SECOND RESTATEMENT OF TORTS

§ 766B. Intentional Interference with Prospective Contractual Relation

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

§ 767. Factors in Determining Whether Interference is Improper

In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:

(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

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Oliver Wendell Holmes,

PRIVILEGE, MALICE, AND INTENT *

8 Harv. L. Rev. 1 (1894)

THE law of torts as now administered has worked itself into substantial agreement with a general theory. I should sum up the first part of the theory in a few words, as follows: Actions of tort are brought for temporal damage. The law recognizes temporal damage as an evil which its object is to prevent or to redress, so far as is consistent with paramount considerations to be mentioned. When it is shown that the defendant's act has had temporal damage to the plaintiff for its consequence, the next question is whether that consequence was one which the defendant might have foreseen. If common experience has shown that some such consequence was likely to follow the act under the circumstances known to the actor, he is taken to have acted with notice, and is held liable, unless he escapes upon the special grounds to which I have referred, and which I shall mention in a moment.

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But the simple test of the degree of manifest danger does not exhaust the theory of torts. In some cases, a man is not liable for a very manifest danger unless he actually intends to do the harm complained of. In some cases, he even may intend to do the harm and yet not have to answer for it: and, as I think, in some cases of this latter sort, at least, actual malice may make him liable when without it he would not have been. In this connection I mean

[1] 2 Bigelow, Fraud, 117, n. 3; Commonwealth v. Pierce, 138 Mass., 165. Compare Hanson v. Globe Newspaper Co., 159 Mass., 293.

[2] See The Common Law, Ch. 2, 3, 4.

by malice a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another.[3] The question whether malice in this sense has any effect upon the extent of a defendant's rights and liabilities, has arisen in many forms. It is familiar in regard to the use of land in some way manifestly harmful to a neighbor. It has been suggested, and brought to greater prominence, by boycotts, and other combinations for more or less similar purposes, although in such cases the harm inflicted is only a means, and the end sought to be attained generally is some benefit to the defendant. But before discussing that, I must consider the grounds on which a man escapes liability in the cases referred to, even if his act is not malicious.

It will be noticed that I assume that we have got past the question which is answered by the test of the external standard. There is no dispute that the manifest tendency of the defendant's act is to inflict temporal damage upon the plaintiff. Generally, that result is expected, and often at least it is intended. And the first question that presents itself is why the defendant is not liable without going further. The answer is suggested by the commonplace, that the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause.[4] When the defendant escapes, the court

[3] See Rideout v. Knox, 148 Mass., 368, 373.

[4] Walker v. Cronin, 107 Mass., 555, 562; Mogul Steamship Co. v. McGregor, 23 Q.B.D. 598, 613, 618.

is of opinion that he has acted with just cause. There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of.

But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.

When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair.

For instance, a man has a right to set up a shop in a small village which can support but one of the kind, although he expects and intends to ruin a deserving widow who is established there already. He has a right to build a house upon his land in such a position as to spoil the view from a far more valuable house hard by. He has a right to give honest answers to inquiries about a servant, although he intends thereby to prevent his getting a place. But the reasons for these several privileges are different. The first rests on the economic postulate that free competition is worth more to society than it costs. The next, upon the fact that a line must be drawn between the conflicting interests of adjoining owners, which necessarily will restrict the freedom of each;[1] upon the unavoidable philistinism which prefers use to beauty when considering the most profitable way of administering the land in the jurisdiction taken as one whole; upon the fact that the defendant does not go outside his own boundary; and upon other reasons to be mentioned in a moment. The third, upon the proposition that the benefit of free access to information, in some cases and within some limits, outweighs the harm to an occasional unfortunate. I do not know whether the principle has been applied in favor of a servant giving a character to a master.

Not only the existence but the extent or degree of the privilege will vary with the case. Some privileges are spoken of as if they were absolute, to borrow the language familiar in cases of slander. For

[1] See Middlesex Company v. McCue, 149 Mass. 103, 104; Boston Ferrule Company v. Hills, 159 Mass. 147, 149, 150.

instance, in any common case, apart from statutory exceptions, the right to make changes upon or in a man's land is not affected by the motive with which the changes are made. Were it otherwise, and were the doctrine carried out to its logical conclusion, an expensive warehouse might be pulled down on the finding of a jury that it was maintained maliciously, and thus a large amount of labor might be wasted and lost. Even if the law stopped short of such an extreme, still, as the motives with which the building was maintained might change, the question would be left always in the air. There may be other and better reasons than these and those mentioned before, or the reasons may be insufficient.[1] I am not trying to justify particular doctrines, but to analyze the general method by which the law reaches its decision.

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Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as law-makers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree. Even the economic postulate of the benefit of free competition which I have mentioned above, is denied by an important school.

Let me illustrate further. In England, it is lawful for merchants to combine to offer unprofitably low rates and a rebate to shippers for the purpose of preventing the plaintiff from becoming a competitor, as he has a right to do, and also to impose a forfeiture of the rebate, and to threaten agents with dismissal in case of dealing with him.[11] But it seems to be unlawful for the officer of a trade union to order the members not to work for a man if he supplies goods to the plaintiff, for the purpose of forcing the plaintiff to abstain from doing what he has a right to do.[12]

In the latter case the defendant's act, strictly, was giving an order, not refusing to contract; but perhaps the case would have been decided the same way if the same course had been adopted by unanimous vote of the union.[13] So the right to abstain from contracting is not absolutely privileged as against interference with business. The combination and the intent to injure the plaintiff, without more, do not seem to be the ground. Both those elements were present to an equal degree in the Mogul Steamship Company's case. It is true the jury found malice.

[11] Mogul Steamship Company, Limited, *v.* McGregor, 1892, App. Cas. 25; 23 Q.B.D. 598. See also Bowen *v.* Matheson, 14 Allen, 499 (1867); Bohn Manufacturing Company *v.* Hollis, 55 N.W.R. 1119 (Minnesota, 1893).

[12] Temperton *v.* Russell, 1893, 1 Q. B. 715.

[13] See Carew *v.* Rutherford, 106 Mass. 1, and the cases below, as to combination. See, also, the further comments toward the end of this article.

But looking at the evidence, the instructions of the judge, and the judgments, evidently they did not mean that the ultimate motive of the defendants was not to benefit themselves. The defendants meant to benefit themselves by making the plaintiff submit, just as, in the other case, the defendants meant to benefit themselves by driving the plaintiff away.

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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.

