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A SURVEY OF STATE LEGISLATION RELATING TO PROBLEMS OF UNIONIZATION AND COLLECTIVE BARGAINING

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"THERE ought to be a law!" So declared labor and its friends in the early days of the New Deal, and the Wagner Act[1] and "little" Wagner acts[2] (the "labor relations acts") were the legislative response. Now, some five years later, with Utopia in labor relations not yet at hand, the hue and cry goes up for still more law, both state and federal. In part this is the typical American reaction to particular irritations and assumes with the usual naïveté that there is a single legislative specific for every isolated ailment. In part it is the equally typical reaction to chronic disturbances which assumes that a complete legislative code is the proper prescription for all ills. Each point of view, whether valid or not, can usefully inform itself concerning past and present legislative curatives. It is the authors' purpose herein to present a panoramic survey of the work of those useful laboratories for experimentation, the state legislatures.

It will come as a surprise to some to note the extent to which the state legislative power has been invoked to deal with problems arising out of the development of trade unionism. Legislation exists in many forms, employing every variety of sanction.[3] Some statutes have long been on the books; others are of recent origin. Some very obviously are the product of political exigency; others give evidence of serious deliberation. All are difficult of evaluation as to their actual incidence without going beyond the sometimes meagre record of appellate court litigation which they have left in their wake. Much therefore remains to

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[1] 49 Stat. L. 449 (1935); 29 U. S. C. (Supp. 1939), § 151 et seq.

[2] Statutes are cited in note 30, infra. Although these acts are not all alike, they have been popularly classified as "labor relations acts" to distinguish them from other types of labor legislation.

[3] The older statutes were almost exclusively criminal and only occasionally were supplemented by damage suits. The labor relations acts added three new sanctions: (1) suit by an administrative tribunal to enjoin violation of a statutory duty; (2) injunction by private group or individual; (3) forfeiture of the benefits of the act by the commission of an unfair labor practice.

This quest for the most efficient enforcement device is necessitated by the fact that many worthwhile laws have (in effect) been repealed by ineffective enforcement.

be explored beyond the preliminary treatment which is attempted here. Yet it is hoped that even a broad approach which leaves unfinished business will prove useful.

I

LEGISLATIVE RESTRICTIONS ON EMPLOYERS

A. *Existing Statutes Exclusive of the Labor Relations Acts*

Broadly speaking, there are two generations of employer restrictions—the recent labor relations acts, and the older limitations, many of which have been on the statute books for over thirty years. This latter group will be first considered and may be divided into two classes: (1) restrictions on the power to contract; and (2) restrictions on control of the labor market.

1. *Restrictions on the Power to Contract*

Many state legislatures in their early debuts as protectors of unionism prohibited employers from exacting from their employees a promise not to join a union.[4] Such prohibitions were inevitable. Although it was not until 1917[5] that such promises were accorded their greatest legal importance, the unions soon found that they constituted a psychological obstacle to union growth. Even in the late eighteen hundreds these promises had been condemned as "yellow-dog" contracts—thereby dramatically epitomizing labor's reaction to their use and at the same time providing a battle cry in its fight for recognition. The battle cry resulted in legislation when labor convinced the legislatures of its rights (or, perhaps, its new-born voting strength).

A similar confinement of the employer's control over his employees was prescribed by statutes prohibiting discrimination against union em-

[4] The 1887 New York statute, Laws (1887), c. 688, is typical: "Any person . . . who shall hereafter coerce or compel any person or persons, employe or employes, laborer or mechanic, to enter into an agreement, either written or verbal from such person, persons, employe, laborer or mechanic, not to join or become a member of any labor organization as a condition of such person or persons securing employment, or continuing in the employment of any such person or persons, employer or employers, corporation or corporations shall be deemed guilty of a misdemeanor." Quoted in People v. Marcus, 185 N. Y. 257, 77 N. E. 1073 (1906).

[5] Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 S. Ct. 65 (1917). Union organizers were enjoined from persuading employes to breach their anti-union promises, which the Court held to be valid contracts. Before this decision the promises had been exacted because employees felt compelled to observe them. After the Hitchman decision, the promises were frequently exacted in order to make it easier to obtain injunctive relief against unions. SEIDMAN, THE YELLOW DOG CONTRACT 76 et seq. (1932).

ployees or applicants.[6] A truly Draconian offspring of the older statutes is to be found in Rhode Island, where a manufacturer, wholesaler, or retailer of alcoholic beverages is forbidden to discriminate against any employee because of his membership in a trade union.[7] The penalty for violation is forfeiture for five years of the employer's license.[8]

Many of these anti-discrimination and yellow-dog contract statutes were soon declared unconstitutional as offending due process because they placed restrictions on liberty of contract.[9] In the *Adair*[10] and *Coppage*[11] cases the United States Supreme Court supported the positions already taken by the state courts, and invalidated both types of statutes. Thus the courts transformed a laissez faire principle into a constitutional right, and thereby strengthened their position (clearly revealed in the field of injunctions) as the division of government most hostile to unionism. At least thirteen states, however, have failed to repeal their yellow-dog statutes,[12] and five states have retained on the

[6] The following language is typical: "Whoever, being a member of a firm, or agent, officer or employe of a company, corporation or person, prevents employes from forming, joining or belonging to a lawful labor organization, or coerces or attempts to coerce employes by discharging or threatening to discharge them from their employ, or the employ of a firm, company or corporation because of their connection with such labor organization, shall be fined. . . ." Quoted from Ohio Gen. Code (1910), § 12943, Laws (1892), p. 269, in Jackson v. Berger, 92 Ohio St. 130, 110 N. E. 732 (1915).

[7] R. I. Gen. Laws (1938), c. 163, § 18.

[8] Ibid., § 10.

[9] The theory of the courts is probably best indicated by the following statement of Cooley: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice." COOLEY, TORTS, 1st ed., 278 (1879). This quotation appears in many of the cases.

Anti-discrimination statutes held unconstitutional: Gillespie v. People, 188 Ill. 176, 58 N. E. 1007 (1900); State v. Julow, 129 Mo. 163, 31 S. W. 781 (1895) (the statute also forbade the employer's requiring a yellow-dog promise); Jackson v. Berger, 92 Ohio St. 130, 110 N. E. 732 (1915) (but note dissents by Wanamaker and Donahue, JJ.); State ex rel. Zillmer v. Kreutzberg, 114 Wis. 530, 90 N. W. 1098 (1902).

Yellow-dog statutes held unconstitutional: People v. Western Union Co., 70 Colo. 90, 198 P. 146 (1921); State ex rel. Smith v. Daniels, 118 Minn. 155, 136 N. W. 584 (1912); People v. Marcus, 185 N. Y. 257, 77 N. E. 1073 (1906); Bemis v. State, 12 Okla. Crim. 114, 152 P. 456 (1915).

[10] Adair v. United States, 208 U. S. 161, 28 S. Ct. 277 (1908).

[11] Coppage v. Kansas, 236 U. S. 1, 35 S. Ct. 240 (1915).

[12] Ariz. Rev. Code Ann. (Struckmeyer, 1928), § 4883; Cal. Labor Code (Deering, 1937), § 922, reenacting Penal Code, § 679; Colo. Stat. Ann. (1935), c. 97, § 65, as amended by Sess. Laws (1937), c. 113, § 6(2); Conn. Gen. Stat. (1930), § 6209; Idaho Ann. Code (1932), § 43-601; Ind. Stat. Ann. (Burns, 1933), § 10-4906; La. Gen. Stat. (Dart, 1939), § 4380; Mass. Gen. Laws (1932), c. 149, § 20;

books their anti-discrimination statutes.[13] What is their present status?

In 1936 the United States Supreme Court decided that an employer subject to the National Labor Relations Act could be enjoined from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[14] Counsel had argued that such a decision would overrule the *Adair* and *Coppage* cases.[15] Chief Justice Hughes in the case in question stated:

> "[These cases] are inapplicable. The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation. . . ."[16]

It would be unflattering to infer that the Supreme Court was thereby affirming the unconstitutionality of a statute which expressly prohibits an employer from exacting a yellow-dog promise as a condition of employment, while upholding a statute which broadly enjoins an employer from discouraging union membership by discriminating in regard to conditions of employment. It would be adjudicating with a micrometer to hold that the Jones & Laughlin Steel Corporation cannot discriminatingly discharge union steel puddlers and also to hold that a California baker has a constitutional right to exact and enforce from pastry rollers a promise not to join the union. The more reasonable inference is that *Coppage v. Kansas* and *Adair v. United States* are no longer the law of the land.[17] The pertinent question then is—are the eighteen unrepealed state statutes now effective so far as federal due process is concerned?

Minn. Stat. (Mason, 1927), § 10378; Nev. Comp. Laws (Hillyer, 1929), § 10473; N. H. Pub. Laws (1926), c. 176, §§ 29, 30; N. J. Rev. Stat. (1937), §§ 34:12-2 to 34:12-4; N. Y. Consol. Laws (McKinney, 1938), bk. 39, "Penal Law," § 531.

[13] Ariz. Rev. Code Ann. (Struckmeyer, 1928), § 4882; Colo. Stat. Ann. (1935), c. 97, § 65; Ind. Stat. Ann. (Burns, 1933), § 10-4906; La. Gen. Stat. (Dart, 1939), § 4380; S. C. Code (1932), § 1299. See also Tex. Civ. Stat. Ann. (Vernon, 1925), §§ 5196, 5197, which prohibit any corporation from discriminating against any job applicant "on account of his having participated in a strike." A Pennsylvania statute prohibiting both discrimination and yellow-dog promises, Pa. Stat. (Purdon, 1930), tit. 18, § 1299, was repealed in 1939, Laws (1939), p. 872, § 1201.

[14] 49 Stat. L. 449 at 452 (1935), 29 U. S. C. (Supp. 1939), § 158 (3).

[15] S. Doc. 52, 75th Cong., 1st sess. (1937), p. 139.

[16] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 45-46, 57 S. Ct. 615 (1937).

[17] See Magruder, "A Half Century of Legal Influence upon the Development of Collective Bargaining," 50 HARV. L. REV. 1071 at 1085 (1937).

The real problem would arise in those states where the statutes were expressly held unconstitutional but whose courts might now be inclined to sustain their validity. Thus, assume that Doe, a Minnesota restaurant operator, has this year procured yellow-dog agreements from all his employees. Doe is convicted under the unrepealed yellow-dog statute, and appeals from his conviction to the Minnesota Supreme Court. Although he may claim that an unconstitutional statute may never be revived by court decision, his more forceful argument would be based on his reasonable reliance on *State ex rel. Smith v. Daniels*,[18] which in 1912 held unconstitutional the Minnesota act. This reasonable reliance could be protected by a decision which held for Doe but which proclaimed that henceforth the statute would be deemed constitutional.[19]

A revival of these statutes by judicial fiat would be a windfall to labor, for the legislative route of reenactment would be less certain and more risky. Many of them exist in states which otherwise place few limitations on the employer.[20] Although their revival would not be a fatal blow to the employer's anti-union campaigns, they would strike at the use of one of his traditionally important weapons.

2. *Restrictions on Control of the Labor Market*

The coercive force of a strike is, of course, greatest when the strikers are the only available source of labor. In the majority of controversies, however, an absolute strikers' monopoly will not exist, and the success of the employer's defense will depend in large part on his ability to obtain an alternate labor supply. In about one-fourth of the states

[18] 118 Minn. 155, 136 N. W. 584 (1912).

[19] See generally, FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 181 et seq. (1935). If, however, Doe were found guilty, it is arguable that his conviction is a denial of federal due process under the Fourteenth Amendment. See Stimson, "Retroactive Application of Law—A Problem in Constitutional Law," 38 MICH. L. REV. 30 at 47 et seq. (1939).

[20] Of the fifteen states only three—Massachusetts, Minnesota and New York—have labor relations acts.

Revival of the anti-discrimination statutes creates a problem concerning the employer's execution of a closed-shop contract with union *M* which contains a majority, but not all, of his employees. Assume that the minority belong to union *U*, and that, pursuant to his contract, the employer threatens to discharge the *U* members if they do not change their affiliation to *M*. Has the employer violated the statute? Some of the labor relations acts have avoided this problem by providing that "nothing in this article [specifically—the prohibition against discrimination] shall preclude an employer from making an agreement with a labor organization requiring as a condition of employment membership therein. . . ." N. Y. Laws (1937), c. 443, Consol. Laws (McKinney 1939), bk. 30, § 704.5.

statutes limit such a defensive tactic by requiring the employer to reveal the existence of a labor dispute in his offer of employment to the alternate.[21] These statutes obviously become efficacious from the union point of view only if potential employees would have been ignorant of the controversy but for the required notice, and acquiring such knowledge, fail to accept employment. They are quite without effect so far as the "strikebreaker" is concerned.

Another body of legislation is aimed directly at the strikebreaker problem by placing restrictions on the employment of outsiders and non-residents who are nominally charged with the duty of policing for the purpose of protecting plant property.[22] Enacted near the turn

[21] Cal. Labor Code (Deering, 1937), § 970; Colo. Stat. Ann. (1935), c. 97, § 71; Me. Rev. Stat. (1930), c. 54, § 7; Mass. Gen. Laws (1932), c. 149, § 22; Minn. Stat. (Mason 1927), § 10392; Mont. Rev. Stat. Ann. (1935), § 11220; Nev. Comp. Laws (Hillyer, 1929), § 2772; N. H. Pub. Laws (1926), c. 176, § 36; Okla. Stat. (1931), § 10879; Ore. Code Ann. (1930), § 49-1001; Pa. Stat. Ann. (Purdon, 1931), tit. 43, § 607; Tenn. Code Ann. (Michie, 1938), § 11363; Wis. Stat. (1937), § 103.43.

Employers sometimes have been in doubt concerning the existence of a strike, and consequently have been uncertain whether the statute applies. Maine, Massachusetts and New Hampshire have attacked this problem by providing that the statute will not be operative after a mediation-conciliation board has investigated the plant and found that a strike does not exist. Me. Rev. Stat. (1930), c. 54, § 7; Mass. Gen. Laws (1932), c. 150, § 4; N. H. Pub. Laws (1926), c. 176, § 38. The Wisconsin statute, § 103.43 (1a), provides that a strike shall be deemed to last as long as certain described conditions appear. It has been limited by judicial action. See Oeflein v. State, 177 Wis. 394, 188 N. W. 633 (1922), and West Allis Foundry Co. v. State, 186 Wis. 24, 202 N. W. 302 (1925).

Some statutes expressly give the duped applicants a civil cause of action against the employer, e.g., Ore. Code Ann. (1930), § 49-1002. As to their rights in the absence of such provisions, see generally Lowndes, "Civil Liability Created by Criminal Legislation," 16 MINN. L. REV. 361 (1932).

The constitutionality of such legislation is well established. Commonwealth v. Libbey, 216 Mass. 356, 103 N. E. 923 (1914); Biersach & Neidermeyer Co. v. State, 177 Wis. 388, 188 N. W. 650 (1922). Cf. Josma v. Western Steel Car & Foundry Co., 249 Ill. 508, 94 N. E. 945 (1911), where the statute, applying only to workmen who change "from one place to another in this state" in reliance on false advertising, was held unconstitutional as involving an arbitrary classification. This body of statutory and case law has not changed substantially within the past decade. See WITTE, THE GOVERNMENT IN LABOR DISPUTES 209, note 3 (1932).

