

“DEVELOPING ETHICS” AND THE “RIGHT TO STRIKE”

Definition of terms is difficult, whereas discussion without definition is easy. The difficult step is occasionally useful, however, in shortening discussion and in reaching an understanding and an agreement. What then is the “right” that is at times so bitterly asserted. In times now past and gone the Stuarts and the Hohenzollerns asserted the existence of what they called “divine” rights. These assertions caused much conflict and suffering, much destruction of goods and many deaths. The result is that these assertions are now discredited. Divinity, though often invoked with the utmost depth of emotion and confidence, failed to answer the call or to justify the assertions. We may not improperly conclude that the same result will follow the assertion of any sort of right as a divine right, whether made by king or peasant, by wealth or poverty. Rights are only human relations, after all; they exist only by virtue of the organization of men.

In 1913 Hohfeld published his first article on *Fundamental Legal Conceptions as Applied in Judicial Reasoning*.¹ It is not intended here to explain again all of these concepts or to justify Hohfeld’s choice of terms;² but it is necessary to call attention again to the fact that judicial usage is variable and that popular usage is equally so. The *concepts* intended to be expressed, however, are believed to be identifiable; and it is further believed that these concepts are not interchangeable. A word is only “the skin of a living thought,” says Mr. Justice Holmes.³ This is true, and it is always necessary to get underneath

¹ (1913) 23 YALE LAW JOURNAL, 16. As is gradually becoming better known, these “conceptions” that he regarded as fundamental are eight in number, divided into four pairs of correlatives, as follows:

right	privilege	power	immunity
duty	no-right	liability	disability

By rearranging them they become four pairs of what he called “opposites,” thus:

right	privilege	power	immunity
no-right	duty	disability	liability

² Some of the works in which Hohfeld’s terminology is explained and approved are: Cook, *Hohfeld’s Contributions to the Science of Law* (1919) 28 YALE LAW JOURNAL, 721; Cook, *Privileges of Labor Unions in the Struggle for Life* (1918) 27 *ibid.* 779; Corbin, *Legal Analysis and Terminology* (1919) 29 *ibid.* 163; Corbin, *Jural Relations and Their Classification* (1921) 30 *ibid.* 226; Borchard, *The Declaratory Judgment* (1918) 28 *ibid.* 1, 105; Harno, *Tort Relations* (1920) 30 *ibid.* 145; Clark, *Licenses in Real Property Law* (1921) 21 COL. L. REV. 757; Lowry, *Strikes and the Law* (1921) 21 COL. L. REV. 783, 788; Goble, *Affirmative and Negative Legal Relations* (1922) 4 ILL. L. QUART. 94; Britton and Bauer, *Cases on Business Law* (1922) 7; Waite, *The Law of Sales* (1921); 26-32 YALE LAW JOURNAL, *passim*; *Rock v. Vandine* (1920) 106 Kan. 588, 189 Pac. 157. Professor Kocourek has published a number of friendly but vigorous criticisms in various law magazines during the last two years. *The Hohfeld System of Fundamental Legal Conceptions* (1920) 15 ILL. L. REV. 24.

³ “It is not necessarily true that income means the same thing in the Constitution and the act. A word is not a crystal, transparent and unchanged, it is the skin

the skin and to identify and understand the thought. Not infrequently a new skin will be found highly necessary to its health and strength. Not infrequently, also, a most unexpected and even unintended "living thought" will be found concealed beneath the skin like a wolf in sheep's skin.⁴ The common little word "right" is the skin of twenty living thoughts,⁵ any one of which may be masquerading as any of the others; the skin does not itself proclaim the occupant within.

Thus, in the learned article of Mr. Moorfield Storey in the present number, and in the quotations therein, we find the following: "The right to strike is only the right to quit work without being liable to punishment." "In going to and from work, men have a right to as free a passage without obstruction as the streets afford." "The legislature however has the right to say what acts shall be criminal." In each of these sentences the word "right" is used with dictionary accuracy; but in no two of the sentences does the word express the same concept. The "skin" is the same but the "living thought" is different.