Another illustration may be drawn from other cases upon boycotts. Acts which would be privileged if done by one person for a certain purpose may be held unlawful if done for the same purpose in combination.[14] It is easy to see what trouble may be found in distinguishing between the combination of great powers in a single capitalist, not to speak of a corporation, and the other form of combination.[15] It is a question of degree at what point the combination becomes large enough to be wrong, unless the knot is cut by saying that any combination however puny is so. Behind all is the question whether the courts are not flying in the face of the organization of the world which is taking place so fast, and of its inevitable consequences. I make these suggestions, not as criticisms of the decisions, but to call attention to the very serious legislative considerations which have to be weighed. The danger is that such considerations should have their weight in an inarticulate form as unconscious prejudice or half conscious inclination. To measure them justly needs not only the highest powers of a judge and a training which the practice of the law does not insure, but also a freedom from prepossessions which is very hard to attain. It seems to me desirable that the work should be done with express recognition of its nature. The time has gone by when law is only an unconscious embodiment of the common will. It has become a conscious reaction

[14] See State *v.* Donaldson, 32 N.J. 151; State *v.* Glidden, 55 Conn. 46; Camp *v.* Commonwealth, 84 Va. 927; Lucke *v.* Clothing Cutters' & Trimmers' Assembly No. 7, 507, K. of L., 26 Atl. R. 505; Jackson *v.* Stanfield, 36 N.E.R. 345 (Indiana, 1894); Mogul Steamship Company *v.* McGregor, 23 Q.B.D. 598, 616 (1892); App. Cas. 25, 45. The cases are not quite unanimous. Bohn Manufacturing Co. *v.* Hollis, 55 N.W.R. 1119 (Minnesota, 1893).

[15] 23 Q.B.D. 617.

upon itself of organized society knowingly seeking to determine its own destinies.

To sum up this part of the discussion, when a responsible defendant seeks to escape from liability for an act which he had noticed was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification. The most important justification is a claim of privilege. In order to pass upon that claim, it is not enough to consider the nature of the damage, and the effect of the act, and to compare them. Often the precise nature of the act and its circumstances must be examined. It is not enough, for instance, to say that the defendant induced the public, or a part of them, not to deal with the plaintiff. We must know how he induced them. If by refusing to let them occupy a building, or to employ them, the answer may be peremptory in his favor, without regard to other circumstances. If by acts wrongful for other reasons, the answer falls outside my subject. If by advice, or combined action not otherwise unlawful, motive may be a fact of the first importance. It is entirely conceivable that motive, in some jurisdictions, should be held to affect all, or nearly all, claims of privilege. The cases which I have cited, by way of illustration, come from different States, and might not be regarded as being so consistent with each other as I have assumed them to be. But in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed.

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VEGELAHN v. GUNTNER

Supreme Judicial Court of Massachusetts, 1896.
167 Mass. 92, 44 N.E. 1077.

After a preliminary hearing an injunction *pendente lite* was issued restraining the union from picketing the plaintiff's factory. The hearing on the merits was before Holmes, J.; who reported the case for the consideration of the full court. His proposed final decree did not enjoin the union from using "social pressure and persuasion" to prevent the employer from getting workmen; but enjoined the union "from interfering with the plaintiff's business by obstructing or physically interfering with any person in entering or leaving the plaintiff's premises . . . or by intimidating, by threats, express or implied, of violence or physical harm to body or property, any person or persons who now are or hereafter may be in the employment of the plaintiff, or desirous of entering the same . . ."

ALLEN, J. The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory maintained from half past six in the morning till half past five in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued, if not enjoined. There was also some evidence of persuasion to break existing contracts.

The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It 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. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the Constitution itself. Commonwealth v. Perry, 155 Mass. 117, 28 N.E. 1126, 14 L.R.A. 325, 31 Am.St.Rep. 533. People v. Gillson, 109 N.Y. 389, 17 N.E. 343, 4 Am.St.Rep. 465. Braceville Coal Co. v. People, 147 Ill. 66, 71, 35 N.E. 62, 22 L.R.A. 340, 37 Am.St.Rep. 206. Ritchie v. People, 155 Ill. 98, 40 N.E. 454, 29 L.R.A. 79, 46 Am.St. Rep. 315. Low v. Rees Printing Co., 41 Neb. 127, 59 N.W. 362, 24 L.R.A. 702, 43 Am.St.Rep. 670. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. In Massachusetts, as in some other States, it is even made a criminal offence for one by intimidation or force to prevent or seek to prevent a person from entering into or continuing in the employment of a person or corporation. Pub.Sts. c. 74, section 2. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307, 9 Am.St.Rep. 689. It was declared to be unlawful in Regina v. Druitt, 10 Cox C.C. 592; Regina v. Hibbert, 13 Cox C.C. 82; and Regina v. Bauld, 13 Cox C.C. 282. It was assumed to be unlawful in Trollope v. London Building Trades Federation, 11 T.L.R. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases, and, when instituted for the purpose of interfering with his business, it became a private nuisance. See Carew v. Rutherford, 106 Mass. 1; Walker v. Cronin, 107 Mass. 555; Barr v. Essex Trades Council, 53 N.J.Eq. 101, 30 A. 881; Murdock v. Walker, 152 Penn.St. 595, 25 A. 492; Wick China Co. v. Brown, 164 Penn.St. 449, 30 A. 261; Coeur D'Alene Consol. & Min. Co. v. Miners' Union, 51 F. 260; . . . .

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. Various decided cases fall within the former class, for example: Worthington v. Waring, 157 Mass. 421, 32 N.E. 744; Snow v. Wheeler, 113 Mass. 179; Bowen v. Matheson, 14 Allen 499; Commonwealth v. Hunt, 4 Metc. 111; Heywood v. Tillson, 75 Me. 225; Cote v. Murphy, 159 Pa. 420, 28 A. 190; Bohn Manuf. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119; Mogul Steamship Co. v. McGregor, [1892] A.C. 25; Curran v. Treleaven, [1891] 2 Q.B. 545, 561. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime. Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307. In re Debs, 158 U.S. 564, 593, 599, 15 S.Ct. 900. . . .

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts. Walker v. Cronin, 107 Mass. 555, 565. Carew v. Rutherford, 106 Mass. 1. Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307. Temperton v. Russell, [1893] 1 Q.B. 715, 728, 731. Floyd v. Jackson, 11 L. T.R. 276.

In the opinion of a majority of the court the injunction should be in the form originally issued.

So ordered.

Field, C. J., dissenting [omitted].

HOLMES, J., dissenting. 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, and therefore, although when I have been unable to bring my brethren to share my convictions my almost invariable practice is to defer to them in silence, I depart from that practice in this case, notwithstanding my unwillingness to do so in support of an already rendered judgment of my own.

