THE SEPARATE JUDICIAL OPINION AND GROWTH OF THE LAW:
Holmes' Dissent in Vegelahn v. Guntner

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INTRODUCTION

For hundreds of years common law appellate courts decided cases by issuing several opinions on each case which came before them. Every member of the judicial panel was entitled to express himself on the issues involved in the controversy, and each usually did so. The particular dispute in litigation would be resolved by counting the number of votes on either side, and by making an appropriate award. Most cases, therefore, did not result in an opinion of the court in the form familiar to modern students of the law.

According to judicial lore, Chief Justice John Marshall put an end, for American courts, the practice of issuing several opinions and began a procedure of consolidation of judicial wisdom into a single opinion from the court as a group. Each member was still free to express himself individually in either a concurrence or a dissent, but most did not, and adhered to Marshall's theory that more importance would be attached to the work of the Court if a clear precedent-making opinion could be agreed upon and published. Experience seems to have borne out the great Chief Justice, if the significance of his court, both in history and today in American life, is a measure of the merit of his ideas. Opinions of the court are the rule in American law, and a case

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1. English practice, inherited by America, was formally adopted by the United States Supreme Court soon after the Court began to transact business, Rule, 2 U.S. (2 Dall.) 414 (1792), and opinions were issued seriatim from the beginning. See, e.g., Georgia v. Brailsford, 2 U.S. (2 Dall.) 402 (1792); in which 5 separate opinions were written; J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 662-672 (1971).

2. A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919); John Marshall 7 (S. Kutler ed. 1972); G. GILMORE, THE AGES OF AMERICAN LAW 10 n.10 (1977); the practice of writing seriatim opinions has been followed by many judges when presented with cases involving constitutional questions, P. JACKSON, DISSENT IN THE SUPREME COURT 17, 23 (1969). The opposite extremes of the practice may be illustrated by Cooper v. Aaron, 358 U.S. 1 (1958), where each member of the Court took the unusual step of signing his name to the opinion of the Court to demonstrate its emphatic unanimity, and Furman v. Georgia, 408 U.S. 238 (1972), where each member of the Court prepared his own separate analytical opinion, requiring the preparation of a tenth opinion, per curiam, which stated the agreement of five justices as to what should result from their deliberations.
where the panel of judges divides into several separate opinions without a majority is not only exceptional, it is unsatisfactory to the judges themselves.³

Solitary judicial opinions, nevertheless, continue to be written by American judges, and, when balanced by the majority opinion, may be the source of great personal satisfaction to their authors.⁴ Even more important than a vehicle for the individual pleasure of its author, the solitary opinion may frequently be the beginning of a new doctrine in the growth of the law. Concurrences in the conclusion of the majority of the court, based upon a different reason, or dissents from that conclusion, provide an opportunity for the expression of ideas, theories, or doubts which may contain the ultimately more agreeable solution to the problem of the litigants, or the community, than does the conventional wisdom of the majority.⁵ This study shall examine in detail one such solitary opinion for the purpose of tracing the growth of the law as it changed to meet an emerging need of society.

The opinion to be analyzed is the dissent of Judge Oliver Wendell Holmes from the majority of the Massachusetts Supreme Judicial Court in 1896 in the case of Vegelahn v. Guntner.⁶ Controversies involving concerted action by laborers against employers had become an important matter of judicial business by the end of the nineteenth century, and the courts, as well as the general community, were not sure how they should be dealt with. This uncertain state of the law had demonstrated a sorely felt need for creative legal theorizing.⁷ Having done some of that work, Judge Holmes availed himself of the opportunity to use his office to

⁴. "The judge who writes for the Court must not roam the fields; on the contrary, he must weigh his words within an ambit of discretion so that he may secure agreement from his fellows. He must avoid confusion and uncertainty not only to obtain unanimity but also to command respect from the bar and the public for the decision of the Court. It is the dissenter who dares to be outspoken . . . ." P. JACKSON, supra note 2, at 15. Felix Frankfurter suggested that dissents could be solos instead of orchestral performances. Quoted in C. Fairman, Introduction in The Writing of Judicial Biography — A Symposium, 24 IND. L.J. 363, 368 (1949).
⁵. "A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1966).
⁷. In the years immediately prior to 1896, the most significant decision of the Supreme Judicial Court affecting labor relations was Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888). There, a single picket carried a banner requesting the boycott of a shop because of the low wages it paid its employees. The court held the action to be a nuisance and an unlawful interference with the owner's business. An injunction was issued without consideration of the rights or interests of the employees. Holmes participated in the decision, but not in the writing of the opinion.

http://scholarlycommons.law.hofstra.edu/hlelj/vol1/iss2/3
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attempt to develop a new way of analyzing these controversies. Given his legal genius, writing talents, and professional prominence, his efforts met great success. This happy combination of characteristics does not often come into confluence around a single judicial opinion, but having done so at least once, the effect of the meeting merits some extended study. While it is easy to overstate the effect of this opinion, it may be asserted that American labor relations law was profoundly affected by Holmes’ dissenting opinion.

THE SETTING

The Picketing and Strike Begins

Factually, the controversy was quite simple. Frederick O. Vegelahn owned a furniture factory near the waterfront, on North Street in Boston in 1894. He had a sizeable business employing a large number of men in a large plant, which produced chairs and couches for the local market. Furniture and upholstery workers recently had been active in attempting to improve their economic circumstances, as had many other laboring people of that era. Most Boston furniture manufacturers had acquiesced in their demands by raising wages to a standard amount, by accepting a pricing schedule for products to avoid competitive undercutting of one another to the disadvantage of the organized employees, and by instituting a nine hour work day in their establishments. Vegelahn had not done so.

In October a group of Vegelahn’s workers visited the office of the wood workers union in Boston and, explaining their situation, asked for the aid of the union in persuading their employer to meet their needs.

8. The factual background of this litigation, as presented in this study, is based upon the original papers in the files of the Supreme Judicial Court of Massachusetts unless otherwise attributed. Where representations of events are patently partial, an attempt to balance them by noting the statement of an adversary has been made. Citations are to documents as titled by their authors or by the court.


10. Throughout the litigation papers the term “price schedule” or “price list” is used. The meaning of the term is the wage rates paid to employees, rather than the cost of goods payable by customers. See W. Leiser son, American Trade Union Democracy 23–24 (1959). Contemporary news accounts plainly state that the dispute was grounded in the employer’s refusal to accede to the demand of workers for a wage increase “of about 15 percent.” Boston Herald, Nov. 15, 1894, at 3, col. 4.

11. On Nov. 13, 1894, a three day strike by twelve furniture workers at the Boston factory of J. Rennison was settled when the employer instituted a new wage schedule and a union shop. Boston Globe, Nov. 13, 1894, at 7, col. 7; Boston Post, Nov. 13, 1894, at 5, col. 7.

12. In the records of the Supreme Judicial Court, the full name of the union is presented as “The International Furniture Workers Union of America, Locals Nos. 24 and 53, Upholsterers and The Wood Workers Local Union, Nos. 24 and 53.”
The workers were welcomed by the union, and George M. Guntner, business agent of the organization, agreed to contact Vegelahn. Guntner initially wrote to Vegelahn on behalf of Vegelahn’s upholsterers, asking that a wage scale be adopted together with a nine hour work day. After about two weeks, having received no reply, Guntner paid a call on Vegelahn and requested a response. Vegelahn was succinct: he would have nothing to do with the union or Guntner and if his employees desired anything, he alone would deal with them. Guntner responded that he was the agent of the employees, that it was in Vegelahn’s interests to accommodate the workers, and that the wage scale would enable Vegelahn to escape injurious competition. Vegelahn demurred.

Guntner waited another three weeks after his meeting and then informed the workmen that Vegelahn had conclusively refused their demands. The workers had previously resolved to strike in the event that Guntner was not persuasive, and on November 14, 1894, they did so. The Vegelahn group had been integrated into the union and followed its procedures in planning their course of action. The men voted to strike, the executive committee of the union approved and advised them to do it, and Guntner gave them instructions for effective activity.

A room was obtained in a building in the neighborhood of Vegelahn’s factory to be used as headquarters for the strike. Guntner advised the workers to set up picket lines consisting of two men who would patrol the street outside of the factory for continuous periods between 6:30 a.m. and 5:30 p.m. The pickets were directed to approach anyone on the street who appeared to be an upholstery or wood worker or who was otherwise concerned with their activity, in order to explain the purpose of their picketing. Although one of the objects of the picket line was to discourage strikebreaking, Guntner specifically instructed the patrolling workers that they should not interfere with any person’s desire to enter Vegelahn’s premises. Rather, the pickets should await his departure from the factory and then renew their efforts to persuade him to join their cause on behalf of all workers. Such people were to be invited to visit the strike headquarters for a full explanation of the strikers’ goals and for invitations to join their union.

Vegelahn, however, charged that the pickets actively prevented others from entering the factory by blocking its doors, using abusive language, and by threatening or intimidating those who had business at

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13. This date is used by the brief for the plaintiff and is supported by newspaper accounts, but the official statement of the case at 167 Mass. 93, states "on or about November 21, 1894." See Brief for Plaintiff at 1, Record; Boston Globe, Nov. 15, 1894, at 2, col. 2; Boston Herald, Nov. 15, 1894, at 3, col. 4.
the factory. Vegelahn's complaint described his own efforts "to employ other men to fill the places of the . . . defendants" as having been successful even though the pickets had "caused certain new men employed as aforesaid to leave the employment of the plaintiff and [his] premises."\(^{15}\)

Guntner and the pickets denied having used blocking tactics, mass picketing, bad language, having threatened or intimidated anyone, having turned away people entering the factory, or having caused anyone to leave Vegelahn's employ other than through the use of legitimate persuasion. Guntner did concede that he had informed one of Vegelahn's insurers that the factory was being used as a lodging place by the strikebreakers, when he had learned that cots had been set up to afford sleeping arrangement inside. His purpose, he maintained, was merely to inform the insurers of the extra hazard created, and not, as Vegelahn had charged, to cause the insurance company to cancel its policy on Vegelahn's building. In any event, the insurance coverage on the building does not seem to have been affected.