How does a "right to strike" differ from a "right to free passage"?⁶ The first is quite properly explained by Mr. Storey to mean that society *will not* punish the possessor of the "right"; his own action (striking, or ceasing to work) is *not forbidden* by society (by "the law"). The second, on the other hand, means that society *will* punish some person other than the possessor of the right; such *other* person's action (obstruction of street) is *forbidden* by society for the protection of the possessor of the right. A workman, therefore, has two kinds of "rights," the subject matter of the first being his own conduct and that of the second some other person's conduct, there being in the first no societal command or compulsion, while in the second such command and compulsion exist. For the first of these "living thoughts" (the "right to strike") Hohfeld's term is *privilege*; for the second, his word is

of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner* (1917) 245 U. S. 418, 425, 38 Sup. Ct. 158, 159.

⁴ "We will not affirm that all difficult questions in labor litigation would be instantly solved if words were used with exactness and in only one signification; but it is safe to say that the difficulties of solution would thus be materially diminished." Jeremiah Smith, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 253, 255.

⁵ See Century Dictionary. "The word 'right' is one of the most deceptive of pitfalls." *American Bank & T. Co. v. Federal Reserve Bank* (1921) 256 U. S. 350, at p. 358, 41 Sup. Ct. 499, at p. 500. "Such words as 'right' are a constant solicitation to fallacy." *Jackson v. Rosenbaum Co.* (1922, U. S.) 67 L. Ed. 7, 8.

⁶ The concept behind the legislature's "right to say what acts shall be criminal" would be expressed by Hohfeld by the term, *power*. The "living thought" to be expressed is that the act of the legislature would create legal duties as against individuals and would be carried into effect forcibly by courts and executive officers. Mr. Storey also says: "The *power* of the state to forbid strikes is clear"; and he quotes from Mr. Justice Holmes concerning "the *power* of the States to make breach of contract a crime."

right (or "claim"). A workman has the legal privilege to cease work; he has the legal right that another shall not obstruct his way to work.⁷

It must not be supposed for an instant that by identifying concepts and choosing terms to express them we can determine whether or not a right or a privilege in fact exists or as a matter of social policy ought to exist, or whether or not Congress has power to create or to extinguish rights and privileges. We can merely say that if a workman has a right to free passage someone else has a duty not to obstruct him, that if he has the privilege to strike as against his employer the latter has no right that he shall not strike.

How then shall we determine whether a workman, either singly or in combination with others, has the legal privilege to stop working, either with respect to his employer or with respect to the members of society as a whole? It is only by a careful study of constitutions, statutes, and the common law of the land. This is not always an easy matter, for constitutions are vague, statutes are generally worse, judicial decisions are innumerable and conflicting, and the law is changing as interests and notions of social welfare change. The question cannot be answered at all in general terms, for the answer varies with the circumstances. Let us attempt, however, a definite answer to a few specific questions.

First, is it possible for the organized inhabitants to deny to workmen the privilege of striking under some or under all circumstances? Yes, as long as they have the strength to maintain their organization and enforce their law. Would not such a law be "unconstitutional"? An act of the legislature might be; but constitutions are themselves nothing but enacted law and the inhabitants can mould their constitutions according to their will. Does Congress have power under our present constitution to destroy the privilege of striking? Without question it does to a considerable degree; very likely there are some limits to its power. In what instances does existing law deny to workmen, singly or in combination, the privilege of striking? A few instances are when he is under contract not to cease work, when he is a trustee of lives or property that would be endangered by his striking, and when his conscious purpose is to compel or induce another person to commit a crime, a tort, or a breach of contract. Are workmen privileged to strike for boycotting purposes? Sometimes, but not always; the strike may be no breach of duty to the employer of the strikers, but may be a breach of duty to third parties whose means of livelihood are injured. This is a field of legal controversy. Who is now making the law of boy-

⁷ Hohfeld's usage also has ample dictionary and judicial justification. In Mr. Storey's article can be found the following: "No man or group of men can claim peculiar *privileges*" (evidently they can assert *common* privileges); "this immunity from punishment is the *privilege* which the decisions and some statutes give the striking laborers"; and "consistent with the right of others to enjoy the same *privilege*." (Italic ours.) Hohfeld merely identified the separate concepts, and by his table of "correlatives" and "opposites" tried to make each "living thought" always wear its own skin.