[22] Ark. Stat. Dig. (Pope, 1937), § 3496 (§ 3497 creates an action in one injured by a strike breaker); Idaho Code Ann. (1932), § 17-1030 (criminal action), § 17-1031 (civil action); Ind. Stat. Ann. (Burns, 1933), § 10-4905; Kan. Gen. Stat. Ann. (1935), § 21-1616 (§ 21-1618 makes each day a separate offense); Ky. Stat. (Carroll, 1930), § 1376; Mass. Acts (1934), c. 233, Laws Ann. (Michie, Supp. 1939), c. 149, § 23A (no person during "labor trouble" shall employ "for the protection of employees" any armed guards other than watchmen regularly employed, police officers or persons licensed under c. 147, §§ 23-30, at least two months prior to the current

of the century when the name "Pinkerton" had first become anathema to organized labor, the statutes have been important in controlling the use of detective agencies by employers. But several factors have prevented their complete success. Under his common-law right to protect

"labor trouble"); Mo. Rev. Stat. (1929), § 4237; Mont. Rev. Code Ann. (1935), § 11315; Neb. Comp. Stat. (1929), § 28-725; N. Y. Consol. Laws (McKinney, 1937), "Penal Code," § 1845; Okla. Stat. (1931), § 10881; Pa. Stat. Ann. (Purdon, Supp. 1939), tit. 38, § 15; S. C. Constitution, art. 8, § 9; Tenn. Code Ann. (Michie, 1938), § 11365 (covers moving of guards with deadly weapons, "provided, that nothing contained in this article shall be construed to interfere with the right of any person, in guarding or protecting his private property or private interests . . ."); Tex. Civ. Stat. Ann. (Vernon, 1925), § 5207 (proviso that the act shall not be construed to interfere with self-defense or defense of property "by such lawful means as may be necessary"); Utah Constitution, art. 12, § 16; Wash. Rev. Stat. (Remington, 1932), § 2546 (prohibits existence of unauthorized military company); W. Va. Code (1931), § 61-6-11 (prohibits the employment for police duty of persons not bona fide residents); Wis. Stat. (1937), § 348.472 (prohibits the hiring of an armed body of men for the suppression of strikes when their appointment has not been authorized by the laws of this state; importation is not a requisite of the offense—see also § 175.07 on licensing of private detectives); Wyo. Constitution, art. 19, § 6.

The gravamen of the offense under most statutes is the moving or transporting. The New York act applies to the strikebreakers themselves, by penalizing anyone who assumes the functions of a sheriff or deputy sheriff without having been duly appointed in writing. N. Y. Consol. Laws (McKinney, 1937), "Penal Code," § 1845. Some statutes emphasize the importation element by providing that the act applies only to imported non-residents.

For a discussion of employers' use of armed guards, see BECKNER, A HISTORY OF LABOR LEGISLATION IN ILLINOIS 63 et seq. (1929). A discussion of the statutory treatment of employment and detective agencies is beyond the scope of this article. However, it is proper to note that there are statutory restrictions on both these sources of labor. As to requiring an employment agency to give notice of a strike at a prospective employer's plant, see Ind. Stat. Ann. (Burns, 1933), § 40-712; Minn. Stat. (Mason, 1927), § 4254-15(j).

The Illinois statute is representative of a rather complete legislative treatment of the licensing of private detectives. Ill. Stat. Ann. (Smith-Hurd, Supp. 1939), c. 38, § 608d, provides that "It shall be unlawful for any person to engage in or attempt to engage in the private detective business without a certificate of registration issued by the Department of Registration and Education." The original section, Laws (1933), p. 469, provided that the words "private detective" should mean (inter alia) the business of making for hire an investigation for the purpose of obtaining information with reference to "the affiliation, connection or relation of any person, firm or corporation with any union or non-union organization; or with any official, member or representative thereof; or with reference to any person or persons seeking employment in the place of any person, or persons, who have quit work by reason of any strike. . . ." A recent amendment, Laws (1937), p. 491, § 1, Stat. Ann. (Smith-Hurd, Supp. 1939), c. 38, § 608b, omits the quoted portion of the foregoing phrase. Although there remains a rather extensive definition of private detectives, the omission of this phrase would seemingly authorize a more unrestricted use of labor spies who are not required to be licensed under the act.

The act prescribes the following qualifications for private detectives: United

his employees and his tangible property, expressly preserved by some of the statutes, the employer may still organize a handy strong-arm battalion. Moreover, most of the statutes prohibit only the *importing* of guards from outside the city. Consequently, plants located in population centers can probably be amply guarded without violating the statute. Utah has recently adopted a different technique in controlling the strikebreaker problem by requiring disclosure instead of imposing prohibitions. Applicants for positions vacated by strikers must register individually with the industrial commission.[23] The registration letter must contain name, address for five years, and the nature and expected duration of work to be done.

Although not operative directly as a restriction on employers, statutes which prohibit the interference of state police and other state employees in labor disputes are pertinent at this point.[24] These statutes seek to break up an alliance which labor has long regarded as unholy. Likewise in point here are statutes of Rhode Island and New York, which make criminal the use of tear gas in labor disputes.[25]

Employers are often willing to make concessions in an effort to avert a costly strike. Usually these concessions are in the nature of higher wages or shorter hours or union recognition; generally the concessions benefit the union members. In less frequent instances, however,

States citizenship; age of 21; satisfaction of the licensing department that the applicant is competent and "is a person of honesty, truthfulness and integrity"; filing of a bond executed by the applicant and a reputable surety company, to be approved by the licensing department, in the penal sum of $1,000; employment for at least three years in a private detective business, or as a detective of the United States government, a sheriff or deputy sheriff or member of a municipal police department (and of a "grade higher than that of a patrolman"). Stat. Ann. (Smith-Hurd, Supp. 1939), c. 38, § 608g1. Whenever the provisions of the act have been complied with and the applicant has paid the required fee, the department is required to grant a certificate of authority to conduct a private detective business. The department has power to suspend, revoke or refuse a certificate for certain named causes. Ibid., § 608q. The act contains provisions regulating the nature of the hearing and the course of judicial review. Ibid., § 608r et seq.

[23] Utah Rev. Stat. (Supp. 1939), §§ 49-1-20 to 49-1-23. Section 49-1-18, 1939 Supp., provides that no employee in a struck plant may be deputized in connection with such strike.

[24] Ind. Stat. Ann. (Burns, Supp. 1939), § 47-828 (state police); Ky. Stat. (Carroll, 1930), § 33a-13 (chief labor inspector and deputies); Minn. Stat. (Mason, Supp. 1938), § 9950-6 (bureau of criminal apprehension), § 2554 (18a) (employees under commissioner of highways), Stat. (Mason, 1927), § 126 (2) (state board of relief may use militia to prevent calamities, "provided, however, that this act shall not be construed to apply in case of strikes, lockouts, or other labor disturbances"; Nev. Comp. Laws (Hillyer, 1929), § 7140 (national guard).

[25] R. I. Gen. Laws (1938), c. 299, §§ 4, 5; N. Y. Laws (1939), c. 625, Consol. Laws (McKinney, Supp. 1939), bk. 19, "General Business Law," § 84.

the employer "buys off" the union leaders from inaugurating a strike, and in such cases the rank and file of union members receive no worthwhile benefits. Legislatures have disapproved this sabotage of union operations by forbidding both bribery and extortion.[26] The successful functioning of these statutes would prevent unscrupulous employers or union racketeers from controlling the labor market to satisfy a selfish purpose.

Blacklisting statutes have been enacted discountenancing employer attempts maliciously to prevent a former employee (typically, a union "agitator") from obtaining or retaining employment elsewhere.[27] Their almost complete failure to achieve their purpose rests on the inability of the prosecutor to procure evidence to sustain a verdict for the state,

[26] N. J. Rev. Stat. (1937), § 2:114-7; N. Y. Consol. Laws, (McKinney, 1938), bk. 39, "Penal Law," § 380 [see People v. Bock, 69 Misc. 543, 125 N. Y. S. 301 (1910)]; Nev. Comp. Laws (Hillyer, 1929), §§ 10475, 10476. See also Ill. Stat. Ann. (Smith-Hurd, 1935), c. 38, § 242.

[27] Ala. Code Ann. (1928), § 3451 (maintaining "what is commonly called a blacklist" with intent to prevent any person's receiving employment from whomsoever he desires); Ariz. Rev. Code Ann. (Struckmeyer, 1928), §§ 4881-4882 (requiring any means of identification); Ark. Stat. Dig. (Pope, 1937), § 9121 (publishing false statement with intent, etc.); Cal. Labor Code (Deering, 1937), §§ 1050, 1051 (publishing false statement with intent, etc.; requiring photograph or fingerprints for use in blacklisting; § 1055 requires public service corporation to give employees letters on request); Colo. Stat. Ann. (1935), c. 97, §§ 88, 89, 93 (publishing name of discharged employee with intent to prevent reemployment); Conn. Gen. Stat. (1930), § 6210 (§ 6211 prohibits belonging to any bureau conducted for the purpose of furnishing information descriptive of affiliations of any person whereby his reputation may be affected unless the records are open to the person investigated); Fla. Comp. Laws (1927), § 6606 (limited to railroad employees; § 6608 requires employer to furnish statement of cause for discharge); Ill. Stat. Ann. (Smith-Hurd, 1935), c. 38, § 139 (conspiracy to blacklist); Ind. Stat. Ann. (Burns, 1933), §§ 40-301, 40-302; Iowa Code (1935), § 13253; Kan. Gen. Stat. Ann. (1935), § 44-117; Minn. Stat. (Mason, 1927), § 4201; Miss. Code (1930), c. 170, § 7131 (limited to telegraphers); Mo. Rev. Stat. (1929), § 4255; Mont. Rev. Code Ann. (1935), §§ 3092-3094, 11219 (duty established to give a truthful report on the worker, if requested; blacklists prohibited); Neb. Comp. Stat. (1929), § 48-212 (public service corporations required to give former employee service letter on request); Nev. Comp. Laws (Hillyer, 1929), §§ 10462, 10463 (§ 10464 establishes duty to furnish truthful statement of cause for discharge); N. M. Stat. (1929), §§ 35-4613 to 35-4615; N. C. Code Ann. (1935), §§ 4477, 4478; N. D. Comp. Laws Ann. (1913), § 9446 (exchanging blacklist); Okla. Stat. (1931), § 10884 (§ 10883 requires public corporations to give service letters to employees leaving); Ore. Code Ann. (1930), § 14-863; Tex. Penal Code (Vernon, 1925), §§ 1617-1619, Civil Code, § 5196 [see St. Louis Southwestern Ry. v. Griffin, 106 Tex. 477, 171 S. W. 703 (1914), holding unconstitutional another statute, Laws (1909), p. 160, requiring the employer to give a discharged employee a true statement of the cause of discharge]; Utah Rev. Stat. (1933), §§ 49-5-1, 49-5-2; Va. Code Ann. (1930), § 1817; Wash. Rev. Stat. (Remington, 1932), § 7599; Wis. Stat. (1937), § 343.682.

for blacklisting is one of those effective practices which often leave few traces.[28] Moreover, since it is now unlawful in at least twelve states to act on the basis of an anti-union blacklist,[29] the potential employer as well as his informant has a very real incentive to cover up.

None of these older statutes has been a Magna Charta to labor. Their effective operation has been sabotaged both by the courts and by the employers. But even if they were scrupulously observed by employers, there still would exist, absent other legislation such as the labor relations acts, an arsenal of legal and lethal weapons with which to fight the growth of trade unionism. Employers would be unrestrained, except by the law of defamation, in propaganda campaigns against unions and their officers. Espionage would be a permissible means of uncovering union sympathies. The fostering of company unions would remain a convenient device for combating organizational drives, and lockouts would be permissible. Finally, even though a union should gain numbers, the employer might apply the *coup de grâce* by refusing to deal with it.

B. *The Labor Relations Acts*

Labor relations acts have been enacted in Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah and Wisconsin.[30] Although the legislatures have differed widely in their approach to the problem of employee restrictions under these statutes, regulation of employers proceeds rather uniformly on the Wagner Act theory that peaceful settlement of labor disputes is improbable if unions are not allowed to mature free from employer interference and to bargain once they have matured.

All seven statutes forbid the employer to discriminate among

[28] Transmission of the necessary information can be effected orally—by tête-à-tête or by telephone. Even a written list can be shuttled around unobtrusively. See WITTE, THE GOVERNMENT IN LABOR DISPUTES 213 et seq. (1932).

[29] In the following states it would appear that an employer cannot discharge or refuse to hire an employee because of his union affiliation: Arizona, Colorado, Indiana, Mississippi, South Carolina, Massachusetts, Michigan, Minnesota, New York, Pennsylvania, Utah and Wisconsin (statutes cited in notes 13, supra, and 30 infra).

[30] Mass. Acts (1938), c. 345, as amended by Acts (1939), c. 318, Laws Ann. (Michie, Supp. 1939), c. 150A; Mich. Pub. Acts (1939), No. 176; Minn. Laws (1939), c. 440; N. Y. Laws (1937), c. 443, Consol. Laws (McKinney, Supp. 1939), bk. 30 "Labor Law," as amended by Laws (1940), c. 4; Pa. Laws (1937), pp. 1168-1178, as amended by Laws (1939), pp. 293-302, Stat. Ann. (Purdon, Supp. 1939), tit. 43, §§ 211.1-211.13; Utah Laws (1937), c. 55, Rev. Stat. (Supp. 1939), §§ 49-1-1 to 49-1-17. Each of these statutes is hereinafter referred to as the "Labor Relations Act" of the particular state. Wis. Laws (1939), c. 57, is hereinafter referred to as the Wisconsin Employment Peace Act (statutory title).

employees with the intent to discourage union membership.[31] Every statute (with the exception of Minnesota's) enjoins the employer's resort to "company unions."[32] Less widely accepted provisions prohibit blacklisting,[33] breach of an existing collective agreement,[34] and spying into union affairs.[35]

Five states follow the federal statute[36] in requiring the employer to bargain collectively and exclusively with the representative of a

[31] Mass. Labor Relations Act, § 4(3); Mich. Labor Relations Act, § 16 (a misdemeanor); Minn. Labor Relations Act, § 12(c); N. Y. Labor Relations Act, § 704 (5); Pa. Labor Relations Act, § 6 (1c); Utah Labor Relations Act, § 9(3); Wis. Employment Peace Act, § 111.06 (1c). The usual provision prohibits discrimination with intent to encourage or discourage membership in a labor organization. The Michigan act prohibits only discrimination with intent to discourage membership in a union. The New York act makes it an unfair labor practice "to encourage membership in any company union or discourage membership in any company union or discourage membership in any labor organization" by discriminating, etc. See Ward, "Proof of 'Discrimination' under the National Labor Relations Act," 7 GEO. WASH. L. REV. 797 (1939).