The pickets admitted that Vegelahn's delivery teams had been followed around town for the purpose of learning where the furniture was being sold. They denied visiting or threatening any of Vegelahn's customers during the strike. Vegelahn charged that such visits and threats were made to customers in Boston and other places, as well as to customers at his North Street factory. He claimed that the harassment of his customers and passers-by in the vicinity of the factory amounted to a common nuisance and was part of a general scheme or conspiracy to injure his business.

Apparently the workers had succeeded in bringing economic pressure on Vegelahn. He complained that if they were permitted to continue their activities, the value of his business "would be further seriously injured and destroyed."\(^{16}\) Guntner and the pickets claimed ignorance of the value of the furniture business but they noted that Vegelahn's employees could earn only an average of $7.00 weekly at the wages he was paying. In response to the charge that they were interested in ruining Vegelahn, Guntner produced a copy of a letter he had written to the Massachusetts Board of Arbitration on December 5th which notified it of the labor dispute. The letter requested that the Board attempt to mediate the strike to obtain a settlement or to determine blame for the continuation of the strike. The Board made such an attempt, Guntner

\(^{14}\) Report at 3, Record.
\(^{15}\) Id.
\(^{16}\) Id.
asserted, but Vegelahn refused to have anything to do with it.\textsuperscript{17} Further, Guntner claimed, he had tried to have the Central Labor Union of Boston lend its aid to settle the dispute, but Vegelahn also refused to have anything to do with that organization.

\textit{The Legal Dispute: Preliminary Litigation}

Vegelahn's refusals were evidently grounded on the legal conclusions that he had other courses open to him to remove his labor difficulties. On December 6, 1894, he executed a complaint, which was filed the next day in the Supreme Judicial Court, Suffolk County equity part, seeking an injunction against the activity of the pickets and Guntner. Vegelahn desired that they be kept away from his factory, away from any potential new employees, away from customers or other visitors to his business, and that they be subjected to any other prohibitions which seemed appropriate to the court.

A preliminary hearing was held December 10th before Judge Morton on the plaintiff's motion. The judge announced his decision granting a temporary injunction that same day, directing the pickets to refrain from the behavior which Vegelahn had charged, thus providing him with the entire relief sought.\textsuperscript{18} The injunction was to remain in effect until such time as the court could hold a full adversarial hearing on the desirability of a permanent injunction.\textsuperscript{19}

\textsuperscript{17} Answer at 10, Record. The Boston Post, Dec. 12, 1894, at 8, col. 3, reporting the application to the Board of Arbitration stated: "Mr. Vegelahn rejects any overtures by the Board, saying that the men's action has caused him to feel unwilling to arbitrate."

\textsuperscript{18} The Decree, granting an injunction pendente lite was dated two days later, on December 12, 1894. Decree at 5, Record.

\textsuperscript{19} Newspaper accounts stated that the hearing lasted all day. Boston Globe, Dec. 11, 1894, at 6, col. 4. The full text of the opinion by Judge Morton does not appear in the records of the court, but was printed in one local newspaper.

The present application is for a temporary injunction and is to be considered somewhat differently than where the case is to be heard on its merits. It appears well settled that on Nov. 14 some eighteen men went out on a strike at Mr. Vegelahn's factory. The question of their right to go out is not involved in this case. Another thing that is well settled is that immediately on the beginning of the strike there was a scheme put on foot to interfere with the efforts of Mr. Vegelahn to fill the places of the strikers. The strikers proceeded to carry out the scheme, not by persuasion or seeing men at different places, but by organizing a patrol, which, during business hours, passed up and down in front of Mr. Vegelahn's premises, and that continued from Nov. 14 up to last Friday, when notice of this proceeding was served on the defendants.

The purpose of this patrol was to intercept persons intending to go into the factory to get work. It makes no special difference whether the patrol spoke to men or whether they carried banners. No body of strikers have a right to organize a patrol and march up and down in front of premises of the employer for the purpose of deterring persons from going to work. In this case, however, the strikers went further and not only used persuasion but used intimidation towards at least one witness, who, it appears, was given reason to apprehend violence if he continued in Mr. Vegelahn's employ.
Counsel for the defendants filed a detailed response to Vegelahn's charges several weeks later, on January 28, 1895. Most of the facts were admitted in the response and the defendants, as had the plaintiff, resorted to the law. Their general demurrer served to focus attention on the law, where it was to remain for the duration of the controversy.

On May 20th, a full hearing was held to determine whether the temporary injunction should be made permanent. The presiding judge was Oliver Wendell Holmes, Jr., associate justice of the Supreme Judicial Court. Holmes was fifty-four years old, in his fourteenth year as a member of the court, and ranked third in seniority out of the seven member bench. He was the famous son of a famous father, having gained an international reputation with the publications of his seminal work, The Common Law, in 1881. Holmes was interested in the legal problems presented by intentional business torts, such as the conduct with which the defendants were charged, and he had recently published a thoughtful analysis of those problems.

Even more, it appears from the testimony of one of the police that on several occasions street and sidewalk were obstructed. Taking everything into account it seems clear that the persons have gone further than they had a right to go. The result has been to injure Mr. Vegelahn in his business and property. If I was persuaded that the stop put to the acts of the defendants on Friday was final, it would put this case in a different attitude; but finding as I do an organized scheme on the part of the strikers and members of the Protective Union to prevent men from going in, I cannot feel a reasonable assurance that it would not be resumed tomorrow. I think it a case for injunction.

Boston Post, Dec. 11, 1894, at 8, cols. 3 and 4.

20. The defendants had been represented at the hearing for the temporary restraining order by James E. Hayes, John H. O'Neill and S.A. Fuller. On January 10, 1895, Thomas H. Russell filed his appearance as attorney for Gunter. On January 28, this was followed by a filing by the firm of Russell and Russell as counsel for the eleven individual workers named as co-defendants. Record.

21. Demurrer at 5, Record.

22. No date for the hearing appears in the records of the court, but the personal Bench Book of Holmes notes that the hearing was held May 20, 1895. O.W. HOLMES, BENCH BOOK 161 (available in Harvard Law School Library, Holmes Manuscript Collection).


24. Holmes has been the subject of several biographies, notably the uncompleted work by Mark De Wolfe Howe, 1 M. De Wolfe Howe, Justice Oliver Wendell Holmes, The Shaping Years, 1841–1870 (1957) and 2 M. De Wolfe Howe, Justice Oliver Wendell Holmes, The Proving Years, 1870–1882 (1963) and F. Frankfurter, Mr Justice Holmes and The Supreme Court (2d ed. 1961). See also S. Bent, Justice Oliver Wendell Holmes (1932), F. Biddle, Mr Justice Holmes (1942), and C. Bowen, Yankee From Olympus (1944).


In the case before him Holmes found little factual dispute. The defendants admitted that they had conspired to keep Vegelahn from getting workers to replace his striking employees and thereby to prevent him from maintaining his business. Holmes reviewed the pleadings and determined that the patrolling pickets, in the course of carrying out their aims, presented a danger of violence even under the most favorable circumstances. When the patrols added threats against present or potential strikebreaking employees, Holmes concluded that the possibility of violence became likely. He decided that the principal question before him was the legality of the pickets' means in pursuit of their goal to injure Vegelahn economically. If the purpose was lawful, Holmes suggested, it followed that "persuasion, advice, and social pressure brought to bear upon" allies of Vegelahn could be permitted.

Holmes commented on the possibility of violence, but stated that, "I do not think violence so inseparably connected with strikes as to warrant declaring a combination for a lawful purpose illegal simply on that ground." The more difficult legal question was whether the defendants' purpose was itself lawful and permissible, given the fact that their tactics constituted an attempt to intentionally injure Vegelahn's business. Holmes noted that gratuitous injury to another's business, by persuading others to stay away, is actionable and could be enjoined. But, he reasoned, when statements are honestly made in response to an inquiry from another, to enable that person to best act in his own self-interest, the statements are privileged and no liability can attach to them. The value of free information, Holmes asserted, outweighs the harm of an occasional injustice. All this he considered to be settled tort law. Guntner and the other defendants, of course, were acting in the most vital self-interest, in a struggle to force Vegelahn to accept their wage demands. Holmes concluded that the purpose of the strikers was sufficient to justify their action.
Holmes next considered whether lawful ends might be rendered unlawful by virtue of the means of combination. He discounted that theory as being unfounded in law. Where a disproportion of power resulted from combination, there perhaps could be some basis for such a result in law, Holmes thought, but not without the suggestion that the concentration of forces was an example of the fittest having survived. Holmes confessed to some doubt regarding his position on the patrolling by the pickets, as the picketing could well produce violence from the threats and physical confrontation. Since it was part of the activity which he had pronounced lawful, he decided to give the patrol the benefit of his doubt, concluding, "I shall not enjoin a patrol limited to lawful methods." Second thoughts occurred to Holmes after having prepared his opinion. Before releasing it, he modified his draft by adding two additional sentences. "It will be understood that what I say as to persuasion applies only to persuasion not to make contracts. It does not apply to persuasion to break contracts already made." The effect of this supplement was significant as it removed from the permissible reach of the pickets' activity the new workers whom Vegelahn had hired to act as strike breakers and to fill the vacant positions of the very men who were picketing. Knowing that a worker who was newly hired by Vegelahn would be protected from their activity, the pickets would inevitably feel hard pressed to turn away applicants from those places, and thus bring great pressure to bear upon men who had not yet made contracts with Vegelahn. Holmes' caveat thereby increased the likelihood of violence, the very event which troubled him most in reaching his decision.

In the Final Decree, on the injunction, dated June 1, 1895, and prepared to reflect the opinion of Holmes, it was ordered that the defendants and their agents and servants be enjoined from physically interfering with anyone entering or leaving Vegelahn's factory, and from verbally intimidating any present or potential employees of Vegelahn from continuing their activity.

