

THE FIRST AMERICAN LABOR CASE

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THE yeast which was to raise the labor injunction was working vigorously in 1877.¹ But some of its earlier ferments are also informing to the student of the subsequent product. Before 1877 there had not, in this country, been many instances of resort to the courts in labor troubles.² To contemporary observation they may have seemed to affect the lives and fortunes of employers and workmen only locally and for brief periods. But their existence as history has had effect upon modern law. The chemistry of the forces which pressed upon the courts in labor cases—hopes, desires, values, emotions, opinions, beliefs—was, moreover, as it is to-day. The law of social physics which explains or describes judicial response and resistance to such forces—a law which, though clearly perceivable, eludes satisfactory formulation³—was also the same then as still. And the facts and ques-

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¹ Persons who in the great strike of that year interfered with the operation of railways which were in the hands of chancery receivers were punished summarily for contempt of court. The cases are discussed in *A Strike and its Legal Consequences* (1931) 40 YALE L. J. 507..

² Professors Commons and Gilmore, editors of volumes iii and iv of the DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1910), found eighteen labor cases prior to the Civil War. Not many others can be added.

That work will here be cited simply as Doc. HIST. It reprints the rare original reports of many cases, including the Philadelphia Cordwainers' Case discussed in this article.

Another work to which citation will be frequent is Ford's collection of THE WRITINGS OF THOMAS JEFFERSON (1892-99); it will be cited as JEFF.

³ At the foundations of juristic thinking there is always some degree of recognition that legal mobility is according to a quasi-physical law of law. But the ethical aims of inquirers perpetually press jurisprudence from the character of science. We cloud our observation of legal phenomena with our pious hopes. The "natural law" philosophers, for example, were concerned less with the actual, and therefore natural, operation and effects of law than with its supposed ethical obligation to move towards righteousness. In aid of imputation to it of ethical obligations, law is often personified—as by Dean Pound in his chapter entitled "*The End of Law*," INTRODUCTION TO THE PHILOSOPHY OF LAW (1922) c. 2. The end there imputed to Law—

tions were substantially similar to those of which our view, when we look at them in contemporary labor cases, is confused by a clutter of adjudications.

I

The first case—which, since it is the most knowable, is also the most informing—arose from a cordwainers' strike at Philadelphia in the fall of 1805.

The on-coming of the Industrial Revolution seems in this country to have been first felt in the foot-wear industry. Before the end of the eighteenth century master cordwainers at Philadelphia and other eastern cities had passed from manufacture only for people who "bespoke" boots or shoes for their own wear to comparative quantity production of stocks for their retail stores. Thenceforth counter-organizations of masters and journeymen were in intermittent conflict.⁴

maximum effectuation and harmonizing of human wants—is in fact an end of Dean Pound himself, among others; all to whom "the security of each and the welfare of all" are important objects are doubtless eager, subject to various priorities, to join with him to bring it about. But law, of course, can have no ends. It is not a person. It is an instrument, serviceable or not to any particular personal (including group) end, whether malignant or benign, according to the relative powers of the competing human wills which press always upon it in chaotic cooperation and conflict. Against all narrowly selfish individual and group wills, the counter-pressure of wills for conformity with generally accepted standards and values, including legal rules, principles and precedents—the counter-pressure of conventional morals and mores, in other words—always counts; but since this counter-pressure, though potentially tremendous, is not always efficiently organized or directed, its seeming victories may be rather formal than real. Counter-pressures of less generally accepted views of justice or social expediency may sometimes, through the more efficient organization of their lighter weight, count more strongly. The weight of narrowly selfish wills is apt to be still more efficiently applied—usually in conjunction with weight cleverly borrowed from conventional morality or jurisprudence. The participation in a pressure of the wills of persons who, as judges, appraise it, may greatly augment its efficient power. And only a judicial automaton could completely and always avoid lending his official weight to his personal will felt as righteous.

The Nature which controls law is human nature. And human nature is not singular; it is plural. Its objects, including ethical objects, are various and conflicting. Intelligent well-wishers of mankind might become more effective than they are if they would sweep their minds clean of all dust of the illusion that either Law or that other personified abstraction, Society, has itself a guiding conscience which is under some mysterious imperfect obligation to agree, with their own, and ground themselves firmly upon Sumner's premise (FOLKWAYS, 1906, § 72) that nothing but might has ever made right.

⁴ My attempt to explain the development of friction in the foot-wear industry leans heavily upon Professor Commons' Introduction to volume iii of the DOCUMENTARY HISTORY, *supra* note 2, and upon Part I (by David

The journeymen's standard of living was not luxurious. As a matter of course, as in all manual employments, the work-day was from sun-rise to sun-set, and was often protracted by candle-light. A slow workman testified that he could not earn ten dollars a week at the piece work rates paid in 1805 if he should work all the twenty-four hours of the day.⁵ One first-rate workman, making only the finest shoes at the highest rate, averaged six or seven dollars a week; another averaged nine or ten.⁶

Since journeymen worked at their own speed in their own houses with their own tools, their only direct object of pressure was to maintain or advance piece-work wages. Their success was at first considerable. They maintained the closed shop; "scabbed" ^r masters and workmen, though they might hobble along for a time, had ultimately to make their peace with the society. The society seems to have been sensitive to the limit within which masters could advance wages, and sale prices, without curtailing production and, consequently, employment. Governing its wage demands by this limit, and so controlling the labor supply that submissive masters could not be hurt by open-shop competition, it won consistently until 1805.

But with the passing of the industry beyond the stage of manufacture for a local market, the society's strategic position was impaired. During the Napoleonic wars, even before Non-Inter-course and Embargo, it became possible for Philadelphia manufacturers to sell boots in the South in competition with boots made in England. The journeymen were not far-sighted enough to perceive the menace of this trade. They helped it grow by accepting—initially doubtless by way of special favor to masters in what seemed exceptional cases—a twenty-five cent reduction of the regular piece work rate when boots were made for export.⁸ That both masters and journeymen should become increasingly dependent upon the export trade was inevitable. In 1805, aware too late that it was regular instead of occasional, the society conjoined demands for a higher regular rate for boots and for discontinuance of the rebate of wages for export or "order" work.⁹

That the masters could not have conceded or compromised

J. Sappington) of COMMONS AND ASSOCIATES, HISTORY OF LABOUR IN THE UNITED STATES (1913).

⁵ 3 DOC. HIST. 118.

⁶ *Ibid.* 83, 123.

⁷ The word "scab" was already in common use, carrying its full modern connotation. A spectator at the cordwainers' trial was fined five dollars for his contempt in exclaiming in court, "A scab is a shelter for lice." *Ibid.* 83.

⁸ *Ibid.* 124.

⁹ *Ibid.* 117. The demand was for the same wages that prevailed at New York and Baltimore. *Ibid.* 129.

these demands without loss of export trade does not appear—unless from their agreement to resist, or from evidence that several years earlier a master had had to cancel export orders which he could not fill before wages had been jumped.¹⁰ The journeymen “turned out.” They were weakened not only by their impotence to affect the price of competitive English boots but also by internal disharmony; the vote to turn out was sixty to fifty.¹¹ The best workmen, being employed exclusively upon fine footwear for the local market, saw no benefit to themselves. They turned out only to avoid being “scabbed.” And it seems likely, though there was no such testimony, that the growth of the export trade had made room for inferior workmen who feared that to win the demands might kill the export trade and throw them out of employment. Both classes of unwilling strikers stood out, however, for several weeks. But after the arrest of eight leaders on a charge of criminal conspiracy they went back to work at the old rates, and the strike ended in total failure.¹²

II

The trial of the eight for the supposed common law crime of “conspiracy to raise their wages” was in the following spring. The legal controversy, both out of court and in, was part of the major political controversy of the time—then still usually expressed as between “aristocracy” and “republicanism” (which meant Jeffersonian democracy).

The interests, feelings and convictions which had sought to “tone the new government as high as possible” were naturally outraged by efforts of journeymen to control their masters. The “aristocratic faction” included such men as John Adams, whose humanitarianism was as deep as Jefferson’s, but who were convinced of the incompetence of the masses to know and secure their own good. Hamilton, however, who seems to have been in-

¹⁰ 1 HISTORY OF LABOUR, *supra* note 4, at 64-5.

¹¹ 3 DOC. HIST. 139. On the failure of the strike forty members left the society. *Ibid.* 90.

¹² The indictment against the eight was not found until January, 1806, after the strike was over. *Ibid.* 61. This fact has sometimes been so stated as to imply that the prosecution had nothing to do with the failure of the strike. But a journeyman testified that while the strike was still on the society had “collected sums of money to meet the expenses of this prosecution.” *Ibid.* 85. The strikers’ protest that the prosecution was invasive of their right to pursue their own happiness was published in *Aurora* for Nov. 28, 1805. 1 HISTORY OF LABOUR, *supra* note 4, at 141-2. The inference that while the strike was still on the eight strikers were arrested on a preliminary complaint seems strong enough to be stated as a fact. How much the arrests had to do with the failure of the strike is of course conjectural; the natural tendency of the division of interests among the strikers was probably hastened.

different to mass welfare, represented a larger constituency; it was in his view an excellence of manufacturing establishments that they would provide dawn to dark employment for the wives and young children of the poor.¹³

The essence of Jeffersonianism was humane concern for "the security of each and the welfare of all," and conviction that those ends were, for the time being, best served by a maximum of individual freedom and a minimum of law and government. Jeffersonian freedom was not a sterile dogma; it meant freedom to obtain as well as to pursue a fair degree of happiness. It was obviously not possible for the journeymen cordwainers to obtain such happiness as better wages could confer if the only effective way to raise their wages was closed to them. It was natural, therefore, that Jeffersonian feeling should rally to their defense. The Jeffersonian newspaper, *Aurora*, edited by William Duane, published their initial protest.¹⁴ And it is clear, from the fact that their own counsel felt professionally obliged to echo to the jury his adversaries' admonition to disregard the newspapers,¹⁵ that Duane himself was fulminating on their behalf before, if not during, the trial.