In the first place, a word or two should be said as to the meaning of the report. I assume that my brethren construe it as I meant it to be construed, and that, if they were not prepared to do so, they would give an opportunity to the defendants to have it amended in accordance with what I state my meaning to be. There was no proof of any threat or danger of a patrol exceeding two men, and as of course an injunction is not granted except with reference to what there is reason to expect in its absence, the question on that point is whether a patrol of two men should be enjoined. Again, the defendants are enjoined by the final decree from intimidating by threats, express or implied, of physical harm to body or property, any person who may be desirous of entering into the employment of the plaintiff so far as to prevent him from entering the same. In order to test the correctness of the refusal to go further, it must be assumed that the defendants obey the express prohibition of the decree. If they do not, they fall within the injunction as it now stands, and are liable to summary punishment. The important difference between the preliminary and the final injunction is 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." I quote only a part, and the part which seems to me most objectionable. This includes refusal of social intercourse, and even organized persuasion or argument, although free from any threat of violence, either express or implied. And this is with reference to persons who have a legal right to contract or not to contract with the plaintiff, as they may see fit. Interference with existing contracts is forbidden by the final decree. I wish to insist a little that the only point of difference which involves a difference of principle between the final decree and the preliminary injunction which it is proposed to restore, is what I have mentioned, in order that it may be seen exactly what we are to discuss. It appears to me that the judgment of the majority turns in part on the assumption that the patrol necessarily carries with it a threat of bodily harm. That assumption I think unwarranted, for the reasons which I have given. Furthermore, 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. I do not think it possible to discriminate, and to say that two workmen, or even two representatives of an organization of workmen, do,—especially when they are, and are known to be, under the injunction of this court not to do so. See Stimson, Handbook to Labor Law, section 60, esp. pp. 290, 298, 299, 300; Regina v. Shepherd, 11 Cox C.C. 325. I may add, that I think the more intelligent workingmen believe as fully as I do that they no more can be permitted to usurp the State's prerogative of force than can their opponents in their controversies. But if I am wrong, then the decree as it stands reaches the patrol, since it applies to all threats of force. With this I pass to the real difference between the interlocutory and the final decree.

I agree, whatever may be the law in the case of a single defendant, Rice v. Albee, 164 Mass. 88, 41 N.E. 122, that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. Walker v. Cronin, 107 Mass. 555. Morasse v. Brochu, 151 Mass. 567, 25 N.E. 74. Tasker v. Stanley, 153 Mass. 148, 26 N.E. 417.

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, 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 considerations 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. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready.

To illustrate what I have said in the last paragraph, it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. In such a case he is not held to act "unlawfully and without justifiable cause," as was alleged in Walker v. Cronin and Rice v. Albee. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. Commonwealth v. Hunt, 4 Metc. 111, 134. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them.

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal, or threat to withdraw, such advantages 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. Commonwealth v. Hunt, 4 Metc. 111, 132, 133. Bowen v. Matheson, 14 Allen 499. Heywood v. Tillson, 75 Maine 225. Mogul Steamship Co. v. McGregor [1892] A.C. 25.

I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do, that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences. So as to "compulsion," it depends on how you "compel." Commonwealth v. Hunt, 4 Metc. 111,

133. So as to "annoyance" or "intimidation." Connor v. Kent, Curran v. Treleaven, 17 Cox C.C. 354, 367, 368, 370. In Sherry v. Perkins, 147 Mass. 212, it was found as a fact that the display of banners which was enjoined was part of a scheme to prevent workmen from entering or remaining in the plaintiff's employment, "by threats and intimidation." The context showed that the words as there used meant threats of personal violence, and intimidation by causing fear of it.

I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. 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.

So far, I suppose, we are agreed. But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle. Commonwealth v. Hunt, 4 Metc. 111. Randall v. Hazelton, 12 Allen 412, 414. There was combination of the most flagrant and dominant kind in Bowen v. Matheson and in the Mogul Steamship Company's case, and combination was essential to the success achieved. But it is not necessary to cite cases; it is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, 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.

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. I am unable to reconcile Temperton v. Russell, [1893] 1 Q.B. 715, and the cases which follow it, with the Mogul Steamship Company case. But Temperton v. Russell is not a binding authority here, and therefore I do not think it necessary to discuss it.

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is disassociated from any threat of violence, and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages. The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist, does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw, in Commonwealth v. Hunt, 4 Metc. 111. . . .

Summers & Wellington, Cases & Materials on Labor Law (1st ed. 1968)

Note on Picketing and Who Shall Decide Whether It is Peaceful

Both Holmes and the majority agree that physical violence and threats of personal injury are unlawful, for Holmes accepts that the law must place limits on the free struggle for life. The implementation of this rule would seem to be particularly fit for the judicial process, for it is predominantly a question of fact to be determined on a case by case basis. But as the opinions in *Vegelahn v. Guntner* suggest, the determination often involves far more than the weighing of evidence. The problem is most sharply posed in picketing cases, for no debate in labor law has created more judicial heat and semantic smoke than the question of when picketing constitutes unlawful coercion and intimidation. The following cases, though not indicative of present law, reveal the temper of the debate and give clues to the deeper disagreement.

(a) In Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324 (1909), the union picketed to induce the employer to employ union members. The court held that although the union was free to persuade customers not to patronize the employer, it could not use the "coercive measure" of picketing. The court declared:

> "A picket, in its very nature . . . tends and is designed by physical intimidation, to deter other men from seeking employment in places vacated by the strikers. It tends and is designed to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect, disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason."

In a similar view, other courts have declared that "'peaceful picketing' is a self-contradiction and aptly describes nothing that is known to man." Cooper Co. v. Los Angeles Building Trades Council, 3 C.C.H. Lab.Cas. 60, 728 at 731 (Cal.Super.Ct.1941); and "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing or lawful lynching", Atchison, T. & S. F. Ry. Co. v. Gee, 139 F. 582 at 584 (C.C.Iowa, 1905). "A single sentinel, constantly parading in front of a place of employment for any extended length of time may be just as effective in striking terror to the souls of employes, bound there by their duty, as was the swinging pendulum in Poe's famous story 'The Pit And The Pendulum' to the victim chained in its ultimate path. In fact, silence is sometimes more striking and impressive than the loud mouthings of the mob. It is the show of force back of the demonstration, or the inevitableness of the impending disaster, which tries men's souls and drives them to desperation." Gevas v. Greek Restaurant Workers' Club, 99 N.J.Eq. 770, 783, 131 A. 309, 314 (1926).