[32] Mass. Labor Relations Act, § 4(2); Mich. Labor Relations Act, § 16 [makes domination of "company union," defined § 2(a), a misdemeanor]; N. Y. Labor Relations Act, § 704(3) ["company union" defined § 701(6)]; Pa. Labor Relations Act, § 6 (1b); Utah Labor Relations Act, § 9(2); Wis. Employment Peace Act, § 111.06 (1b). The New York provisions in this regard are the most complete of any existing legislation in this country.

[33] Minn. Labor Relations Act, § 12(f); N. Y. Labor Relations Act, § 704(2), (9); Wis. Employment Peace Act, § 111.06 (1k).

The Minnesota act carries a triple sanction: forfeiture of benefits of the act (§ 15); injunction against unfair labor practice (§ 14); criminal prosecution for an unlawful act (§ 12g). See 24 MINN. L. REV. 217 at 232 (1940).

[34] Minn. Labor Relations Act, § 12(a); Wis. Employment Peace Act, § 111.06 (1f).

[35] Minn. Labor Relations Act, § 12(e); N. Y. Labor Relations Act, § 704(1); Wis. Employment Peace Act, § 111.06(1j). The Massachusetts, Pennsylvania and Utah acts probably forbid espionage under the blanket unfair labor practice provision which declares that an employer shall not "interfere with, restrain or coerce employees in the exercise of the rights" guaranteed by the act. Mass. Labor Relations Act, § 4(1); Pa. Labor Relations Act, § 6(1a); Utah Labor Relations Act, § 9(1). Similar provisions appear in the N. Y. Labor Relations Act, § 704(10), and Wis. Employment Peace Act, § 111.06 (1a).

Earlier statutes had placed a few rather innocuous limitations on the use of industrial spies. Thus, a Nevada statute [Comp. Laws (Hillyer, 1929), § 2770] makes it unlawful to discharge an employee on the report of a "spotter" unless there is accorded to the employee a hearing and confrontation with the "spotter." Cf. Ohio Gen. Code Ann. (Page, 1939), § 12956-1. See also 52 HARV. L. REV. 793 (1939).

Unless authorized by the employees, an employer is forbidden to conduct a check-off by the Pennsylvania Labor Relations Act, § 6(1f), and the Wisconsin Employment Peace Act, § 111.06(1i).

[36] 49 Stat. L. 449 at 453 (1935), 29 U. S. C. (Supp. 1939), § 159. See Wolf, "The Duty to Bargain Collectively," 5 LAW & CONTEM. PROB. 242 (1938).

majority of his employees in an "appropriate bargaining unit."[37] Elections of such representatives are conducted under the supervision of the administrative agency,[38] which certifies the majority's choice as representative (often for one year[39]) for the entire unit.[40] Reflecting

[37] Mass. Labor Relations Act, § 4(5); N. Y. Labor Relations Act, § 704 (6); Pa. Labor Relations Act, § 6(1e); Utah Labor Relations Act, § 9(5); Wis. Employment Peace Act, § 111.06 (1d).

The existence of a minority union has created a difficult problem for the employer who is under a duty to deal with the exclusive representative of the majority. The Wisconsin act declares that it is an unfair labor practive for an employer to bargain collectively with the representatives of less than the majority of his employees in a collective bargaining unit. § 111.06(1e). This provision supplements the more usual one (cited supra). New York, however, apparently gives more privileges to the minority by making it an unfair labor practice for an employer "to refuse to discuss grievances with representatives of employees. . . ." § 704(7).

If a Nevada employer or union conducts a meeting touching wage negotiations or working conditions, it is unlawful to deny the adversary party or parties his right to be present and to present arguments. Nev. Comp. Laws (Hillyer, Supp. 1938), §§ 2825.31 to 2825.34 (enacted 1937).

[38] The Wagner Act does not expressly give to the employer the right to force an election and certification, but the present regulations of the National Labor Relations Board permit an employer petition. N. L. R. B. RULES AND REG., Series 2, art. 3 (1939). The state legislatures must have been influenced by the stormy dispute which has centered on the N. L. R. A. provision. In three states the employer is by statute given the right to force a certification. Minn. Labor Relations Act, § 16(b); Pa. Labor Relations Act, § 7(c); Wis. Employment Peace Act, § 111.05(4) (mandatory when petition shows that an emergency exists). In New York the statute makes a certification upon employer petition permissive but not mandatory. N. Y. Labor Relations Act, § 705.3.

[39] Minn. Labor Relations Act, § 16(b); Pa. Labor Relations Act, § 7(c). The Pennsylvania act provides that the certification shall be binding for one year. The Minnesota act gives the certification a one-year life, but it further allows the conciliator to conduct a new election if "it appears to him that sufficient reason exists." The Minnesota act probably represents the practice of the labor tribunals.

[40] Under the Wagner Act (and the Utah facsimile) the labor board is given rather wide discretion in determining the nature of the bargaining unit. In most instances the practical choice is between the craft and some other (e.g., plant or employer) unit. Some of the acts have relieved the board of some responsibility by declaring that the craft shall under certain circumstances be the unit: Mass. Labor Relations Act, § 5(b) (if the majority within the craft shall vote in favor of craft representation); Minn. Labor Relations Act, § 16(b) ("when a craft exists, composed of one or more employees then such craft shall constitute a unit," etc.); N. Y. Labor Relations Act, § 705 (2) (similar to Massachusetts); Pa. Labor Relations Act § 7(b) (similar to Massachusetts). It should not be assumed that such provisions leave no difficulties. E.g., what, exactly, *is* a craft? The National Mediation Board, which functions under the Railway Labor Act—44 Stat. L. 577 (1926), as amended, 45 U. S. C. (1934), § 151 et seq.—has met with some problems in trying to answer this question. See NATIONAL MEDIATION BOARD, FIFTH ANNUAL REPORT 11 etseq. (1939); Cohen, "The 'Appropriate Unit' under the National Labor Relations Act," 39 COL. L. REV. 1110 (1939).

the 1939 decline in labor's popularity, the recent Michigan and Minnesota acts do not make the employer's refusal to bargain collectively an unfair labor practice. But the Minnesota statute does provide administrative machinery for the certification of majority representatives who "shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . ."[41] Conceivably a court might imply from this provision a duty in the employer to bargain, but this is unlikely.

Although the duty to bargain collectively has not been fully defined and hence is incapable of perfect enforcement, the National Labor Relations Board has expressed itself concerning the nature of the duty as follows:

> "the Act imposes upon the employer not only the duty to meet with the duly designated representatives of its employees and to bargain with them in good faith in a genuine attempt to achieve an understanding on the proposals and counter proposals advanced, but also the duty, if any understanding should be reached, to embody that understanding in a binding agreement."[42]

Since the Supreme Court has explained that this duty never requires the employer to make an agreement,[43] it may be argued that Michigan and Minnesota unions have not been seriously prejudiced by the omissions in their statutes. However, if "good faith" is ever determined on the basis of the "reasonableness" of the employer's response to the union's demands, the omission of an enforceable duty to bargain collectively would be serious from the point of view of labor. Thus, assume an employer has refused to grant a wage increase, claiming that he would be driven into bankruptcy by any increase in wages; that the labor board finds that the employer can reasonably afford the wage increase, and has therefore acted in bad faith and refused to bargain collectively; that the board's "cease and desist" order is sanctioned by a court; and that, fearing the penalty for contempt, the employer grants the wage increase. It is obvious that in such circumstances the existence of the statutory duty to bargain means real immediate gain, at least, for labor.

In addition to their theory of emancipating unions from employer interference, the Michigan and Minnesota acts outlaw trial by battle

[41] Minn. Labor Relations Act, § 16(a).

[42] In the Matter of Aronsson Printing Co., 13 N. L. R. B. 799 at 821 (1939). See Ward, "The Mechanics of Collective Bargaining," 53 HARV. L. REV. 754 (1940).

[43] National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1 at 45, 57 S. Ct. 615 (1936).

for a "cooling" period during which state officials must attempt to induce a peaceful settlement. The employer who desires to resort to a lockout must give at least ten days' notice in Minnesota.[44] In Michigan, five days is ordinarily the maximum period during which an employer may not lockout.[45] In both states the lockout right may be deferred for thirty days if the employer conducts a business affected with the public interest.[46]

Enough differences exist among these acts and between them and the federal act to suggest the probable usefulness of a careful examination into their operation. Such an examination should not only provide a basis for appraising them and suggesting possible improvements, but, more importantly, should provide information to guide

[44] Minn. Labor Relations Act, § 6. Where the employer desires to change an "existing agreement," he must notify the employees of such intention. If at the expiration of 10 days the parties have not reached an agreement and if the employer desires to lockout, he must then serve a notice thereof upon the employees and upon the labor conciliator. A lockout would be legal, only if it occurred 10 days after this latter notice had been served.

The meaning of "existing agreement" is somewhat nebulous. The act in §§ 11(a), 12(a) contains the term "valid collective agreement." If the phrase "existing agreement" is construed broadly to include both non-enforceable "understandings" and collective contracts, the "cooling period" would be extended in many situations to 20 days.

A further question arises from § 15, which provides that any labor organization which has committed any one or more of the seven enumerated unfair labor practices "shall not be entitled to any of the benefits of this act." Assume that *X* union, the representative of a majority of the employees, has attempted to compel independent workers to join—an unfair labor practice. *Y*, the employer, now desires a lockout. Must the 10 (or 20) day notice be given to a union not entitled to the benefits of the act? Is there an over-riding public interest which must be protected even though an undeserving party receives incidental benefits?

[45] Mich. Labor Relations Act, § 9a: "For a period of not less than five days after the above notice is served, or until the board undertakes the adjustment and settlement of the dispute should said board undertake such adjustment or settlement within five days, it shall be the duty of both employes and employers to use their best efforts to avoid a cessation of employment or a change in the normal operation of the business, and during said period the parties to said dispute shall undertake a mediation thereof."

[46] Minn. Labor Relations Act, § 7. The statutory test for affection with a public interest is this: Would a temporary suspension of operation "endanger the life, safety, health or well being of a substantial number of people of any community"? The disputants in a business affected with a public interest are controlled by § 6 (see note 44, supra) until the governor appoints a three-man commission to conduct a hearing and make report concerning the controversy. From the time of the appointment of the commission the right to lockout is suspended for 30 days or until the commission makes its report (if less than 30 days).

Under § 13 of the Mich. Labor Relations Act, the appointment of a commission is not a condition precedent to the 30 day suspension. The act merely prescribes that the governor shall appoint a commission during the cooling period.

and inform Congress in considering amendments of the Wagner Act. This observation applies, of course, not only to employer restrictions imposed by the acts, but also to employee restrictions imposed by some of them, which are to be discussed later. It is evident that more inertia attends the federal than attends the state amending process. Congressional committees would apparently do well to take advantage of this and spend part of their time looking for some of the empirical data to be found in the experience of the state legislative laboratories.

II

EMPLOYEE RESTRICTIONS

Although legislation has been increasingly (albeit slowly) restrictive on employers, labor's freedom has been alternatively expanded and contracted. In this ebb and flow of statutory restriction, the enactment of new restraints has tended to overbalance the repeal of old ones, so that virtually every weapon of labor is now in terms outlawed or suspended by at least one state statute. The enactment in the middle thirties of anti-injunction laws patterned after the federal Norris-La Guardia Act lessened the importance of the older restrictions, and the tenor of legislation then turned toward liberating the unions in order that they might grow into responsible bargaining units. But some of the recent labor relations acts have imposed new rules on the unions, and perhaps presage an era which will see extensive coordinated restrictions on both employers and employees.

A. *Statutes of Broad Application*

1. *Restraint of and Injuries to Trade*

Probably the broadest and vaguest of the existing prohibitions are those which seek to prevent injuries to commerce. Most of the legislatures have declared that a combination in restraint of trade is illegal,[47] and a smaller number have forbidden conspiracies "to commit any act injurious to public morals, trade or commerce."[48] What are the potentialities of such legislation with respect to trade unionism?

[47] See note classifying and analyzing state statutes in 32 COL. L. REV. 347 (1932).

[48] Ill. Stat. Ann. (Smith-Hurd, 1935), c. 38, § 242; Minn. Stat. (Mason, 1927), § 10055 (6); N. Y. Consol. Laws (McKinney, 1938), "Penal Code," § 580 (6) [and see People v. Fisher, 14 Wend. (N. Y.) 9 (1835)]; N. D. Comp. Laws Ann. (1913), § 9441 (6); S. D. Code (1939), § 13.0301 (5); Wash. Rev. Stat. (Remington, 1932), § 2382 (6). See Aigler, "Legislation in Vague or General Terms," 21 MICH. L. REV. 831 (1923).

It has been forcefully argued that the common law rarely regarded the ordinary coercive tactics of unions as restraints of trade, for "restraint of trade" was a finely-fashioned term of art which was generally applied to prevent business proprietors from agreeing to raise prices by self-imposed limitations.[49] Some movement toward freeing labor from the restrictions of these statutes has been made by the courts,[50] and also by the legislatures in more than one-fourth of the states. Such legislatures have declared: (1) that two or more persons shall not be subjected to criminal sanctions for agreeing and combining to do an act which would not be criminal if it were done by one person; [51] or (2) that labor is not a commodity nor an article of commerce; or, explicitly, (3) that the anti-trust laws do not apply to labor unions.[52] The statutory exemption has been given its greatest effect in New York, where the courts have upheld union-employer contracts that tend to subject the labor market to the control of the contracting parties.[53] However, even there the courts may refuse to exclude unions entirely from the operation of the restraint of trade statutes.[54]

No precise metes and bounds mark out the limitations imposed by these statutes, and the enactment of the anti-injunction statutes has made the domain of the monopoly laws still more uncertain.[55] A combination in restraint of trade was unlawful at common law because it engendered undesirable high prices and thereby injured the consuming public; a conspiracy to injure the business of *X* was unlawful unless the objective of the conspirators justified the injury. During the last

[49] Boudin, "The Sherman Act and Labor Disputes: II," 40 COL. L. REV. 14 (1940). Cf. Black, "How Far is the Theory of Trust Regulation Applicable to Labor Unions?" 28 MICH. L. REV. 977 (1930).

[50] Robison v. Hotel & Restaurant Employees Local No. 782, 35 Idaho 418, 207 P. 132 (1922); Shaughnessey v. Jordan, 184 Ind. 499, 111 N. E. 622 (1915). See also Karges Furniture Co. v. Amalgamated Woodworkers Local Union, 165 Ind. 421, 75 N. E. 877 (1905).

[51] E.g., Cal. Labor Code (Deering, 1937), § 1110. For decisions that a similar earlier statute [Cal. Stats. (1903), p. 289] did not prevent injunctive relief against boycott, see Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 86 P. 806 (1906); Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324 (1909).

[52] E.g., Iowa Code (1935), § 9916 and N. Y. Consol. Laws, (McKinney, Supp. 1939), bk. 19, "General Business Law," § 340(2), provide that the anti-trust law is not applicable to bona fide unions.

[53] Williams v. Quill, 277 N. Y. 1, 12 N. E. (2d) 547 (1938), appeal dismissed 303 U. S. 621, 58 S. Ct. 650 (1938).