Duane was a powerful, though far from adequate and perhaps sometimes time-serving, spokesman of authentic Jeffersonian feeling. Jefferson's political party, however, was by no means solidly Jeffersonian. Jefferson himself, practical politician as well as humane philosopher, had deemed it "material to the safety of Republicanism to detach the mercantile interest from its enemies and incorporate them into the body of its friends," and favored "making all the banks Republican by sharing deposits among them in proportion to the dispositions they show."¹⁶ After 1800, with Republicanism both nationally and, except in New England, locally in the saddle, most ambitious self-seekers whose commitment to Federalism had not been such as to hold them loyal through shame were ready enough to profess Republicanism in the abstract.¹⁷ Chase, the Federalist hanging judge, told his son-in-law that, since he was young, he was right in being a Republican.¹⁸ Only the bench and bar remained both

¹³ HAMILTON, *Report on Manufacturers*, 3 WORKS (ed. Lodge 1885) 331; and see generally 1 PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* (1927) 292-320.

¹⁴ *Supra* note 12.

¹⁵ 3 Doc. HIST. 173.

¹⁶ Letter to Gallatin, July 12, 1803, 8 JEFF. 252.

¹⁷ In 1823, when all politicians were calling themselves Republicans, Jefferson wrote to La Fayette: "You are not to believe that these two parties are amalgamated, that the lion and the lamb are lying down together. . . . For in truth, the parties of Whig and Tory, are those of nature." 10 JEFF. 281.

¹⁸ WHARTON, *STATE TRIALS* (1849) 43-4.

strongly and openly Federalist.

The *Cordwainers' Case* fell neatly into place in the line of Federalist common law holdings over which Jeffersonianism had been boiling for years. Jefferson himself felt that his "revolution" would not be complete until it had republicanized the law as judicially declared. With him, and those who followed him rather from conviction than interest, the object of the impeachment campaign was not to man the courts with Republican politicians—though of course its success would have had that result—but to take the Federalist judges *out* of politics, in which they had been immersed to their ears. One of the Republican cries was for repudiation of the English common law. "English common law" meant, concretely, a series of decisions and charges in political cases in which Federalist judges had invoked it, with much violence to what had been Federalist constructions of the Constitution in the campaign to placate opposition to its adoption. The English common law as to crimes against governmental authority was, it was held, "the common law of the United States;" though the Federal government possessed no powers not delegated to it by the Constitution, and the Constitution entrusted implied powers to Congress only, the Federal courts, without warrant from Congress, had "inherent" power to punish as violative of the common law of the United States conduct prejudicial to the policies of the Federalist administration. An American serving on a French privateer was punishable for violation of Washington's proclamation of neutrality; French naturalization would not divest his American citizenship, for at common law there is no right of expatriation; as a corollary, naturalized Americans of British origin were subject to impressment in the British navy.¹⁹ Common law doctrines of seditious libel, long disputed in England and there repudiated in 1791 by Fox's Libel Act, were held compatible with the nature of American government and not repugnant to the First Amendment; freedom of the press consisted only in freedom from censorship prior to publication. Republican publications reviling Federalist officials and policies were punishable as seditious libels under the common law of the United States even without the Sedition Act of 1798. That act tempered the common law by making truth a defence; but the falsity of an opinion, for example, that before the near-war with France President Adams was only "in the infancy of political mistake," was deemed irrefutable.²⁰ The constitutional definition of treason was control-

¹⁹ 1 WARREN, SUPREME COURT IN UNITED STATES HISTORY (1926) 112-3, 159-64, 433-41, and cases there cited.

²⁰ WHARTON, *supra* note 18, at 473-481 (Judge Iredell's charge, 1799), 333 ff. (Trial of Lyon), 659 ff. (Cooper), 684 ff. (Haswell), 688 ff. (Caldender); Madison's argument of the unconstitutionality of the Sedition

led, before the case of Aaron Burr, by a Federalist common law; the disorders in Pennsylvania incident to the collection of Hamilton's excise taxes amounted to levying war, "not constructive, but actual;" and John Adams' sensible pardons of rioters sentenced to death were branded by Hamilton, among others, as a "virtual dereliction."²¹

The Republicans could see no way to purge the courts of Federalist partisanship except by impeachment. The result might constitutionally have been reached by increasing the number of judges and appointing Republicans to the new seats. But this would have been inconsistent with Republican reprobation of the creation by the Federalists, on the eve of their downfall, of a host of new judicial offices through which their influence might be prolonged.²² So it was attempted to impeach Justice Chase for a series of exuberances which established clearly only that the temperament of that keen but hot-headed lawyer was anything but judicial. To find him guilty of high crimes and misdemeanors was too much for some of the more conservative Republican Senators, and the impeachment failed.²³

In Pennsylvania, Alexander Addison, President Judge of one of the Courts of Common Pleas, was impeached—nominally for a clear instance of arbitrary conduct into which he had been trapped, actually for the Federalist stump speeches which he had delivered as charges to grand juries.²⁴ Soon afterwards the Federalist majority of the Supreme Court of Pennsylvania summarily punished for contempt one Passmore who had denounced, at a coffee house, his adversaries in a civil action for taking an appeal from a judgment in his favor.²⁵ This added a new count—or rather, revived in Pennsylvania what was already an old one—to the Republican indictment of the common law. The Federalist judges were supported by Governor McKean, a nominal Republican who had himself as a Federalist judge made an obnoxious finding of contempt by publication,²⁶ who was related to

Act, 4 ELLIOT'S DEBATES, 546, 561-580; 2 BEVERIDGE, LIFE OF JOHN MARSHALL (1916) 451 ff., 3 *ibid.* 23 ff; Frank Maloy Anderson, *Enforcement of the Alien and Sedition Laws*, 113 ANN. REP. AM. HIST. ASSN. (1912) 115 ff.; BOWERS, JEFFERSON AND HAMILTON (1925) c. 17.

²¹ WHARTON, *supra* note 18, at 102 ff. (the "Whiskey Insurrection" cases, 1797), 458 ff. (trials of Fries and others, 1799-1800), 644 (Hamilton on the pardon).

²² 3 BEVERIDGE, *supra* note 20, c. 2; 1 WARREN, *supra* note 19, c. 4.

²³ BEVERIDGE, c. 4; WARREN, c. 6.

²⁴ 3 McMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES (1914) 154-7.

²⁵ Bayard and Petit v. Passmore, 3 Yeates 439 (Pa. 1802); *Respublica v. Passmore*, *ibid.* 441 (Pa. 1802); 3 McMASTER 157 ff.; Nelles and King, *Contempt by Publication* (1928) 28 COL. L. REV. 401, 413 ff.

²⁶ *Respublica v. Oswald*, 1 Dallas 319 (Pa. 1788); *Contempt by Publication*, *supra* note 25, 409 ff.

Passmore's adversaries, and whose son had been their counsel in the prosecution of Passmore for contempt.²⁷ The judges escaped impeachment for abuse of their contempt power—but by a narrow margin.²⁸ The Republican Party of Pennsylvania split. The majority faction demanded reformation of the judiciary and abolition of the common law by constitutional amendment. The "Constitutional Republicans," headed by Governor McKean, by alliance with the Federalists, carried a close election in the fall of 1805,²⁹ contemporaneously with the cordwainers' turn-out.

The prosecution and conviction of the cordwainers on the heels of this election added still another count to the majority Republican indictment of the common law. The British authorities discussed in sub-division VI of this article were said by the court to establish that a "conspiracy of workmen to raise their wages" was criminal at common law. The United States Gazette for March 18, 1806—the trial was then pending—reports that in the state legislature a bill "which went to supersede the operation of the common law, was disagreed to—44 to 32." The forty-four were of course Federalists and McKean Republicans.

The case was tried in the Mayor's Court of Philadelphia. The Mayor and aldermen seem to have been of the McKean faction.³⁰ So was Recorder Moses Levy, who presided—who, as counsel for Passmore, had made an obsequious mess of his client's defense in the contempt case.³¹ The prosecution was conducted by two of the ablest members of the brilliant Philadelphia bar of that period: Joseph Hopkinson and Jared Ingersoll. Hopkinson is best known in history as the author of "Hail Columbia," the words of which he composed in 1798 as propaganda for the war with France, to be sung to a Federalist audience at an actor's benefit.³² In 1805 he had been a prominent member of the corps

²⁷ BUCHANAN, LIFE OF THOMAS MCKEAN (1890) 45, 83, 97, 116.

²⁸ WILLIAM HAMILTON, REPORT OF THE TRIAL AND ACQUITTAL OF SHIPPEN, C. J., AND YEATES AND SMITH, JJ. (1805).

²⁹ MCMASTER, *loc. cit. supra* note 25.

³⁰ No mention of candidates and votes for city offices has been found in such Philadelphia newspapers of 1805 as it has been practicable to examine. McKean carried the city, though by a mere handful of votes. The United States Gazette, Federalist, indicates that the term of Mayor Innskeep, whom it seemed to regard with favor, commenced in December, 1805, at the same time with Governor McKean's.

³¹ *Op. cit. supra* note 25. Sampson Levy is mentioned in the United States Gazette, Nov. 26, 1805, as chairman of the Philadelphia "Constitutional Republican" organization which fused with the Federalists. The success at the bar of the brothers Moses and Sampson Levy was in the teeth of racial and caste obstacles which at that time were substantial. Both became Episcopalians. 1 DAVID PAUL BROWN, THE FORUM (1856) 542-555, 307, 355.

³² 2 MCMASTER, *supra* note 24, at 377-380; KONKLE, JOSEPH HOPKINSON (1931). Biographical information, when no better source is indicated, is

of distinguished lawyers, headed by Luther Martin, that defended Chase from impeachment. John Quincy Adams appointed him to the Federal bench to succeed Judge Peters. Jared Ingersoll had been a member of the Constitutional Convention of 1787. He seems to have been a man of extraordinary sophistication, sagacity, and good nature; "He glided into the affections, and disregarding the passions, he captivated, by the strength and simplicity of his appeals, the reason and the judgment of his hearers."³³ Only one Philadelphia lawyer of high standing—Dallas—called himself a Republican; and since Ingersoll took his Federalism more lightly than most, he was twice appointed Attorney-General by Republican governors, and often retained for Republican interests in litigation; his comparative inoffensiveness to Republicans probably accounts for his nomination by the Federalist forlorn hope for the vice-presidency in 1812. But no political luke-warmness impaired his professional efficiency in the *Cordwainers' Case*.