(b) In People v. Nixon, 248 N.Y. 182, 161 N.E. 463 (1928) a group of pickets were charged with "disorderly conduct." Twenty pickets were parading four abreast in front of the employer's premises, taking up half of the sidewalk. The court, in holding that this conduct did not "tend to a breach of the peace", stated:

> "There is no suggestion in the record that the defendants' march up and down the street was not quiet and orderly. There is no suggestion that the defendants' demeanor was threatening, abusive or insulting, or that any person on the street or elsewhere believed he was being threatened, insulted or abused. . . . They were guilty, we may well concede, of atrociously bad manners, and they discommoded some other persons . . . There is no evidence that the persons discommoded showed any particular annoyance. Perhaps bad manners are too usual to evoke unusual irritation or annoyance. As yet bad manners have not been made punishable by imprisonment.
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> "It has been said at times that picketing in large numbers near a place of business where a strike is in progress is in itself a threat of violence, and invites counterviolence. Circumstances may in particular cases justify a finding to that effect . . . In the absence of evidence, we may not infer that the conduct of the defendants was intended as a threat, or could be so construed, or was an incentive to violence by others."

In a similar tenor, another court said, "The law recognizes the right of peaceful picketing. Although that term is sometimes criticized as a contradictory one, since the word 'picketing' is taken from the nomenclature of warfare and is strongly suggestive of a hostile attitude, it has acquired a significance and meaning commonly understood. It connotes peaceable methods of presenting a cause to the public in the vicinity of the employer's premises. . . . Such picketing or publicity is not per se unlawful." Music Hall Theater v. Moving Picture Machine Operators Local 165, 249 Ky. 639, 642–43, 61 S.W.2d 283, 285 (1933).

(c) In Keith Theatre, Inc. v. Vachon, 134 Me. 392, 187 A. 692 (1936), the union picketed a non-union theatre to induce the employer to adopt the union scale and the closed shop. None of the employees were members of the union or engaged in the picketing. The trial court found no intimidation of the employees or patrons, but the upper court in finding the picketing coercive said:

> "Even peaceable picketing is not intended to affect only the employer and its employees. Its purpose is to involve the public in the controversy. It seeks to use the public as a cudgel. Besides desiring to secure its approval on the merits of the issue, its particular purpose is so to arouse and inflame it that it will not patronize the employer unless under compulsion the employer accedes to the demands of the picketers. Fair argument failing, loss of patronage by its incited customers must make the employer abandon its lawful right to manage, control and perhaps save its business."

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Robert Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining (1976)

§ 3. The Right to Picket

Unlike the right of private-sector employees to strike, their right to engage in picketing in support of organizational or bargaining demands has been the subject of considerable constitutional litigation, the course of which has been rather serpentine. At common law, courts readily issued injunctions against labor picketing, at first because such concerted activity was regarded as intrinsically coercive and tortiously disruptive to the employer's business, and later because the picketing was deemed to serve ends, such as the closed shop or the secondary boycott, which the courts disapproved. In such a legal milieu, the labor injunction could hardly have been viewed as depriving employees of liberty without due process of law or as impinging upon any constitutional right of free speech. Indeed, the United States Supreme Court held that a state statute making *lawful* all peaceful strikes, picketing and boycotts (in the absence of independent torts) and thus blocking the issuance of an injunction against group picketing amounted to a denial of due process and equal protection of the laws to the complaining employer. Truax v. Corrigan (U.S.1921).

In Thornhill v. Alabama (U.S.1940), however, the United States Supreme Court drastically revised its position and struck down as unconstitutional on its face a state statute declaring it a crime to picket a place of business for the purpose of interfering with that business. The attempt through peaceful persuasion on the part of a picket to convince a co-employee to honor the strike was assimilated by the Court to an exercise of free speech with the object of communicating the facts concerning the labor dispute, a matter of public interest, and was thus protected by the due process clause of the Fourteenth Amendment against unqualified governmental intrusion. The Court noted that the statute barring picketing was absolute on its face and had made no exceptions depending upon the number of pickets, the manner in which they conducted themselves, or the cause of the labor dispute. *Thornhill* was later applied in an injunction case, the Court striking down as unconstitutional an injunction against organizational picketing based on a state policy barring such appeals by "strangers" in the absence of an immediate dispute between an employer and its own employees. AFL v. Swing (U.S.1941).

It was not long, however, before the Court's decisions marked a retreat from this treatment of labor picketing as akin to "pure" political discourse. The Court came to acknowledge that "picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." Bakery Drivers Local 802 v. Wohl (U.S.1942) (Douglas, J., concurring). This characterization of labor picketing as "speech plus" was not in itself sufficient to alter drastically the constitutional implications, for even "pure speech" can properly be outlawed by government when employed in pursuit of an illicit objective (*e. g.,* criminal conspiracy) and even conduct may be constitutionally protected against governmental interference which is based on no substantial public interest. The Court's increasing willingness to sustain state restrictions upon peaceful picketing was thus attributable to its holding that states could legitimately assert certain specific local policies and thus render their interference with picketing immune to constitutional attack.

In "balancing" the interest of the picketers in dramatically appealing to employees and customers and the countervailing state interests, the Court sustained state-court injunctions against picketing in the nature of secondary boycotts (which violated the state antitrust laws). Carpenters Local 213 v. Ritter's Cafe (U.S.1942); Giboney v. Empire Storage & Ice Co. (U.S.1949). It also upheld against constitutional attack a state-court injunction against picketing designed to induce the employer to hire its employees in proportion to the race of its customers (and which thus violated the state policy against involuntary hiring on the basis of race), Hughes v. Superior Court (U.S.1950); and state-court injunctions against organizational or recognition picketing which was designed to induce the employer to compel its employees to join the union which was sponsoring the picketing (and which thus violated the state policy barring employer coercion of employees in the selection of their bargaining representative), Building Serv. Employees Local 262 v. Gazzam (U.S.1950). See Teamsters Local 695 v. Vogt, Inc. (U.S.1957) (thorough treatment of earlier Court decisions). This disinclination to use the First and Fourteenth Amendments to strike down state control of picketing continues today, even in situations where it might be argued that the communicational interests of the employees and of the public are no less weighty (and the interference with the business of the employer no more severe) than in *Thornhill.* See American Radio Ass'n v. Mobile S.S. Ass'n (U.S.1974) (state court enjoined dockside picketing of foreign ship in American port; Supreme Court found valid state interest in preventing both interference with business of stevedores seeking to unload the ship as well as the potential tie-up of the port and loss to farmers seeking to ship agricultural goods).