cotts? The legislatures and the courts, interpreting the *mores* of the community as they understand them. Are strikers privileged to beat "scabs," obstruct streets, and destroy buildings? Certainly not; no more than other people. Does the fact that the workmen are in the employ of the nation, the state, a public service corporation, a private corporation, or a private individual affect the privilege to strike? It is believed not, at least to any large degree, although new rules may now be in process of making.⁸

Mr. Storey says: "These organizations of laborers absolutely without right have undertaken to cut off the country's supply of coal and to stop the operation of its railroads . . ." If he means by "absolutely without right" that the miners and railroad shopmen do not have the legal privilege to stop working, either singly or in combination, as a means of obtaining higher wages, it is believed that he is in error.⁹ The employers in those instances, private corporations and individuals

⁸ The fact that an individual is engaged in work that is already recognized as the public service is an important fact in determining the constitutional power of Congress or of a state legislature to destroy or to grant the privilege of striking or to fix rates, wages, and profits. Some existing legislation already has a bearing on these matters, as for example, the Adamson Law, Act of Sept. 3, 5, 1916 (39 Stat. at L. 721); the Clayton Act, Act of Oct. 15, 1914 (38 Stat. at L. 730); the law creating the Railway Labor Board, Act of Feb. 28, 1920 (38 Stat. at L. 456, 470); and the Kansas Industrial Court Act (Kan. Laws, 1920, ch. 29).

⁹ However, he quotes a statement from Vice-President Coolidge in harmony with his view. He might also have quoted from President Harding's public statement made in 1919 when a bituminous coal strike was threatened. He then said: "Such a strike under such circumstances would be the most far-reaching plan ever presented in this country to limit the facilities of production and distribution of a necessity of life and thus indirectly to restrict the production and distribution of all the necessities of life. A strike under these circumstances is not only unjustifiable, it is *unlawful* . . . must be considered a grave moral and *legal* wrong against the Government and the people of the United States." *The New York Times*, Oct. 26, 1919. Doubtless the President would have been correct in this if he had attempted to enforce his supposed law and had been sustained by the courts. Of the President's statement Mr. Philip G. Lowry, *Strikes and the Law* (1921) 21 *Col. L. Rev.* 783, says: "In the contemplation of the Department of Justice and of the United States District Court for the District of Indiana, the only 'legal' wrong involved was the violation of the War Food and Fuel Control (Lever) Act of 1917." Kales, *Contracts and Combinations in Restraint of Trade* (1918) sec. 160, speaking of the Clayton Act, says, "Section 20 enumerates a list of specific acts which it provides shall not 'be considered or held to be in violation of any law of the United States.' This list does not include the 'secondary boycott,' which was a tort at common law and under the Sherman Act. The list does include a number of acts which, taken by themselves alone, were clearly lawful at common law and may be assumed to have been lawful also under the Sherman Act—such as: 'terminating any relation of employment,' and 'ceasing to perform any work or labor.' This points to the strike. Mere striking, however, has never been illegal at common law; and it may be assumed that it is not so under the Sherman Act."

It is believed that under our present constitution Congress has power to create or to extinguish the privilege of striking in many sorts of cases. Whether the power should be exercised is a question of social and economic policy.

in the one case and public service corporations in the other, have no legal right against the workmen that they shall continue at work, in the absence of contract. Nor do third persons, either individually or collectively, have any such right, except perhaps in Kansas and under certain emergency war legislation.¹⁰ It is believed that both by statute and by judicial decision the privilege of striking has been recognized instead of denied.¹¹ If, however, the meaning is that the workmen have undertaken to cut off the supply of coal or to stop transportation by destruction of property and by violence toward other willing workers, he is quite correct as to the law. Neither singly nor in combination are workmen privileged to do these things. Such acts are crimes as well as torts. With such a meaning, the statement merely involves issues of fact with which we are not at present concerned.