[54] Falciglia v. Gallagher, 164 Misc. 838, 299 N. Y. S. 890 (1937). See also 51 HARV. L. REV. 752 (1938); 26 COL. L. REV. 344 (1926).

[55] See, for example, Pauly Jail Building Co. v. International Assn. of Bridge, Structural & Ornamental Iron Workers, (D. C. Mo. 1939) 29 F. Supp. 15.

century these principles were reasonably distinct and independent. Under the statutes the courts have scrambled them along with other fragments of economic and social philosophy. A cursory examination of some of the cases in which these statutes have been used or cited in deciding labor controversies suggests that the courts may have found in them no criteria for testing the lawfulness of union objectives and methods essentially independent of and different from those worked out under common-law conspiracy principles.[56] To the extent that this is true, the statutes have no utility in this area of the law except as they may impose special kinds of sanctions (such as criminal penalties or multiplied damages[57]). This is to be contrasted with the situation obtaining under the Sherman Act, where the federal authorities and courts, as illustrated by the recent activities of Assistant Attorney General Arnold, are able to use the federal statute as a means for testing the legality of union action without being limited by particular state doctrine.[58]

2. *Private Wrongs*

There are certain statutes which are more clearly directed against interference with individual rights. A Connecticut statute[59] prohibits any person from threatening or intimidating any person "to do any act, or to abstain from doing any act which such person has a legal right to do." In *State v. Murphy*[60] the act was held to be violated by union defendants who had sought to obtain a closed shop contract by

[56] Consider, for example, Campbell v. Motion Picture Machine Operators Union, 151 Minn. 220, 186 N. W. 781 (1922). Plaintiff theatre owner informed union officials that he would discharge union operators in an attempt to reduce expenses. Following the discharge, the union circulated a "We Do Not Patronize" list, and for two and a half years picketed plaintiff's theatre. The court construed "trade," in the restraint of trade statute, to include both labor and "business of any kind in which a person engages for profit." The decision did not turn on the fact that the union action injured non-union workers; rather, the court enjoined picketing and the use of the unfair list on the ground that plaintiff (and not the public) had been injured by the union's campaign. Other courts have similarly used their statutes to redress essentially private rather than public wrongs. See Hellman v. Retail Furniture Salesmen's Assn., 23 Ohio N. P. (N. S.) 177 (1919); Webb v. Cooks', Waiters' and Waitresses' Union, (Tex. Civ. App. 1918) 205 S. W. 465.

[57] See 32 COL. L. REV. 347 at 352 (1932).

[58] Statement by Assistant Attorney General Thurman Arnold, 5 LABOR REL. REP. 316 et seq. (1939).

[59] Conn. Gen. Stat. Rev. (1930), § 6208. A Washington statute is similar, Wash. Rev. Stat. Ann. (Remington, 1932), § 2614.

[60] 124 Conn. 554, 1 A. (2d) 274 (1938). Cf. Loew's Enterprises, Inc. v. International Alliance of Theatrical Stage Employees, (Super. Ct. Hartford County) 5 CONN. L. J. 186 (1937), where peaceful picketing was held not to violate the statute.

interfering with the movement of plaintiff's trucks. The same statute was a basis for the conviction of union defendants who conspired to boycott an employer to force him to discharge non-union employees.[61]

Other statutes are aimed directly at the protection of employers. The typical enactment prohibits any person from using "force, threats or intimidation . . . to force or induce another to alter his mode of carrying on business, or to limit or increase the number of . . . workmen . . . or their rate of wages or time of service."[62]

B. *Statutes of Specific Application*

The discussion turns now to statutes which are relatively more specific than those just described. A characteristic of the latter is their blanket prohibitions, which may be used to cover a great variety of employee misconduct. The statutes now to be considered prohibit intimidation of non-union employees, regulate or prohibit picketing, suspend the right to strike, outlaw the use of force, etc. They represent the legislature's treatment of particular phases of industrial warfare. In order to present these statutes in an orderly fashion, they will be discussed as they impinge upon the various stages in the development of a "typical" strike.

1. *Statutes Exclusive of the Labor Relations Acts*

(a) *The Strike*

The union's officials meet to consider the advisability of a strike. *X*, the chairman of the meeting, argues that the union should conduct a sit-down strike (which in many states is criminal), or should seize and overturn the automobiles of employees who refuse to join an ordinary strike. *X* has dangerously skirted, if he has not stepped completely inside, the area forbidden by the syndicalism statutes. A typical

[61] State v. Stockford, 77 Conn. 227, 58 A. 769 (1904); State v. Glidden, 55 Conn. 46, 8 A. 890 (1887).

The Connecticut statute raises several practical questions. If an employer is under a duty (so that he can maintain he has a "right") to bargain with a union, either by statute (such as the National Labor Relations Act) or by contract, may not the Connecticut statute be invoked against a minority or outside union which resorts to the ordinary forms of union coercion to compel such employer to recognize and bargain with it? Under what circumstances does the employer's "right" arise? E.g., is certification by the board necessary?

[62] N. D. Comp. Laws (1913), § 10241. Similar provisions are found in Ala. Code (1928), §§ 3447, 3990 [see Hardie-Tynes Mfg. Co. v. Cruse, 189 Ala. 66, 66 So. 657 (1914)]; Fla. Gen. Laws (1927), § 7542; Ga. Code Ann. (1933), § 66-9909; Me. Rev. Stat. (1930), c. 138, § 26, as amended Laws (1937), c. 12; Okla. Stat. (1931), § 2245; S. D. Code (1939), § 13.1825; Wis. Stat. (1937), § 343.681.

statute declares that criminal syndicalism "advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends." [63] Prosecution under these statutes, however, has rarely been undertaken against the more reputable and responsible unions.

While *X's* union employee-colleagues remain at their posts in the plant, their conduct would run counter to few statutory prohibitions which have not already been discussed. At least two states impose criminal sanctions on any resort to sabotage.[64] But, in the main, statutory restrictions do not become important until *X's* union has terminated its actionless war of nerves, and has begun overt hostilities, as by striking.

The mere cessation of work by the employees of *X's* union would probably not involve statutory penalties. In the great majority of states the ability of workers to strike is unrestricted. The little Wagner acts specifically provide that they shall not be construed "so as to interfere with or impede or diminish in any way the right to strike." [65] Statutes have been previously mentioned which declare that several persons shall have a right to do any act which would not be criminal if done by one person.[66] Since generally an employee commits no crime when he quits work (even if he thereby breaches a contract), these statutes would in most instances authorize any number of persons to quit work simultaneously. The exceptions to this general rule arise from the idea that the public interest in certain circumstances requires suspending the right to strike. Locomotive engineers, for example, in some states may not abandon their locomotives in furtherance of a strike.[67] Another type of statute penalizes an employee who "willfully and maliciously" breaches a contract of service, "knowing or having reasonable cause to believe that the consequence of his so doing will be to endanger human life or cause grievous bodily injury, or to expose

[63] Okla. Stat. (1931), § 2571.

[64] Kan. Gen. Stat. (1935), § 21-302; Wash. Rev. Stat. (Remington, 1931), § 2563-3.

[65] Mass. Labor Relations Act, § 9; N. Y. Labor Relations Act, § 713; Pa. Labor Relations Act, § 12; Utah Labor Relations Act, § 14. The Wisconsin Employment Peace Act has a similar section (§ 111.15).

[66] Supra, note 51.

[67] Del. Rev. Code (1935), § 3970; Ill. Stat. Ann. (Smith-Hurd, 1935), c. 114, § 101; Kan. Gen. Stat. (1935), § 21-1901; Me. Rev. Stat. (1930), c. 134, § 11; N. J. Rev. Stat. (1937), § 48:12-164; Pa. Stat. Ann. (Purdon, 1930), tit. 18, § 1871.

valuable property to destruction or serious injury."[68] Few cases have been decided under such statutes. Consequently the critical language has not become case hardened.[69]

If the projected strike is of the sit-down genus, it will probably be unlawful under the forcible detainer statutes;[70] and a few recent statutes, inspired by the 1936-1937 epidemic of sit-downs, expressly declare unlawful the retention of possession of shops or factories by employees.[71] The labor relations acts of Massachusetts, Michigan, Minnesota, Pennsylvania and Wisconsin declare the sit-down strike to be unlawful or enjoinable as an unfair labor practice.[72]

(a) *Picketing and Boycotting*

(i) *The Criminal Statutes*

Our union may decide, however, to attempt a war of attrition by directing its offensive towards a reduction of the employer's supply of labor and raw materials, and also towards a reduction in the demand for his products. Such an economic blockade, if successful, will force the employer either to go out of business or accede to the union's demands.

In virtually every campaign to enlist the support of non-striking employees and the public, unions have resorted to the use of picketing (or "patrolling" in the language of the nineties). The tactics of pickets

[68] Wash. Rev. Stat. (Remington, 1931), § 2533; Nev. Comp. Laws (Hillyer, 1929), § 10271; N. Y. Consol. Laws (McKinney, 1938), "Penal Law," § 1910.

[69] Take the case where union employees are charged with the duty of firing furnaces in a glass factory; they strike at a peak season when the furnaces are at capacity loads; the resultant cooling leaves the glass worthless and the furnaces seriously damaged. If criminal prosecution under such a statute is begun, a decision would necessarily determine (inter alia) whether the strike was "wilful and malicious" and whether raw glass and furnaces are "valuable property." It would seem clear that liberal judicial interpretation and vigorous prosecution would operate as a substantial deterrent on crippling (and hence effective) strikes.

[70] The Pennsylvania statute is typical: "If any person shall by force and with a strong hand, or by menaces or threats, unlawfully hold and keep the possession of any lands or tenements, whether the possession of the same were obtained peaceably, or otherwise, such person shall be deemed guilty. . . ." Pa. Stat. Ann. (Purdon, 1930), tit. 18, § 512. Held violated in Commonwealth v. Guthier, 34 D. & C. (Pa.) 351 (1938); Apex Hosiery Co. v. Leader, (C. C. A. 3d, 1937) 90 F. (2d) 155. See also Oswald Co. v. Leader, (D. C. Pa. 1937) 20 F. Supp. 876. See Wiley, "Was the Sit-Down Strike a Crime in Michigan?" 19 MICH. S. B. J. 66 (1940).

[71] Vt. Pub. Acts (1937), No. 210. See also Wash. Rev. Stat. (Remington, 1931), § 2563-4.

[72] Mass. Labor Relations Act, § 4A; Mich. Labor Relations Act, § 15; Minn. Labor Relations Act, § 11(c); Pa. Labor Relations Act, § 6(2b); Wis. Employment Peace Act, § 111.06(2h). See comment 35 MICH. L. REV. 1330 (1937); McClintock, "Injunctions Against Sit-Down Strikes," 23 IOWA L. REV. 149 (1938).

extend from a well-reasoned plea for support to the exercise of physical force, with most of it probably partaking somewhat of the characteristics of each extreme. At common law the courts are continually forced to decide whether picketing involves only peaceful persuasion (which in many situations is not enjoinable) or threats of force (which are usually enjoinable). Keen judges have often been able to make fair decisions in spite of the difficulties involved. However, many courts have adopted positions seriously interfering with the use of picketing. The most extreme cases deny that there can be peaceful picketing, presuming that picketing is necessarily coercive.[73] Other courts admit that peaceful picketing can exist, but are astute to find intimidation in the facts.[74] Since equity is generally willing to enjoin the use of coercive tactics, employers freely resort to the courts with complaints alleging coercive and intimidatory picketing. They have been so successful that the courts have been accused of "government by injunction."

A common type of statute provides:

> "Any person or persons, who, by threats, violence, intimidation, or other unlawful means, shall prevent or attempt to prevent any person or persons from engaging in . . . any lawful employment or occupation, shall be guilty of a misdemeanor."[75]

[73] See, e.g., Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13 (1898). See Hellerstein, "Picketing Legislation and the Courts," 10 N. C. L. REV. 158 at 175 (1932).

[74] As in Robison v. Hotel & Restaurant Employees Local, 35 Idaho 418, 207 P. 132 (1922). See Cooper, "The Fiction of Peaceful Picketing," 35 MICH. L. REV. 73 (1936).

[75] Ga. Code Ann. (1933), § 66-9906. See Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336, 62 S. E. 236 (1908); McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 S. E. 226 (1921); Robinson v. Bryant, 181 Ga. 722, 184 S. E. 298 (1936). Similar statutes: Colo. Stat. Ann. (1935), c. 97, § 92; Ill. Stat. Ann. (Smith-Hurd, 1935), c. 38, § 377; Me. Rev. Stat. (1930), c. 138, § 27; Mass. Gen. Laws (1932), c. 149, § 19 [see Sherry v. Perkins, 147 Mass. 212, 17 N. E. 307 (1888); Vegelahn v. Guntner, 167 Mass. 92, 44 N. E. 1077 (1896)]; Mich. Pub. Laws (1931), No. 328, § 352 reenacting Comp. Laws (1929), § 8612 [see People v. Washburn, 285 Mich. 119, 280 N. W. 132 (1938)]; Minn. Stat. (Mason, 1927), § 10431; Mo. Rev. Stat. (1929), § 4246; Nev. Comp. Laws (Hillyer, 1929), § 10424; N. H. Pub. Laws (1926), c. 380, § 27; N. Y. Consol. Laws, (McKinney, 1938), bk. 39, "Penal Code," § 580(5) [see Falciglia v. Gallagher, 164 Misc. 838, 299 N. Y. S. 890 (1937)]; N. D. Comp. Laws (1913), § 10240; Okla. Stat. (1931), § 2244; Ore. Code (1930), § 14-860; Pa. Stat. (Purdon, 1931), tit. 43, §§ 199-201; R.I. Gen. Laws (1938), c. 607, § 10; S.D. Code (1939), § 13.1824; Tenn. Code (1938), § 11035 et seq.; Tex. Penal Code (Vernon, 1925), art. 1146 [arts. 1094-1099, held unconstitutional in Ratcliff v. State, 106 Tex. Cr. 37, 289 S. W. 1072 (1936)]; Utah Rev. Stat. (1933), § 103-17-9 (induce by threats or coercion to join

If the appellate cases are a valid index, these statutes have been little used as a ground for criminal prosecution. They have probably played a more active role in injunction suits. Many of these legislative declarations appeared before the turn of the century—at a time when the common law of labor injunctions had not hardened, and was consequently most easily capable of being molded. The cases reveal that the courts found in the statutes additional reason, if any was needed, for freely granting injunctions.[76] The existence of the criminal remedy was not regarded as a reason for refusing injunctive relief where the plaintiff complained of "irreparable injury."

Picketing has, however, invoked prosecution under statutes not aimed solely at labor and having as their object the preservation of the peace. Such statutes are those prohibiting unlawful assemblages, riots and disorderly conduct. If the members of our union assemble as pickets in an attempt to intimidate non-striking employes or customers by force, it is strongly arguable that their conduct violates the statute prohibiting unlawful assembly, for an unlawful assembly may be typically described as a meeting of three or more persons with the intent to do an unlawful act.[77] If the pickets engage in actual combat or make threats of force, the riot statutes may be successfully invoked.[78] Moreover, the picketers may be hailed into court under the omnibus statute or city ordinance which penalizes "disorderly conduct."[79]

any organization); Vt. Pub. Laws (1933), §§ 8590, 8591 [see State v. Dyer, 67 Vt. 690, 32 A. 814 (1894)]; Wash. Rev. Stat. (Remington, 1931), § 2614; W. Va. Code (1931), § 22-2-80 (limited to mines); Wis. Stat. (1937), § 343.683.