Contemporaneously with this constitutional evolution away from comprehensive protection for concerted activities, Congress was utilizing its own statutory authority to forbid and otherwise regulate such union activities as secondary boycotts, work-assignment strikes, strikes and picketing linked to so-called featherbedding, and certain types of recognition picketing. These limits were effected through the enactment of union unfair labor practice provisions in section 8(b) of the Taft-Hartley amendments of 1947. While the Supreme Court's constitutional decisions thus rendered such federal regulation (as much as state regulation) immune from attack, comparable state regulation was soon held to be ousted by the preemptive effect of specific provisions of the federal Labor Act which make picketing either protected under section 7 or prohibited under section 8.

John Nockleby, Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract and Tort, 93 Harv. L. Rev. 1510, 1537-39 (1980)

IV. The Emergence of Balancing

By the end of the nineteenth century many courts and commentators recognized the impossibility of simultaneously protecting both competitive and property interests. As Holmes noted, "[t]he two advantages run against one another, and a line has to be drawn."[131] Formal reasoning could not resolve the dilemma, nor could blind appeal to conclusory doctrines such as malice. Finally, in the twentieth century, external and internal changes were made in an effort to resolve the conflict. Externally, the source of much conflict, labor relations, was removed from the purview of the tort. Instead, an administrative agency, the National Labor Relations Board, was created to oversee labor-management struggles and a body of statutory law is used to resolve conflicts.[132]

The internal response to the conflict between plaintiffs' property and defendants' competitive interests took two forms. First, various rules were developed that qualified both

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[128] Holmes, *supra* note 99; *see* Plant v. Woods, 176 Mass. 492, 499, 57 N.E. 1011, 1014 (1900). *Compare* Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 55 N.W. 1119 (1893) (holding that malice is not actionable), *with* Steffes v. Motion Picture Mach. Operators Union, 136 Minn. 200, 161 N.W. 524 (1915) (holding malice is actionable).

[129] *See, e.g.*, Doremus v. Hennesy, 176 Ill. 608, 52 N.E. 924 (1898).

[130] *See* Henderson, *Malicious Motive as a Ground of Action*, 13 JUR. REV. 452, 461 (1901) (the result of the English interference decisions between 1881 and 1901 demonstrates that "[t]he conception of legal malice . . . mean[s] little more than mere intention").

[131] Holmes, *supra* note 99, at 6.

[132] *See* National Labor Relations (Wagner) Act of 1935, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151–169 (1976)); Norris-LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115 (1976)). *But cf.* Klare, *Judicial Deradicalization of the Wagner Act*, 62 MINN. L. REV. 265 (1978) (arguing that Supreme Court has interpreted Wagner Act with reference to common law contract principles).

parties' rights and privileges. For example, term, at will, and mere prospective contracts no longer received equivalent protection.[133] By the 1920's, some courts urged that a plaintiff's contractual interests deserved greater protection from interference when he had secured his expectation against the other party through an explicit agreement for a fixed term than when either party could terminate the contract at will.[134] And even less protection seemed appropriate when the plaintiff had never signed a contract but had merely hoped to reach some agreement in the future. Similarly, the defendant's ability to invoke a privilege to compete for business was qualified. The defendant's motive for acting became relevant in determining whether a privilege exists, but the mere classification of him as a competitor of the plaintiff's, or a friend of the breaching party, would not automatically serve as a defense. The right to compete was unlikely to privilege acts such as that encountered in *Mogul Steamship*.[135]

The second internal response to the demise of formalistic reasoning was an attempt to "balance" the conflicting interests. Beginning with Holmes, a new view of legal analysis emerged that maintained that intelligent lawmaking, like intelligent policymaking, must consider the social consequences of legal rules; courts must attempt to weigh the interests of the plaintiff, the defendant, and the society to find an appropriate solution to a legal controversy. In the interference context, a leading scholar, Professor Carpenter, wrote in 1928,

> [W]hether a privilege of invasion exists depends upon whether it is of greater moment to society to protect the defendant in the invading activities than it is to protect and guard the plaintiff's interest from such invasions. An evaluation and balancing of the social import of the conflicting interests of the respective parties and of the social interests *per se* are involved.[136]

No interest of either party is so absolute that the other party will not at times succeed in the litigation. Each case rests on its own facts, and the process of "weighing" the various interests involved admits of sufficient discretion to permit courts to override a party's claim or defense if social policy so requires.

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[133] W. PROSSER, LAW OF TORTS 933 (4th ed. 1971).

[134] *See, e.g.*, Beekman v. Marsters, 195 Mass. 205, 80 N.E. 817 (1907) (competition excuses interference with either at will or prospective agreements); Posner Co. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918) (recovery for interference subject to existence of express contract for definite period of time); DeJong v. Behrman Co., 148 A.D. 37, 131 N.Y.S. 1083 (1911) (interference tort limited to use of fraudulent means to break existing contracts); RESTATEMENT OF TORTS § 766, Comment b, at 52 (1939) ("[t]he added element of a definite contract may be a basis for greater protection"). It should be noted that the same privilege to compete did not yet extend to labor unions. *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

[135] [1892] A.C. 25; *see* pp. 1530–31 *supra*.

[136] Carpenter, *supra* note 109, at 745.

The Stakes of Law, or Hale and Foucault!

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Introduction

I started law school in 1967 with a sense that the "system" had a lot of injustice in it, meaning that the distribution of wealth and income and power and access to knowledge seemed unfairly skewed along class and race lines. I thought law was important in the skewing process and in efforts to make distribution fairer, but I had no clear idea how or why. This article describes what I think I have found out in the intervening 25 years about this elemental question.

In the 1920s and 30s, the legal realist institutional economists, and most particularly Robert Hale, worked out an analysis of the role of law in the distribution of income between social classes that retains its power today.[1] The basic idea is that the rules of property, contract and tort law (along with the criminal law rules that reinforce them in some but not all cases) are "rules of the game of economic struggle." As such, they differentially and asymmetrically empower groups bargaining over the fruits of cooperation in production.

In the 1970s, Michel Foucault and his collaborators developed an analysis of "power/knowledge" that has much in common with that of the realists.[2] Foucault gives law an important place in his general social theory, but his version of law is, unfortunately, pre-realist. At the same time, Foucault offers an indispensable antidote to the pre-modern understanding of the "individual" or the "subject" that infuses realist thinking about the economy.

This article is more a rude appropriation of text-fragments of Hale and Foucault than a study of their thought. The motive of the appropriation is to get help in developing a method for analyzing the role of law in the reproduction of social injustice in late capitalist societies. The method would be a pastiche of positive insights from the pragmatist/legal realist/institutional economics school and from post-modernism and post-structuralism. The pastiche would make up in practical usefulness, for example in the study of class, race and gender aspects of low income housing markets, what it lacked in purity of origin. But this article does no more than begin to explore compatibilities and incompatibilities of the two schools.