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combination is of more importance than the harm that may be done to the successful competitor . . . . It was said at the argument that this was not competition. It is true verbally, but not with reference to the principle which I am trying to express. I mean by free competition, a free commercial fight subject to the rules of the game as to fair play. Opinion, Equity Sitting at 7, Record.

31. Substantial authority differed with Holmes and held that combination could make for illegality. See Arthur v. Oakes, 63 F. 310 (7th Cir. 1894) (Harlan, J.) and cases cited therein.

32. For Holmes' thoughts on such contests, see Holmes, The Gas Stokers' Strike, 7 AM. L. REV. 582, 583 (1873); See infra note 101 and accompanying text.

33. Opinion, Equity Sitting at 8, Record.

34. Records of the Supreme Judicial Court include the original version of the Holmes opinion, amended in his handwriting to make the change. His second thoughts avoided the necessity of controverting established case law as to existing contracts. See Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 53 S.E. 161 (1906); Annot. 84 A.L.R. 43, 77, 98 (1933).
Picketing to persuade the public to shun Vegelahn and his customers or employees was not prohibited by the provisions of the decree and neither, curiously, was peaceful and orderly persuasion of non-striking employees to join the strike. Despite his after-thought, it is possible that Holmes considered the chance of persuasion directed against those with “contracts already made” so unlikely that it did not bear specific prohibition in the decree. Another possibility, more likely, is oversight.

On the same day that the Final Decree was issued, Holmes prepared a Report. This document summarized the record of the litigation in order to assist the full bench of the Supreme Judicial Court in its review. In his Report to his colleagues, Holmes indicated which facets of the problem were important to him in reaching his decision to limit the initial injunction. Because his analysis of the law emphasized the importance of legal justification when one harmed another, he began with a short review of the factual circumstances. There was a strike in progress, he noted, with a limited goal of gaining an economic advantage for the defendants. If that goal should be attained, the activity of the defendants would cease. In their efforts to prevent Vegelahn from obtaining workmen and carrying on his business, the defendants effectively used “persuasion and social pressure[,] [a]nd these means are sufficient to affect the plaintiff disadvantageously, although it does not appear, if that be material, that they are sufficient to crush him.” Because the use of those means for their purpose was justified, Holmes reported, he had refused to enjoin them. He conceded that if the means had been unjustified, or unlawful, an injunction against them would be appropriate.

Holmes admitted that the additional means of “threats of personal injury or unlawful harm” had been used against present or prospective employees of Vegelahn, “although no actual violence was used beyond a technical battery, and although the threats were a good deal disguised and

35. 167 Mass. at 96, 44 N.E. at 1077. The date of the decree is shown in the files of the court. Report, Final Decree, at 11.
36. See supra note 34.
37. 167 Mass. at 95–96. Massachusetts law in 1895 provided that suits for injunction should initially be heard and determined by a single justice. 1886 Mass. Pub. Stat. ch. 151, §11. Upon the issuance of a final decree, the justice was empowered to report the case to the full bench for its consideration of questions of law. 1886 Mass. Pub. Stat. ch. 151, §20. Similarly, upon demurrer by one of the parties to the single justice’s resolution of a question of law, the case could be reported to the full bench. H. Bushwell & C. Walcott, Practice And Pleading In Personal Actions In The Courts Of Massachusetts 17 n.1 (2d rev. ed. 1883). Counsel for the defendants in this case filed a demurrer with the court on January 28, 1895, thus providing the basis for Holmes’ Report.
38. 167 Mass. at 95.
39. Id.
express words were avoided.” In the final version of his statement, Holmes added another sentence: “It appeared to me that there was danger of similar acts in the future.” He concluded that these additional means should be enjoined.

Vegelahn’s greatest problem was the pressure applied to him by the patrolling pickets outside his factory. Holmes next reported the details of that activity. A patrol of two men was established, between 6:30 a.m. and 5:30 p.m., changing every hour. At times the number of men was greater, and at times “on one of the busy streets of Boston” he emphasized, there was “some little inclination to stop the plaintiff’s door.” It seemed proper to enjoin this more serious activity. Where the activity of the pickets went beyond simple advice to passers-by, yet had “not obtruded beyond the point where the other person was willing to listen,” Holmes indicated some uncertainty, but implied that overreaching by the pickets would fall into the category of improper means. He reiterated that the patrol should not be enjoined if confined solely to persuasion and the dissemination of information. Persuasion to break existing employment agreements, however, was unlawful and properly enjoined. In such form and at such point, the controversy came to the full membership of the Supreme Judicial Court for its review.

REVIEW BY THE MASSACHUSETTS SUPREME JUDICIAL COURT

Vegelahn’s injunction, as modified on June 1, 1895, continued in effect while the proceeding was pending before the court. Argument by counsel was scheduled for March 24, 1895 with Edwin B. Hale of the Boston law firm of Hale and Dickerman appearing on behalf of Vegelahn, and Thomas H. Russell of Russell and Russell, also a Boston firm, representing Guntner and the individually named pickets. Hale, of course, was desirous of absolutely terminating the picketing and he sought to convince the court that the patrol should have been

40. Id.
41. Id.
42. Id. at 96.
43. Id.
44. Id.
45. Holmes’ opinion does not appear in the official published report of the decision in volume 167 of Massachusetts Reports, nor does it appear to have been published in any of the daily newspapers of Boston. However, it seems to have attracted some attention among interested persons. Frank K. Foster, a prominent Boston labor leader wrote to Holmes on May 28, 1895 that “your decision in the Vegelahn case, I need not say, is highly gratifying to many of our people. Where can I get in full for publication?” Letter from Frank K. Foster to Oliver Wendell Holmes (May 28, 1895) (available in Harvard Law School Library, Holmes Manuscript Collection).
46. The defendants had been represented in the proceeding for the temporary restraining order by the firm of Hayes and O’Neil. Russell filed his appearance with the court on January 10, 1895. Supra note 20.
enjoined without exception. A broad attack was made against the
defendants' behavior through allegations that the picketing was a general
threat and menace, regardless of whether it was a civil or criminal wrong.
Hale argued that the picketing was a nuisance subject to the traditional
equitable remedy of injunction. He did not limit himself to a single line of
argument, and he further maintained that the defendants had formed an
illegal conspiracy against Vegelahn which could not be justified on any
basis, including that of free competition. The argument relied on much
English law for its support, although Hale also made good use of the
limited number of Massachusetts precedents available.47

By contrast, Russell had the greater burden. The law tended to be
against him, as Holmes had noted,48 and he cited only four judicial
decisions and one treatise49 as authority for his arguments. Russell
accepted all of the limitations of the Final Decree upon the pickets’
activity and embraced Holmes' analysis. He maintained that trade unions
were lawful in Massachusetts, that workers were free to combine and to
use accepted business tactics to further their own interest, and, that in the
absence of methods employing violence or physical coercion and
intimidation, there was no basis in the law for a prohibition or picketing.
Indeed, Russell argued, it was desirable for the courts to approve
picketing in order to insure the continued peaceful expressing of the
grievances of working people.

The matter was taken under advisement by the Supreme Judicial
Court and seven months elapsed before a decision was announced.50 The
difficulty in resolving the controversy within the court was underscored by
the unusual occurrence of two dissenting judges separating themselves
from the majority with individual opinions.51 The senior Associate
Justice, Charles Allen, wrote for the majority, while dissents were filed by
Chief Justice Wallbridge A. Field and Holmes, who had been unable to
convince his brethren of the merit of his earlier conclusions.

Justice Allen's opinion exemplified the operation of the double
standard which characterized judicial analysis of labor relations in the

47. Brief for Plaintiff, Record, citing Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888);
Walker v. Cronin. 107 Mass. 555 (1871); Arthur v. Oakes, 63 F. 310 (7th Cir. 1894).
48. See supra note 30 and accompanying text.
49. Brief for Respondents at 6, Record. Russell conceded that the cited treatise, S & B
Webb, THE HISTORY OF TRADE UNIONISM (1894), stated that picketing resulting in intimidation
was unlawful and should be "repressed."
50. 167 Mass. 92, 44 N.E. 1077 (1896).
51. Only eight dissenting opinions were written by all of the members of the Supreme
Judicial Court in 1896. Twelve dissenting votes were cast that year. H. SHRIVER, THE JUDICIAL
OPINIONS OF OLIVER WENDELL HOLMES 325, 326 (1940).
Allen, describing the circumstances of the picketing, opened his opinion with quotations and paraphrasing from the equity sitting Report. He termed the picketing part of a conspiracy against Vegelahn "to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices." In the Report, Holmes had used the same language, but had continued "... and for the purpose of compelling him to accede to that schedule, but for no other purpose. If he adopts that schedule he will not be interfered with further." Allen immediately concluded that the picketing

was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed.

Allen believed that such interference with the beginning of or the continuation of employment was contrary to judicial precedent, Massachusetts criminal statutes, the Constitution, morality, and certainly amounted to a tortious nuisance.

Since the presence of justification might eliminate the basis for finding a tortious nuisance, the opinion dealt specifically with that possibility and, in doing so, applied a different standard from Holmes' to judge the conduct of the pickets.

