p. 332.

197. For example, see Bruce C. Nelson, *Beyond the Martyrs* (New Brunswick, 1988), 185 (Chicago, 1885); Zieren, "The Labor Boycott," 142-43; and Sarah M. Henry, "The Strikers and their Sympathizers: Brooklyn in the Trolley Strike of 1895," *Labor History* 32 (1991).

quently in strikes and lockouts. Direct legal or police involvements occurred in only sixteen out of 238 strikes in Ontario from 1880 to 1889 (see Table 1). Moreover, police interventions were rarely violent. Over the course of the decade, not a single worker was killed in Ontario as a result of strike-related activity. The greatest use of force occurred in the TSR strike, but even then no one was seriously injured. The militia was called up in aid of the civil power only once when laborers rioted after a railroad contractor in Port Rowan failed to pay them. The incident was not considered serious, however.¹⁹⁸

The low level of direct state coercion starkly contrasts with the American experience where criminal conspiracy prosecutions were far more common and the punishments meted out tended to be far more severe, even when the conduct complained of was similar to the non-violent forms of economic pressure employees were exerting in Ontario. Over one hundred trade unionists were sentenced to penitentiary terms for boycotting in New York City alone in 1886.¹⁹⁹ Little work has been done on the use of the general criminal law, including charges of assault, riot, and damage to property in the context of strikes in the United States, making comparisons somewhat tenuous. The murder charges brought against the Haymarket defendants and the execution of four of them are, perhaps, suggestive of a more repressive use of this aspect of the law. The labor injunction also developed much earlier in the United States. Although the period of "government by injunction" did not begin until the 1890s, actions in both state and federal courts were already becoming commonplace in the 1880s.²⁰⁰ The use of police and military force against striking workers in the United States was far more frequent and deadly than in Ontario.²⁰¹ Finally, employers supplemented

198. D. Morton, "Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867-1914," *Canadian Historical Review* 51 (1970); J. J. B. Pariseau, *Disorders, Strikes and Disasters: Military Aid to the Civil Power in Canada, 1867-1933* (Ottawa, 1973), 52-53. There was at least one occasion when Toronto police were sent to Algoma, at the request of the provincial government, to help quell riots that broke out when shantymen were not paid for work performed the previous winter. *Mail*, May 18, 1889, p. 12, col. 2.

199. See Hurvitz, "American Labor Law," 318-28; Gordon, "Labor Boycott," 218-29; Forbath, *Law and the Shaping*, 79-97.

200. See Hurvitz, "American Labor Law," 328-44; Forbath, *Law and the Shaping*, 66-90.

201. For a partial account of these violent confrontations, see J. Brecher, *Strike!*, 25-52. Also see, Sidney L. Harring, *Policing a Class Society* (New Brunswick, 1983), esp. chap. 6.

Table 1. Strikes with Judicial/Police Involvement, Ontario, 1880-89¹

Date	Place	Occupation	Judicial/Police Involvement
May 1880	London	Printers	Apprentices charged with leaving employment
April 1881	Hamilton	Coal Haulers	Police called
April 1882	Toronto	Freight Handlers	Police called
April 1882	Brockville	Long-shoremen	Charges arising out of fight
April 1882	Brockton	Laborers	Assault charge
Nov. 1883	Toronto	Plasterers	Injunction, contempt, charges under 1876 Act
Feb. 1886	Toronto	Laborers, Iron Molders	Police called
March 1886	Toronto	Street Car Workers	Police called, various charges
Aug. 1887	Toronto	Carpenters	Police called, charge of threatening language
July 1888	Toronto	Plumbers	Police called, charges of intimidation
July 1888	Gravenhurst	Mill hands	Charges of trespass, intimidation and conspiracy
Aug. 1888	Toronto	Printers	Injunction restraining call for boycott
Feb. 1889	Ayr	Iron Molders	Police protection
April 1889	Hamilton	Masons	Criminal conspiracy
May 1889	Port Rowan	Railway Construction Workers	Militia called out
June 1889	Toronto	Bakers	Police called

¹ The list is admittedly incomplete. I examined all strikes in Toronto, Hamilton, and London, the three largest strike centers, which account for 176 strikes, or nearly seventy percent of the total. Other sources examined include the labor press, proceedings of labor bodies, the business press, and the Ontario Bureau of Industries' Annual Reports. While it is possible I have missed some strikes with judicial or police involvement, it is unlikely further research will significantly alter the picture. This is because strikes with such involvement attracted publicity and generated paper trails in the press and in the courts. Further references for the strikes identified in the table but not discussed in the text are in the author's possession.

the public forces with private police who quickly developed a reputation for violence.²⁰² There was no equivalent use of private police in Ontario.