The focus of this article doesn't mean that I think the only important thing about law is its distributive effect. Legal rules function to distribute, but they also "resolve disputes" in ways that people find more or less fair or just (this is where ideals like altruism and individualism come in). Legal discourse is the language for stating the legal rules that function distributively, but it has many other uses and effects (this is where ideas like legitimation, rationalization, apology and utopia come in).

The Importance of Legal Rules in Determining the Distribution of Income Between Social Classes

> The market value of a property or of a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others (Hale 1943, 625).

A crucial factor in the distribution of income between social classes is bargaining between capital and labor over wages. Labor and capital cooperate (and battle) in the production process, so that the output is a joint product. Nothing tells us a priori how the value of the joint product will be divided. If we analogize bargaining to a game played under rules, the outcome of the game is the distribution of the benefits of cooperation. Each rule of the game, even if stated in a way that "applies to all players," can be analyzed for its impact on the chances of all players. For example, the rules of basketball can be said to favor tall players over short ones, fast ones over slow ones, and so forth. Lowering the height of the net would affect, in complex ways, the relative "ability" of each player.

Bargaining over joint products differs from many games in that the outcome is an agreement. An important goal of the realists was to show that it was unreal to treat the agreement as an instance of "freedom," if what we mean by that is "doing or getting what you want." They preferred to characterize the outcome as the product of "coercion," by which they meant that neither party got what it wanted (the whole joint product) and each had the experience of being "forced" to settle for less.

This recharacterization was important in part because it punctured the conservative economic rhetoric of the time. That rhetoric justified the existing capitalist system on the ground that it was based on freedom (the free market, free labor, freedom of contract, consumer sovereignty) by contrast to socialism, which supposedly replaced all these freedoms with their opposite, namely state coercion. According to the realists, capitalism was as coercive in its way as socialism (see Samuels 1973, 302-23, 354-68).

The realists' analysis was equally hostile to the marxism of the time, which offered a model in which the "absolute impoverishment" of the working class meant that capital was "free" (within the constraints of competition among capitalists), but the working class was coerced into "accepting" an exploitative wage rate. In that model, there is no bargaining at all, since one side has no bargaining power. In the realist model, each side is constrained, each can inflict harm on the other in some ways but not in others, each has limited alternatives to cooperation, and capitalists are as much coerced as workers.

The realists coercion analysis contained a substantive insight, as well, an insight into the role of legal rules. The state uses force to ensure obedience to the rules of the game of bargaining over a joint product. To the extent these rules affect the outcome, forcing the parties to settle for X rather than Y percent of the joint product, the state is implicated in the outcome. It is an author of the distribution even though that distribution appears to be determined solely by the "voluntary" agreement of the parties (see Samuels 1973, 323-44).

Looked at in this way, judges influenced the distribution of income between workers and owners when they decided whether or not a secondary boycott (union refuses to deal with employer X to induce him to stop dealing with employer Y, with whom the union has a dispute) was legal or illegal. When Congress outlawed secondary boycotts, it changed the balance of power between labor and capital. And when judges decide in doubtful cases whether a particular tactic falls into that category, they are deciding the distributive consequences of the statute.

This example is an easy one, because it is intuitively plausible that there was an open legal question at the end of the nineteenth century about the legality of secondary boycotts, and we are now used to thinking of legislation in the labor/management area as at least partly distributively motivated. It seems plausible to see this as a situation in which the "contribution" of the judges and the legislature was to deal with a new situation and then work out the implications of the solution (the NLRA ban on secondary boycotts).

The problem with this way of looking at it is that it distracts attention from the fact that legislators and judges are responsible for the whole network of ground rules within which labor conflict is conducted, including such basic rules as that corporations can "own" factories, that no one "owns" the ocean, that you have no legal obligation to help a starving stranger, that workers can sell their labor and must refrain from taking its product home with them when they have agreed that it will belong to their employer.

Most of the time, these ground rules of the system are just assumed, as are the hundreds and hundreds of other articulated rules that it takes to decide what we <u>mean</u> by "owning a factory." But someone had to decide whether the recognition of employee rights to self-organization in the NLRA did or did not imply a right of union organizers to go onto employers' premises against their will. In other words, they had to decide whether the property rights of the employer, which most lay people assume must include as a matter of course a right to exclude trespassers (just like the right of a residential home owner to exclude trespassers) would or would not trump the right to organize. When the judges decided that under some circumstances the organizer can enter the plant against the employer's will, they altered the distribution of income between the parties.

In the realist analysis, there are two particularly important general categories of rules affecting bargaining strength. The first and more obvious contains the rules governing the conduct of the parties during bargaining. The second contains the set of rules that structure the alternatives to remaining in the bargaining situation.[3]

In the first category are the rules governing strikes, lockouts, picketing, blacklisting, dismissal for union activity, sabotage, boycotts, and so forth. These include both general tort law rules and the rules governing "labor torts" (torts that only occur in labor situations, or which have been defined differently in those situations than in situations not involving labor and management). The category also includes the rules about what contracts will be enforced (for example, the rule invalidating individual worker-employer contracts that attempt to supercede a collective bargaining agreement), about remedies for breach of contract (say, limiting the remedy for an unfair labor practice to back pay and an injunction against future violation), and about compulsory contractual terms (say, the incorporation of the Fair Labor Standards Act into collective bargaining agreements).

The second category includes both the rules that influence the availability and desirability of alternative employment and those that influence the possibility and desirability of abandoning employment altogether and taking up either self-sufficiency or self-employment.

<u>Rules Structuring Bargaining Conduct</u>

The legal rules in the first category appear to most observers to be of no more than marginal interest, because it seems obvious that in the negotiation of the division of the joint products of labor the parties' shares are determined by such things as: (1) their marginal productivity, meaning that how much they get is proportional to their contribution; (2) the scarcity of what they have to offer, so that they can "hold up" others, who need what they have to offer and can't get it elsewhere; (3) their strategic position, say in providing a service that's a small part of the total cost but is absolutely indispensable to the whole operation, so it makes sense to avoid large scale disruption by giving in to what seem disproportionate demands; (4) their bargaining resources, that is, wealth that allows them to hold out for a long time rather than caving in; (5) allies to help out in the struggle; (6) bargaining skill; and (7) crazy intense commitment that makes some people willing to do things that the other party regards as irrational (Nixon's theory in bombing Hanoi). The realist analysis does not deny that all of these factors are profoundly significant. Indeed, the analysis takes them as a starting point.