Other statutes prohibit conspiracies to interfere with the exercise of employment relations. Minn. Stat. (Mason, 1927), § 10055(5); Miss. Code (1930), § 830(5); N. D. Comp. Laws (1913), § 9441(5); Wash. Rev. Stat. (Remington, 1931), § 2382(5).

[76] See cases cited in note 75, supra.

[77] Although the statutory language varies, it may be safely said that the statutes are aimed at group acts of violence or group meetings which contemplate acts of violence. See La. Code Crim. Proc. (Dart 1932), art. 885; Me. Rev. Stat. (1930), c. 134, § 2. This element of force is more apparent in those unlawful assembly statutes which prohibit only assemblies to do an act which if completed would be riot. N. D. Comp. Laws (1913), § 9807; S. D. Code (1939), § 13.1402.

[78] Under the typical statute, a riot is a use of force or threat of force, accompanied by immediate power of execution, by two or more persons. Okla. Stat. (1931), § 2534. See State v. Winkels, 204 Minn. 466, 283 N. W. 763 (1939); Commonwealth v. Apiceno, 131 Pa. Super. 158, 198 A. 515 (1938), extending a line of Pennsylvania cases. Cf. People v. Edelson, 169 Misc. 386 at 388, 7 N. Y. S. (2d) 323 (1938): "To permit this indictment [for a "brief disturbance"] to stand is to sanction the whittling away of the right of picketing. . . ."

[79] See People v. Jenkins, 138 Misc. 498, 246 N. Y. S. 444 (1930), in which it was held that defendants had violated the New York statute (Penal Code, § 722) by

Instead of prohibiting only the intimidation and violence that may accompany picketing, a few legislatures and a larger number of municipalities have dealt with picketing eo nomine by legislation which makes even the peaceful picket a criminal and virtually an industrial outlaw. This prohibition of picketing is in some instances omnibus in nature, extending without limitation to any and all persons; in other instances it extends only to certain classes of persons, such as picketers who act without the sanction of a majority of the employees of the employer picketed.[80] But wherever it is applied and enforced, this anti-picketing legislation is so broad and sweeping that it forecloses any appeal to customers or non-picketing employees at or near the establishment of the employer or the customer. The United States Supreme Court has recently climaxed judicial attacks on the validity of these laws by holding unconstitutional the omnibus anti-picketing provisions of an Alabama statute and a Shasta, California, ordinance.[81] The Court

picketing with signs "Milgrims on Strike." In fact there was no strike at Milgrims. The court felt that untruthful picketing tends to lead to breaches of the peace. See also State v. Perry, 196 Minn. 481, 265 N. W. 302 (1936) which held, picketing of the house of a non-striker was a violation of Minneapolis Ordinances (1872-1925), p. 760, § 2, prohibiting public disturbances.

[80] Ala. Code (1928), § 3448; Colo. Stat. Ann. (1935), c. 97, § 90; Kan. Gen. Laws (1935), § 44-617; Neb. Comp. Stat. (1929), § 28-213. For discussion of ordinances, see 38 COL. L. REV. 1521 (1938). For statutes which deny picketing to minority or outside unions, see infra, note 83; also 125 A. L. R. 963 (1940).

[81] Thornhill v. Alabama, (U. S. 1940) 60 S. Ct. 736; Carlson v. California, (U. S. 1940) 60 S. Ct. 746. Ala. Code (1923), § 3448, reads as follows: "Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, or corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The Shasta ordinance was paraphrased by Justice Murphy as follows: "Section 2 on its face declares it unlawful for any person to carry or display any sign or banner or badge in the vicinity of any place of business for the purpose of inducing or attempting to induce any person to refrain from purchasing merchandise or performing services or labor. It likewise makes it unlawful for any person to loiter or picket in the vicinity of any place of business for a similar purpose." 60 S. Ct. at 748.

The Colorado statute, Colo. Stat. Ann. (1935), c. 97, § 90, was held unconstitutional in People v. Harris, 104 Colo. 386, 91 P. (2d) 989 (1939), because it violated the federal and state due process clauses, the state freedom of speech clause and (by Bakke, J.) because it conflicted with the state Norris-La Guardia act. Cf. O'Rourke

placed its decisions squarely on the ground that these enactments denied employees the rights of free speech and publication as guaranteed by the Fourteenth Amendment. Justice Murphy, speaking for the Court, stated that an unrestricted discussion of the issues involved in labor disputes is necessary to insure the proper growth of an industrial society. Faced with the argument that this legislation was justified as a means of preserving the peace and protecting life and property, he said:

> "no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."[82]

In so saying, the Court leaves without definite answer the question whether there may be framed a constitutional anti-picketing statute, although the implications seem to be in the affirmative. Must such legislation prohibit only picketing that is violent or breaches the peace? Or may the legislature also forbid certain described picketing that, in the opinion of the legislature, *tends* to breach the peace? To what lengths may the legislature go in declaring that specifically described conduct is potentially dangerous?[82a]

v. City of Birmingham, 27 Ala. App. 133, 168 So. 206 (1936), cert. denied 232 Ala. 355, 168 So. 209 (1936).

Ordinances have been declared void where their anti-picketing provisions conflicted with the clearly expressed policy of the state Norris-La Guardia acts. Local Union No. 26, National Brotherhood of Operative Potters v. Kokomo, 211 Ind. 72, 5 N. E. (2d) 624 (1937); Yakima v. Gorham, 200 Wash. 564, 94 P. (2d) 180 (1939), noted 7 UNIV. CHI. L. REV. 388 (1940). And see generally, Hellerstein, "Picketing Legislation and the Courts," 10 N. C. L. REV. 158 (1932).

[82] Thornhill v. Alabama, (U. S. 1940) 60 S. Ct. 736 at 745-746.

[82a] The opinion may drop a hint of the proper bases for limiting picketing when it notes, "The [anti-picketing] statute as thus authoritatively construed and applied [by the Alabama courts] leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and accurateness of the terminology used in notifying the public of the facts of the dispute." Ibid., at 742-743. In the Carlson case there also appears somewhat similar language which may carry the implicit suggestion that the legislation may limit picketing in regard to the falsity of the statements of the pickets or in regard to the number of persons picketing. "[The ordinance] contains no exceptions with respect to the truthfulness and restraint of the information conveyed or the number of persons engaged in the activity." Carlson v. California, (U. S. 1940) 60 S. Ct. 746 at 748-749.

This basic question is of immediate concern in the light of statutes such as those of Oregon and Wisconsin.[83] By that legislation all picketing is unlawful unless there is a "labor dispute," which exists only if a majority of workers in the place picketed are engaged in a labor dispute with their employer. This legislation is hit hard by the argument that the Supreme Court has declared that there is a constitutional right of peaceful picketing. The blow is not necessarily fatal, however. Proponents of the statute may argue with some effectiveness that picketing by a minority or outside union tends to breach the peace, and that the statute may be brought within Justice Murphy's approval of "a statute narrowly drawn to cover the precise situation giving rise to the danger."

The opinions imply, then, that a properly drafted statute may constitutionally prohibit picketing that would tend to inflict physical injury upon persons who attempt to enter or leave the employer's shop or plant. But they leave unanswered the question whether a statute may constitutionally prohibit picketing which tends to inflict *economic* injury upon the customers of the employer. To invest this type of secondary boycott with legality as a matter of constitutional law would be startling in view of the fact that many courts have held such injury to customers to be non-privileged and wrongful.[83a] The actual decisions of the Supreme Court are not in conflict with this view, for in each case the picketing was directed against the employer, and not against a customer of the employer. Professedly, however, the Court found each statute void on its face, and expressed its views concerning civil liberties with an equally abstract approach. Consequently it would be unwise to discount too much of the opinion as dictum. Weight must be given to Justice Murphy's repeated proclamations that there is a constitutional right to publicize the facts of a labor dispute. Conceivably, the Court may hold that a peaceful picket at the customer's shop has a right to publicize the facts of a labor dispute. But it is equally conceivable (and perhaps more probable) that the Court will admit that the right to picket does not exist at all times and in all places.

If labor's right to publicize may be qualified, another question arises as to the nature of the nature of the qualification. It has already been

[83] Ore. Laws (1939), c. 2; Wis. Laws (1939), c. 25. The Minnesota Labor Relations Act provides that it shall be an unfair labor practice for more than one person to picket a single entrance to any place of employment where no strike is in progress, § 11(e), or for any person to picket during a strike unless a majority of persons picketing are employees, § 11(d).

[83a] See Hellerstein, "Secondary Boycotts in Labor Disputes," 47 YALE L. J. 341 (1938); J. D. Smith, "Coercion of Third Parties in Labor Disputes—The Secondary Boycott," 1 LA. L. REV. 277 (1939).

noticed that the Court would apparently approve legislation which prohibits violent or intimidatory picketing. The Court might also uphold legislation whose object is to avoid breaches of the peace or violence, where the particular restrictions on picketing are reasonably directed towards attaining that objective. May legislatures also prohibit picketing that (according to the legislature) is directed toward undesirable objectives (e.g., the closed shop, control of management price policies, etc.)? If so, must this be on the theory (perhaps difficult to substantiate) that picketing for such objects tends to result in violence and public disturbance, or is there some other proper basis of qualification? Justice Murphy may be indicating the turning point of future controversies on this question when he states that the union defendants had the right to publicize the facts of a "labor union dispute," including such disputes among the "issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." He then refers specifically to hours, wages, working conditions and "bargaining position" as among those labor issues which are of public concern. Does this approach suggest that there may be situations, in which picketing and concomitant publicity are resorted to, which are beyond the limits of privilege under the Fourteenth Amendment because of the nature of the issues involved?

These cases likewise raise interesting and important questions outside the field of state legislative action. Assume that striking union members picket *A's* plant peacefully, carrying truthful signs; that a state trial court enjoins defendants from such picketing, declaring that there cannot be such a thing as peaceful picketing; and that the case is carried to the state supreme court, which affirms. May defendants then appeal to the United States Supreme Court, claiming that they have been deprived of rights guaranteed by the Fourteenth Amendment? If the state court decisions are subject to limitations of substantive due process, the decision would clearly be bad. There is a paucity of authority concerning the application of concepts of substantive due process to judge-made law. Some support may be found, however, for the conclusion that a decision of a case by a state court is state action, which may be so flagrantly erroneous that it violates the federal due process clause.[88b]

The application of this idea would seem to be easier when state judicial action is challenged on the ground that it involves a violation of

[88b] See Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55 (1932); Brown v. Mississippi, 297 U. S. 278, 56 S. Ct. 461 (1936); Chambers v. Florida, (U. S. 1940) 60 S. Ct. 472; Muhlker v. New York & H. R. R., 197 U. S. 544, 25 S. Ct. 522 (1905); Gelpcke v. Dubuque, 1 Wall. (68 U. S.) 175 (1863).

civil liberties than when it is merely alleged that a substantive rule of law has been promulgated which operates unreasonably on property rights, for the business of defining and protecting civil liberties is historically the peculiar province of the Supreme Court. The impact of this view, were it accepted, would be sweeping, for it would provide a basis for molding the "common law" as well as the statutory law concerning picketing according to a single, basic principle, and for eliminating from the scene the wide variations which now exist from state to state.

(ii) *The Anti-Injunction Acts*

The reign of the chancellor and his government by injunction instilled in unions a hearty dislike for judicial intervention and a deep-seated distrust of the courts. It is not surprising that they carried their complaints to the legislatures, and ultimately succeeded in obtaining the enactment of statutes designed to curb the issuance of injunctions in labor disputes. Their campaign before the legislatures has extended for over forty years, and the way is marked with the skeletons of statutes interpreted to death by the courts or so hopelessly feeble as to lack the hardihood to survive. At long last appeared statutes, modeled after the federal Norris-La Guardia Act, which apparently possess the essential inherent strength. But even they have been subjected to debilitating excisions by some courts, and recent legislative action has further restricted their application in some instances. In some states there is still no anti-injunction legislation at all.

Before turning to the more widely used statutes, which are aimed at the source of injunctions, and which expressly attempt to limit the jurisdiction of the chancellor, another experiment should be noted. The Texas legislature attempted to cut down the use of injunctions by declaring that "It shall be lawful for any member or members of . . . trade unions . . . to induce or attempt to induce by peaceable and lawful means, any person to . . . refuse to enter any pursuit or quit or relinquish any particular employment. . . ."[84] The Texas courts have held that this provision does not apply to picketing conducted by outsiders, or where the objective is a closed shop contract.[85] The courts, moreover, concluded that the legislature could not have intended to permit unions "to dictate" by coercive methods the terms of employment.[86]

[84] Tex. Civ. Stat. (Vernon, 1925), § 5153, also Penal Code, § 1643.

[85] Culinary Workers' Union v. Fuller, (Tex. Civ. App. 1937) 105 S. W. (2d) 295; Tex. Motion Picture & Vitaphone Operators Union v. Galveston Motion Picture Operators, (Tex. Civ. App. 1939) 132 S. W. (2d) 299.

[86] Webb v. Cooks', Waiters' and Waitresses' Union, (Tex. Civ. App. 1918) 205 S. W. 465 at 469. The court's full statement throws light on the judicial process: "So

Any classification of the anti-injunction laws in the ascending order of their importance should begin with the Montana statute:

> "An injunction cannot be granted . . . in labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character, or between parties neither or none of whom were laborers or interested in labor questions."[87]

Showing remarkable restraint and a proper respect for a coordinate branch of government, the Montana court in *Empire Theatre Co. v. Cloke*[88] remarked: "Touching this provision, we may say that it adds nothing to the pre-existing law. . . ."

Other statutes, modelled after section 20 of the Clayton Act,[89] declare that the chancellor shall not issue injunctions against certain types of labor conduct. There are, however, certain implied or express exceptions to the broad anti-injunction declaration, and the courts have made the most of these loopholes. Restricted by the statute from enjoining peaceful picketing,[90] the Illinois court has been able to enjoin picketing nevertheless merely by finding that the defendants had revealed a lack of peaceful qualities.[91] The New Jersey act[92] is a virtual duplicate of the Illinois statute. And the New Jersey and Illinois courts have declared that their acts do not apply to picketing by outsiders.[93] Justifiably or not, the Kansas court declared that

that the question is narrowed to the simple one of whether in enacting article 5245, it was the legislative purpose to authorize any character of coercion or intimidation to compel a person in business necessitating the employment of servants to employ such persons only as shall be designated by another person or association of persons, and to permit such other person to dictate the rate of wages to be paid, the number of hours to serve, etc. We do not think so."

[87] Mont. Rev. Code (1935), § 9242(8).

[88] 53 Mont. 183 at 194, 163 P. 107 (1917).