Caesar A. Rodney had been imported from Delaware by the majority faction of Pennsylvania Republicans to prosecute the attempted impeachment of the Supreme Court justices in 1805—for Dallas, who had prosecuted the impeachment of Judge Addison, was of the McKean faction and conducted the defense of the justices. In the same year Rodney, as one of the managers for the House of Representatives, had taken part in the prosecution of Justice Chase. In 1806 he was brought again to Philadelphia to defend the journeymen cordwainers, with Walter Franklin as his junior. Though Rodney was a wind-bag, he was by no means an empty one; but his florid professional artistry often overreached itself. Probably he was as competent an advocate as, in the conditions of time and place, the journeymen could have got. Within the year Jefferson appointed him Attorney-General of the United States.³⁴

III

The practice of arguing law as well as fact to juries in criminal cases was still universal at the time of the cordwainers' trial. There was no controversy as to the facts. The question of law involved was novel in the United States. It would have been rash, therefore, for the court to undertake to prevent counsel from appealing to the jury on grounds of public policy as well as by citation of English authorities. And since the issues of public policy with respect to organized labor have not changed

from APPLETON'S ENCYCLOPEDIA OF AMERICAN BIOGRAPHY (Rev. ed. 1899-1900).

³³ 1 BROWN, *supra* note 31, at 471.

³⁴ Jefferson to Rodney, Jan. 17, 1807, 9 JEFF. 12.

greatly in a century and a quarter, the most interesting of the arguments of counsel are those which touched them.

The major premise of the prosecution's case was that unlimited expansion of manufactures is beneficial to the community. It is therefore proper, said Hopkinson, "to support this manufacture. Will you permit men to destroy it who have no permanent stake in the city; men who can pack up their all in a knapsack, or carry them in their pockets to New York or Baltimore?"³⁵ The journeymen's confederacy, said Ingersoll, will destroy the industry, to the ruin, not of the masters, who could stand the shock, but of the journeymen themselves.³⁶

Another of the prosecution's scare-crows may have seemed to the jury more perturbing: if the masters pay higher wages, "you must pay higher for the articles." From this was drawn the inference, perhaps plausible if the export trade had not yet become important to the masters, that the masters "have no interest to serve in the prosecution . . . They, in truth, are protecting the community."³⁷

Rodney, for the defendants, speciously denied that higher wages meant higher prices: "If you banish from this place (as it is morally certain you will) a great number of the best workmen, by a verdict of guilty, can you reasonably expect, that labour will be cheaper? Will it not rise in value, in exact proportion to the scarcity of hands, and the demand for boots and shoes, like every other article in the market?"³⁸ It followed, he argued, that it was not the journeymen's society but the prosecution that endangered the export trade and the prosperity which "must be the sincere wish of us all."

"The best method to accomplish this desirable object is to secure to workmen the inestimable privilege of fixing the price of their own labour. . . . No person is compelled to give them more than their work is worth, the market will sufficiently and correctly regulate these matters. If you adhere to our doctrines . . . I venture to predict . . . that scarcely a breeze will blow, but what will waft to our shores, experienced workmen from those realms, where labour is regulated by statutable provisions; not a wave of the Atlantic, which will not bear on its bosom to this country, European artificers, by whom the raw materials furnished from our extensive regions, will be wrought in the greatest perfection. Give me leave, however, frankly to declare, that I would not barter away our dear bought rights and American liberty, for all the warehouses of London and Liverpool, and the manufactures of Birmingham and Manchester: no; not if were to be added to

³⁵ 3 Doc. Hist. 136.

³⁶ *Ibid.* 214.

³⁷ *Ibid.* 137.

³⁸ *Ibid.* 198.

them, the gold of Mexico, the silver of Peru, and the diamonds of Brazil.”³⁹

That the prosecution was subversive of American freedom was the main contention of the defence. Even if it were conceded (as of course it was not) that at English common law the cordwainers' society would be a criminal conspiracy, that common law was not American common law. In support of this, counsel argued, relying upon Tucker's Blackstone,⁴⁰ that if a doctrine of labor conspiracy had been used in this country during the colonial period—which it had not—it could not survive as law in one of the United States, even under a constitution or statute which continued “the common law” in general terms. For it would be in derogation of the natural and unalienable rights of man, and inconsistent with democracy.

The anomalies of freedom were, however, as striking then as now. To associate for betterment is an exercise of freedom. And the associates may claim freedom of collective action. The power of the association serves generally the substance of the freedom, which is economically conditioned, of its members. But efficient service may involve a variety of coercions of unwilling individuals—to join, or to conform with its regulations, or to concede its demands.

So Ingersoll had also freedom points, with which, disclaiming emulation of Rodney's “appeals to passion,” he could play more effectively than Rodney upon the feelings of both judges and jury.

“The defendants formed a society, the object of which was . . . What? That they should not be obliged to work for wages which they did not think a reasonable compensation? No: . . . they may legally and properly associate for that purpose. But when we allow the rights of the poor journeymen, let us not forget those of the rich employer, with his wedges of gold, his bars of silver, and his wings of paper stock, mentioned by Mr. Rodney.”⁴¹

The object of the society was not freedom, but compulsion:

³⁹ *Ibid.* 179-181.

⁴⁰ *Ibid.* 240-242. St. George Tucker (1752-1828) was successively a soldier of the Revolution, judge of the General Court of Virginia, professor of law at William and Mary College, President Judge of the Virginia Court of Appeals, and United States District Judge. His poems and satires rank high in the meagre American literature of the period. His edition of Blackstone (Philadelphia, 1803) “containing the first legal commentaries on the Federal Constitution which appeared in the United States” was one of the first important American law books. WARREN, HISTORY OF THE AMERICAN BAR (1913) 336. His views were very close to those of Madison.

⁴¹ 3 Doc. HIST. 207.

"We charge a combination, by means of rewards and punishments, threats, insults, starvings and beatings, to compel the employers to accede to terms, they the journeymen present and dictate."⁴²

In repeated instances the society had substituted compulsion for freedom of contract in fixing wages. A turn-out in 1798 had forced wages above the contract rate; and when, in 1799, the masters combined to restore the contract rate, another turn-out kept them up.⁴³ The evidence—which had not been confined to the events of 1805, but had ranged back into the eighteenth century—was full of concrete hardships suffered by individuals. Ingersoll adroitly, without heightening or cumulation of details, refreshed the jury's sense of the moving quality of this evidence as it had come from the lips of the witnesses. Job Harrison had joined the society in 1794 for fear of being scabbed: "if I did not join the body, no man would set upon the seat where I worked, . . . nor board or lodge in the same house, nor would they work at all for the same employer." Most of the turn-outs were for wages on boots; he, making only fine shoes, had nothing to gain. During the turn-out of 1799, having "a sick wife and a large young family," he scabbed secretly for Mr. Bedford until, having been detected by the "tramping committee" and roused to indignation by the strikers' rejection of the tearful plea of one Dobbin for leave to support his children, he resolved to scab openly. Mr. Bedford promised to protect him, and kept him on after the strike had been won. Mr. Bedford's shop was therefore scabbed; his force, which before the strike had been twenty, was for a year and a half reduced to four or five journeymen, of whom only two were competent. While his shop was scabbed his shop window was broken with potatoes which had pieces of broken shoemakers' tacks in them—"at least the one had which they aimed at my person, and was near hitting me in the face." Harrison having finally been readmitted to the society on payment of a fine, Mr. Bedford could get workmen again. He went South and secured many customers; but soon after his return, business becoming a little brisk, his new force compelled him to raise their wages and demand higher prices of his Southern customers—with the result that he lost trade to the amount of \$4,000 a year.⁴⁴ Mr. Blair testified: "At the turn out in 1798, I had six men working for me; who were willing to continue notwithstanding the turn-out. These men were kept up in a garret, but sometimes after dark, they would venture out to Mrs. Finch's, next door but one,

⁴² *Ibid.* 221.

⁴³ *Ibid.* 216-218.

⁴⁴ *Ibid.* 73-85, 99-101.

to get a drink of beer; one Sunday evening . . . I found them hid away in the cellar; they had been beaten, and the girl was crying, and had been beaten also. I was very angry, and determined next day to buy a cow-skin, and whip the first that came near the house. Their clerk, Nelson, was the first, and I fell foul and beat him; he sued me for it, and my men sued them afterwards; we dropped the whole and squared the yards. . . . I afterwards had to pay fines for my men, to get them into the body again.”⁴⁵ A journeyman testified: “The name of a scab is very dangerous; men of this description have been hurt when out at nights. I myself have been threatened for working at wages with which I was satisfied. I was afraid of going near any of the body: I have seen them twisting and making wry faces at me, and heard two men call out scab, as I passed by. I was obliged to join, for fear of personal injury. . . .”⁴⁶ There was no evidence, however, of any violence within five years of the 1805 turn-out, or that any of the defendants had ever done more than take part in strikes and live up to the no-association-with-scabs rule of the society.

IV

An open-minded judge might have felt bound to caution a jury which was judge of the law applicable to undisputed facts in this political case of first impression against the superficiality of counsel on both sides as well as against their “appeals to passion.” The fairest of practical judges might well, however, have shrunk from undertaking himself to marshal fully and fairly all the arguments and inferences that might properly have been weighed. Even after one hundred and twenty-five years this difficult job cannot be undertaken without diffidence. And though it is here attempted as of 1806, with an eye mainly to facts then evident and inferences then reasonable, what is said must inevitably reflect consideration of later experience.

Whether the journeymen cordwainers were guilty of crime depended, not upon the English authorities which Recorder Levy purported to find controlling,⁴⁷ but upon whether a Jeffersonian or a Tory⁴⁸ judgment of tendency with respect to the prosperity

⁴⁵ *Ibid.* 97-98.

⁴⁶ *Ibid.* 93.

⁴⁷ See sections v and vi, *infra*.

⁴⁸ The intention of the use of the word “Tory” is descriptive, not disparaging. The Tory premise that intelligence is rare seems indisputable. That Tories possess most of it may also be true, though it is less obvious. That they can be relied upon to use it to promote “the security of each and the welfare of all” is at least as doubtful as the usual democratic premise that most people are intelligent enough to recognize and pursue their own good when intelligence points it out to them.

and happiness of people, standing in thought as *the* people, should prevail.