In the article herein on *Developing Ethics and Resistant Law*, Mr. Donald R. Richberg speaks of the "vague public right" to have coal mined and trains run; and he says that a "definite feeling" exists that private individuals have a "right to the coöperative service of one's fellow-men." Mr. Storey's article may be taken to sustain him in this. Mr. Richberg, however, does not go so far as to say that any such legal right to coöperative service, either public or private, actually exists. Possibly he blames the courts for not creating such rights by judicial legislation. It is clear that he has no doubt that a nation of people can create such rights and duties if they care to exercise their physical and legal powers. It can probably be done by our state and national legislatures under existing constitutions. It can be done by the courts, if they act slowly, legislating "interstitially" and by "molecular motion."¹² At present, however, miners and shopmen are legally privileged to stop work. Other members of the community are legally privileged to dig coal for themselves so far as the miners are concerned, and they have legal rights not to be obstructed in digging it.

Mr. Richberg rather heatedly criticizes our courts and legislators for not keeping our law up to date, especially industrial law and criminal law. With his general idea that the *mores*¹³ of a people change with

¹⁰ See the Lever Act, Act of Aug. 10, 1917 (40 Stat. at L. 276).

¹¹ See the Clayton Act, sec. 20, *supra* note 8.

¹² Mr. Justice Holmes in *Southern Pacific Co. v. Jensen* (1916) 244 U. S. 205, 221, 37 Sup. Ct. 524, 531: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

¹³ The term used by Mr. Richberg is "ethics," a term that seems objectionable on the ground that as it has been used in the past it conveys the idea of some absolute and unchanging system of morality and justice by which conduct is to be judged. The term "*mores*" as used and explained by William G. Sumner, *Folkways* (1906), seems preferable. This term, too, must be used cautiously. Like "ethics," "justice," and "morality," it may easily be regarded as a universal and absolute system of rules of conduct, social practices, and welfare policies; whereas no rule, practice, or policy is approved and adhered to by *all* individuals or at all times. In any specific instance the extent of approval and adherence can be definitely determined only by a count of individuals. It varies in degree.

changing economic and social conditions and that the law should be continually reconstructed by courts and legislators so as to accord therewith, the present writer is in entire agreement.¹⁴ Disagreement quickly begins, however, with the treatment of specific instances and with the underlying assumption that there has been a sweeping change in the *mores* (or "ethics," to use the author's own term), generally recognized and accepted by all enlightened souls (or perhaps by all persons whatever except the bench and the bar with their "Neanderthal skulls" and "natural density"), and that this change requires a total destruction of the "house of the law," with its "foul dungeons and dismal court-rooms" and the erection of a "sound structure" with "absolutely new foundations."¹⁵ "Ethics," he tells us, "are not to be confused with ideals. Prevailing ethics are merely standards of conduct generally regarded as in the interest of the largest number of persons Developed ethics are simply accepted standards of community interest and as such should be embodied in law with less resistance than would meet developed ideals, which as minority products, obtain community sanction very slowly." This is sound doctrine, and, in the main, courts and legislators apply it daily. The author's impatience with them is

¹⁴The author's text, taken from one Wang Yang-ming, is that "the principles of righteousness have no fixed abode." Wang might have meant by this that no one race or nation or religion or sect or pious prophet has a monopoly on "principles of righteousness." They may and do *abide* anywhere. He might also have supposed, however, that "principles of righteousness" in all their various abodes are identical, uniform, eternal, and unchangeable. Such a supposition is directly opposed to Mr. Richberg's conclusions. It is a belief almost universally held, nevertheless, and it is responsible for much of the difficulty in arriving at a "peace of justice" whether at Versailles or in the coal fields.

¹⁵Thus the criminal law will indeed permit of much improvement; but changes in it that are based upon "developing" ethics are about as unsafe as those based upon an appeal to *eternal* justice and an *absolute* system of morality. The correct appeal is to "standards of conduct generally recognized as in the interest of the largest number of persons," the "developed ethics" defined by the author himself. That system of criminal law should be adopted that accords with the prevailing *mores* and that experience has shown will produce relatively safe living conditions for the community. This may require absolute responsibility in certain cases, irrespective of intent or negligence, of weak adrenal glands or bad hearts. In the law of torts we often adjudge according to the standard of the reasonably prudent man. Shall we acquit the defendant because his heredity and environment prevented him from being reasonably prudent?