[89] 38 Stat. L. 738 (1914), 29 U. S. C. (1934), § 52. Several states had Clayton Act laws at the time they adopted little Norris Acts. One of these was Washington, in which an interesting problem has arisen. Important sections of the Washington little Norris Act, Rev. Stat. (Remington, Supp. 1939), § 7612-1 et seq., were declared unconstitutional in Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P. (2d) 397 (1938). However, at the time the little Norris Act went into effect it carried the usual clause repealing inconsistent laws. Query, then, is § 7612 no longer existent?

[90] Ill. Stat. (Smith-Hurd, 1935), c. 48, § 2a.

[91] Ossey v. Retail Clerks' Union, 326 Ill. 405, 158 N. E. 162 (1927).

[92] N. J. Rev. Stat. (1937), § 2:29-77.

[93] Newark International Baseball Club v. Theatrical Union, (N. J. Ch. 1940) 10 A. (2d) 274; Miller's Inc. v. Journeymen Tailors Union Local No. 195, (N. J. Ch. 1940), CCH LABOR LAW SERVICE, ¶ 18,556: "picketing even if peaceable is unlawful except as an incident to the existence of a lockout or other labor dispute in which a strike can be justified."

"the act [94] itself expressly excepts from the prohibition injunctions to prevent irreparable injury to property or to a property right for which there is not adequate remedy at law." [95]

"Property" means "business," [96] said the Kansas court, and the chancellor's door was opened as usual.

The Kansas act, in common with the little Norris acts, and unlike the Arizona, Illinois and New Jersey acts, recognized and attempted to cure certain procedural weaknesses attending the issuance of injunctions. The Massachusetts act likewise contains these extremely worthwhile procedural reforms.[97] Except in the case of the five-day restraining orders (which now can be granted only if the complainants post adequate security) no injunction may be issued in Massachusetts in a labor dispute except after testimony of witnesses and unless defendants are offered an opportunity for cross-examination. Rhode Island places

Swing v. American Federation of Labor, 372 Ill. 91, 22 N. E. (2d) 857 (1939). Farthing, J., dissenting, declared that the federal cases were not in point. He pointed out that section 20 of the Clayton Act, 38 Stat. L. 738 (1914), 29 U. S. C. (1934), § 52, declared that no injunction should be granted "in any case between an employer and employees" and that the Illinois act does not contain the employer-employee phrase. The Illinois statute provides: "No restraining order or injunction shall be granted by any court of this State, or by a judge or the judges thereof in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons . . . from peaceably and without threats or intimidation recommending, advising, or persuading others [to cease work]." Ill. Stat. Ann. (Smith-Hurd, 1935), c. 48, § 2a. See Meadowmoor Dairies v. Milk Wagon Drivers' Union, 371 Ill. 377, 21 N. E. (2d) 308 (1939), noted 34 ILL. L. REV. 493 (1940).

The Arizona statute, Rev. Code (Struckmeyer, 1928), § 4286, was held unconstitutional in Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124 (1921), in so far as it was construed to legalize libellous abusive attacks on plaintiff's employees and customers. The Arizona statute is similar to the Kansas act.

[94] Kan. Gen. Stat. (1935), § 60-1104 et seq.

[95] Bull v. International Alliance, 119 Kan. 713 at 717, 241 P. 459 (1925).

[96] Ibid., 119 Kan. 718.

[97] Mass. Laws (1935), c. 407, § 4, Laws Ann. (Michie, Supp. 1939), c. 214, § 9A. An excellent judicial analysis of the procedural problem may be found in the opinion of Amidon, J., in Great Northern Ry. v. Brosseau, (D. C. N. D. 1923) 286 F. 414. In Long v. Bricklayers' & Masons' International Union, 17 Pa. Dist. 984 (1908), Fuller, J., states with reference to the practice of granting temporary injunctions upon affidavits: "Hardly anything of greater private or public gravity is ever presented to the court, and yet these matters are constantly receiving adjudication without a single witness brought before the judge. It is a bad practice. I confess my inability to determine with any satisfaction from an inspection of inanimate manuscript, questions of veracity. In disposing of the present rule, I am compelled to find, as best I may from perusing two hundred and thirty-five lifeless typewritten pages of conflicting evidence, the facts. . . ." See also FRANKFURTER and GREENE, THE LABOR INJUNCTION, c. 2 (1930); 2 TORTS RESTATEMENT, § 943 and comment (1934); Kingsley, "Labor Injunctions in Illinois," 23 ILL. L. REV. 529 (1929).

a similar limit on the duration of restraining orders.[98] Copied from the procedural provisions of the Norris-La Guardia act, these statutes are aimed at the old equity practice of issuing blanket injunctions on ex parte hearings of plaintiff's counsel and his witnesses or (more probably) his affidavits. Since strikes and picketing are more successful as Blitzkriegs than as extended contests, a blanket injunction forbidding all warfare for (say) thirty days is often fatal. The little Norris acts and the Massachusetts statute insure the union an early day in court and a chance to resume economic warfare while there is still a possibility of victory.

Representing the peak of drafting technique in state labor legislation, the little Norris acts attempt to modify substantively the common law of labor injunctions.[99] First, they expressly remove the jurisdiction

[98] R. I. Gen. Laws (1938), c. 299, §§ 1, 2. Other states which have attacked only the procedural problem are Maine and New Hampshire. Me. Laws (1933), p. 439; N. H. Laws (1935), c. 46.

[99] They have been enacted in the following states (deviations from the federal statute are noted in parentheses): Colo. Stat. Ann. (1935), c. 97, §§ 76-87 (additional statement of policy); Idaho Sess. Laws (1933), p. 404; Ind. Stat. Ann. (Burns, 1933), § 40-501 et seq.; La. Gen. Stat. (Dart, 1939), § 4379.5 et seq.; Md. Code Ann. (Supp. 1935), art. 100, § 65 et seq.; Minn. Stat. (Mason, Supp. 1938), § 4260-1 et seq. (condition precedent of reasonable negotiation efforts omitted); N. Y. Civ. Prac. (Cahill, 1937), § 876a et seq.; N. D. Laws (1935), c. 247; Ore. Code (1935), § 49-901 et seq. as amended by Laws (1939), c. 2 ("labor dispute" defined more narrowly); Pa. Laws (1937), p. 1198, as amended by Laws (1939), p. 302, Stat. Ann. (Purdon, Supp. 1939), §§ 206a-206r (labor dispute defined more restrictively); Utah Rev. Stat. (Supp. 1939), § 49-2A-1 et seq.; Wash. Rev. Stat. Remington, Supp. 1939), § 7612-1 et seq.; Wis. Stat. (1937), § 103.51 et seq., as amended by Laws (1939), c. 25 ("labor dispute" defined more restrictively); Wyo. Laws (1933), c. 37, § 3, Rev. Stat. Ann. (Supp. 1934), §§ 63-201 to 63-207, as amended by Laws (1937), c. 15 ("labor dispute" not defined).

For discussions of the operation of the federal act, see Monkemeyer, "Five Years of the Norris-LaGuardia Act," 2 MO. L. REV. 1 (1937); 36 MICH. L. REV. 1146 (1938). For discussions of the state acts, see McClintock, "The Minnesota Labor Disputes Injunction Act," 21 MINN. L. REV. 619 (1937); 49 YALE L. J. 537 (1940); 16 N. C. L. REV. 38 (1937). For the sake of convenience, the state acts have been termed "little Norris Acts." In fact, however, the Wisconsin statute (enacted in 1931) preceded the 1932 federal enactment.

Statutes have been discussed previously (note 13, supra) which impose criminal sanctions on an employer who exacts a yellow-dog contract from an employee. Such statutes would also have the effect of making the yellow-dog promise unenforceable in law or equity, for they implicitly declare that yellow-dog promises run against pubic policy and are consequently illegal. The more recent legislation, however, does not place criminal sanctions upon the employer, but expressly states that yellow-dog promises are unenforceable in law or equity. This recent legislation was drafted at a time when the criminal statutes were still regarded as unconstitutional, on the authority of Coppage v. Kansas and allied cases. See supra at note 11. Prior to the Jones-Laughlin case, serious questions had been raised as to the validity of the more modern statutes. See MacDonald,

of the courts to lend their assistance to the enforcement, directly or indirectly, of yellow-dog contracts.[100] Next, they expressly immunize peaceful picketing, non-fraudulent publicizing and other types of collective labor action from the injunctive process provided only that a "labor dispute," as defined, exists. And the term "labor dispute" is defined in so artful a manner[101] as apparently to defy judicial limita-

"The Constitutionality of Wisconsin's Statute Invalidating 'Yellow Dog' Contracts," 6 WIS. L. REV. 86 (1931). The constitutionality of the recent statutes is now generally conceded.

Yellow-dog contracts have been declared unenforceable by the following statutes: Cal. Labor Code (Deering, 1937), § 921; Idaho Sess. Laws (1933), c. 215, § 2; Ill. Stat. Ann. (Smith-Hurd, 1935), c. 48, § 2b; Ind. Stat. Ann. (Burns, 1933), § 40-503; La. Gen. Stat. (Dart, 1939), § 4831.2; Ind. Code Ann. (Supp. 1935), art. 100, § 66; Mass. Laws (1933), c. 351, § 1, Ann. Laws (Michie, Supp. 1939), c. 149, § 20A; Minn. Stat. (Mason, Supp. 1938), § 4260-3; N. J. Rev. Stat. (1937), § 34:12-5; N. Y. Laws (1935), c. 11, § 2, "Civil Rights Law," § 17; N. D. Laws (1935), c. 247, § 3; Ohio Gen. Code (Page, 1937), § 6241-1; Ore. Code Ann. (Supp. 1935), § 49-1903; Pa. Laws (1937), p. 1198, § 5, Stat. Ann. (Purdon, Supp. 1939) tit. 43, 206e; Utah Rev. Stat. (Supp. 1939), § 49-2A-2; Wash. Rev. Stat. (Remington, Supp. 1939), § 7612-3 (see note 89, supra); Wis. Stat. (1937), §§ 103.46, 103-52; Colo. Stat. Ann. (1935), c. 97, § 77.

[100] In this connection it may be desirable to turn back to 1917, the common law, and Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 S. Ct. 65 (1917). In that case the employer had obtained yellow-dog promises from his employees. Defendant union organizers solicited such employes to join the union. The Supreme Court held that the promises had the status of contracts, that the defendants had, in substance, induced the workers to breach their contracts, and that the appeal to employees was unlawful and enjoinable. With but one exception, the decision was accepted and followed by the state courts, and employers were able to obtain injunctions against union organizational campaigns merely by showing that the union organizers were attempting to induce breach of anti-union contracts.

Prevented by most decisions from prohibiting the employer to induce yellow-dog contracts, the pioneer legislatures solved the problem by declaring that yellow-dog promises should not be the basis of legal or equitable relief. Since the Jones & Laughlin case has probably resurrected the old criminal yellow-dog statutes, labor is doubly assured that one source of injunctions has been substantially limited. In those states, however, where the legislatures have not condemned the yellow-dog contract, it may still be utilized by local employers in seeking state court injunctions.

[101] Following is the definition of "labor dispute" in the Norris-La Guardia Act, 47 Stat. L. 73 (1932), 29 U. S. C. (1934), § 113:

"When used in this Act, and for the purposes of this Act—

"(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any

tion unless the very breadth of the definition must be deemed to make a judicial reconstruction of legislative intent necessary. It would at least seem beyond question that these statutes should be effective to legalize non-violent picketing for the ordinary union objectives—improvement in the labor contract, unionization, the closed shop, the check off—irrespective of previous common-law refinements concerning proper and improper objectives. Whether this result has been reached can only be ascertained by a check of the action of trial and appellate courts in the states involved. There is some disturbing evidence that such result has not been completely reached.[102] To the extent

conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

"(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, or if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

"(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

"(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

See law review discussions cited in note 99, supra.

[102] Busch Jewelry Co. v. United Retail Employees' Local, 281 N. Y. 150, 22 N. E. (2d) 320 (1939); Stalban v. Friedman, 171 Misc. 106, 11 N. Y. S. (2d) 343 (1939); Jewish Hospital of Brooklyn v. Doe, 252 App. Div. 581, 300 N. Y. S. 1111 (1937); Thompson v. Boekhout, 273 N. Y. 390, 7 N. E. (2d) 674 (1937); Opera on Tour, Inc. v. Weber, 170 Misc. 272, 10 N. Y. S. (2d) 83 (1939).

Only one act has been held unconstitutional. Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P. (2d) 397 (1938). In the other states the acts have survived, and the litigation has, naturally, hinged in large part on the interpretation of "labor dispute." Some courts have been unwilling to surrender the common-law techniques which they had used to determine the existence of a union privilege. Consequently, some courts have declared that no labor dispute exists in situations which would seem clearly covered by the broad language of the statute. The rationale of other decisions is that the little Norris acts are merely procedural in nature, and were not intended to change the substantive law. There are many cases, however, in which the courts have been more impressed by the "plain meaning" of the statutes. These cases recognize that the legislature has prescribed changes in the substance of labor law. This tendency is well illustrated by Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 S. Ct. 857 (1936). Plaintiff and several helpers conducted plaintiff's business. Defendant union picketed to force all work to be done by union men, but refused to allow the proprietor, Senn, to join the union. It is clear that many common-law courts would have enjoined the picketing for several reasons: defendants were outsiders; they sought a closed shop; the attainment of a closed shop would deprive

that this is true the courts seem clearly chargeable with failure to heed a legislative mandate. But a detailed survey of this situation is beyond the scope of this article.

The anti-injunction acts have in some instances been restricted by amendment in recognition of certain genuine employer grievances in being victimized by minority or "outside" union groups who refuse to accept the consequences of the majority choice. The *Senn* case, for example, presents a minor drama over which reactionaries may well grow vehement.[103] Legislature and court, hurriedly departing from a bleak scene, left the valiant but weak Senn to protect his business and his job from the overpowering onslaught of the voracious union. But the case of the unfortunate Mr. Senn is only a minor incident in the unfolding of a serious problem which attends the application of the anti-injunction acts to situations in which a minority group is inflicting economic injury upon an employer who is legally and ethically guiltless.[104]

the proprietor of his job. However, the Supreme Court upheld a refusal to enjoin the picketing.

The Senn case, it is submitted, reached a result consonant with sound legal and political theory. Where the statute has broad social implications, the court's interpretation should be especially careful to give effect to the intention of the legislature. It is axiomatic in American political theory that the legislature is the policy-determining branch of the government. Those courts which give a restrictive interpretation to the definition of "labor dispute" substitute in part their ideas of policy for the ideas of the legislature. In only one situation may this be justifiable—where the court feels that an act which attempts to cut down the jurisdiction of the equity court would be unconstitutional. However, where the court of last resort has previously held that the act can constitutionally change substantive law, there is no excuse for lower courts attempting to "save" the act by restrictive interpretations. See Fraenkel, "Judicial Interpretation of Labor Laws," 6 UNIV. CHI. L. REV. 577 (1939). In the Senn case the Supreme Court met and disposed of federal constitutional objections to the union methods and objectives there involved.

[103] The case is discussed in note 102, supra.