Although a combination of business interests to pressure another to take action furthering their own cause was generally considered by American courts to be good business practice and not actionable, Allen and the majority of the court found that such a combination by labor was not justified. Furthermore, this section of the opinion demonstrated the

52. See C. Gregory, Labor and The Law, chs. 2–3 (2d rev. ed. 1961), and text, infra, at note 82.
53. 167 Mass. at 97, 44 N.E. at 1077.
54. Id. at 95.
55. Id. at 97, 44 N.E. at 1077.
56. Id. at 97, 98, 44 N.E. at 1077, 1078.
57. The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful.
58. Bowen v. Matheson, 96 Mass. 499 (1867); Gregory, supra note 52.
importance of Allen's omission of the qualifying language from Holmes' conclusion in the Report.\textsuperscript{59} Holmes had decided that the workmen had taken their action primarily in furtherance of their own interests, and that the harmful effect on Vegelahn's business was a secondary purpose, however necessary and inevitable. Allen's assumption was that the conduct must be judged solely by its effect, and that whatever its actual purpose, there could be no justification for the infliction of injury upon Vegelahn and the interference with his right to carry on his business as he pleased.\textsuperscript{60}

Similarly, Allen placed great emphasis upon the means of conscription of third parties into the dispute by the pickets. He gave no consideration to any means other than "of intimidation or constraint"\textsuperscript{61} of present or future employees of Vegelahn. Forms of physical, intimidating, or threatening persuasion had been proscribed by the Final Decree of June 1, 1895, and had been expressly disavowed by Russell, the attorney for the defense.\textsuperscript{62} The legality of any other form of persuasion or "social pressure,"\textsuperscript{63} as Allen referred to it, either through speech or the presence of the patrol in front of Vegelahn's factory, was the central question decided by the court. In fact, such persuasion might have been directed at the public in general or those members of the public who might be interested in becoming Vegelahn's employees. No issue had been raised concerning the general public as targets of the action, but as to those in the latter group, Allen had no doubt that the "threats and intimidation"\textsuperscript{64} directed against them were unlawful and should be enjoined. Again, the intention of the pickets was assumed to be the impermissible infliction of injury upon the employer, and the possibility of legally justifiable self-benefiting ends, or privilege, was ignored by the majority opinion.

Although courts of equity normally refrain from enjoining behavior which might be considered criminal, the majority concluded that the danger of continuing injury to Vegelahn's property and business interest should be met by an injunction. The full bench of the Supreme Judicial Court ordered that the Final Decree issued by Holmes seventeen months earlier be overturned and that the original and broad preliminary

\textsuperscript{59} 167 Mass. at 95, 44 N.E. at 1077.

\textsuperscript{60} Holmes' analysis, naturally, depended upon the assumption that, in addition to the right of the employer to carry on his business, the law must heed the privilege of the employees to combine to further their own interests. See W. Nelles & S. Mermin, Holmes and Labor Law, 12 N.Y.U. L. Rev. 517, 520 (1936).

\textsuperscript{61} 167 Mass. at 99, 44 N.E. at 1078.

\textsuperscript{62} "It is not contended that a labor organization, by itself or agents, may seek to effect its purposes by any physical force or violence whatsoever." Brief for Respondents at 3, Record.

\textsuperscript{63} 167 Mass. at 97, 44 N.E. at 1077.

\textsuperscript{64} Id. at 99, 44 N.E. at 1078.
injunction of December 1894 be restored against Guntner and the pickets. The effect of the injunction was to terminate the picketing and, thus, any hope of success with Frederick O. Vegelahn and his wage schedules was ended.65 Two members of the Court disagreed.

Chief Justice Field prepared a careful analysis of the law upon which the majority opinion had depended.66 He began his analysis by discussing the principal decisions of American and English courts which formed the precedents used by Justice Allen. Field distinguished or discounted these decisions as being based upon varying factual circumstances, or law which was unsound in 1896.67 The source of disagreement between Field and his colleagues was a belief on his part that an injunction was an inappropriate remedy in a dispute of the nature before them. He considered these problems to be best resolved by legislation. Field feared erratic results if judges were forced to act in the absence of statutes, since “if the acts complained of do not amount to intimidation or force, it is not in all respects clear what are lawful and what are not lawful at common law.”68 Justification could not be a satisfactory standard for evaluating these potentially tortious acts, he argued, nor could malice be used. Both concepts were subjective and, therefore, unsatisfactory. Field did not dispute the claim that Guntner and the pickets might have wronged Vegelahn, although he doubted that they had done anything illegal. He did believe that equity should have been denied to Vegelahn since civil or criminal law would have been available to provide all the necessary relief if illegality were to be established. Field concluded that in the absence of an objection by the defendants to the original injunction, the court should have confined itself to an affirmance of the decree entered by Justice Holmes.

HOLMES' DISSENT

In the second dissenting opinion, Holmes issued a manifesto which, as shall be demonstrated, became an important contribution to the develop-

65. By ignoring the distinction between those members of the public who might be interested in entering Vegelahn’s premises as applicants for employment or as customers, and those who were disinterested passers-by, and by removing any provisions of the injunction which limited its protections “only to persons who are bound by existing contracts,” Id. at 100, 44 N.E. at 1078, the court effectively banned all picketing at the site of the dispute and destroyed any possibility of successful concerted action by the workers.
66. Id.
67. He conceded Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888), to be an important precedent. This was the first decision of the Supreme Judicial Court to approve the issuance of an injunction in a labor dispute. Nonetheless, Field argued, the decision appeared to be based upon English decisions which had been overruled or superseded by statutes. 167 Mass. at 101, 102, 44 N.E. at 1078, 1079.
68. Id. at 102, 44 N.E. at 1079.
opment of labor relations law in the twentieth century. Holmes agreed with the other judges that their view represented the widely accepted legal wisdom on the topic, but he believed that wisdom to be both misguided and wrong. He rejected their analysis, their interpretation of the facts in the dispute, their social theories, their idea of what the role of their court in the controversy ought to be, their economics, and their resulting legal conclusions. He urged a reconsideration of these components of the law in language and philosophy sufficiently compelling to win that goal from his own court and, ultimately, from the nation.

Beginning with a deprecatingly toned disapproval of judicial dissenting opinions, Holmes then referred to the Report and its factual conclusions. His entire opinion, longer than Allen's or Field's, was a subdued re-examination of legal conclusions expressed by the majority. He noted that since there had been no issue raised concerning compliance with the final injunction by the pickets, the question which should have been decided by the court was the adequacy of the terms or the scope of the relief. Comparing the preliminary with this final injunction revealed that "the former goes further, and forbids the defendants to interfere with the plaintiff's business 'by any scheme . . . organized for the purpose of . . . preventing any person or persons who now are or may hereafter be . . . desirous of entering the [plaintiff's employment] from entering it.'" The important distinction between the terms of the two decrees was the prohibition by the earlier injunction of attempts by the pickets, however orderly their efforts, to engage in "social intercourse" or persuasion to keep away those who might contract with Vegelahn for employment or otherwise. Holmes objected that the conclusion of the majority assumed that the pickets, necessarily constituted a threat of bodily harm, and he reiter-

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69. According to the correspondence of President Theodore Roosevelt, the dissenting opinion also profoundly affected the growth of American jurisprudence in the first third of the twentieth century by influencing him in favor of Holmes. While reviewing with Senator Henry Cabot Lodge the qualifications of Holmes to fill a vacancy on the U.S. Supreme Court in 1902, Roosevelt wrote: "The labor decisions which have been criticized by some of the big railroad men and other members of large corporations constitute to my mind a strong point in Judge Holmes' favor . . . I think it eminently desirable that our Supreme Court should show in unmistakable fashion their entire sympathy with all proper effort to secure the most favorable possible consideration for the men who most need that consideration."

70. Holmes was not merely offering a disclaimer couched in false modesty. In the twenty years during which he served on the Supreme Judicial Court, he wrote a total of twelve dissenting opinions and voted in dissent eleven other times. He wrote a total of 1,291 opinions in that period.

71. 167 Mass. at 104, 44 N.E. at 1080.

72. Id.
ated that the assumption was unwarranted,73 there being adequate safeguards in the Final Decree against the use of unlawful means by the two pickets. Holmes rejected the notion that a threat of force was to be implied from picketing by two men, but he suggested that if he was wrong, the Final Decree would have served as it had prohibited all threats of force.

Even if the difference between the scope of the two injunctions had been resolved or had been less controverted, Holmes noted, he would have taken issue with the majority position over what he termed “the real difference”74 between the two decrees. Justification for the conduct of the defendants, or the lack of it, was the principal point of disagreement between Holmes and the court. Holmes returned to the arguments advanced in his earlier opinion, and stated that there was no legal liability for the intentional infliction of injury to another where the law regarded the actor as being justified. It was with respect to the issue of what constituted justification that he remarked,

and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are consideration of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes.75

He argued that public policy is always open to contention, and matters of economics and competition were subjects of considerable dispute. It is generally accepted, however, “that free competition is worth more to society than it costs . . . .”76 An element of competition may be “the intentional inflicting of temporal damage”77 when done to another “as an instrumentality in reaching the end of victory in the battle of trade.”78 Holmes believed that in such cases the justification for injury imposed was clear as a matter of tort law and that “the only debatable ground is the nature of the means by which such damage may be inflicted.”79 The means certainly could not be force or threats of force, but if one entrepreneur

73. “[t]It cannot be said, I think, that two men walking together up and down a sidewalk and speaking to those who enter a certain shop do necessarily and always thereby convey a threat of force . . . especially when they are, and are known to be, under the injunction of this court not to do so.” Id. at 105, 44 N.E. at 1080.
74. Id.
75. Id. at 105-06, 44 N.E. at 1080. Nelles and Mermin referred to this insight in 1936 as a “paragraph which there may still be some who do not know by heart.” Supra note 60, at 528.
76. 167 Mass. at 106, 44 N.E. at 1080.
77. Id., 44 N.E. at 1081.
78. Id.
79. Id.
competed with another, injury "may be done by persuasion to leave a rival's shop and come to the defendant's." Holmes noted that according to settled law injury may also be imposed by a competitor withdrawing benefits "from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants." He declared that threats, compulsion, annoyance, or intimidation directed against another were not unlawful without regard to the end sought and means used. One is free under the law to threaten another with action which is permissible under the circumstances, such as trade competition, thus allowing the other a chance to avoid that action.

Holmes perceptively characterized the enduring conflict between employers and employees as competition:

If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests.