The case studies and the data on the incidence of judicial and police involvement in strikes raise a number of difficult questions. Why was so little direct legal coercion used during this decade of labor strife? Under what circumstances did employers and state officials resort to such strategies in Ontario? Why were the forces of law and order used so much more coercively in the United States than in Ontario? Recent American scholarship suggests that these questions can be answered through an examination of the institutional settings in which class conflict was conducted and that, in particular, the strength of the courts relative to the legislatures was crucial.²⁰³ These state-centered studies have generated important insights into the trajectory of the American labor movement in the late nineteenth and early twentieth centuries, but have not adequately explained why employers and state officials resorted to this degree of coercion.

The availability of powerful, sympathetic courts does not fully explain why employers invoked their power. Judges in Ontario did not behave that differently than their American counterparts, except in regard to sentencing. When asked, they enjoined striking workers from interfering with the hire of replacement workers and from calling a boycott; they broadly interpreted the scope of common law criminal conspiracy and they convicted workers charged with strike-related criminal offenses. Ontario employers, however, did not seek judicial intervention as frequently as American employers. Similarly, strong courts and weak states do not explain the level of violence used by police and militia in enforcing court orders and maintaining "public order," or the use of private police by employers. An alternative state- and law-centered answer to the question of why direct legal coercion was less common in Ontario than in the United States, is that law was more strongly hegemonic. Hegemonic law would reduce both the need for direct coercion and the eagerness to resort to it. The need would be reduced if, through law, employers and state officials, including judges and magistrates, were able to obtain the consent of workers to the existing regime by, in effect, convincing them of its legitimacy, normality and, perhaps, inevitability. As a result, workers would be more respectful of legal norms, reducing the need to resort direct legal coercion. Also, employers and state officials might be less eager to act coercively because displays of excessive force could undermine consent. A condition of legal he-

202. Frank Morn, *"The Eye That Never Sleeps"* (Bloomington, 1982), chap. 5.

203. See, e.g., Forbath, *Law and the Shaping* and Hattam, *Labor Visions*.

gemony is that law must be seen to take into account, at least to some extent, the interests of the subordinate class. Law becomes a medium through which compromises are negotiated and this constrains the dominant class's use and manipulation of it in nakedly coercive and self-interested ways.²⁰⁴

Was labor law in Ontario in the 1880s strongly hegemonic? The question is difficult to answer, in part, because it is hard and perhaps artificial, to isolate law from other ideological systems. Clearly, a partial class compromise was reached in Ontario, and it was partly achieved through, and institutionalized in, law. But law was only mildly hegemonic. Support for this conclusion can be found, for example, in the speeches of working-class leaders and intellectuals pointing to the gap between law and justice. Recall in the plasterers' strike, Chase's response to Hynes's threat to "insist upon the strong arm of the law" to permit replacements. "Mr. Hynes can have all the law. We simply want justice."²⁰⁵ Similarly, the *Palladium of Labor* and the *Canadian Labor Reformer* regularly condemned the law, particularly when judge-made, as class-biased, unjust, and undemocratic. Although legislated labor law fared somewhat better, it too was accorded limited legitimacy. "Popular government as it exists at present in Canada, the United States and Great Britain is a sham and a farce," declared the *Palladium of Labor*²⁰⁶ and, as a result, workers could not expect their interests to be protected by the legislature.

Were judges and magistrates restrained by a perceived need to maintain the appearance of neutrality and fairness between the parties? Here the picture is decidedly mixed. Denison felt no compunction about taking the employers' side, and recurring complaints about his conduct do not seem to have affected his behavior. Cameron, an arch-Tory with a long history of anti-worker and anti-union sentiment, was similarly unrestrained by such concerns. Other officials were more sensitive, however. In both *Hynes* cases, Wilson's equation of economic coercion by employers with physical coercion by the plasterers was quite remarkable and, in the *Gibson* case, while Sinclair expressed an extremely hostile attitude toward worker boycotts, he clearly saw the ideological value of mercy in sentencing.

204. E. P. Thompson, *Whigs and Hunters* (New York, 1975), 258-69.

205. *Globe*, November 8, 1883, p. 6, col. 3.

206. *Palladium of Labor*, December 6, 1884, p. 1, col. 1. The editorial notes that, in the United States, "Behind the law-making power stands the cast-iron constitution and the Supreme Court." Canada, however, was seen to be no better off. "Our Partyism is as much dominated by monopoly as theirs . . . And over and above all we have the supremacy of British interests. . . ."