[104] Four situations are common. (1) The problem is most acute where the minority union (U) pickets an employer (E) who is under a statutory duty, imposed by a labor relations act, to bargain exclusively with the majority representative. Assume that *M* has been certified as the majority representative following an election conducted by the labor board; that *U's* picketing severely injures *M's* trade; and that, as a price for ceasing to inflict this injury, *U* demands that *E* enter into a closed shop contract with *U*. *E* is then faced with the equally unpleasant alternatives: refusing to recognize *U*, and suffering a serious and perhaps fatal loss of business from *U's* continued picketing; or entering into a contract with *U*, and being subjected to an unfair labor practice proceeding. At common law there would be a possibly effective answer to this dilemma—an injunction against *U's* picketing. But under the little Norris acts this situation involves a labor dispute by the plain wording of the statute, and these acts provide that peaceful picketing is not enjoinable. When *E* comes to court for an injunction, many courts would be tempted arbitrarily to hold that such a situation does not involve a "labor

In Oregon, Pennsylvania and Wisconsin the courts have been relieved of the necessity of facing such pleas by recent amendments to the anti-injunction acts. The effect of the changes is to restore to the chancellor a part of his former jurisdiction over labor controversies, and to benefit the employer and the majority union at the expense of the minority or outside union. Thus the Oregon legislature has provided that "labor dispute" means only "an actual bona fide controversy in which the disputants stand in proximate relation of employer and the majority of his or its employees."[105] Picketing in the absence of a labor dispute is made a criminal act. The Wisconsin amendment[106] is similar. The amended Pennsylvania act declares that its provisions shall not apply

> "Where any person, association, employe, labor organization . . . engages in a course of conduct intended or calculated to coerce an employer to commit a violation of the Pennsylvania Labor Relations Act of 1937 or the National Labor Relations Act of 1935."[107]

The act is further declared inapplicable in situations in which the action sought to be enjoined tends to procure a breach of a "valid subsisting labor agreement."[108] The way is also cleared for injunctions in situations involving certain types of jurisdictional disputes.[109]

dispute," and to enjoin *U's* picketing. Such judicial legislation may be fluently commended and condemned.

(2) Where *E* has already entered into a collective agreement with *M*, an objective of *U's* picketing is to induce a breach of such contract. This additional factor makes the employer's dilemma even more hopeless, for the duty to *M* is now enforced by a threat of judgment for damages as well as by a threat of statutory proceedings.

(3) Where *E* is not subject to a Wagner Act provision, but has made such an agreement, the threat of damages still creates a dilemma, but one of the horns is somewhat less sharp.

(4) It is also argued, but with less force than in the foregoing situations, that the employer should not be denied an injunction during certain jurisdictional disputes. Assume that *A* and *B* are both C. I. O. unions; that *E* is willing to recognize whichever union his employees select; that *A* and *B* both picket E's business site and seriously reduce *E's* income. The hardship on *E* is apparent, and once again the court is faced with the plea that the statute be limited.

[105] Ore. Laws (1939), c. 2, § 1. This statute was enacted by means of initiative and referendum in 1938.

[106] Wis. Laws (1939), c. 25.

[107] Pa. Laws (1937), p. 1168, as amended by Laws (1939), p. 302, § 4 (c), Stat. Ann. (Purdon, Supp. 1939), § 206d(c).

[108] Ibid., § 4(a).

[109] Ibid., § 4: "this act shall not apply in any case . . . (b) Where a majority of the employes have not joined a labor organization, or where two or more labor organizations are competing for membership of the employes, and any labor organization or any of its officers, agents, representatives, employes, or members engages in a

2. *The Labor Relations Acts*

With the exception of the New York and Utah statutes, every state labor relations act contains employee restrictions. The existence of these limitations reveals that state legislatures have taken a step that has been heatedly debated, especially in relation to proposed amendments to the Wagner Act, which imposes no such restrictions.

The quantum of the restrictions in the state acts varies markedly. In Massachusetts only the sit-down strike is outlawed.[110] In Wisconsin, at the other extreme, employees are confronted with ten unfair labor practices.[111] Thus, under some of the labor relations acts, picketing will for the first time be regulated under orders which emanate from administrative bodies.[112] In Minnesota there is no administrative hearing concerning alleged unfair labor practices. They must be judicially prosecuted by private action, or by the labor conciliator.[113] In Michigan criminal sanctions exclusively are used.[114]

These employee restrictions are, generally speaking, aimed at specific types of misconduct, and do not purport to authorize a flood of blanket injunctions. Consequently the discretion of the prosecuting tribunal is limited, and labor is saved from the fear of an administrative star chamber. The Minnesota and Wisconsin acts limit the right of outside unions to engage in picketing. In Minnesota an outsider may not picket during the existence of a strike unless the majority of persons engaged in picketing are employees.[115] In the absence of a strike not more than one person may picket a single entrance to any place of employment. Unlike the Wisconsin act, the Minnesota prohibitions do not seriously retard the picketing campaigns of minority unions. For if a minority of workers has struck, the Minnesota act does not prohibit picketing and requires only that a majority of the picketers be employees.[116] The Wisconsin act, however, declares that it shall be an unfair labor practice for an employee or any person to engage in "picketing, boycotting or any other overt concomitant of a strike unless a

course [of] conduct intended or calculated to coerce an employer to compel or require his employes to prefer or become members of or otherwise join any labor organization."

[110] Mass. Labor Relations Act, § 4A. Michigan, Minnesota, Pennsylvania and Wisconsin also outlaw the sit-down strike. See generally, comment in 40 COL. L. REV. 165 (1940).

[111] Wis. Employment Peace Act, § 111.06 (2).

[112] Mass. Labor Relations Act, § 6; Pa. Labor Relations Act, §§ 8, 9; Wis. Employment Peace Act, § 111.07.

[113] Minn. Labor Relations Act, § 14.

[114] Mich. Labor Relations Act, §§ 9a, 15, 17.

[115] Minn. Labor Relations Act, § 11d; "employee" defined, ibid., § 1(c).

[116] Ibid., § 11(e).

majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."[117] The Wisconsin act also severely regulates a resort to mass picketing by majority or minority or outsiders.[118]

Four of the acts have singled out specific conduct which is often, but not necessarily, connected with picketing and organization campaigns in that intimidation of employees or their families is prohibited.[119] The Wisconsin act also protects the employees' right to select representatives of their own choosing by making it an unfair labor practice for a union to coerce an employer into interfering with his employees' choice.[120] The Pennsylvania legislature has declared that the intimidation of an employer or members of his family is not an acceptable bargaining technique and accordingly makes it an unfair labor practice.[121] Wisconsin deals with the secondary boycott by forbidding employees to intimidate either the customers or the suppliers of the employer.[122] Interference with a vehicle operated by a neutral is an unfair labor practice in Minnesota.[123] The import of these restrictions is obvious: legislatures are not willing to pay any price for the strengthening of collective bargaining units. Rather, they are determined to protect the interest of employers, non-union employees, and neutrals.

The Pennsylvania, Minnesota and Wisconsin acts provide for temporary forfeiture of their benefits as a sanction for employer and employee unfair labor practices.[124] Probably these provisions would be

[117] Wis. Employment Peace Act, § 111.06(2e). For a criminal sanction of non-majority picketing, see Laws (1939), c. 25.

[118] Wis. Employment Peace Act, §§ 111.06(2f), 111.06(3). The Wisconsin act, § 111.06 (2j), declares that it shall be an unfair labor practice for an employee "to commit any crime or misdemeanor in connection with any controversy as to employment relations." It has been argued that this provision will flood the board with collateral questions. 40 COL. L. REV. 165 at 172 (1940). See also § 111.07 (3) of the Wisconsin act.

[119] Mich. Labor Relations Act, § 17; Minn. Labor Relations Act, § 11(g); Pa. Labor Relations Act, § 6(2a); Wis. Employment Peace Act, § 111.06 (2a).

[120] Wis. Employment Peace Act, § 111.06 (2b).

[121] Pa. Labor Relations Act, § 6 (2d).

[122] Wis. Employment Peace Act., § 111.06 (2g).

[123] Minn. Labor Relations Act, § 11 (f). See also § 13.

[124] Pa. Labor Relations Act, § 10.1; Minn. Labor Relations Act, § 15; Wis. Employment Peace Act, § 111.07 (4). See Hart and Prichard, "The Fansteel Case: Employee Misconduct and the Remedial Powers of the National Labor Relations Board," 52 HARV. L. REV. 1275 (1939).

The Pennsylvania and Wisconsin acts provide for prosecution of the unfair labor practice by an administrative tribunal. The Minnesota act provides "Whenever any

invoked most often as a defense against complaints instituted by disputants. The most difficult problem attending these provisions arises in connection with employee or union wrongs, and concerns the imputation of fault. The law of agency has defined more clearly the responsibility of an employer for the acts of his foreman and minor executives than it has defined the responsibility of union members for the acts of their colleagues. These statutes demand an answer to a vital question—when will the unions and union members be held responsible for the unfair labor practices of other members? The question is not answered by statutory language, nor have the courts had time to build up a body of case law by way of determination of legislative intent.

III

STATUTES DIRECTED TOWARD PEACEFUL SETTLEMENT OF CONTROVERSIES

Not content with prescribing Marquis of Queensbury rules to govern labor warfare, legislatures have also hopefully provided mechanisms for the peaceful settlement of the issues. These have ranged from mediation and arbitration to procedures utilizing administrative tribunals empowered to impose determinations of the issues upon both employers and labor. Administrative inaction and judicial action under the Constitution have rendered ineffective much of this legislation.

A. *Mediation Procedures*

Legislation creating mediation facilities proceeds upon the assumption that labor and employers will observe more faithfully a rule for which they have bargained than a rule which is imposed. Over one-half of the legislatures have provided for the appointment of mediators in-

unfair labor practice is threatened or committed, a suit to enjoin such practice may be maintained in the district court of any county. . . ." § 14.

In substance, the following language is typical of the state anti-injunction acts and may be important in deciding future cases involving alleged employee wrongs:

"No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization." Pa. Laws (1937), p. 1202, § 8.

vested with the function of aiding the disputing parties to make an amicable settlement.[125] The government official may enter the dispute on his own volition, and, in some states,[126] he may be under a duty to enter a serious dispute. In many states the invocation of his services is subject to the condition that a certain minimum number of workers varying from ten to fifty be involved.[127] One of his biggest clubs may be the force of public opinion, which he will be required to bring to bear upon the erring party in some states by issuing a report of blameworthiness.[128]

Temporary suspension of the right to strike or lockout has been deemed vital to the success of mediation in Colorado, Michigan and

[125] Ala. Code (1928), § 7602 et seq.; Ariz. Rev. Code (Struckmeyer, 1928), § 1397; Ark. Stat. Dig. (Pope, 1937), § 8503 (e); Cal. Laws (1939), c. 810; Colo. Stat. Ann. (1935), c. 97, § 29 et seq.; Conn. Gen. Stat. Rev. (Supp. 1935), § 1607c, (Supp. 1939), § 1324e; Ga. Laws (1937), p. 238, § 9 (e), Code Ann. (Supp. 1939), § 54-122 (e); Ill. Stat. Ann. (Smith-Hurd, 1935), c. 10, § 19 et seq.; Ind. Stat. Ann. (Burns, Supp. 1939), § 40-2109 (d); Iowa Code (1935), § 1496 et seq.; Kan. Gen. Stat. (1935), § 44-601 et seq.; La. Gen. Stat. (Dart, 1939), § 4280.9; Me. Rev. Stat. (1930), c. 54, §§ 1-8; Md. Code Ann. (1924), art. 89, § 4 et seq.; Mass. Gen. Laws (1932), c. 150, as amended by Laws (1938), c. 364; Mich. Labor Relations Act, §§ 1-13; Minn. Labor Relations Act, §§ 1-9; Mont. Rev. Code Ann. (1935), § 3052 et seq.; Nev. Comp. Laws (Hillyer, 1929), § 2763 et seq.; N. H. Pub. Laws (1926), c. 174, § 12 et seq.; N. Y. Laws (1937), c. 594, Consol. Laws (McKinney, Supp. 1939), "Labor Law," § 750 et seq.; Ohio Gen. Code (Page, 1937), § 1063 et seq., also § 871-22 (8); Okla. Stat. (1931), § 4318 et seq.; Ore. Code Ann. (1930), § 49-201 et seq.; Pa. Laws (1937), p. 674, Stat. (Purdon, Supp. 1939), tit. 43, § 211.31 et seq., and see (Purdon, 1931), tit. 43, § 691 et seq.; R. I. Gen. Laws (1938), c. 281, § 4; S. C. Acts (1937), No. 340, Code (Supp. 1938), § 6353; Utah Rev. Stat. (1933), § 42-1-16 (5), also Const., art. 16, § 2; Vt. Pub. Laws (1933), § 6620 et seq.; Wash. Rev. Stat. (Remington, 1931), § 7606; Wis. Employment Peace Act, § 111.01 et seq., especially §§ 111.10, 111.11; Wis. Stat. (1937), § 101.10 (8).

[126] E.g., Massachusetts.

[127] Ill. Stat. Ann. (Smith-Hurd, 1935), c. 10, § 20 (twenty-five); Mont. Rev. Code Ann. (1935), § 3055 (twenty); N. H. Pub. Laws (1926), c. 174, § 15 (ten); Ohio Gen. Code (Page, 1937), § 1077 (twenty-five); Okla. Stat. (1931), § 4320 (twenty-five); Ore. Code Ann. (1930), § 49-206 (fifty); Vt. Pub. Laws (1933), § 6625 (ten). Mass. Laws (1938), c. 364, § 2, Laws Ann. (Michie, Supp. 1939), c. 150, § 5, repealed the former requirement that twenty-five persons should be employed. If the investigation is not completed within a certain period (varying from ten days to three weeks), the disputants may resort to hostilities. E.g., Ohio Gen. Code (Page, 1937), § 1066.

[128] For unsuccessful attempts to enjoin the issuance of a report of blame, see New Orleans City & Lake R. R. v. State Board of Arbitration, 47 La. Ann. 874 (1895); Moore Drop Forging Co. v. Board of Conciliation & Arbitration, 239 Mass. 434, 132 N. E. 169 (1921). See also Holcombe v. Creamer, 231 Mass. 99, 120 N. E. 354 (1918).

Minnesota.[129] Under the statutes of these states neither party may substantially alter the employment relation for a designated period[130] after deciding to resort to hostilities. And in Michigan and Minnesota[131] government officials must be notified of prospective employer or union action. These three statutes provide for compulsory investigation by the government agency.

The compulsory investigation statutes deprive disputants of the tactical advantage of a sudden offensive against an unprepared opponent. Consequently, employees and (to a lesser degree) employers are presumably more willing to compromise their claims. It is too early to predict the effectiveness of these statutes, but experience under the Colorado act is pertinent. Although that act has not in practice relegated strikes and lockouts to the limbo of forgotten things, it has led to a substantial number of peaceful settlements.[132] The Canadian Industrial Disputes Investigation Act[133] is similar to the Colorado act, and its successful operation should be heartening to American exponents of compulsory investigation.

B. *Arbitration Provisions*

1. *Voluntary Arbitration*

If bargaining with the help of a mediator or otherwise reaches an impasse, economic warfare may sometimes still be averted if the parties will submit the determination of their controversy to a third person. The statutes of the various states present three basic types of arbitration procedures. In addition, of course, common-law arbitration is a possibility.