To American commercial Toryism (except that of New England ship-owners) the beneficence of rapid development of manufactures was not open to question. Hamilton would have thought *per se* excellent the increased wealth that would result. Wealth tends inevitably, to be sure, to become concentrated in the most capable hands. But such happiness as poverty and incapacity may hope for depends upon the wealth of the rich. The richer the rich, the more employment they provide, and the greater their power to be generous should they be so disposed.⁴⁹ Manufactures would, moreover, increase the aggregate wealth, power and importance, however distributed among individuals, not only of the city, but also of the nation. We should escape dependence upon Europe for necessities; and find ourselves better equipped for aggression and defence in wars which no observer of the Napoleonic world could feel as escapable. Private wealth is national power. It is better to live in a strong nation than in a weak one. Since journeymen's societies were clearly obstructive of rapid increase in manufacturing wealth, they were obstructive of both public and private security and prosperity.

A more humane Tory than Hamilton could in 1806 have reinforced this contention. At the trial no one either dared or wished to challenge the beneficence of manufactures. It could not have been denied that the proceeds of increased manufactures would be widely distributed among persons then living at Philadelphia. The jury was composed of one merchant, three inn-keepers, three grocers, a bottler, a watch-maker, a tailor, a hatter, and a tobacconist.⁵⁰ If, for non-inclusion of persons dependent upon wages, it was not fairly representative of the economic interests of all the people of Philadelphia, it represented a probable majority. All such as those jurors, having a head-start upon the competitors who would be sure to arise, stood to fatten their pocket-books through increase in the total amount of money to be spent in Philadelphia. Export manufacture would clearly bring to town much money; there would be more employers with more money to spend before there would be fewer, with still more; and however low the wages of manufacturing labor, their aggregate would be enormous. Manufacturing wage-earners then present in Philadelphia would ob-

Probably the basic distinction is between conceptions of good living.

⁴⁹ The summary of Hamilton's political philosophy which seems to me most adequate, perhaps because I share its Jeffersonian bias, is Parrington's, cited *supra* note 13. In Hamilton's own speeches and writings and in historians and biographers whose feeling towards him is more sympathetic, I have noted nothing that impeaches the adequacy of Parrington's analysis.

⁵⁰ 3 Doc. Hist. 61.

viously suffer loss, but opportunities to re-coup were many and hopeful. If their wages became unsatisfactory, it was true that a good many could pack their all in a knap-sack and better themselves at New York or Baltimore, or by going West, or by changing occupation. The native farm girls who first, under attractive conditions, tended the looms of New England were probably not reduced to misery when immigrant cheaper labor undermined their advantages.⁵¹ They escaped the mills. It was not till towards the middle of the century that Know-Nothing nativism gave evidence that the difficulty of satisfactory re-adjustments under comparable circumstances had become great.⁵² As for the immigrants who pushed natives and earlier comers sometimes up and sometimes down, doubtless they lived meanly. But even they could sometimes rise; and at worst they lived better than in famished Ireland. An observer who concluded that manufacturing laborers had little need of defensive-aggressive organization in 1806, and that their closed shops impaired the freedom and happiness of the majority, was not obviously biased or uninformed.

A weighty other side to the case could, however, be seen or felt even in 1806. Economic factors are not the sole factors in human welfare, and wealth is neither an equivalent of happiness nor its necessary condition. Our Twentieth Century preoccupation with economics tends to make thinking lop-sided. The pendulum has swung from extravagant denial of the heresy of economic determination to counter-extravagance of affirmation.

The Eighteenth Century produced men who, like Jefferson and Madison, saw things in better proportion. Candid though they were in recognition of economic motives and values, they did not deem it soft-headed to perceive that economic gains may be human losses, even to their gainers.

It was obvious to Jefferson that somewhat autonomous work (whether or not stimulated by gain or need) in which main attention is upon excellence of product—whether tobacco leaves, a civilization, poetry, or tables and chairs—develops more satisfactory human animals than work whose doing fails to shut from view a gain or need which prompts it.⁵³ The effects upon human quality of the pursuit of gain dissociated from creation were evident, *e.g.*, in the Saturnalia which had attended the adoption of Hamilton's Funding Plan.⁵⁴ Wealth, moreover, makes poverty. Even European economists were not yet definitely

⁵¹ 1 HISTORY OF LABOUR, *supra* note 4, at 111, 320, 422-3. WARE, THE INDUSTRIAL WORKER (1924) c. 9.

⁵² WHIPPLE, STORY OF CIVIL LIBERTY IN THE UNITED STATES (1927) 57-63; 8 MCMASTER, *supra* note 24, at 74 ff., 211 ff.

⁵³ 3 JEFF. 268-9; 4 *ibid.* 87 ff., 105; *cf.* 10 *ibid.* 143-6.

⁵⁴ BOWERS, JEFFERSON AND HAMILTON (1925) c. 3.

committed to the theory that the Iron Law of Wages is a law of Nature and therefore both immutable and excellent;⁵⁵ Jefferson might have said that the actual reduction of English manufacturing labor to bare life, without liberty or happiness, was not natural but artificial. Since their human products are so undesirable, we could properly, according to the man to whom *laissez faire* individualism is ascribed as a dogmatic faith, outlaw manufactures. If we subordinate our other pursuits to agriculture, he said, we are more likely to be happy than if we mimic an Amsterdam, a Hamburg, or a city of London.

"Every society has a right to fix the fundamental principles of its association, and to say to all individuals that, if they contemplate pursuits . . . involving dangers which the society chooses to avoid, they may go somewhere else for their exercise; that we want no citizens . . . on such terms. We may exclude them from our territory, as we do persons infected with disease."

When the alternatives are "1, licentious commerce and gambling speculations for a few, with eternal war for the many; or, 2, restricted commerce, peace, and steady occupations for all," Jefferson's choice was unequivocal:

"If any State in the Union will declare that it prefers separation with the first alternative, to a continuance in union without it, I have no hesitation in saying, 'let us separate.'" ⁵⁶

Jefferson seems never to have expressed himself with direct relation to any cordwainers' conspiracy case. In 1806, as a practical politician, he was rigorously shutting his lips against expression upon any question that was dividing his party in Pennsylvania, anxious that both factions should continue to call themselves Republicans, support his foreign policy, and vote for his Republican successor in 1808.⁵⁷ Our buffetings by combatants in the Napoleonic wars convinced him that domestic manufacture of necessities was desirable, and he himself stimulated them, not only by his foreign policy but also privately, setting an example of ordering cloth for clothes from Connecticut.⁵⁸ For all his abhorrence of the effects of industrialization upon people, he would not, even had it been possible, have invoked the power of outlawing manufactures which he conceived government to have.

⁵⁵ The Iron Law—that wages cannot "naturally" exceed the minimum essential to subsistence—was intimated in the Eighteenth Century by Quesnay and Turgot, but got its main impetus from Ricardo in 1817. GIDE & RIST, *HISTORY OF ECONOMIC DOCTRINES* (1915) 42, 157.

⁵⁶ 10 JEFF. 34-5 (to Crawford, 1816).

⁵⁷ 9 *ibid.* 102, 103n, 129n, *cf.* 313.

⁵⁸ 9 *ibid.* 373; 10 *ibid.* 225-6.

But neither would he have regarded the desirability of their stimulation as justifying legal restriction of workmen's possibilities of self-help. Had he let himself look closely at the Philadelphia case, there can be little doubt of his reasoning or conclusions.

Democracy, *laissez faire*, individual freedom, and equality of rights were as a result of his ascendancy accepted as shibboleths by people of the most divergent views and values. Those phrases became for more than a century an ambiguous Esperanto of American political and judicial communication. To Jefferson himself and to authentic Jeffersonians after him their meanings were very different from the meanings which Toryism, after Hamiltonian candor had become impossible in public, attached to them. Jefferson was a pragmatist. He adopted his principles because he thought them calculated to result in the practical consequences summed up by the phrase "general welfare." He did not scruple to depart from them when consistency would result in contrary practical consequences.⁵⁹ While he adhered to them, he could give them no constructions or applications which would tend to subvert "the security of each and the welfare of all." And security and welfare, in his conception, though they involved material goods, did not depend upon wealth.

Jeffersonian *laissez faire* was not dogmatic. It was premised upon a state of facts in which letting alone was desirable. Its continued validity as a maxim of public policy depended upon the persistence of such a state of facts. Unless people remained comparatively (not, of course, absolutely) free, equal and intelligent, *laissez faire*, like the democracy of which it was to Jefferson a corollary, would become inappropriate.

Free Americans were, in comparison with Europeans, equal, and even if Jefferson exaggerated their intelligence, they had generally a degree of it. Freedom had not become, for most, a sterile right of fruitless seeking. It was substantial, enabling men rather generally, if meagerly, to obtain and enjoy both economic goods and goods ulterior. The field of opportunity was large, and handicaps in competition were relatively small. In such conditions it was clearly sensible for law and government to let people alone for the most part. For so long as competitors are not too disparate in power, competition tends to check its own injurious tendencies. However intense the competition between merchants, live and let live tends to be the policy of

⁵⁹ He conceded, for example, that the democracy which was practical for the actually free, happy, fairly intelligent, and therefore orderly people of the United States would not work for South Americans—who would, he hoped, achieve *liberty* under an oligarchy "well-guarded against the egoism of its functionaries." 10 JEFF. 22-25 (to Du Pont de Nemours, 1816); cf. *ibid.* 30-31, 152-3, 280.

approximate equals; resort to cut-throat tactics is usually due either to the desperation of an underdog or to the Napoleonic ambition of one so prosperous that he can stand losses ruinous to his weaker rivals. While buyers compete on fairly even terms, and sellers do likewise, a competing buyer and seller can bargain with mutual satisfaction. Even in the competition between employer and employee, satisfaction with an individual wage contract may be mutual if the employee has a practical alternative to acceptance of the employer's terms, or a fair hope of ultimate escape.