Again, it does not justify the charge of ancestor worship to suggest that wisdom comes from history and experience and not from an inflated inner consciousness. For this reason he who tears down the house of the law to begin on "absolutely new foundations" will find himself painfully collecting the broken shingles and the rusty nails. It is quite untrue to say that "we learn from the wisdom of our sires largely what mistakes we may avoid and obviously none of the truths that we are to discover." In general, each one of us must "discover" over and over again the same old truths that our sires painfully discovered in their time. "The present has a right to govern itself so far as it can"; says Mr. Justice Holmes, *Collected Legal Papers* (1920) 139, "and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity."

due to the fact that they follow his own advice. They are daily embodying "developed ethics" in the law; but they have not yet embodied in it some of his own "minority products."¹⁶ They may observe new *mores* "developing," but when do they become "developed"? How are they to be informed when a new standard has become "generally accepted" or has "community sanction"? When has the community decreed the abolition of "property rights" or the "right of profit"? A few hardshell judges might refuse to abide by the results of a plebiscite on the subject, but they would quickly be submerged. Even constitutional amendments are no longer an impracticable remedy.¹⁷

We must not overlook the fact that the "community" is not a person; it is a large number of persons, each busily engaged in hoeing his own row. "Community ethics" or "social ethics" are merely the standards of individual persons living in a group, more or less numerous, and never reaching actual unanimity. "Community interests" are the interests of many individuals where those interests coincide. We cannot turn either the "interests" or the "ethics" into universals. There is constant conflict in both "interests" and "ethics." It is the function of the law to deal with these conflicts; but it cannot always reconcile them or even compromise them. The "interests" and the "ethics" of the few must yield to those of the many.

The increase of population, the progress of invention, the industrial revolution, these have indeed changed environmental conditions. New *mores* have developed and are developing. These require the constant restatement of rules of law, quite independently of the question whether or not "human nature" has changed. Who does not know this has indeed a "Neanderthal skull." But our new "society" is still a society

¹⁶ Some years ago, in a popular article, Hugo Münsterberg attacked the courts and the law for not knowing and using up-to-date psychological methods for determining the veracity of a witness. He was answered by Dean Wigmore, *Professor Münsterberg and the Psychology of Testimony* (1909) 3 ILL. L. REV. 399, with full citations of all the psychological and juristic authorities of Europe and America. The controversy ended right there. Münsterberg had made some useful discoveries—promising saplings in the forest of knowledge. They loomed so large before his peering spectacles that he lost sight of the forest itself. His new methods were "developing" methods, not yet arrived to that state of "developed" perfection so as to be accepted and used by more than a small "minority."

¹⁷ For the courts in cases of this sort *vox populi* must be equal to *vox dei*. The will of the majority, duly registered, must control. It does not follow, of course, that their expressed will accords with sound economic and social policy. Bankruptcy, starvation, and death may follow the adoption of new policies by majority vote. Thus new policies of wage-fixing, rate-fixing, price-fixing, and profits-fixing are not for the courts to adopt merely because there is agitation for them. They are still matters for economic debate and legislative experiment, not for ethical fervor and headlong judicial action. Once properly adopted, however, the courts must carry out a policy—except as they may legislate interstitially—even though convinced that it will lead to the breaking up of large industrial units, the return of small-scale production, the consumption of wealth, the lowering of standards of living, and general impoverishment.

of individuals, each struggling for existence, each striving to get the most he can at the least cost. Men are alike in this whether they belong to labor unions, to college faculties, or to manufacturers' associations. In the struggle they cry out for "what they know to be their rights," each individual and each group being firmly convinced that they are being robbed, that other men are worse than they, consciously and wickedly denying them justice. The law is a science because it is the function of lawyers, judges, and legislators to understand human nature, the nature of organized society and its evolution, and to construct and keep ever reconstructing the system of stated rules to accord with the needs and desires of the times, rules the concrete application of which will attain the purposes for which they are constructed.