The point is that each has significance in practice only within the framework of legal rules, and the rules affect each factor's "value" to the parties. If you can't strike at all (public employees), the size of the strike fund is irrelevant. If legal rules impose strict requirements on how much training you must give substitute workers before they can take over strikers' jobs, you have less bargaining power than if you can deploy them immediately. If the employer can discharge you for engaging in union activities (supervisory personnel, such as university professors), you won't be able to cooperate with allies with the same effectiveness as you would if you were protected by law from such conduct. And so forth.

The obvious ways in which legal rules structure the bargain, which mostly have to do with acts of aggression by one party against the other, such as strikes and blacklisting, are only the tip of the iceberg. The whole list of factors that we include in bargaining power is subtly constituted by the legal background. The word "constituted" signals that there just wouldn't be a balance of bargaining power in the way we customarily refer to it without a set of ground rules defining what you can and cannot do to the people you are cooperating with in production when the moment comes when you are fighting over the product.

We can imagine enormous variation in the definition of the ground rules. In almost any type of situation, we can imagine modifying them so far in one direction or another that the outcome of struggles in that type of situation will also be dramatically modified. In this sense, law is at least partially responsible for the outcome of every distributive conflict between classes (see Samuels 1973, 342-44).

The first way to grasp this is with a "partial equilibrium" analysis, in which we imagine a bargaining relationship in which all the listed factors are relevant, but all are constant. The parties bargain repeatedly, and come up with more or less the same outcome every time. Then imagine changing just one of the relevant background legal rules, say the rule that an employer can spend money to inform workers of why it opposes their joining a union. Changing the legal rule should, other things being equal, marginally shift bargaining power from employers to workers.

Now imagine changing a very large number of the background rules, all in favor of one of the parties. It is easy to imagine an additive process by which each rule change modifies the bargaining outcome marginally until it has shifted substantially toward one side at the expense of the other. The outcome is still in one sense determined by the list of factors above, but because they play out within a different framework, they yield a different outcome.

The Significance of Hale's Analysis

Hale's analysis of the impact of law on distribution has two quite different kinds of significance. First, it suggests a method of analysis of particular legal rules in order to determine their effect on bargaining power and thereby on the distribution of income between whatever groups are concerned. It seems to me truly extraordinary how little of this kind of analysis gets done by legal academics. But, of course, those who propose legislation, and legislators and their staffs, do it every day.

It is obvious that you can do a distributive analysis on any set of possible solutions to a legal problem. And you can do the distributive analysis from the point of view of whatever interest you care about. It is equally obvious that the answer may be that there is little distributive difference between the alternative rules under discussion. Even rules that seem radically different from the point of view of justice between particular parties may turn out to have little or no impact on any significant question of justice between social groups. But it is no objection to the method that it sometimes reaches this conclusion; indeed it is a strength of the method.

The second significance of Hale's analysis is in a quite different domain: that of the social theory of law. The analysis suggests a theory about the distribution of wealth, income, power and knowledge in capitalist society. This theory is that law, or rather the legal ground rules that structure bargains between competitive/cooperative groups, plays a "larger" "causal" role in distribution than it is allotted either in conventional marxist or conventional liberal accounts.

In conventional marxist accounts, law plays a minor role because distribution is determined by the "relations of production." There is a capitalist class and a proletariat, defined by their ownership or non-ownership of the means of production. Although these relationships to capital and land have a legal form, that form is merely reflective of an underlying set of material conditions. Once the basic structure is in place — numerous proletarians bargaining with capitalists from a position of destitution — the capitalists expropriate the whole joint product except for what is necessary to reproduce the working class. In this model, the kinds of variations in the rules about bargaining that I discussed above have no significance whatsoever.

In the liberal model, law plays a major role in the form of "the rule of law," a defining element in the liberal conception of a good society. But the content of the background of legal rules is seen to flow either as a matter of logic from regime-defining first principles (rights of bodily security, private property, freedom of contract) or from the will of the people, or from both together in some complex combination. The distributive issue is present, but understood as a matter of legislative intervention (e.g. progressive taxation, labor legislation) to achieve distributive objectives by superimposition on an essentially apolitical private law background.

The mere possibility of doing a distributive analysis of changes in the legal rules does not, of course, establish that the rules play a larger role than they are generally accorded in these theories, and such an assertion is interesting precisely because it is controversial. I will argue it briefly later on. It seems like a good idea to get a fuller version of the analytic method on the table first.

I will do this by extending the analysis in two directions. One direction is toward complicating the "partial equilibrium" point by adding the dimensions of circular causation, unstable equilibrium, unstable legal background, "crisis," and rules structuring alternatives to staying in the bargaining situation. The other involves extending the analysis to subjects other than conflict between labor and capital over wages. Before beginning, though, there is a legal realist point that will, I hope, be useful both for the methodological and for the social theoretical agenda.

A basic reason for the invisibility of the distributional consequences of law is that we don't think of ground rules of permission as ground rules at all, by contrast with ground rules of prohibition. This is Wesley Hohfeld's insight: the legal order permits as well as prohibits, in the simple-minded sense that it could prohibit, but judges and legislators reject demands from those injured that the injurers be restrained (see Hohfeld 1917; Singer 1988, 482).[4] For example, in most jurisdictions a homeowner or developer can block the light and air of neighboring buildings with impunity, even though doing so reduces real estate values dramatically and deeply annoys the victims. This is not a "gap" in the law, but a conscious decision that it is better to let builders have their way, and make victims buy them out if they care that much about their view.

Permissions to injure play an enormously important role in economic life, since all competition is legalized injury, as is the strike, the lockout, picketing, the consumer boycott and the leveraged buyout. Think also of our refusal to impose liability in many cases of non-negligent injury. The invisibility of legal ground rules comes from the fact that when law makers do nothing, they appear to have nothing to do with the outcome. But when one thinks that many other forms of injury are prohibited, it becomes clear that inaction is a policy, and the law is responsible for the outcome, at least in the abstract sense that the law "could have made it otherwise."

Within this category of legal permissions, perhaps the most invisible is the decision not to impose a duty to act on a person who is capable of preventing another's loss or injury or misfortune. Again, begin with cases in which law makers do require action: obligations of parents to children, teachers to students, contractual partners to one another in some but not all imaginable cases. Hospital emergency rooms are required to take in patients even if they have no money; restaurants are required to act up to various standards in food preparation. It is clear that law makers could require almost anything. When they don't, it looks as though the law is uninvolved in the situation, though the legal decision not to impose a duty is in another sense the cause of the outcome when one person is allowed to ignore another's plight (see Hale 1946).

The Hohfeldian insistence on the legal character of permissions allows us to distinguish the realist analysis of distribution from the familiar notion that law has become distributively central, but only as a result of the increasing ordering role of courts and legislatures. It is a long running cliché that statutes have "proliferated" and that we face a litigation "explosion." In the realist sense, these developments do not increase the distributive importance of law, but only bring to visibility what was there all along.