Did this restraint, such as it was, lend legitimacy to law in the eyes of workers? There is little evidence on this point. Undoubtedly, individual defendants in *Hynes* and *Gibson* were relieved, but labor representatives did not praise Wilson, Sinclair, or the legal system. In respect of *Gibson*, Elliot, the labor lobbyist, reported that the sentence was lighter than anticipated "for a reason which we are not in a position to explain." Certainly, the law under which they were convicted was not vindicated by this exercise of mercy. All that was eliminated was the need to carry through with plans to seek executive clemency. The campaign for legislative reform was as urgent as ever.²⁰⁷

Why was labor law in Ontario only weakly coercive and mildly hegemonic? The answer, I suggest, is to be found by examining the interaction between the development of class relations *and* the particular form of their institutionalization. In an earlier period, from 1837–77, there was a conflict between the social zone of toleration for trade unions and the formal legal zone of toleration. By the third quarter of the nineteenth century, trade unions had become accepted as legitimate organizations on the understanding that workers should be free to combine for the purposes of improving wages and other terms and conditions of employment. The willingness of employers to tolerate trade unions during this period was rooted in the practice of paternalism and prevailing labor-market conditions. To a significant extent, employers and skilled workers still saw themselves sharing a common space as producers, albeit within a framework in which deference was due the employer, property rights would be respected and no acts of physical coercion would be committed. In exchange, employers exhibited a measure of loyalty to the worker and respected certain artisanal norms.²⁰⁸ Moreover, labor surpluses gave employers confidence that the labor market would operate in their favor and exert a disciplining influence on any group that attempted to defy its logic. Most of the skilled elements of the working class accepted this compromise.

A similar process occurred in Great Britain during this period. Alan Fox has argued that by the third quarter of the century, employers and politicians were coming to accept trade unions as legitimate organizations for the protection of working-class interests in the labor market

207. *Report of the Canadian Legislative Committee of the Knights of Labor* (1889), 11.

208. For example, see Paul Craven and Tom Traves, "Dimensions of Paternalism: Discipline and Culture in Canadian Railway Operations in the 1850s," in *On the Job: Confronting the Labour Process in Canada*, ed. Craig Heron and Robert Storey (Kingston, 1986), 47; Palmer, *A Culture in Conflict*, chap. 4.

and to allow greater working-class participation in politics.²⁰⁹ This was facilitated by the economic buoyancy of the time, which provided a margin for concessions to the upper strata of the working class, promoted social stability, and generated a mood of optimism about the ability of the system to integrate trade unions as a junior partner in the system of industrial regulation. As well, trade unions adopted “‘accommodative’ postures toward the broad social structures of wealth, power and status.”²¹⁰ Indeed, employer acceptance was contingent on trade unions agreeing to represent their members’ interests within the emerging industrial capitalist system. “Irresponsible” trade union conduct could evoke a coercive response by the police, state officials, and employers, all with legal support. In any event, there were material benefits to be gained from participating in the emerging system of collective bargaining, especially for organized craft workers who constituted the backbone of the union movement. Finally, there were ideological and cultural supports for this accommodative strategy, especially among the labor aristocracy. Their inculcated individualism, desire for respectability, and sense of hierarchy undermined efforts to create a broader-based labor movement committed to the transformation of the prevailing capitalist regime.²¹¹

The significance of the British experience for Canada does not lie in any claim about the equivalence of the conditions that gave rise to and supported a compromise. Clearly, there were both similarities and differences, but it had a direct impact in at least two different ways. First, British immigrants to Ontario brought with them a culture and outlook shaped by their experience. Skilled workers expected their trade unions would be accepted here, just as in mid-Victorian England, and they had already learned the “rules of the game.”²¹² The second impact was through the legal system, and here we must step back and clarify the role of law in the compromise.

Judge-made law was not the vehicle through which the compromise was achieved. Legal doctrines that treated trade unions as criminal conspiracies were inconsistent with the social space that had been created. Workers and law reformers resented these regressive laws and sought, and incrementally achieved, immunity from them in the third

209. Alan Fox, *History and Heritage* (London, 1985), 124–73.

210. *Ibid.*, 164.

211. For similar assessments of the role of trade unions in British society during this juncture, see Fraser, *Trade Unions*; Henry Phelps Brown, *The Origins of Trade Union Power* (Oxford, 1986), 23–31; Richard Price, *Labour in British Society* (London, 1986), 49–92.