If disparities of bargaining power became oppressive, government might properly intervene.⁶⁰ But "a government regulating itself by what is wise and just for the many, uninfluenced by the local and selfish views of the few who direct their affairs, has not been seen perhaps, on earth. Or if it existed, for a moment, at the birth of ours, it would not be easy to fix the term of its continuance."⁶¹ The best hope for its continuance is a tradition of not meddling. While it is reasonable to suppose that the individually weaker may by collective self-help somewhat better themselves without, in the large, reducing to insubstantiality the goods enjoyed by their competitors, government and its law would best neither help nor hurt them.

At the very beginning of quantity production of foot-wear for the local Philadelphia market, the bargaining power of the individual journeyman became insufficient to enable him to keep his head up in society. The same principle that forbade legal interference with the masters' enlargement of their business equally forbade interference with the equally natural self-advancement of the journeymen through the only means open to them—collective pressure. And so long as advances in wages could be passed on to the local public, there was no thought of a law against such pressure. Both masters and journeymen, in spite of occasional hot friction, were on the whole reasonably satisfied—as was also the public. For if it paid the advanced wages when it bought shoes, it got them back again when they were spent. If the principle of *laissez faire* required that the masters be free to undertake an adventure, pregnant with dangers as well as benefits to the local community, into remote markets whose power to pay wage advances was doubtful or non-existent, it required correlatively that the journeymen be free to refuse to take part save on satisfactory terms. If the adventure failed in consequence, it would be renewed. It could not "naturally"⁶² succeed until there should be a substantial

⁶⁰ *Supra* note 56.

⁶¹ 10 JEFF. 36.

⁶² In question-begging uses of the word "natural" and its derivatives I am trying to connote the values for whose cultivation the sages of the Eight-

body of journeymen as well as of masters whose interests would be served by its success. If that was not already the case in 1806, immigration and the birth-rate would quickly bring it to pass. Union or no union, no appreciable number of journeymen who would be condemned to unemployment unless boots were manufactured for export would long hold out for a wage prohibitive of such manufacture; and their own losses from a mistaken strike would sufficiently deter repetition of their blunder. The law of a free society has no business to punish mere blunders, or to aid in an economic subjugation which it might properly intervene to prevent.

This view of the case in the large may need supplementation, even though it involves some repetition, with a more specific Jeffersonian answer to the contention that the coercions of Dobbin, Job Harrison and Mr. Bedford were subversive not only of *their* freedom but also of *freedom*. Throughout the Nineteenth Century Jeffersonian conviction that freedom was promoted by labor pressures whose effectiveness required coercion of individuals found itself embarrassed by its own doctrines, become dogmas, in its attempts at logical explanation.

One dogmatic false premise was that freedom is a *right*, instead of a complicated and unstable fact. Others—the fallacies will be shown presently—were that rights are and must be equal; and that, subject to the speciously definite and absolute qualification that “No man has a right to commit aggression on the equal rights of another,” they are also absolute. If freedom is a right, and rights are equal and absolute, all men’s freedom must be and therefore, contrary to fact, *is*, equal and absolute.

This conceptually equal and absolute freedom entitled everyone to do what he chose, subject to the equal rights of others, to serve his own interests. Mr. Bedford had clearly a “right” to take orders for boots at Charleston. The “right” of his journeymen A, B and C to refuse to make the boots at wages which would leave Mr. Bedford a profit was as clear. If Mr. Bedford lost the trade he wanted because his workmen would not work at the wages he was willing to pay, it was unfortunate. It was equally unfortunate if his men lost the wages they wanted because he would not pay them. Neither’s equal freedom of self-service is invaded by its futility.

But the counter pressures of employers and workmen never come naturally to rest in failure. Mr. Bedford could normally, in the absence of closed shop conditions effective throughout the

eenth Century Enlightenment endowed Nature with benign authority. Their baptism as “natural” of what they thought desirable was often, of course, somewhat arbitrary. See BECKER, *THE DECLARATION OF INDEPENDENCE* (1922) and his Storrs Lectures at Yale, 1931, delivered under the title, *THE HEAVENLY CITY OF THE EIGHTEENTH CENTURY*.

industry, find three Dobbins who were willing to make his boots for the wages he was willing to pay. If their freedoms and A's, B's and C's are equal, they have a "right" to do so. Mr. Bedford has in consequence a coercive power to which A, B and C must surrender, unless they can by association with others organize a coercive power superior to Mr. Bedford's. To coerce Mr. Bedford the association must coerce the cooperation of many Dobbins. It may also have to coerce Job Harrison, who makes shoes, not boots, at satisfactory wages; for even if he is not likely to be persuaded to turn from shoes to boots if he stays at work, his participation in a turn-out may be essential to a solidarity sufficient to break down the resistance of the Dobbins or Mr. Bedford. Unless the association may resort to the minimum of coercion essential to its efficiency—a minimum which is not susceptible of definition precise enough clearly or always to exempt Job Harrison⁶³—the "right" of journeymen to refuse to work for unsatisfactorily low wages is as barren as Mr. Bedford's "right" to refuse to pay unsatisfactorily high wages would be if he had not also a "right" to hire Dobbins.

The question is which coercive power (not of course *right* in any strict sense) will result in more peace, freedom and happiness. But it was attempted for a century to settle it by individualist dogma. Mr. Bedford's power to hire Dobbins was easily reconcilable with dogma, simply by not calling it a right to coerce. All attempts to reconcile a coercive "right of association" with individualist dogma end, however, in dilemma or paradox. And while the sanctity and adequacy of dogmatic individualism were unchallenged, the rising industrial Toryism was able to make tremendous use of this irreconcilability. The feeling of authentic Jeffersonians was hostile. But logical justification of its hostility called for closer analysis of freedom than would be made by people who assumed that it must be absolute and equal and that the problems of social ethics are solvable by individual rectitude.

Freedom, like interstate commerce, is a practical conception, and its practical boundaries are even more shifting and elusive. Freedom in general is in perpetual conflict with freedom in particular. None have ever enjoyed freedom either absolutely or equally. Anyone's freedom is inevitably either more or less than anyone else's. A man's possession or lack of freedom is not measured by his legal rights, which can only affect his power to become more free. How much freedom he actually enjoys

⁶³ In 1806, of course, no glimmering of the notion that a boycott of any sort might be unlawful had yet dawned. Rodney could argue without fear of contradiction that it would be "perfectly lawful . . . for two or more persons to agree not to purchase dry goods or groceries at a particular store." 3 Doc. HIST. 176.

is a question not of law but of fact, and the answer is different in every instance. A free society is a society in which fairly substantial freedom is fairly generally enjoyed—of course in various and unequal degrees.

The essence of freedom is a sense of self-value—which requires possession and successful exercise of a degree of power. Though the typical freeman is autonomous, no autonomy is complete, and no slave is without some degree of it. The power, and therefore the freedom, of a despot is qualified by the power of his subjects to resist, even though their resistance may surely be unavailing. Even a slight degree of autonomy results in a degree of freedom. The powers of an inferior to render or not render efficient service raises some sense of self-value. A servant may value himself highly for obedient efficiency if it has commanded rewards (artistic or creative satisfaction with work interesting in itself or well performed, pay, favors, esteem, deference of the less successful). He may also value himself for disobedient inefficiency—a desperate reach for freedom induced by feeling, sometimes reasonable, that the rewards of efficiency are insufficient to sustain self-respect. It may be argued (though it is not here; the possibility only is put as illustrative) that negroes were in general more free as slaves than they have been since emancipation; they were considerably restrained from vicious, futile and self-defeating conduct; as valuable property they could regard themselves as important; their exercise of their limited options, as to serve well or ill, was sometimes fruitful enough to make them feel their worth and power as substantial. They were not, however, very free. For freedom is in proportion to autonomy, which is in proportion to power (which is various, and would include the power of an ascetic to master the calls of the flesh). In proportion, for example, as a despot's power is unconditioned, he is free, and his subjects are unfree. A "benevolent despotism" which might conceivably result in more general enjoyment of substantial freedoms than has ever been the fact under "free government," would involve the despot's submission to manifold restraints; his power would be conditioned even when it was self-conditioned; in so far as his altruism controlled his selfishness he would be lending part of his power to his subjects. A "free society" which permits inequalities of power *ipso facto* permits inequalities of freedom.

To reduce citizens of unequal capacities to equality of power is of course impossible. And a free society has good reason for not going nearly so far towards compulsion of equality as might be possible. That good reason is not, however, its concern for freedom, which is qualitatively neutral. It is concern for the qualities of its freemen. The freest society conceivable might be a society of morons. Concern for general enjoyment of sub-

stantial freedoms conflicts with and yields somewhat to concern for human excellence. The freest of free societies, if it were likewise intelligent, though its regulations would often be of leveling tendency, would check leveling short of the point at which it would defeat that full and ardent competitive cultivation and use of superior faculties which is a supreme excellence of living.

In Jeffersonian America the danger of too much leveling was supposed to be met by the policy of letting people alone to do their utmost for themselves within the limits of the tolerable. That policy meant that life would be a rough-and-tumble in which much coercion and loss would have to go without legal remedy and be written off as due to the "inevitable friction of society." But while disparities were moderate, fairly substantial freedom somewhat general, and opportunities abundant, it stimulated most people to better their qualities and to enrich their lives. Whether it would also result in the conservation of as satisfactory a diffusion of substantial freedom as there was to start with depended upon whether it should be held applicable and what it should be construed as requiring in concrete instances such as the *Cordwainers' Case*.

No rule, maxim or principle of law or policy will necessarily and always result in conservation or increase of freedom. The question of what legal regulations or omissions to regulate will serve those ends is always practical. Regulations and principles originally useful will drift into disservice unless their actual tendency at successive moments of history is observed and made a ground for their construction or revision. The principle of equality of rights is an example. The freedom of the weaker members of society was in fact increased when they were given rights which in the abstract were the same as and equal to the rights of the stronger. A great man could no longer, as anciently, take the property of an inferior merely because he was superior, or exact service from him without a form, usually involving a fair degree of substance, of consent. But though the principle of identity and equality of individual rights has done good work for freedom, it does not follow either that it is of the substance of freedom or that freedom is necessarily or always served by it. To say that because men's abstract rights are equal they are equally free is indeed a crude and violent *non sequitur*. "Consider," said Anatole France, "the majestic equality of the law, which visits the same punishment upon rich and poor for begging in the streets, for sleeping under bridges, and for stealing bread." Equality of property rights results in freedoms somewhat, though very roughly, in proportion to property owned, and in lacks of freedom somewhat in proportion to property lacked. In the conditions of Jefferson's time equality of property

rights could be felt on the whole as practically servicable to freedom generally. But even then it was seen (by Madison, for example) ⁶⁴ that the tendency of accumulations of wealth to impair freedoms would call ultimately for correction "by the equalizing tendency of our laws." Since freedom depends on power, and legal rights are elements of power, when disparities of power widen, the inferior may need superior rights or privileges and immunities in order to enjoy such freedoms as it is desirable and practicable that they should have.