We are told that there has been an impairment of "the common faith in an appeal to law for the decision of contending claims of right." One reason for this is that the old "common faith" included an ignorant belief in the existence of an absolute and eternal system of justice that could be applied with infallibility with the result that every one would be rich and happy. This belief, like many others, may be impaired. When it dies, peace to its ashes and may there be no resurrection. Our best hope lies in a facing of the facts with courage and serenity, in the conscious and generous compromise of the inevitably conflicting interests, in the scientific construction of rules in the light of past experience and prevailing conditions. Dean Pound has said:¹⁸

"From an earthly standpoint the central tragedy of existence is that there are not enough of the material goods of existence, as it were, to go round; that while individual claims and wants and desires are infinite, the material means of satisfying them are finite; that while, in common phrase, we all want the earth, there are many of us but only one earth. Thus we may think of the task of the legal order as one of precluding friction and eliminating waste; as one of conserving the goods of existence in order to make them go as far as possible, and of precluding friction and eliminating waste in the human use and enjoyment of them, so that where each may not have all that he claims, he may at least have all that is possible."

In the carrying out of this program shall we in new classes of cases deny to individuals the legal privilege of striking? Shall we grant them new legal privileges of boycotting, of breaking contracts, of destroying wealth? Shall we confiscate wealth and deny to individuals the "right of profit" and rights of property? These things can be done if enough individuals will combine to do them, and they can be done without revolution and according to existing forms of law. By all means let us adopt these new rules of law if they will help us to attain the ends for which they are proposed.

These are the days of rapid evolutionary variation in the industrial, social, and economic *mores*.¹⁹ Many individuals and large groups,

¹⁸ *The Spirit of the Common Law* (1921) 196.

¹⁹ See A. G. Keller, lecture on *Societal Evolution* in the Sigma Xi lectures on *The Evolution of Man*, 126, 139, delivered at Yale University in 1922.

moved by discomfort and charged with emotion, are proposing the tearing down of many institutions and the adoption of new and extraordinary policies. With equal vigor, others are insisting on the preservation of things as they are. All alike, whether conservative or radical, loudly proclaim their "rights," assuming these to be well known and indubitable and denied only by the stupid or the malignant. Some of these proclaimed "rights" do in fact exist by reason of existing law and fully developed *mores* of the past; others are nothing more than economic and social interests and desires. How are we, the individual atoms of which society (the state, the community) is composed to know which new desires to satisfy, what new "rights" to create, what new policies to adopt? The process of societal selection will answer these questions in the end after it is too late for us; those individuals who survive the struggle will perhaps know the answer. But is there no step that we can take to mitigate the selective struggle, to reduce the economic waste and the cost in lives? Undoubtedly there is; but where is the social and economic prophet who can point it out, and where is the statesman who can induce us to try it? A most interesting and moderately promising step is the creation of a system of industrial courts, of the sort now existing in Kansas and Australia. We are experimenting also with labor boards and commissions of all sorts. Our courts of common law and equity have worked out our existing legal rights and privileges by the slow, experimental, inductive process of precedent on precedent. This process is still in operation; but the uncomfortable and the impatient chafe at its action and its delay to act. An extension of the system of courts, with enlarged jurisdiction and more frankly economic training, may prove to be helpful.²⁰ We may certainly expect new law, new legal rights and privileges, and the destruction of old legal rights and privileges. These changes will not come directly from divinity, nor will they be absolute and eternal; they will be much resented by many; they will of necessity be the result of a compromise of conflicting human interests.²¹

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²⁰ See Vance, *The Kansas Industrial Court and Its Background* (1921) 30 YALE LAW JOURNAL, 456; W. Jethro Brown, *The Separation of Powers in British Jurisdictions* (1921) 31 *ibid.* 24; *Statutory Prohibition of Strikes* (1920) 36 L. QUART. REV. 378; Higgins, *A New Province for Law and Order* (1915) 29 HARV. L. REV. 13; (1918) 32 *ibid.* 189; (1920) 34 *ibid.* 105; Lowry, *Joc. cit.*

²¹ At present nearly all the persons engaged in industrial conflicts distrust industrial courts and fear to give them jurisdiction over economic questions not heretofore determined by the law. Shall such courts be given power to determine wages, prices, and profits, to limit property rights *ad libitum*, to impair the obligation of contracts openly, and to deny the privilege of striking? In both contending camps there is a fear of economic slavery. Neither party will be pleased with such courts as long as they believe that they can get more by their own efforts. No one is ever pleased with a limitation of his own rights and privileges.