212. E. J. Hobsbawm, *Labouring Men* (New York, 1967), 406.

quarter of the nineteenth century. This was done by legislation that paradoxically ousted "the law" from labor relations. Moreover, because English employers in the 1880s resorted to law infrequently, the judges had limited opportunities to develop innovative doctrines to challenge this ouster.²¹³

These developments in England provided a model for institutionalizing a class compromise in Canada, and did not produce legal precedents for attacking it. Canadian politicians copied English labor law statutes and so the legalization of trade unions and basic trade union activity was accomplished through statutory immunities from prosecution under the common law. The enactment of Canada's *Trade Union Act* in 1872 was understood as a foundational event and, for that reason, Blake and Macdonald fought continuously over who could claim the lion's share of the credit. The intervention by Blake in the 1890 debates over the amendment to the criminal conspiracy law was but one example of this.²¹⁴

Thus, at the beginning of the 1880s, the dominant understanding among employers was that labor relations were to be conducted within the market,²¹⁵ but without resort to common law prosecution of workers for joining trade unions, participating in strikes, or peacefully picketing. Employers could accept this, even as paternalistic work relations were becoming more strained, because they felt reasonably secure behind tariff walls and because they were still confident that the trade unions they knew could not defy the law of the market. This attitude was reflected in the pages of the *Monetary Times* and the *Canadian Manufacturer*.

The events of the mid-1880s challenged this compromise. Not only

213. Commercial litigation was also infrequent. H. W. Arthurs, *Without the Law* (Toronto, 1985), 56–62.

214. Blake's campaign speeches to workers in the 1887 Dominion elections harped on these themes. Indeed, he went so far as to instruct Aemelius Irving to research the question of who had actually ended the prosecutions against the Toronto printers in 1872. When Irving confirmed that Mowat, the Liberal premier, was responsible, Blake used this to discredit Macdonald. See Edward Blake Papers, OA, MS 20(1), Series B-2, Legal Correspondence, letter from Blake to Irving, December 17, 1886; MU 154, Series B, Box 17, Env. 3, letter from Irving to Blake, December 18, 1886.

215. Of course, the labor market itself is legally constructed and the way law defines the limits to permissible behavior and advantage-taking influences to the balance of power between workers and employers. These limits were socially contested, but employers were content with the kinds of restrictions contained in the 1876 Act. For an excellent discussion of these questions, see Robert J. Steinfeld, "The *Philadelphia Cordwainers' Case* of 1806: The Struggle over Alternative Legal Constructions of a Free Market in Labour," in Tomlins and King, *Labor Law in America*, 20.

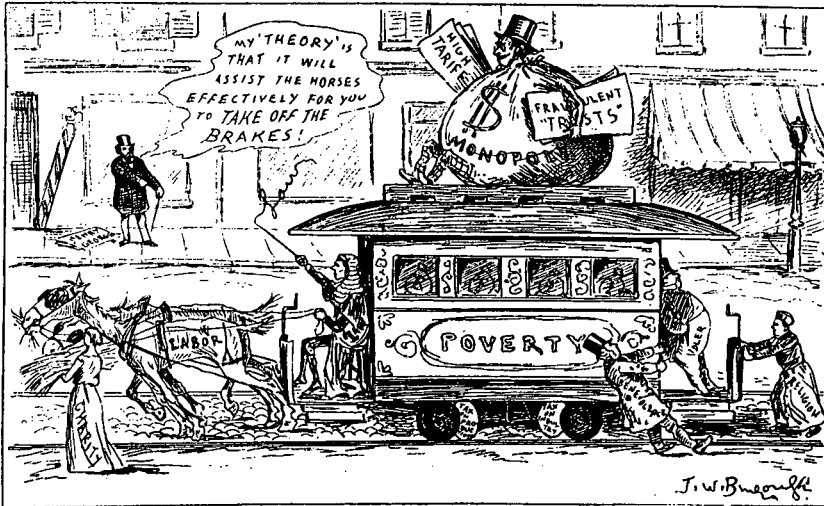
did the level of class conflict increase, but so too did its character. The organization of the Knights, in particular, posed a threat. They did not just critique lawyers and the legal system supporting market relations; they challenged the justice of the labor market itself. As Kealey and Palmer have argued, “[i]n the Ontario of the 1880s, . . . there was an alternative hegemony in formation.”²¹⁶ The efforts of the Knights to organize workers on a broader basis and to develop solidaristic strategies, like the boycott, led employers to fear that the Knights might actually be able to defy market forces. Even this challenge, however, did not cause many employers to resort to direct legal coercion. They also did not seek to have more coercive laws enacted, although the temptation to do so was there.²¹⁷ As figure 3 suggests, directly coercive law was a factor to be reckoned with, but its full force rarely came down on the backs of labor.