This often quoted passage enabled Holmes to contrast rules regulating the conduct of businessmen in dealings with each other to the law governing the relationship between capital and labor. He believed that there was a double standard in the law which left businessmen free to engage in unregulated competition with one another but which tied workers to strict standards of accountability in tort in their struggles with employers.

Rejecting a theory "which latterly has been insisted on a good deal" Holmes dismissed the suggestion that a combination by a group to do what an individual was free to do, could somehow transform that conduct into unlawful behavior. He argued that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

80. Id. at 106-07, 44 N.E. at 1081.
81. Id. at 107, 44 N.E. at 1081.
82. Id.
83. Id.
84. Id. at 108, 44 N.E. at 1081. Holmes' future colleague on the United States Supreme Court, John Marshall Harlan, had stoutly maintained that combination could convert lawful behavior into unlawful conspiracy in Arthur v. Oakes, 63 F. 310 (7th Cir. 1894). In Massachusetts, the law was as Holmes stated. Commonwealth v. Hunt, 45 Mass. 111 (1842). Another
Holmes explained that if it was as inevitable that labor would combine to reach its ends as it was obvious that capital had already been permitted to combine to further its interests, the law must change to meet that fact. The most famous segment of his opinion followed:

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

Holmes argued that the law was required to grant to working people the same liberty to support their interests “by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control” as had been granted to capital. He noted that strikes which were devoid of violence or broken contracts had become acceptable to society and the law, so that the only remaining legal standard to be evolved was for judging the methods of working people. Indeed, the analysis which Holmes applied to the dispute was so compelling that his confidence was justified. The next time the issue was presented to his court, the majority adopted the approach which he had expounded.

**THE IMPACT OF VEGELAHN**

The court had decided, in *Vegelahn*, that whether or not wage strikes were unlawful, picketing to bring pressure on employers was not permissible in Massachusetts. The intimidation of the public, either as potential...
tial employees or as potential customers of Vegelahn, was behavior that was too anti-social to be condoned. Holmes' argument was that the picketing, even if threatening or intimidating, contrary to his perception of it, should be justified as simple and fair trade competition. In the absence of violent conduct, he could attribute no illegality to the behavior of the pickets.

Four years later, in its decision in *Plant v. Woods*, the Supreme Judicial Court revealed a change in its interpretation of the economic pressure brought against employers by trade unions. A schism in a union of painters had produced a bitter contest for economic supremacy between two groups seeking the same jobs. One group threatened employers with a refusal to work wherever its rivals were also employed, unless the latter group agreed to join their association. The employers who were intimidated or coerced by these threats sought judicial assistance through restraining orders and injunctions against continued threats or refusals to work. In what one authority has described as "a serious abuse of judicial authority," the Supreme Judicial Court ascribed to the defendants' mere threat to strike, the most serious consequences possible and refused "to bring the acts of the defendants under the shelter of the principles of trade competition."

Significantly, in *Plant v Woods*, the court held that "in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause;" thereby conceding to workers acting in concert a standard for the judging of their tactics in economic warfare which it had previously been unwilling to extend to any group other than entrepreneurs. Nevertheless, it must be added that the court, upon reviewing the behavior in question with this standard, found

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90. 176 Mass. 492, 57 N.E. 1011 (1900).
91. C. GREGORY, supra note 52, at 64.
92. These included "unlawful physical injury" to property, injury to the employer's business and "his ruin, if possible," and "actual and threatened personal violence" to employees who do not strike or those who apply for employment. 176 Mass. at 496-97, 57 N.E. at 1013.
93. "The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws." *Id.* at 502, 57 N.E. at 1015.
94. *Id.* at 499, 57 N.E. at 1014.
that "such acts are without justification, and therefore are malicious and unlawful . . . ."95

Holmes, who had become Chief Judge of the court, filed another separate opinion in which, while dissenting, he understood the change of his colleagues' interpretation of the law since their confrontation in Vegelahn v Guntner: "[M]uch to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one . . . ."96 He elaborated, with what must have been considerable satisfaction:

I agree that the conduct of the defendants is actionable unless justified. May v. Wood, 172 Mass. 11, 14, and cases cited. I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted. Vegelahn v. Guntner, 167 Mass. 92, 105, 106 . . . . I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined . . . . To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats.97

Holmes was attempting to nudge the court into a further acceptance of his analysis of picketing, this time to approve peaceful picketing to bring about a closed shop. He argued that if it was lawful to strike and to picket to obtain higher wages, then what might be considered a preliminary objective, the strengthening of the union through increased membership by the establishment of a closed shop, should also be the lawful end of a strike and peaceful picketing. He emphasized his point with language similar to his dissent in Vegelahn: "I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest."98 In 1906 when the court again was presented with the question, it changed its position into substantial agreement with Holmes' analysis.99

95. Id. at 502, 57 N.E. at 1015.
96. Id. at 504, 57 N.E. at 1016. He had also noted that in its decision in Allen v. Flood, 1898 A.C. 1, the English House of Lords had substantially agreed with the mode of analysis he had urged in Vegelahn. See also 14 L.Q. Rev. 129, 132 (1898).
97. 176 Mass. at 504–05, 57 N.E. at 1016.
98. Id. at 505, 57 N.E. at 1016.
99. Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753 (1906), held that despite the resulting financial loss to the rivals, union craftsmen were within their rights in refusing to work for an
The theories which Holmes published in the Massachusetts Reports, and which became so influential in the development of the law, were the result of long deliberation. His habit of thinking analytically about the law was due, in part, to his authorship of a number of published works. Some of these pieces show the growth of his theories about the law regulating the activities of combinations of laborers. In a brief note published in 1873, which discussed the outcome of a discomforting strike in England, Holmes considered the effect of legislation which was applied against the strikers. He commented that the workers might be seen as involved in a struggle which required them to put their interests at variance with those of others. It was natural and right that they should do so. It was also natural, however, that their stronger opponents would use whatever means they had available to destroy the strike and the alliance of workers. Fresh from his brutalizing experience in the Civil War, Holmes was showing a streak of determinism which spiced his work throughout his long career, but he understood early that labor and capital were involved in direct competition for economic power.

An article published in 1894 is also important to an understanding of Holmes' theory. Cited authoritatively by the majority in *Plant v. Woods*, although curiously without attribution to their colleague, this work became "the fountain-head of analysis" for judicial review of picketing activities. In the law of torts, Holmes began, familiar justifications for action permitting defendants to escape liability have usually included the defense of privilege. The degree to which privilege might be a defense for injurious behavior is a question of policy which should depend upon the reasoning of the legislature and not properly upon that of judges.
He maintained policies must be set up in generalities, "but plainly the worth or the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts." These evaluations may include the belief "that free competition is worth more to society than it costs, . . . that a line must be drawn between the conflicting interests of adjoining owners which necessarily will restrict the freedom of each . . . and . . . that the benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate."

Holmes noted that the defense of privilege was not general, but limited, since it often depended upon the motives of the actor. For example, in the case of interference with another's business, it is desirable that people should be free to advise others, but it is not desirable that one should wrongly lose his business. Therefore, if advice was believed to be good and if it was given to benefit the hearers, the defendant would not be liable. If the defendant's motive had been only to harm the business, liability would result.

"If the privilege is qualified," Holmes wrote, "the policy in favor of the defendant's freedom generally will be found to be qualified only to the extent of forbidding him to use for the sake of doing harm, what is allowed him for the sake of good." These are hard distinctions to make, certainly, "and the distinctions on which they go will be distinctions of degree," but the legislature is still capable of making them. "Views of policy are taught by experience of the interests of life. Those interests are fields of battle." Holmes illustrated his point with a review of cases which showed that combinations of merchants were lawful while combinations of laborers in a trade union were not.

Holmes believed that these cases established that "the ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." For Holmes, there seemed to be no doubt. "Behind all is the question whether the courts are not flying in the face of the organization or the world which is taking place so fast, and of its inevitable consequences." These choices of policy ought to be

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105. Supra note 103, at 3.
106. Supra note 103, at 3-4. The similarity to Holmes phrases in Vegelahn v. Guentner cannot be overlooked.
107. 8 Harv. L. Rev. at 6-7.
108. Id. at 7.
109. Id. at 7.
110. Id. at 8.
111. Id. at 8-9.
made knowingly, intelligently, and by people with the appropriate responsibility. In any policy, "the advantages to the community, on one side and the other, are the only matters really entitled to be weighed."112 Judges were not the people to be making those decisions, Holmes concluded.

In another article three years later,113 Holmes enlarged upon this theme. These policy matters, he stated, "really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place."114 Commenting about lawyers, but necessarily about judges too, he noted, "I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions."115

Holmes' analysis of privilege and its place as a justification in the law of tort was the basis for his dissent in Végelahn. His rhetoric on the struggle between opposing interests gave to this analysis the substance which he needed to apply his theory to the controversy between the employer and the pickets. He found partial success in the grudging decision of his court in Plant v. Woods. Holmes' urging of judicial restraint, emphasized by the inequitable power of an employer armed with an injunction, was less compelling to his court and others, even though his argument was finally persuasive.116

The significance of the Holmes' opinions was not long in being recognized.117 Scholars noticed the dissents soon after their publication.118 Melville M. Bigelow, Dean of the Law School at Boston University and one of the prominent theoreticians of legal education, used Holmes'
dissents in *Vegelahn* and *Plant v. Woods* as the centerpieces in an analysis of contemporary law. Dean Bigelow called for realism and scientific methods in the law to enable its students and practitioners to cope with the great changes of the day. Using labor relations decisions of the courts to review the inability of judges to evolve law which would effectuate desirable public policy, Bigelow discussed the decisions of the Massachusetts court and lamented the outcome. He found consolation and optimism in the opinions of Holmes.\(^\text{119}\)

Professor John H. Wigmore evaluated the dissent in *Vegelahn* with great praise. Wigmore stated that the Holmes opinions on labor relations are some of his most distinctive and continued that, "no man can consider himself to have a respectable conviction on this subject unless he has faced and settled with the dissenting opinion in *Vegelahn v. Guntner*.\(^\text{120}\) The tone of evaluations of this work has not changed in the ensuing years.\(^\text{121}\)