[129] Colo. Stat. Ann. (1935), c. 97, § 29 et seq., and see People v. United Mine Workers, 70 Colo. 269, 201 P. 54 (1921); Mich. Labor Relations Act, §§ 9-13; Minn. Labor Relations Act, §§ 6-9; see also Wis. Employment Peace Act, § 111.11, which applies only to employees in the production, harvesting or initial processing of any farm or dairy product and requires a 10-day notice of an intent to strike. It imposes no limitation on the employer's right to lock out.

[130] In Michigan the period is 30 days in a business affected with public interest (Labor Relations Act, § 13) and 5 days in other instances (ibid., § 9a). In Minnesota the longest single period is 30 days, in businesses affected with public interest (Labor Relations Act, § 7), but there may be added to this other periods (ibid., § 6) to make a total continuous suspension of 50 days. In Colorado the suspension commences from the beginning of the dispute until the commission has terminated its investigation. Colo. Stat. Ann. (1935), c. 97, § 32. The only limit on the length of investigation is the requirement of due diligence. Ibid., § 31.

[131] Mich. Labor Relations Act, § 9; Minn. Labor Relations Act, § 6.

[132] TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT 119 (1935).

[133] Can. Rev. Stat. (1927), c. 112. See SELEKMAN, LAW AND LABOR RELATIONS (1936).

In several states the statute which creates the official conciliation and mediation agency, discussed above, also sets up alternative procedures for converting such agency into one empowered to arbitrate.[134] Typically, the agency is under statutory duty, upon receiving notice of an actual or impending strike of serious enough proportions, to endeavor either to mediate the dispute or to induce the parties to submit it to the agency itself or to a "local" board of arbitration selected in the manner provided in the act. The submission may be made by written application either by the employer or a majority of the employees concerned or by both, and such application must contain a promise to preserve the status quo pending the decision of the arbitrators.[135] The agency is empowered to use compulsory process to obtain evidence, is required to conduct a hearing upon published notice and must make a written decision which is stated to be "binding on the parties who join in the application" for a certain minimum period specified in the statute (e.g., "for six months or until the expiration of sixty days after either party has given notice to the other in writing of his intention not to be bound thereby").[136] The means by which the decision may be made "binding" may be spelled out in the statute, as in Illinois, where, if both parties have joined in the application, the decision may, upon its filing in a circuit court, forthwith become the basis for contempt proceedings.[137] Or the statute may leave the enforcement problem untouched except to make "violations of the act" subject to penalty. Presumably in such a case the decision can be enforced, if both parties have joined in the submission, in the same manner as a common-law arbitral award.

The procedure under the Iowa statute is somewhat similar to that

[134] E.g., Illinois, Maine, Massachusetts, Montana, New Hampshire, Ohio, Vermont. Statutes cited, supra, note 125. Substantially similar provisions may be found in the Oklahoma and Oregon statutes, cited supra, note 125.

The statutes of some of these states require an absence of a justiciable controversy, before the government agency may be called in. E.g., Illinois, Montana, Ohio, Oregon, Vermont.

[135] E.g., Illinois, Maine, Massachusetts, Montana, Ohio. Statutes cited supra, note 125.

[136] The Vermont statute provides, Pub. Laws (1939), § 6626: "The commissioner shall hear all persons interested who come before him, advise the respective parties what ought to be done or submitted to by either or both to adjust such controversy and make a written decision thereof. . . ." § 6627: "Such a decision shall be binding upon the parties who join in such application for a period of six months or until the expiration of sixty days after either party has given notice in writing to the other and to the commissioner of his intention not to be bound thereby."

[137] Ill. Stat. (Smith-Hurd, 1935), c. 10, § 24. Cf. Opinion of the Justices, 251 Mass. 569, 147 N. E. 681 (1925).

just described, but enough different to be worth noting separately.[138] There, if a labor dispute is sufficiently serious, either or both of the parties, or a public official such as the mayor of the involved city, may apply to the governor for the appointment of a board of arbitration and conciliation. Each of the parties may submit a list of nominees for such board, from each of which the governor is required to select one arbitrator. Those so selected may designate a third. In other respects the agency has powers and duties similar to those possessed by the agencies of the first group of states, and its decisions are similarly "binding."

The Nevada and Texas statutes allow disputants to select arbitrators for a labor controversy; they also determine the duration of the award and attempt to restrict the warfare of the disputants during the arbitration process.[139]

Since a majority of the states do not provide special labor arbitration procedures such as those just described, the disputants must, if they desire to arbitrate, utilize general common-law or statutory arbitration as a substitute for machinery custom-built for labor controversies. A word about these two procedures is therefore in order.

At common law two persons may submit an existing controversy to an arbitrator and his award will be binding (i.e., enforceable by action) unless, prior to its entry, either party revokes his submission. Under statutory arbitration the submission is irrevocable. Generally, the statutory award may be made an order of court, while the common-law award must be prosecuted to judgment as an ordinary cause of action.[140]

Since a submission under statutory arbitration is irrevocable, even in the presence of altered circumstances (e.g., a substantial rise in prices), a disputant must attempt to measure the risk involved in making a submission. At least six legislatures, possibly in recognition of this problem, have provided that labor disputes may not be settled by statutory arbitration.[141] Some statutes limit statutory arbitration to controversies

[138] Iowa Code (1935), § 1496 et seq.

[139] Nev. Comp. Laws (1929), § 2764 et seq.; Tex. Civ. Stat. (Vernon, 1925), art. 239 et seq. See also Kan. Gen. Stat. (1935), § 6-114 et seq.

[140] It is also possible to agree to arbitrate future disputes by common-law or statutory means. And the agreement is revocable at common law. See generally, STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930).

[141] Ariz. Rev. Code (Supp. 1934), § 4301a (applies only to agreements to arbitrate future disputes, semble); Cal. Code Civ. Proc. (Deering, 1937), § 1280; N. H. Laws (1929), c. 147, § 1; Ohio Gen. Code (Page, 1937), § 12148-1; Ore. Code Ann. (Supp. 1935), § 21-101; R. I. Gen. Laws (1938), c. 475, § 1. Pennsylvania excepts contracts relating to "personal services" from statutory arbitration. Pa. Stat. Ann. (Purdon, 1930), tit. 5, § 161.

which might be the "subject of a civil action"[142] and accordingly exclude arbitration of the issues involved in a strike to *procure* a collective agreement. Statutory arbitration of such issues is possible only in those states which allow such arbitration in the case of "any controversy."[143] Minnesota has indicated approval of an irrevocable submission by a 1939 amendment which extends the availability of statutory arbitration to "every controversy which can be the subject of a . . . labor dispute as defined in the Minnesota Labor Relations Act. . . ."[144]

Arbitration's streamlined advantages over slow legal procedure is often a persuasive factor in the decision to arbitrate—especially where great loss would be averted only by relatively quick action. A further consideration is the lex loci concerning the enforceability of a union's promise to arbitrate and (in those situations where the award has the effect of creating a new contract) the nature of collective agreements generally.[145] It is obvious that the employer will not be eager to submit to a contract which guarantees him substantially less security than it does to the other party. However, as modern legislation continues to strengthen responsible employee associations, unions will undoubtedly become closer knit and will increasingly impress both courts and employers with their ability to assume substantial obligations.

It is impossible to make a horoscope of the future of arbitration. Its past record reveals some promising successes,[146] but it is clear that arbitration has never been given a complete and exhaustive test. In all but a few states government intervention under the mediation-arbitration statutes above described has ceased;[147] and in the

[142] E.g., N. D. Comp. Laws (1913), § 8327. For grouping of statutes see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS 199 (1930). The statute may have an Achilles' heel in its failure to provide for equitable relief in the enforcement of the award. See Callender, "Pennsylvania Arbitration Act Ineffective for Labor Disputes," 2 ARB. J. 193 (1938); Fraenkel, "The Legal Enforceability of Agreements to Arbitrate Labor Disputes," 1 ARB. J. 360 (1937).

[143] E.g., Ill. Stat. Ann. (Smith-Hurd, 1935), c. 10, § 20. See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS 199 (1930).

[144] Minn. Laws (1939), c. 439. The Maryland statute provides that "All subjects of dispute . . . between employers and employees in any trade or manufacture may be settled and adjusted [by arbitration]." Md. Code Ann. (1924), art. 7, § 2.

[145] See Witmer, "Collective Labor Agreements in the Courts," 48 YALE L. J. 195 (1938).

[146] Tongue, "Settlement of Labor Disputes under Trade Agreements," 3 ARB. J. 34 (1939), noting, however, that employer recognition of the union was a condition precedent to successful arbitration; Murray, "Arbitration in the Building Trades of Greater New York," 2 ARB. J. 136 (1938).

[147] The Twentieth Century Fund investigation discovered active boards only in

declining use of the state government mediator, arbitration probably has lost its best salesman. Recently, however, new impetus has been given to arbitration by some of the labor relations and other acts. The Minnesota labor conciliator is given the power to act as arbitrator and to select other arbitrators if the submission agreement so provides.[148] The Wisconsin act provides that "Parties to a labor dispute may agree in writing to have the board act or name arbitrators. . . ."[149] A 1937 Pennsylvania statute allows the disputants to elect an arbitral settlement by providing for a three-man arbitration board, where mediation has failed.[150] These enactments may represent the incipient stages of an arbitration revival. Mediation-arbitration statutes may again be dusted off for state officials, who need only look to the National Mediation Board and to the work of the federal commissioners of conciliation to learn that mediation can be successful.[151]

2. *Involuntary Arbitration*

At common law and under every existing statute (with one exception) the arbitrator's award is binding on both employer and union only if the both parties have voluntarily submitted their controversy to him. The one exception is as important as it is lifeless; for, as the keystone section of the Kansas Industrial Act,[152] it represents America's only experiment with involuntary arbitration. It was also the *raison*

Massachusetts, New York and Pennsylvania. TWENTIETH CENTURY FUND, LABOR AND THE GOVERNMENT 115 (1935).

The annual bulletins of the Ohio Industrial Commission, later incorporated in the Department of Industrial Relations, reveal graphically its history:

1914: "Under the terms of the Act creating the Industrial Commission, it was given a free hand to establish such machinery as it might see fit toward the end of securing industrial peace in Ohio. . . . During the first several months, it was thought expedient to proceed carefully and tentatively. . . ." OHIO INDUSTRIAL COMM., FIRST ANNUAL REPORT 29 (1914).

1916-1917: "During the year covered by this report, the chief mediator or his deputies participated in settlements involving approximately 28,500 wage workers. In five of the twelve cases their efforts were successful. . . ." OHIO INDUSTRIAL COMM., FOURTH ANNUAL REPORT 31 (1917).

1926-1927: "During the fiscal year the Division was not called upon to use its influence." OHIO DEPT. IND. REL., SIXTH ANNUAL REPORT 33 (1927).

1931-1932: No mention in OHIO DEPT. IND. REL., ELEVENTH ANNUAL REPORT (1932).

[148] Minn. Labor Relations Act, § 9.

[149] Wis. Employment Peace Act, § 111.10.

[150] Pa. Laws (1937), § 674, Stat. Ann. (Purdon, Supp. 1939), § 211.31 et seq.

[151] See 47 MONTHLY LABOR REVIEW 851 (1938).

[152] Kan. Gen. Stat. (1935), § 44-601 et seq.

d'être for *Wolff Packing Co. v. Court of Industrial Relations*,[153] which is the leading case concerning the constitutionality of compulsory arbitration.

In industries declared to be affected with a public interest[154] the Kansas Court of Industrial Relations was empowered to investigate important controversies and to order "such changes, if any, as are necessary . . . in the matters of working and living conditions, hours of labor, rules and practices, and a reasonable minimum wage, or standard of wages. . . ."[155] Employers were forbidden wilfully to limit or cease operations without the approval of the industrial court.[156] Employees were forbidden to strike, but the individual employee was expressly assured his right to quit.[157] During its brief life the act was flouted by many openly rebellious labor groups; its administration was only partially successful.[158] In the *Wolff* cases the act was held unconstitutional as applied to the regulation of wages and hours in a $600,000 packing house. Since 1925 the act has been a dead letter, but has never been repealed.

The decisions in the *Wolff* cases did not completely foreclose the future use of compulsory arbitration. Noting that the Kansas legislation curtailed the liberty of contract, the courts held that the packing business was not so affected with a public interest as to justify the curtailment. The following language, however, is representative of a thought which runs through the opinions:

> "The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."[159]

[153] 262 U. S. 522, 43 S. Ct. 630 (1922), 267 U. S. 552, 45 S. Ct. 441 (1924).

[154] Kan. Gen. Stat. (1935), § 44-603. The legislature declared the industries engaged as follows to be affected with a public interest: (1) manufacture of preparation of food products; (2) manufacture of clothing; (3) mining or production of fuel; (4) transportation of food products, fuel or substances entering into wearing apparel "from the place where produced to the place of manufacture or consumption"; (5) supplying of public utility services.

[155] Ibid., § 44-608.

[156] Ibid., § 44-616.

[157] Ibid., § 44-617.

[158] See WITTE, THE GOVERNMENT IN LABOR DISPUTES 265 et seq. (1932); Cf. HUGGINS, LABOR AND DEMOCRACY (1922).

[159] Wolff v. Kansas Court of Industrial Relations, 262 U. S. 522 at 539, 43 S. Ct. 630 (1922).

This language would indicate possible approval of compulsory arbitration as applied to some—perhaps all—public utilities. Professor Simpson has suggested that the states could also exercise in this manner their admitted power to prevent trade restraints in those essential industries where union strikes and boycotts are capable of substantially reducing the flow of goods.[160] Although the constitutionally protected liberty of contract is far from its Götterdämmerung, its ascendancy has been challenged by cases upholding minimum wage and maximum hour legislation.[161]

However desirable compulsory arbitration may be in theory and whatever may be its chances of surviving constitutional attack, its immediate mushroom growth seems politically unlikely. Labor will probably be more inclined to rely upon its increasing strength than to yield to the dictates of a tribunal. Many employers will consider freedom from strikes an inadequate exchange for the extension of governmental control over the conduct of business. Consequently any movement to revive and extend compulsory arbitration is apt to be halted at the legislative stage by a combination of two extremely potent forces.

Words of conclusion concerning a task which at the outset was stated to be merely preliminary in nature seem scarcely appropriate. The authors again simply wish to emphasize, as must now be clear, that such was its nature. They again wish to point out that any attempt to appraise the content of the variegated state laws should await an examination into their practical effects. Without such an examination it is possible only to theorize and speculate, more or less in the manner employed piecemeal from time to time herein. With such an examination it might be possible to draw from the experience of the states some valuable object lessons in the framing of labor legislation. Such object lessons, the authors submit, could profitably displace the conjecture, surmise and suspicion, both of friends and foes of labor, so characteristic of discussions of the subject at the present time.

[160] Simpson, "Constitutional Limitations on Compulsory Industrial Arbitration," 38 HARV. L. REV. 753 at 778 (1925).

[161] West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578 (1937); Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324 (1908).