A full answer to the question of why law was used so much more coercively in the United States than in Ontario is beyond the scope of this article. Institutional factors undoubtedly played a significant role. The greater constitutional power of American courts, the place of law in American culture, and the more frequent use of law to resolve disputes are part of this. Also, Canadian employers, workers, and state officials witnessed the level of violence and direct state coercion in American labor relations and wished to avoid it. But these institutional and cultural factors do not tell the whole story. Equally important are the reasons for the higher level of class conflict in the United States during this period; for example, Laslett has argued that the American labor movement was “more advanced” than the British in its political and organizing strategy, and that this was the result of the more rapid growth of large-scale manufacturing and the earlier rise of monopolies in key sectors.²¹⁸ Even the biggest British firms were much smaller than their American counterparts, as small family firms dominated English man-

216. Kealey and Palmer, *Dreaming*, 278.

217. In 1887 legislation was passed to restrict the activities of shipping and dock workers. This was a response to the activities of a group of semi- or unskilled dock workers that had engaged in mass actions during a strike in Quebec. S.C. 1887, c. 49; House of Commons, *Debates*, June 17, 1887, p. 1075; *ibid.*, June 20, 1887, pp. 1152–55; *ibid.*, June 22, 1887, pp. 1229–33. A draft penal code, prepared in 1884, also contained some harsh provisions aimed at curbing labor riots and turbulent strikes, but the government never acted upon it. *Globe*, August 30, 1884, p. 6, cols. 1–2; *Palladium of Labor*, September 6, 1884, p. 1, cols. 1–3; and Desmond H. Brown, *The Genesis of the Canadian Criminal Code* (Toronto, 1989), 109–11.

218. J. H. M. Laslett, “Haymarket, Henry George, and the Labor Upsurge in Britain and America during the Late 1880s,” *International Labour and Working Class History* 29 (1986).

Figure 3. *Grip*, January 28, 1888, p. 10.

"THE HARD ROAD TO TRAVEL."

ufacturing well into the 1880s.²¹⁹ Although Ontario experienced rapid industrial growth in the 1880s, including the growth of large manufacturing enterprises, the scale of enterprise was significantly smaller than in the United States. For example, manufacturing firms in Chicago employed an average of twenty-one workers in 1890 while the average in Toronto for 1891 was 11.6. In 1886, McCormick's reaper works in Chicago employed 1,381 workers while the Massey Agricultural Implements Company employed seven hundred and was the largest factory in Toronto.²²⁰ The larger scale of production in the United States was associated with increased mechanization, greater displacement of skilled labor, and intensification of work, all of which met with worker resistance.²²¹ Heightened class conflict was the inevitable outcome. More radicalized workers organized in militant unions were perceived by employers and state officials to pose a threat to the social and labor market order, which required a repressive response. Again, comparisons

219. Philip S. Bagwell and G. E. Mingay, *Britain and America 1850-1939: A Study of Economic Change* (London, 1970), 170-75.

220. Bruce C. Nelson, *Beyond the Martyrs*, 11, 180; Kealey, *Toronto Workers*, 32, 196.

221. David M. Gordon et al., *Segmented Work, Divided Workers* (Cambridge, 1982), 113-27.

between Chicago and Toronto workers in the 1880s are instructive. The Knights of Labor was the most advanced working-class organization of any size in Toronto, while in Chicago there was a strong movement of socialists and anarchists advocating more radical platforms and courses of action. One final factor was the greater ethnic diversity of a city like Chicago. Immigrants from central and eastern Europe came with different cultural and political traditions, and their concentration among the least skilled and most radical elements of the working class made it easier for employers and state officials to characterize their activities as un-American and, therefore, dangerous.²²² In sum, just as law shaped the American labor movement, the dimensions and intensity of class struggle shaped the law and, more important, the way it was used.

The later development of Canada's second industrial revolution may be the key to understanding why coercive labor law was less important in Ontario than in the United States. It may also explain why, at the turn of the century, as class conflict intensified in conjunction with this new wave of industrial growth, law became significantly more important in Canada, both as an instrument of direct coercion and as a means for legitimating capitalist relations of production. The simultaneous development of the law's coercive and legitimating capacities in this century, however, is a story or, perhaps, book for another day.

222. Nelson, *Beyond the Martyrs*.