Within the judicial profession, Holmes' analysis was reviewed, whether or not specifically cited and followed, by state and federal courts alike. In Massachusetts the work of its former Chief Judge, after his promotion to the national Supreme Court bench,\(^\text{122}\) had been incorporated into the opinions of the court in *Plant v. Woods*\(^\text{123}\) and *Pickett v. Walsh*.\(^\text{124}\) Relatively few labor relations cases made specific note of *Vegelahn* in succeeding years,\(^\text{125}\) but those which contemplated the problem of


\(^{121}\) C. Gregory, *supra* note 52 at 62 terms it the work of "a true legal prophet." "[T]he classic dissent," say F. Frankfurter & N. Green *supra* note 104 at 27. A thoughtful review may be found in S. Konefsky *The Legacy of Holmes and Brandeis* 20 (1956). For an English comment on the *Vegelahn* dissent, see *infra* note 157 and accompanying text. In addition to contributing to the development of labor relations law, Holmes has been credited with the invention of the doctrine of the *prima facie* tort in his *Vegelahn* dissent. Alberto Diaz v. Kay-Dix Ranch, 9 Cal. App. 3d 588, 582, 88 Cal. Rptr. 443, 445 (1970); State ex rel. Taylor v. Circuit court of Marion County, 240 Ind. 94, 98, 162 N.E.2nd 90, 92 (1959); Annot. 16 A.L.R. 3d 1191 (1967).

\(^{122}\) Holmes left the Massachusetts bench in 1902. See *supra* note 69.

\(^{123}\) 176 Mass. 492, 57 N.E. 1011 (1900).


\(^{125}\) Disputes involving commercial torts cited *Vegelahn* authoritatively. E.g. Silsbee v. Webber, 171 Mass. 378, 50 N.E. 555 (1898) (conveyance of property after a threat); Moran v. Dunphy, 177 Mass. 485, 59 N.E. 1125 (1901) (slander inducing discharge from employment);
the legality of workers’ concerted action used a Holmesian mode of analysis.\textsuperscript{125}

As Holmes well knew, the use of his theory of competition as justification did not insure that labor would obtain a favorable result.\textsuperscript{127} In \textit{L. D. Willcutt & Sons Co. v. Driscoll},\textsuperscript{128} the Massachusetts court was presented with another strike for a closed shop. Although the majority opinion based its decision on the presence or absence of competitive justification for the action of the workers, it followed its conclusion in \textit{Plant v. Woods} and held both that the closed shop was an unlawful objective in Massachusetts and that the union’s activity was properly enjoined. A dissent by two judges unsuccessfully argued the same points raised by Holmes in \textit{Plant v. Woods}, that both the means and the end of the union were justified.

The division in \textit{Willcutt} illustrated a problem frequently encountered by judges when reviewing the competitive action taken by unions. Noting that strikes were generally legal, or that a specific strike was legal, a court often would hold that the means used by the union amounted to intimidation, coercion, or violence and were unlawful and to be enjoined. Holmes had dealt with this problem in \textit{Vegelahn} when he considered whether the behavior of the pickets would present “threats of personal injury,”\textsuperscript{129} or “stop the plaintiff’s door,” or “break existing contracts,”\textsuperscript{130} and had decided that the possibility of such activity should be enjoined. Different judges naturally would react to given circumstances in different ways and reach inconsistent conclusions.\textsuperscript{131} Decisions of the Supreme


\textsuperscript{128} Holmes was personally indifferent to the outcome of the litigation, as befitted his judicial impartiality, and expressed some annoyance at the importance attached to it. See Holmes—Pollock Letters 106 (Howe ed. 1941). Holmes had merely placed the \textit{Vegelahn} controversy into his comprehensive scheme of tort law; the affect of his judicial analysis was immaterial to him. See M. Tushnet, \textit{The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court}, 63 VA. L. REV. 975, 1040 (1977). This is not to say that Holmes was disinterested in the problems of organized labor. In a letter to Sir Frederick Pollock, he related with some relish his visit to a prominent labor leader and the instructive conversation which ensued. See Holmes—Letters 44 (Howe ed. 1941). (I am indebted to Judge Hiller Zobel for the final reference.)

\textsuperscript{129} Id. at 96, 44 N.E. at 1077.

\textsuperscript{130} See Rogers v. Evarts, 17 N.Y.S. 264 (Sup. Ct. 1891), (“It may be impossible to lay down a general rule as to what surrounding circumstances will characterize persuasion and entreaty as intimidation. Each case must probably depend upon its own surroundings.”) \textit{Id.} at 269, and Stephens v. Ohio State Tel. Co., 240 F. 759, 771 (N.D. Ohio 1917).
Judicial Court reflect this variance in judgment, despite the application of the same theory of problem analysis.132

Courts outside of Massachusetts followed the same analytical procedure, often citing Vegelahn, or setting out quite similar theories. Holmesian language was used by the Supreme Court of Indiana133 in a controversy similar to that in Vegelahn:

So, in a contest between employees and employers on the one hand to secure higher wages, and on the other to resist it, arguments and persuasion to win support and cooperation from others are proper to either side, provided they are of a character to leave the persons solicited feeling at liberty to comply or not, as they please.134

Although many states followed this analysis,135 it was not to be expected that all would do so.136

The federal courts also had many opportunities to pass judgment on strikes and picketing. Consolidated Steel & Wire Co. v. Murray,137 is the first post-Vegelahn decision to cite it. Confronted with picketing by striking workers and others the court issued an injunction against concerted action by the workers, and granted some minimum legal concessions to the union. The court found judicial decisions to be in harmony on the issues and the law and noted that,

while they recognize the right of employees of whatever rank or degree

132. Labor relations decisions in which the Supreme Judicial Court used the mode of analysis called for by Holmes include M. Steinert and Sons Co. v. Tagen, 207 Mass. 394, 93 N.E. 584 (1911); Minasian v. Osborne, 210 Mass. 250, 96 N.E. 1036 (1911); Mechanics' Fdy. & Machine Co. v. Lynch, 236 Mass. 504, 128 N.E. 877 (1920); Rice, Barton & Fales Machine & Iron Co. v. Willard, 242 Mass. 566, 136 N.E. 629 (1922); and Goyette v. Watson Co., 245 Mass. 577, 140 N.E. 285 (1923). Massachusetts ultimately codified the Holmesian analysis, MASS. GEN. LAWS ch. 149, §24 (1971) and inferentially overruled Vegelahn v. Guntner in 1938. See supra note 100. Holmes, from his prestigious vantage point in Washington, D.C., had reminded successor Massachusetts lawmakers that his ideas had not changed. In a dissent filed in Coppel v. Kansas, 236 U.S. 1, 27 (1914), he cited his opinions in Vegelahn and Plant v. Woods and remarked "I still entertain the opinions expressed by me in Massachusetts."

133. Karges Furniture Co. v. Amalgamated Woodworkers Local Union No. 1131, 165 Ind. 421, 75 N.E. 877 (1905).

134. Id. at 431, 75 N.E. at 881.


136. E.g., Purvis v. Local No. 500, United Bhd. of Carpenters and Joiners, 214 Pa. 348, 63 A. 585 (1906), where the court held that the mere demand for recognition of the union by an employer was itself threatening and coercive, and therefore, unlawful and to be enjoined.

137. 80 F. 811 (N.D. Ohio 1897). The decision was announced on May 8, 1897.
to combine for the purpose of resisting any measures of oppression or coercion by their employers, and even for the purpose of instituting strikes and adopting other measures for their own protection or for the bettering of their condition, they are agreed that they must not interfere with the rights of employers to manage their own business in their own way, so long as they do not trespass upon the rights of others.138

In short, interference with the employer's business, in any manner, beyond the mere withholding of one's own labor, was considered to be an unlawful act. The court correctly described this conclusion as being in harmony with that of other courts which had considered similar questions, including the opinion of the court in *Vegelahn*, which it quoted and discussed at length. It did not mention, however, the separate opinion of Holmes nor did the court consider the alternative analysis which he had offered. The court, instead, aggressively and belligerently asserted that it would be ready to enjoin, as necessary, any attempt by labor organizations to exceed the limits of the law.139

Six months later, in *Hopkins v. Oxley Stave Co.*,140 the Court of Appeals for the eighth federal circuit was presented with a dispute over the availability of an injunction against an agreement between labor unions to conduct an organized boycott against machine-made barrels for the purpose of preserving work for coopers. Conceding the right of workers to organize in furtherance of their own interests, the court stated that there is a general prohibition in the law against interfering with "the right of an individual to carry on his business as he sees fit..."141 But concluding on a slightly different analytical basis, it held:

> We think it is entirely clear, upon the authorities, that the conduct of which the defendants below were accused cannot be justified on the ground that the acts contemplated were legitimate and lawful means to prevent a possible future decline in wages, and to secure employment for a greater number of coopers.142

The possible defense of justification conceded in this legal analysis, due to the need to protect the legitimate ends of the unions, introduced a significant new consideration for the federal courts.

One judge dissented from the majority opinion in *Hopkins*, and his argument may have been responsible for pushing the majority into this

138. *Id.* at 828.
139. "...the courts will be ready for the emergency whenever and wherever the spirit of anarchy may manifest itself, whether within or without the lodges, and the American people, if need be, will rise in their majesty and their might, and crush it as a trip-hammer would crush an eggshell." 80 F. at 829.
140. 83 F. 912 (8th Cir. 1897).
141. *Id.* at 917.
142. *Id.* at 921.
new concession. In a long and compelling dissent, Judge Henry C. Caldwell argued that the combination of laborers in unions to further their own interests is "a natural and inherent right." He quoted Holmes' dissent in *Vegelahn* at length and then urged that "it is a fundamental error to deny to labor the rights and privileges of competition, upon the ground that labor is not . . . entitled to any of the rights of capital." He maintained that "[t]he right of organization itself may as well be denied to [laborers], if the right of peaceful and orderly collective action is denied to them." Competition, according to Caldwell, should be defined to include peaceful behavior in the self-interest of capital or labor, and in competing with capital, labor should be justified in asserting its combined economic power in a peaceful manner however troublesome to an employer that might be.