The *Cordwainers' Case* involved no claim for the defendants of unequal rights or special privileges or immunities in a strict sense of those words.⁶⁵ It did involve, however, upon the artificial assumptions that freedom is a right instead of an end to be furthered and that freedoms are equal and include equal and absolute immunities from coercion, the principle of equality of "rights." The stress of the prosecution was upon the coercions incident to the activities and objects of the association, without regard to whether they were brought home either to the defendants or the association, and without distinction between whether they were effected by acts then recognized as unlawful (beating of strike-breakers) or by acts which were not (refusal of association). The question may be stated in two ways: it was between Mr. Bedford's power, through his "right" to hire Dobbins, to coerce his own workmen on the one hand, and his workmen's power, through coercion of Dobbins, to coerce Mr. Bedford on the other; it was between temporary impairments of the freedoms of a few individuals in a few instances and the service which the efficient existence and activity of the association would render to the freedom of journeymen generally. Decision either way would result in one side's practical immunity to coerce.

No equality of "rights" (equal immunity from coercion) could be effected. To make the principle of equality a basis of decision was inconsistent alike with the view that the widest practicable diffusion of substantial freedom is desirable and with the

⁶⁴ See 5 ELLIOTT'S DEBATES (ed. of 1866) 580-583.

⁶⁵ It may be necessary to repeat that there was no claim or evidence that anything which an individual might not lawfully have done had been done in the 1805 strike. The defendants might therefore have claimed that they were denied equality of right.

Since there is no wish to palliate the fact that instances of violent and intimidatory coercion such as had occurred in 1793 are naturally incident to collective labor pressures, especially to an initial establishment of a closed shop, the fairness of trying the defendants for the whole past history of their organization is not discussed. No claim of legal immunity for the instigators or perpetrators of violent coercions is involved in the argument that in spite of the likelihood of occasional incidents of lawlessness if the society survived, membership in the society would better not have been held unlawful. Occasional lawlessness is incident to many lawful activities.

policy that law should leave life a competitive rough and tumble, restraining only intolerable practices and tendencies.

It was true that in its control both of its own members and of outsiders the journeymen's organization had done things which it was not then conceived that a free government might properly do. But if the burdens imposed by government are preferable to those of anarchy, so also may be those imposed by such an organization. Under any government that tolerates inequalities of fortune and power, the problem of *imperium in imperio* incessantly arises. Every employment of one man to use his mind or muscles for another raises it to a degree. Every incorporation or partnership raises it. And the power of employers over workmen who have no practical alternative to acceptance of their terms raises it acutely. So long as the *imperium in imperio* of the journeymen was subject to a sufficiency of natural checks, including that of the *imperium in imperio* of their masters, it was best let alone. For legal abatement of either would surely be at the behest of the other, which would wax in power over as well as within government as a consequence.

If in coercive competition the dominant power, whether of masters or journeymen, should tend in the large rather to subvert than to serve freedom or human excellence, legal intervention would become imperative. But there was in 1806 no imminence of pernicious labor dominance. The power of the journeymen's association, if let alone by law, would encounter natural checks. It could not long or often maintain solidarity for wages which the industry was not prosperous enough to pay, or which would result in substantial curtailment of production and, consequently, of employment. If it tried to do so, it would destroy itself—as it perhaps had done in 1805, irrespective of the prosecution, since almost half the members had turned out unwillingly. Though its successes might diminish employers' net profits, they would not, save temporarily or in occasional special instances such as that of Mr. Bedford, inflict losses, or so reduce profits that employers would not find it worth while to strive to make them. Sensible employers would reduce danger of exorbitant or impractical demands by sharing with the association their information as to the state of the industry; and mutual understanding and good-will would be added to the more tangible restraints upon the association's power. The result would be a normal state of industrial peace in which both masters and workmen could enjoy substantial degrees of freedom and happiness. Neither's energy or enterprise would be impaired. Since journeymen were paid by the piece, and masters could reject bad workmanship, and the best workmen got the best paid kinds of work, there would have been no lack of premiums for labor

efficiency. And employers' efficiency would not have ceased to command substantial premiums.

For law to emasculate labor power of such tendency because of such ephemeral hardships as were suffered by Dobbin, Job Harrison and Mr. Bedford would be to strain at gnats and destroy a useful camel. Such, at any rate, might have been the conclusion of an authentically Jeffersonian court and jury.⁶⁵

⁶⁵ The claim that an argument of which Jefferson never heard is Jeffersonian must rest largely on belief that Jefferson, if pressed, would have accepted it. He said many things which on their face are inconsistent, as well as many—for example, “No one has a right to obstruct another, exercising his faculties innocently for the relief of sensibilities made a part of his nature” (10 JEFF. 24)—which might be construed either way. In the society which he observed, absolute immunities of individuals were more importantly serviceable to freedom than they have been since. It may be, therefore, that he could not have accepted the argument unless at the end of another life-time.

Whatever he said, his belief in absolute and equal immunities was because he thought them practically useful, not because Nature had endowed men with them. He believed, for example, in an absolute immunity for opinion and its expression—a belief which he supported on practical grounds in his preamble to the VIRGINIAN TOLERATION ACT of 1785, 12 HENNING'S STATS. VA. 84, 85, quoted in 98 U. S. at 163: “to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty, because he being of course the judge of that tendency will make his opinion the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own;” . . . It does not follow that he believed that equal immunity for opinions would or could make men's minds either equally or absolutely free. He saw as clearly as Madison, Hamilton and Adams that opinions are for the most part coerced by interests dominant in environments; pressures for conformity with dissenting or outlaw views are as tyrannous, within their narrower ranges of coercive power (*e. g.*, a Freudian or aesthetic coterie in Greenwich Village, or a gang of boot-leggers; and see SMITH, AGE OF THE REFORMATION—1920), as the pressure of a Chamber of Commerce within its wider range. An absolute legal immunity of thought and speech is in practical effect a special privilege to under-dog opinion to offer itself as truth “in the competition of the market,” serving falsehood as well as truth, but increasing the freedom of some men's minds without diminishing that of others. Jefferson clearly felt that its service to truth and freedom outweighed its undoubted harms—infection of weak minds with foolish and pernicious principles. And he might, had the Cordwainers' Case struck him as more than episodic, have found, upon a similar weighing of goods and ills, that the service to freedom of an absolute immunity of Job Harrison from coercion would be trifling in comparison with its damage. Since he thought that “a little rebellion now and then,” even if misguided, was a valuable check upon the tendency of rulers to lose sight of the interests of the masses (4 JEFF. 359, 362-3, 467), it seems fair to infer that he would have seen a similar value, at least, in labor pressures.

V

A safe and sensible position for a court in 1806 might have been this: The question is of American public policy and cannot be deemed controlled by English authorities. Society is divided with respect to it; there is no such approach to unanimity as might justify a court in feeling that it had a mandate from society to decide it, and no such indifference as to make a decision either way preferable to none at all. Such a question of policy is more appropriate for legislative than for judicial consideration; and so long as the legislature has not spoken, society may be presumed to will that the subject shall remain unregulated by law.

A different position, however, was taken by Recorder Levy. In his charge to the jury such sensitiveness as he showed to considerations which have been here adduced was not catholic.

It was proper, he said, to consider whether the journeymen's combination was injurious to the public welfare. It interferes with the "natural" regulation of wages and prices by supply and demand. If journeymen may combine to exact "artificial" wages "dependent upon the will of the few who are interested," it follows that the masters may combine to exact artificial prices for boots. "If they could stand out three or four weeks in winter, they might raise the price of boots to thirty, forty, or fifty dollars a pair, at least for some time. . . . In every point of view this measure is pregnant with public mischief and private injury—tends to demoralize the workmen—destroy the trade of the city, and leaves the pockets of the whole community to the discretion of the concerned." No merchant can do business if, after he has contracted to deliver articles, his journeymen may arbitrarily jump their wages. Consider, moreover, the effects upon the journeymen themselves. "The botch, incapable of doing justice to his work," is put on a level with the best workman. Indigent workmen, with families to maintain, "however sharp and pressing their necessities, were obliged to stand the turn-out, or never afterwards be employed." They were not free to use their own good sense and return to work. Does not this tend to lead "necessitous men . . . to take other courses for the support of their wives and children? It might lead them to procure it by crimes—by burglary, larceny, or highway robbery! A father cannot stand by and see, without agony, his children suffer."⁶⁷

The laws of the journeymen "leave no individual at liberty to join the society or reject it. . . . They are not the laws of Pennsylvania." Are we to have, "besides our state legislature, a new legislature consisting of journeymen shoemakers"⁶⁸—an *imperium in imperio*?

⁶⁷ 3 Doc. Hist. 228-230, 234.

⁶⁸ *Ibid.* 231, 235.