Subsequent federal judicial decisions dealing with requests for injunctions in labor disputes often referred to the *Vegelahn* dissent, if only to take pains to explain how the injunction being issued fell into Holmes' exceptions for improper methods such as violent or intimidating behavior by pickets. In modifying an injunction issued by the trial judge, the court in *Iron Molders' Union No. 125 v. Allis Chalmers Co.*, used language strikingly similar to that of Holmes:

A strike is one manifestation of the competition, the struggle for survival or place, that is inevitable in individualistic society. Dividends and wages must both come from the joint product of capital and labor. And in the struggle wherein each is seeking to hold or enlarge his ground, we believe it is fundamental that one and the same set of rules should govern the action of both contestants . . . . In contests between

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143. *Id.* at 929.
144. *Id.* at 937.
145. *Id.*, at 939. Caldwell's understanding of labor economics did not depend upon Holmes. Three years before, he had written the following analysis, in an action disputing the right of railroad management to decrease wages: "A corporation is organized capital; it is capital consisting of money and property. Organized labor is organized capital; it is capital consisting of brains and muscle. What it is lawful for one to do is lawful for the other to do. If it is lawful for the stockholders and officers of a corporation to associate and confer together for the purpose of reducing the wages of its employees, or of devising other means of making their investments profitable, it is equally lawful for organized labor to associate, consult, and confer with a view to maintain or increase wages. Both act from the prompting of enlightened selfishness, and the action of both is lawful when no illegal or criminal means are used or threatened." *Ames v. Union Pac. Ry. Co.*, 62 F. 7, 14 (D. Neb. 1894).
146. *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3, 90 F. 608 (N.D. Ohio 1898) (injunction granted); Union Pac. R. Co. v. Ruef, 120 F. 102 (D. Neb. 1902) (injunction granted); Wabash R. Co. v. Hannahan, 121 F. 563 (E.D. Mo. 1903) (injunction denied); Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155 (E.D. Wis. 1906) (injunction granted), modified 166 F. 45 (7th Cir. 1908); Alaska S.S. Co. v. International Longshoremen's Ass'n., 236 F. 964 (W.D. Wash. 1916) (injunction granted). 147. 166 F. 45 (7th Cir. 1908), modifying 150 F. 155 (E.D. Wis. 1906).
capital and labor the only means of injuring each other that are lawful are those that operate directly and immediately upon the control and supply of work to be done and of labor to do it, and thus directly affect the apportionment of the common fund, for only at this point exists the competition, the evils of which organized society will endure rather than suppress the freedom and initiative of the individual.148

It had become distinctly easier for federal courts to follow Holmes' theory of analysis in 1904. Writing for a majority of the United States Supreme Court in a decision 149 affirming a conviction under a Wisconsin statute for the unlawful combination of three businesses for the direct purpose of competitively injuring a fourth company, Holmes elaborated and incorporated his theory of justification into the federal law of torts.150

Federal trial and appeals courts worked Holmes' standard further into the common law of labor relations during the next decade.151 That period culminated with Congress' passage of the Clayton Anti-Trust Act of 1914,152 which codified much of the federal case law developed since the Vegelahn decision in 1896. Section 20 of the Act153 protected both strikes conducted in furtherance of the lawful objects of labor and the peaceful persuasion of others to join in its cause. After 1914, in suits of this type, the federal courts, based upon their interpretation of the statute, usually permitted the union activity to continue.154 In 1921, the decision of the

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150. It has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law . . . requires a justification if the defendant is to escape. If this is the correct mode of approach it is obvious that justifications may vary in extent according to the principle of policy upon which they are founded, and that while some, for instance, at common law, those affecting the use of land are absolute, others may depend upon the end for which the act is done.

Id. at 204. Some authorities cite this paragraph as significant in developing the prima facie tort doctrine. Annot., 16 A.L.R. 3d 1191, 1197 (1967). See supra, note 122.

151. E.g., Pope Motor Car Co. v. Keegan, 150 F.148 (N.D. Ohio 1906); Gill Engraving Co. v. Doer, 214 F. 111 (S.D.N.Y. 1914); Duplex Printing Co. v. Deering, 247 F. 192 (S.D.N.Y. 1917), aff'd, 252 F. 722 (2d Cir. 1918), rev'd, 254 U.S. 443 (1921); National Fireproofing Co. v. Mason Builders' Ass'n., 169 F.259 (2d Cir. 1909); Iron Molders' Union No. 125 v. Allis Chalmers Co., 166 F. 45 (7th Cir. 1908); Lowe v. California State Fed'n of Labor, 139 F. 71 (N.D. Cal. 1905). Of course, there were contrary ideas expressed as to the ends or means of labor. Kolley v. Robinson, 187 F. 415 (8th Cir. 1911); Atchison, Topeka and Santa Fe Ry. v. Gee 139 F. 582 (S.D. Iowa 1905).


U.S. Supreme Court in *Duplex Printing Press Co. v. Deering*, however, construed Section 20 narrowly enough to eliminate the statute as a bar to injunctions against peaceful picketing or solicitation. The court held that Section 20 added nothing to existing rules, and it specifically prohibited the union's use of persons, as either pickets or aides in the carrying out of a boycott against the offending employer, who were not workers at the shop where the dispute was located.

At about the same time, in late 1920, the opinion in an English case brought great personal and professional satisfaction to Holmes. A respected British judge paid him the extraordinary compliment of authoritatively citing the dissenting opinion from an American state court. Lord Justice Scrutton wrote as a member of the English Court of Appeal, reviewing *Ware and De Freville, Ltd. v. Motor Trade Ass'n.*, which involved an action for damages against an organization urging a boycott against the plaintiff for having broken its policy as to pricing merchandise. While examining the concept of justification for the acts of the defendant, Justice Scrutton remarked that he did "respectfully concur on this point with the admirable judgment of Holmes J. in *Vegelahn v. Guntner*, and then, after quoting Holmes, went on to repeat his complimentary adjective. The court unanimously agreed with Scrutton's conclusion and exonerated the association. Nevertheless, if ever the Anglophile, Holmes understood where his work remained.

One year later, in a decision which modified some of the apparent strictures of *Duplex*, the U.S. Supreme Court incorporated Holmes' theory of analysis into its labor relations case law. The dispute in *American Steel Foundries v. Tri-City Trades & Labor Council* concerned the propriety of a broad injunction against union activities

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155. 254 U.S. 443 (1921).
156. [1921] 3 K.B. 40, 69–70.
157. Id. at 69.
158. Id. at 70. Scrutton found himself in agreement with Holmes on at least one other occasion. See supra note 115.
159. Following the English practice, each judge felt free to prepare a separate opinion, and there was no opinion of the court, per se. In an untitled note upon the case, Holmes' old friend and correspondent, Sir Frederick Pollock wrote of the *Vegelahn* dissent that "this is one of the judgments which ... appear, if we may be allowed so familiar an expression, to improve in the bottle." 37 L.Q. Rev. 395, 398 (1921). Pollock had previously complimented Holmes' opinion in the same journal, and had recommended it as reading for English lawyers as early as 1898. F. Pollock, *Allen v. Flood*, 14 L.Q. Rev. 129, 132. Pollock's admiration of Holmes' work was also reflected in the many editions of his LAW OF TORTS, all dedicated to Holmes, beginning in 1886, and in their fifty-eight year private correspondence. 2 HOLMES—POLLOCK LETTERS 224 (M. Howe ed. 1941).
160. 257 U.S. 184 (1921).
during the occurrence of a violent strike over lowered wages. For the Court, Chief Justice Taft wrote:

We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of the other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation.

Once violence began, Taft declared, all information, arguments, and persuasion became intimidation because of the circumstances. Conceding that strikers do have a right to communicate with and attempt to convert those still working, as well as the right of those others to be free from intimidation, it became clear that "each case must turn on its own circumstances." An equitable result permits limited representatives of the strikers to be present for solicitation. "The purpose should be to prevent the inevitable intimidation of the presence of groups, but to allow missionaries." Despite the prohibitions of the Clayton Act, as construed by Duplex, against the involvement of those who were neither present nor former employees of the struck employer, the court held that interference in such a dispute by a labor organization was neither malicious nor without lawful excuse. Such organizations existed, Taft said, because workers knew that the union was essential to give laborers opportunity to deal on equality with their employer. To render this combination at all effective, employees must make their combination extend beyond one shop. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild.

Having thus modified the holding in Duplex, Taft turned to the legal theory for justification of the union's attack on the employer. "The elements essential to sustain actions for persuading employees to leave an employer are first, the malice or absence of lawful excuse, and, second, the actual injury." We find nothing in the reported decisions, the Court concluded,

161. Brandeis, J., concurred in the opinion of the Court and Clarke, J., dissented, each without preparing a separate opinion. 257 U.S. at 213.
162. 257 U.S. at 204.
163. Id. at 206.
164. Id. at 207.
165. Id. at 209.
166. Id. at 210.
which limits our conclusion here or which requires us to hold that the members of a local labor union and the union itself do not have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment.\footnote{Id. at 212-13.}

The injunction was ordered in accordance with the opinion.