Rodney had somewhat, though inadequately, argued that the interests of the journeymen themselves, which reach points of coincidence with those of the masters, would sufficiently restrain tendencies to exorbitant exaction. But Rodney's rhetorical excess made such substance as it diluted easy to evade. "As far as the arguments of counsel apply to your understanding and judgment," said the Recorder, "they should have weight; but, if the appeal has been made to your passions, it ought not to be indulged. You ought to consider such appeals as an attack upon your integrity."⁶⁹

"An attempt has been made," he continued, "to shew that the spirit of the revolution and the principle of the common law, are opposite in this case. That the common law, if applied in this case, would operate an attack upon the rights of man. The enquiry on that point, was unnecessary and improper. Nothing more was required than to ascertain what the law is."⁷⁰ Later in the charge, however, he undertook to refute Rodney's unnecessary and improper contention. "Was it the spirit of '76, that neither masters or journeymen, in regulating the prices of their commodities, should set up a rule contrary to the law of their country? General and individual liberty was the spirit of '76. It is our first blessing. It has been obtained and will be maintained."⁷¹

Though the Recorder had charged, as was then orthodox, that it was for the jury as well as the court "to decide what the rule of law is,"⁷² and though he had stated that it was proper to consider the public welfare and had undertaken to do so, he exerted himself to foreclose the jury from deciding the law upon grounds of public policy. The rule of law, "whatever may be its spirit or tendency," must control.⁷³ The common law has introduced and perpetuated "that admirable institution, the freeman's boast, the trial by jury." It is an "invaluable code" which has "ascertained and defined" both civil rights and crimes with consistency and "critical precision." Only those who understand it as a whole are competent judges of it. "As well might a circle of a thousand miles diameter be described by the man, whose eye could only see a single inch, as the common law be characterized by those who have not devoted years to its study." It "regulates with a sound discretion most of our concerns. . . . Its rules are the result of the wisdom of the ages."⁷⁴ He then stated its rules for the case:

⁶⁹ *Ibid.* 225.

⁷⁰ *Ibid.* 225.

⁷¹ *Ibid.* 235.

⁷² *Ibid.* 224.

⁷³ *Ibid.* 225.

⁷⁴ *Ibid.* 232.

"If the purpose to be obtained, be an object of individual interest, it may fairly be attempted by an individual. . . . Many are prohibited from combining for the attainment of it.

". . . a combination of workmen to raise their wages may be considered in a two fold point of view: one is to benefit themselves . . . the other is to injure those who do not join their society. The rule of law condemns both. If the rule be clear, we are bound to conform to it even though we do not comprehend the principle upon which it is founded. . . . It is enough, that it is the will of the majority. It is law because it is their will—if it is law, there may be good reasons for it though we cannot find them out."⁷⁵

He proceeded, however, to adduce as a reason the coercion incident to such a combination. A unanimous court, he said in conclusion, "have given you the rule as they have found it in the book. . . . If you can reconcile it to your consciences, to find the defendants not guilty, you will do so; if not, the alternative that remains, is a verdict of guilty."

In *Aurora* for March 31, 1806, Duane wrote as follows:

"A man who did not know the purposes for which the law contemplated the appointment of a *recorder* to preside in the mayor's court, would unquestionably have concluded that Mr. Recorder Levy had been paid by the master shoemakers for his discourse in the mayor's court on Friday last—never did we hear a charge to a jury delivered in a more prejudiced and partial manner—from such courts recorders and juries, good lord deliver us."⁷⁶

It is inferrable that the majority Republican faction of which *Aurora* was the organ may not have been unrepresented on the jury, and that its representatives may have been responsible for a form of verdict reminiscent of a famous case which may still somewhat have lived in Pennsylvania tradition. When William Penn was tried at London for the crime of unlawful assembly, the jury returned as its verdict: "Guilty of holding a meeting in Fenchurch Street." This, the court held, was not a verdict of Guilty. And since the jury would find no other, Penn went free. The sealed verdict signed by the jurors in the *Cordwainers' Case* was as follows:

"We find the defendants guilty of a combination to raise their wages."⁷⁷

Whatever may have been the intention of the jurors, or some of them, this was entered as a verdict of Guilty.

⁷⁵ *Ibid.* 233.

⁷⁶ 1 HISTORY OF LABOUR, *supra* note 4, at 152.

⁷⁷ 3 DOC. HIST. 236.

Counsel for the prosecuting masters had assured the jury that they were concerned only to establish a principle, and were not desirous that the defendants be punished. The court, doubtless anxious to avoid further exasperation of popular feeling, kept their implied promise. The defendants were each fined eight dollars.

Duane published the stenographic report of the trial, dedicated to the Governor and General Assembly "with the hope of attracting their particular attention, at the next meeting of the Legislature." He thus, as paraphrased by McMaster,⁷⁸ expressed the majority Republican reaction to the whole case:

"Among the blessings promised mankind by the Revolution was the emancipation of industry from the fetters forged by luxury, laziness, aristocracy, and fraud. . . . Of all the barbarous principles of feudalism entailed on us by England, none was left but slavery, and even this would be greatly restricted in 1808. Yet, would it be believed, at the very time when the state of the negro was about to be improved attempts were being made to reduce the whites to slavery. . . . It was by the English common law that such things became possible."

VI

The *Cordwainers' Case* is important mainly for affording distinct view of a conflict of values, interests, and ideas which has survived changes of conditions—exhibiting that conflict in an air which, since time has laid some of its dust, is clearer than the air of the present. The importance of the old English common law which Recorder Levy so confidently construed has greatly diminished. Perhaps indeed it has disappeared. Counsel continued, however, in later cases to bandy contentions respecting it. And since modern labor law preserves relics ascribed to that old law, its state at the beginning of the Nineteenth Century demands attention. But anyone who believes that there must have been, and therefore was, a definite and authoritative rule or principle of the common law applicable to the *Cordwainers' Case* should consult Sir R. S. Wright and Professor Sayre if he wants it one way, and Sir William Erle if he wants it another.⁷⁹

In England the period was that of transition from paternalism to *laissez faire*—not the *laissez faire* of Jefferson, but that of the commercial middle class.

In the Middle Ages the favoritism of the paternal state to the

⁷⁸ *Ibid.* 59; 3 McMASTER, *supra* note 24, at 512, citing *Aurora* for May 29, 1806.

⁷⁹ WRIGHT, *LAW OF CRIMINAL CONSPIRACIES AND AGREEMENTS* (London 1873, Am. ed. 1887); Sayre, *Criminal Conspiracy* (1922) 35 HARV. L. REV. 393; ERLE, *THE LAW RELATING TO TRADE UNIONS* (1869).

landed baronage had been candid. The peasants who survived the Black Death of the Fourteenth Century were bound to the soil; every able-bodied man and woman in the realm, "not living in merchandize, nor exercising any craft, nor having of his own whereof he may live, . . . and not serving any other, . . . shall be bounden to serve him which so shall him require." No one might give alms to any valiant beggar "which may labour," or seduce a servant from his master, or harbor a run-away. The statutes fixed maximum wages in agriculture and the building trades.⁸⁰ But if wages were low, so were prices of necessities. While the interests of traders themselves were minor among the interests which trade served, it would have been absurd to suggest that "public" interest required that traders be let alone to wring from the public such profits as they could. It was criminal to keep any goods from coming to fair or market by buying them privately, or to buy any victuals for re-sale.⁸¹ Regulation tended to prevent not only the accumulation of commercial wealth, but also the cyclical extortions and depressions of economic anarchy. Only the artist could charge all that the traffic would bear. The arts overlapped the crafts; and craftsmen were also favored children of the paternal state. Their chartered boroughs got "liberties." Their guilds naturally and beneficently restrained trade in fabricated wares, maintaining quality, and limiting inconvenient excesses both of out-put and of labor supply through the apprentice system.⁸²

The Tudor statè revised the statutes of labourers and made Crown law of the guild regulations of handicrafts. Covins and conspiracies of victuallers to raise prices, and of artificers or labourers to exact unlawful wages or cut down the lawful work day were severely punishable.⁸³ But the welfare of workmen was not ignored. Profiteering at the expense of labor in the clothing trades (doubtless the first to go in for quantity production) was checked by requiring that whoso had three apprentices should keep one journeyman, and one other journeyman for every apprentice above three.⁸⁴ And since statutory wages were "in divers places too small and not answerable to this time," the justices of the peace in every shire, with the mayor or bailiff in every city or town corporate, were directed to inquire annually "respecting the plenty or scarcity of the time,"

⁸⁰ A convenient collection of extracts from the old statutes is in SAYRE, *CASES ON LABOR LAW* (1922) 3 ff. They are summarized in HEDGES AND WINTERBOTTOM, *LEGAL HISTORY OF TRADE UNIONISM* (1930) c. 1.

⁸¹ Act against Reqrators, Forestallers and Ingrossers, 5 & 6 EDW. VI, c. 14 (1552)—repealed by 12 GEO. III, c. 71 (1772).

⁸² WEBB, *HISTORY OF TRADE UNIONISM* (1920) 4-21.

⁸³ 2 & 3 EDW. VI, c. 15 (1548).

⁸⁴ 5 ELIZ. c. 4, § 33 (1562).

and authorized to rate and appoint the wages for the year of all labourers and artificers, so as to "yield unto the hired person, both in the time of scarcity, and in the time of plenty, a convenient proportion of wages."⁸⁵

In the Seventeenth and Eighteenth Centuries manufactures arose to which the Tudor statutes, if applicable, were not applied. The interests of colonizing corporations, in which members of the upper class could respectably adventure in commerce, were served by cheapness and abundance of manufactured goods. Manufactures acquired military value. Manufacturing wealth became important as tax fodder. The political consequence of the commercial class grew with its prosperity. Its interest in profits pressed for recognition as coincident with general welfare. As the wealth of the nation became a major consideration, and favor to the commercial middle class became sound practical politics, shire and borough authorities ceased bothering to assure unto the hired person his convenient proportion of wages.

The abandonment by law and government of paternal responsibility for laborers was, however, gradual. Lord Holt turned a prosecution of journeymen for refusing to work at the lawful rates into an arbitration at which increased wages were awarded.⁸⁶ Parliamentary squires in the Eighteenth Century were sometimes moved by the miseries of manufacturing labor, and the Elizabethan wage adjusting machinery revived for its benefit.⁸⁷ More frequently, however, legislation responsive to the suit of employers fixed maximum wages, not revisable according to the plenty or scarcity of the time.⁸⁸ And after Adam Smith had provided employers with a powerful brief, "the abandonment of the operatives by the law, previously resorted to under pressure of circumstances, and, as we gather, not without some remorse, was now carried out on principle, with unflinching determination."⁸⁹ Finally in 1811, Lord Ellenborough, construing the Elizabethan statute with literal accuracy, annihilated it; the justices of the peace must, he held, on petition of laborers consider the plenty or scarcity of the time; but since the statute did not make it mandatory that they exercise their "authority" to award a convenient proportion of wages, they could let wages alone.⁹⁰ The law somewhat clung to its paternal function of protecting the public from unreasonable charges for necessities, whether due to a combination or to "cornering" of supply by an individual.⁹¹ But with this exception it was

⁸⁵ *Ibid.* §§ 1 & 15.

⁸⁶ WEBB, *supra* note 82, at 29.

⁸⁷ *Ibid.* 46-55.

⁸⁸ *E. g.*, 7 GEO. I, stat. 1, c. 13 (1720).

⁸⁹ WEBB, *supra* note 82, at 55.

⁹⁰ *King v. Justices of Kent*, 14 East 395 (1811).

⁹¹ *Rex v. Waddington*, 1 East 143 (1801).

completely sold to *laissez faire* for merchants and manufacturers. It was but slowly seen, however, that the new principle involved for laborers even so little as that they should be let alone to do what they could for themselves by separate individual wage bargains.

While wages were fixed by law it was of course a criminal subversion of law for anyone, whether individually or in combination with others, to attempt to change them otherwise than by Act of Parliament.⁹² And that is all that was necessarily conveyed by the Eighteenth Century authorities relied upon as establishing the Pennsylvania law applicable to the Philadelphia *Cordwainers' Case*. Even if the English authorities meant the more sweeping things they said, those things could scarcely settle the law of an American state in which they had never been said—in which, moreover, the “rights of man” were constitutional rights which would be infringed if *laissez faire* were adopted with less than Jeffersonian impartiality and completeness.⁹³ But since constitutional argument convinces no one who is not convinced beforehand, discussion will be confined to the English meaning of the English cases.

In 1698 Lord Holt, granting leave to file an information against button makers for combining not to sell under a set rate, said: “It is fit that all confederacies, by those of a trade to raise their rates, should be suppressed.”⁹⁴ That of course was true under a paternalism which fixed wages and contemplated that prices, when not fixed by law, should be determined by haggling in market overt. A single individual who had forestalled or engrossed supply would have been equally criminal.

Hawkins wrote in 1716: “There can be no doubt, but that all Confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at Common Law, as where divers Persons confederate together by indirect means to impoverish a Third Person.”⁹⁵ For this loose broadcast Hawkins cited only cases of conspiracies to achieve objects in themselves criminal or to defeat the King’s revenue.⁹⁶ No English labor case prior to the American Revolution adopted his vague doctrine of common law conspiracy.

In the famous slovenly reported case of the *Journeyman Taylors of Cambridge*⁹⁷ the court may have said that “a conspiracy of any kind is illegal although the matter about which they conspired might have been lawful for them, or any of them, to do,

⁹² See Sayre, *op. cit. supra* note 79.

⁹³ See TUCKER’S BLACKSTONE, *supra* note 40.

⁹⁴ Anon., 12 Mod. 248 (1698).

⁹⁵ 1 PLEAS OF THE CROWN (1716) c. 72, § 2 (1st ed.) 190.

⁹⁶ Sayre, *op. cit. supra* note 79.

⁹⁷ 8 Mod. 10 (1721).

if they had not conspired to do it." The *holding* was at most, that a conspiracy to subvert a law is criminal at common law: a statute limited tailors' wages to two shillings a day; therefore it was a crime, at common law, for them to *conspire* to exact more than that, and the indictment need not contain the words *contra formam statuti*.

In an obscure case in 1783, Lord Mansfield may be thought to have gone a long way further. The indictment charged conspiracy "by indirect means, to impoverish one H. Booth, and to deprive and hinder him from using and exercising the trade and business of a taylor." The indirect means was not stated; it seems likely that it was by holding out for wages higher than two shillings a day—though the maximum wage statute may have become obsolete. Lord Mansfield held that allegation of the means was unnecessary;

"for the offense does not consist in doing the acts by which the mischief is effected, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offence, persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy; so every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence."⁹⁸

This clearly, in the light of the language of the indictment which Lord Mansfield held sufficient, says these things: (1) combination "to impoverish by indirect means," whatever the means may be, is criminal at common law; (2) to try for or get better than "natural" market prices or wages is lawful for an individual, but unlawful for a combination. Lord Mansfield could not have thought that "to impoverish" is unlawful; it is done lawfully every day. If Lord Mansfield took "indirect" in a vague popular sense,⁹⁹ perhaps he meant this: *Combination* to get better than market prices or wages is of impoverishing tendency, and is not a normal or usual way of impoverishing; therefore it is an *indirect* means, and the combination is criminal at common law under Hawkins' definition. Probably he did not press himself closely. All that is clear is that he deplored labor combinations to the point of willingness to set the common law against them.

⁹⁸ Rex v. Eccles, Leach C. C. 274 (1783).

⁹⁹ Sampson, arguing for the defendants in the New York Cordwainers' Case, 3 Doc. Hist. 251, 282 (1809-10), urged that since the Latin *directum* gives the French *droit*, "indirect" as used by Hawkins definitely meant "unlawful."

To exclaim indignantly at this disposition of Lord Mansfield's would betray gross lack of historical perception. It was the disposition of the Parliamentary squires who for years had been passing statutes fixing maximum wages in particular trades and making it criminal for workmen to combine to demand more. There was little, if any, respectable contemporary English expression of a contrary disposition.¹⁰⁰ The case is a flagrant instance, however, of Lord Mansfield's notorious looseness as a common lawyer. That looseness was often beneficent; it was sometimes essential to the judicial statesmanship upon which his fame rests. In this instance it may be permitted to question whether his statesmanship was quite judicial. At the same time that he was Chief Justice he was also the brains of Tory cabinet ministries. The soundness of his expressions as practical politics is clearer than their soundness as common law.

Lord Mansfield's decision was the only thing in the English books that could fairly be claimed as authority for the rule of law so confidently declared in the Philadelphia *Cordwainers' Case*.¹⁰¹ If that decision was law, it was legislation based upon the new political policy of free play for the natural self-interest of the commercial middle class—but not for the self-interest of their workmen. The political policy expressed in old common law and legislation was to protect the interests of workmen as well as employers. As to labor combinations the common law before Lord Mansfield had gone no further than to say that conspiracies

¹⁰⁰ Adam Smith, indeed, though he deplored "unnatural" wage or price increases, clearly conveyed his feeling that under the statutes laborers were getting a bad worst of it. "The masters," he said, "being fewer in number, can combine much more easily; and the law . . . does not prohibit their combinations. . . . Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above their actual rate, . . . which nobody ever hears of . . . But whether [workmen's] combinations be offensive or defensive, they are always abundantly heard of. . . . They are desperate, and act with the folly and extravagance of desperate men. . . . The masters on these occasions are just as clamorous upon the other side, and never cease to call aloud for the assistance of the civil magistrate, and the rigorous execution of those laws which have been enacted with so much severity." *THE WEALTH OF NATIONS* (1776) Bk. i, c. viii. (ed. Dent, 1910) vol. i, 59-60.

¹⁰¹ There was a dictum to the same effect as Lord Mansfield's opinion by Grose, J. in *Rex v. Mawbey*, 6 T. R. 619 (1796). And 4 *CHRISTIAN'S BLACKSTONE* (1800) 137n. broadened language somewhat further: "Every confederation to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy. Journeymen who refuse to work, in consequence of a combination, until their wages are raised, may be indicted for a conspiracy." This probably, in spite of the paucity of authority adducible, would not have seemed extravagant to Englishmen, who were used to seeing workmen summarily punished by magistrates for statutory crimes of labor conspiracy.

to subvert wage-fixing statutes were criminal. This contention was cogently made by Rodney and Franklin for the journeymen cordwainers, and for subsequent labor defendants in the United States until 1842. In that year it finally prevailed.¹⁰²

Whatever the authority in England of what Lord Mansfield held and said in 1783, it was no more binding in a state that had severed itself from England in 1776 than the one-sided policy of *laissez faire* which Adam Smith had made respectable in the same year, or than another piece of legislation—the Combination Act of 1800—under which, and not under the common law, labor pressures were being suppressed in England at the time of the *Cordwainers' Case*.¹⁰³

The importance of authority in the *Cordwainers' Case* was rather formal than real. It would strain credulity to say that Recorder Levy and the Mayor and Aldermen and jurors of Philadelphia were constrained or controlled by authority. The fact that there existed in text-books clear sweeping loose statements as to the common law, even though those statements were not warranted by decisions, counted, however, to this extent in the complex of pressures¹⁰⁴ by which the result of the case was determined: it served all the interests pressing for conviction by making it possible for decision to wear a dress of submission to compulsive legal obligation—a dress which may somewhat have lessened the effective power of objections.

It is not intended to imply that narrowly selfish pressures determined decision unassisted. The cooperative efficacy of honest wills for morality, justice, and social expediency was substantial. The coercions of Dobbin and Job Harrison could be abhorred with religious intensity. The dangers of abuse of collective labor power could be felt as out-weighing the harms that would result from its emasculation. The manifold prosperities that would be served by stimulation of export manufactures (here narrow selfishness and concern for general welfare tend to become indistinguishably blurred) could be felt as outweighing any imminent hardships to manufacturing labor. Believers in social control mainly by “the rich, the wise, and the good”—so Federalists often frankly described themselves—could not regard efficient labor power as compatible with it. Without the cooperation of

¹⁰² *Commonwealth v. Hunt*, 4 Metc. 111 (Mass. 1842). This case, decided by Chief Justice Shaw, will be considered in a later article.

¹⁰³ Under this act workmen might be summarily convicted by justices of the peace for combining for higher wages or shorter hours, or for “maliciously,” by persuasion or otherwise, endeavouring to prevent an unhired person from hiring himself to any employer, or influencing a hired person to quit. 40 GEO. III, c. 106 (1800). See WEBB, *op. cit. supra* note 82, c. 2.

¹⁰⁴ See note 3, *supra*.

such pressures more selfish pressures would have been almost completely ineffectual.

The result was far from an unqualified victory of the pressures which induced the decision. The force of the counter-pressure of wage earners adversely affected was not insubstantial, even before universal male suffrage. And the force of Jeffersonian convictions and values, impaired though it was by the logical obscurity which tended to reduce it to the form of unreasonable sympathy, was tremendous. These counter-pressures sufficed to assure that prosecutions of labor unions would for long be rare; that the rule of law, in spite of Recorder Levy, would not be felt as clear and settled; and that the Recorder's doctrine would not, without verbal qualification, be adopted in later cases.