With the decision in \textit{American Steel Foundries}, the Holmesian analysis, extending equality of rights of concerted action to labor, as well as to capital, was raised to the law of the land by the Supreme Court. Holmes participated in the decision and exerted his influence upon the other members of the Court, as well as its spokesman, Chief Justice Taft.\footnote{In a letter to his English friend Harold Laski, two months prior to the decision, Holmes mentioned having prepared a dissent which had then evolved into a memoranda by Mr. Justice Pitney and himself. In December, after the decision was announced, Holmes told Laski of the disappointment which he and Mr. Justice Brandeis felt when after Taft had had "a happy success in uniting the Court" in \textit{American Steel Foundries}, 238 F.728 (1916) the Chief Justice followed it with \textit{Truax v. Corrigan}, 257 U.S. 312 (1912), Letter from O.W. Holmes to Harold J. Laski (Dec. 22, 1921) \textit{reprinted in 1 Holmes--Laski Letters} 389 (M. Howe ed. 1953).}

The embracing of this doctrine by Taft and others of the majority groups was unsure, however, as two weeks later the Chief Justice released his opinion for the Court in \textit{Truax v. Corrigan},\footnote{257 U.S. 312 (1921).} a curious, retrogressive decision condemning boisterous but peaceful picketing of a restaurant by its striking employees. Their object was to obtain an eight hour day through the application of economic pressure upon the employer. The Court held that the object was to injure or destroy the business, and that the noisy, vigorous picketing used by the union was made illegal by the \textit{Duplex} decision. Furthermore, the Court concluded that a state statute, similar to Section 20 of the Clayton Act, which withheld injunctive powers from state courts in controversies of this nature, was an unconstitutional denial of equal protection of the law. Four members of the Court dissented, with Justice Brandeis delivering an elaborate and historical analysis, rebutting Taft in detail. Justices Pitney and Clarke disagreed that peaceful picketing was or could be illegal, and Justice Holmes limited his opinion to some deprecations over the misuse of the Fourteenth Amendment.\footnote{Holmes wrote to Laski that Brandeis' dissent, "a very elaborate study," had conceded that its contents were "not proper for a judicial opinion, ordinarily, but people are so ignorant that it was desirable that they should know and I dare say he was right." Of his own dissent, Holmes remarked, "at B.'s request I wrote a few words before I saw his and as he wanted me to print I did." Letter from O.W. Holmes to Harold J. Laski, \textit{supra} note 169.}

\footnote{Holmes' Dissent in \textit{Vegelahn v. Guntner} which limits our conclusion here or which requires us to hold that the members of a local labor union and the union itself do not have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment.\footnote{Id. at 212-13.}}
Truax was succeeded in due course by Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass’n. Through strikes and boycotts, a union attempted to strengthen its control of work in the production of stone for building material. The Supreme Court applied its holding in Duplex and decided that the union’s action was to be construed as an attack upon interstate commerce. The Court reiterated its previous position that federal anti-trust statutes constituted such a compelling statement of public policy that the right of the workers “to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations” had to be curtailed. Brandeis and the aging Holmes dissented on the ground that the Court’s application of the anti-trust statutes to this case was unwarranted since the boycott was not a significant threat to interstate commerce and that even if the boycott was a restraint on trade, it was an entirely reasonable one.

This progression of federal law reached its conclusion with the passage of the Anti-Injunction (Norris-LaGuardia) Act of 1932, which substantially prohibited the issuance of injunctions by federal courts in labor cases. The statute effectively accomplished what organized labor believed that Section 20 of the Clayton Act had been designed to do. The Norris-LaGuardia Act has continued to serve as a barrier against unwarranted judicial incursion into labor disputes to the present day, although somewhat modified by judicial construction in 1970. One of the authors of the Norris-LaGuardia Act was Felix Frankfurter, then Professor of Law at Harvard University. In his 1930 gloss on the proposed statute, The Labor Injunction, Frankfurter paid deference to the mode of judicial analysis which he hoped to see used in the federal courts. “The analysis for application is the one articulated in the classic dissent by Mr. Justice Holmes in Vegelahn v. Guntner, and adopted by the majority in Plant v. Woods. Self-interest, in its undefined amplitude, is the end that justifies.” Reviewing the divergent results which various theories had brought about in the state and federal courts, Frankfurter concluded that

171. 274 U.S. 37 (1927).
172. Id. at 54.
173. Id. at 56-65.
175. In Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), the Supreme Court held that the prohibitions of the Norris-LaGuardia Act were not so absolute as they had seemed, and that while entertaining an action brought under §301(a) of the Taft-Hartley Act, 29 U.S.C. §185(a) (1976), a federal district court may issue an injunction in circumstances where the grievance of the union was arbitrable and its strike was causing irreparable injury to an employer.
177. Id. at 27.
a comprehensive statute was the best insurance against judicial decisions based upon analytical error or extra-legal grounds.

CONCLUSION

In modern times, the ideal that peaceful picketing is lawful is a maxim raised periodically to constitutional status. Today, Vegetlahn is rarely cited, and then only for its antiquarian interest, or by those indefatigable Holmesians who find enduring truth in his canons. Experience has proven Holmes correct in his analysis; and in the law, as Holmes so aptly demonstrated, experience is the most important ingredient.

Holmes took issue with the conventional logic of the law as he found it, and argued that the peaceful concerted activity of workers to further their own interests should not be viewed as interference with the right of an employer to conduct its business and, therefore, as a tort, subject to liability and injunction. The force of this re-examination of legal analysis, by a respected and prominent legal philosopher and historian acting in his official judicial capacity, was too great to be ignored. The attention it gained, and the thought it provoked, eased the profound change brought to the American law of labor relations in the first third of this century.

The purpose of this exposition has been to demonstrate the utility of the judicial dissenting opinion. It is a thought which ought not to be a

178. Thornill v. Alabama, 310 U.S. 88 (1940); but see Hudgens v. NLRB, 424 U.S. 507 (1976). It is now the rule of the U.S. Supreme Court that peaceful picketing is privileged and to be protected even at the risk of incidental violence or intimidation, thus marking a complete reversal of the holding in Vegetlahn. See NLRB v. International Rice Milling Co., 341 U.S. 665 (1951); Youngdahl v. Rainfair, 355 U.S. 131 (1957). I concede, as my colleague Professor Karl Klare has urged, that Teamsters, Local 695 v. Vogt, 354 U.S. 284 (1957), allows states in formulating local law to revert to an "unlawful objective" test for judging the validity of picketing.

179. E.g., Republic Steel Corp. v. United Mine Workers, 570 F.2d 467 (3d Cir. 1978).

180. Their numbers have inexorably declined with the deaths of those who knew him, but their commitments were wonderful. Jerome Frank, a true disciple [see J. FRANK, LAW AND THE MODERN MIND (1930)] while a judge of the federal court of appeals for the second circuit, produced a chain of nine opinions in four years on subjects as diverse as government contracts, trademark infringement, and wrongful death actions, each of which managed to include a reference to the Vegetlahn dissent to bolster an obscure point. M. Witmark & Sons v. Fred Fisher Music Co., Inc. 125 F.2d 949, 954 (2d Cir. 1942) (Frank, J., dissenting); Perkins v. Endicott Johnson Corp., 128 F.2d 208 (2d Cir. 1942); Beidler & Bookmyer, Inc. v. Universal Ins. Co., 134 F.2d 828 (2d Cir. 1944); Eastern Wine Corp. v. Winslow-Warren, Ltd., 137 F.2d 955 (2d Cir. 1943); cert. denied, 320 U.S. 758 (1943); United States v. Liss, 137 F.2d 995, 1001 (1943) (Frank, J., dissenting opinion), cert denied, 320 U.S. 733 (1943); Package Closure Corp. v. Sealright Co., Inc., 141 F.2d 972 (2d Cir. 1944); Doehler Metal Furniture Co., Inc. v. United States, 149 F.2d 130 (2d Cir. 1945); Standard Brands, Inc. v. Smidler, 151 F.2d 34, (2d Cir. 1945) (Frank, J., concurring); Ricketts v. Pennsylvania R.R., 153 F.2d 757, 760 (2d Cir. 1946) (Frank, J., concurring).

controversial point; but, nonetheless, it is one which should be repeated from time to time. A desire for judicial unanimity is often expressed, but much less often proved necessary. That might be because unanimity is neither as essential nor as worthwhile as some think. Students of jurisprudence have seen dissents transformed into majority opinions frequently enough to be able to doubt the general proposition. Judicial inspiration in any form is a goal to be sought.

182. Holmes did so, himself. Writing of the fallacy that the only force in the development of law is logic, he criticized

... the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct .... So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come .... We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.


184. Among the most important of these transmutations was Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J. dissenting) into Brown v. Board of Education, 347 U.S. 483 (1954); among the most speedy was Minersville School District v. Gobitis, 310 U.S. 586, 601 (1940) (Stone, J. dissenting) into Board of Education v. Barnette, 319 U.S. 624 (1943); among the most unpleasant was Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962) (Brennan, J., dissenting) into Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970), where Mr. Justice Black (whose opinion for the Court in Sinclair was being discarded) wrote bitterly, "nothing at all has changed, in fact, except the membership of the Court and the personal views of one Justice." 398 U.S. at 256 (Black, J. dissenting). Several of the dissents written by Holmes while a member of the U.S. Supreme Court subsequently became the basis for reversals of opinion by the Court. Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (Holmes, J. dissenting) was succeeded by U.S. v. Darby, 312 U.S. 100 (1940); Adkins v. Children's Hospital, 261 U.S. 525, 567 (1923) (Holmes, J. dissenting) was succeeded by West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Tyson and Brother v. Banton, 273 U.S. 418, 445 (1927) (Holmes, J. dissenting) was succeeded by Nebbia v. New York, 291 U.S. 502 (1934); Toledo Newspaper Co. v. U.S. 247 U.S. 402, 422 (1918) (Holmes, J. dissenting) was succeeded by Nye v. U.S. 313 U.S. 33 (1941); Long v. Rockwood, 277 U.S. 142, 148 (1928) (Holmes, J. dissenting) was succeeded by Fox Film Corp. v. Doyal, 286 U.S. 123 (1932). Holmes was well aware of the possibility of subsequent change and may have anticipated the shift which came in Plant v. Woods: when he opened his dissent in Vegelahn with these words: "In a case like the present, it seems to me that, whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated ...." Vegelahn v. Gunter, 167 Mass. at 104, 44 N.E. at 1079.