Before the regulation of workplace safety, the employer's legal permission to operate with no other threatened sanctions for dangerous conditions than the possibility of worker job actions, or tort suits for injuries, structured the distribution of welfare just as fully as does a legal prohibition through OSHA. The law has no greater impact on wages after enactment of a comparable worth statute than it has when it permits employers to set wages according to "supply and demand."

When lawmakers change lots and lots of background rules in a short time, it looks as though the law itself is playing a larger role than before. When many of those changes shift us from permitting to prohibiting or compensating harm, law is more "intrusive," in the sense that injurers more often have to deal with regulators. But the question of intrusiveness is different from that of causal responsibility. Once there is a legal system, the choice of any particular set of background rules is a choice of a set of distributive outcomes, whether achieved through many rules or only a few.

Circular Causation and Unstable Equilibrium

We can go beyond the partial equilibrium framework and recognize that other things are never equal in reality. The various factors that affect bargaining power are changing all the time for all parties, and the changes are interrelated or mutually interactive. This is the phenomenon of circular causation, or the feedback effect. Sometimes, the effects are cumulative, and the system is consequently in unstable equilibrium.[5]

In a situation of circular causation and unstable equilibrium, a small change in one factor initiates a small change in another factor which "feeds back" or reinforces the first change. This initiates a second change in the second factor, another reaction back, and so forth, until the system restabilizes at a new level that is much further from the starting point than would seem plausible if we looked at the first small change in isolation. For example, a set of plant-specific factors that allow a union to win a single union election by a very small margin might increase union resources for organizing enough to win another election by a small margin, providing yet more organizing resources and starting a "snowball."

By contrast, a change that looks as though it would substantially increase the union share, if other things remained equal, may bring about a countervailing change in another factor that nullifies the first impact. For example, an increase in the willingness of unions to support each other in secondary boycotts might produce a reaction of public opinion against unions inconveniencing the public that would cancel out the increased leverage from specific boycotts.

The Instability of the Legal Framework

The context of legal rules within which these shifting factors are deployed is itself constantly shifting, not in the sense of our experiment with a deliberate "change" in a preexisting rule, but in the sense of evolution of the existing set of legal rules and materials as new situations arise. It is easy to see that a new bargaining situation, resulting from a change in one of the factors, may provoke new bargaining tactics whose legality or illegality is unclear. For example, can a large union pension fund, on whose viability depend the retirement incomes of the union members, engage in aggressive buying and selling of the stock of an employer with whom the union has a dispute? The question won't arise unless and until unions acquire pension funds large enough so that the tactic has a chance of success.

It is less obvious but no less important that new tactics whose legality is unclear are constantly invented by smart people looking for ways to modify the balance of power without a change in the intractable, large, general determinants of strength. This means that legal innovation is built into the system: the parties deliberately confront the courts with the necessity to make new law, because the parties are intensely aware of the significance of the legal background and try to manipulate it. As union pension funds grew, someone had to come up with the idea of the "corporate campaign." It didn't "invent itself," so to speak.

Finally, the lawmaking process itself is dependent on the balance of forces in the "private" sphere of economic conflict and cooperation. Hale wrote almost nothing on how law is made by legislators, let alone by judges, except to insist that they make policy choices willy-nilly. He wrote throughout his life as a member of a ruling elite addressing other members of the elite on the subject, first, of how their actions as rulers worked or operated in determining the distribution of income, and, second, on the subject of how they ought to exercise their responsibilities given the description of the world he had developed.

What he has to teach us is that the legal ground rules of economic struggle constitute the economic bargaining power of the combatants. But he was aware that the ground rules are themselves at least in part the product of the conflicts they condition. The process of circular causation works between the private economic system and the public lawmaking system as well as within the economy (see Hale 1952, 541-50; Samuels 1973, 344-54; Kennedy 1973, 383-86).

Thus an increase in labor's economic power may translate into an increase in legislative power, which may then feed back into further economic gains. Or the increase in economic power may set off a counteracting reduction in legislative power, so that the system stabilizes itself rather than moving through a series of cumulative changes. This is much more obvious but no more true for the legislative than for the judicial process.

Crisis

One kind of "crisis" in the relationship between workers and owners occurs when the parties believe that the outcome of a particular bargaining session will initiate a series of changes that cumulate and bring about much larger changes in rapid succession. The system is in unstable equilibrium, at a "tipping" point or "threshold" beyond which the bargaining situation may be "transformed" rather than modified additively or incrementally. One side may end up, when the situation restablizes, with a much larger share and the other side with a much smaller share of the joint product.

It will seem worthwhile for the parties to mobilize all their resources to control this outcome, whereas within a stable equilibrium situation neither party would have seen the small change as meaning anything at all. Once the parties are mobilized, the outcome may hinge on a very small difference in the comparative force of the parties, as in the classic "for want of a nail . . . the kingdom was lost." The comparative force is determined by the total set of all factors contributing to bargaining power, and it makes no sense to attribute the margin of victory to any of these, where they are combined indiscriminately into the force that produces the final result. When you win by one vote, everyone's vote determines the outcome.

In a crisis, very small changes in the legal system may have dramatic long term effects. Where there are many union organizing campaigns going on, and many of them produce close elections won by management, a relatively small change in the rules governing the elections might almost immediately dramatically increase the number of successful union organizing drives, and ultimately significantly modify the distribution of income between workers and owners and between union and non-union workers.

In a crisis, the parties are particularly likely to devote resources to throwing the established rules into legal doubt, to inventing new tactics whose legal treatment presents a case of first impression, and to mobilizing legislative resources. When we are talking about the legal rules governing bargaining between capital and labor, the basic claims are therefore two fold:

(1) If you went about systematically changing the rules of bargaining behavior that affect an outcome, you could dramatically change that outcome, so that law is a major "cause" of the existing distribution, even if we restrict our focus to situations of stable equilibrium.

(2) In situations of unstable equilibrium, small changes in apparently insignificant legal rules can make the difference between victory and defeat for one side or the other, and thereby affect subsequent distributions much more dramatically than seems at first sight compatible with the minor character of the rules and the changes. The rules are sometimes the "nail" for want of which a kingdom is lost.

Sometimes a rule may be plausibly regarded as causal even though the participants never focused on it as something that might have been changed to the advantage of one side or another. But often a crisis evokes behavior that is not easily or unselfconsciously disposed of by the rule, or that spurs people to look for reinterpretation of what seemed "clear" rules. Then people are aware that a lot is at stake.

Rules Structuring Alternatives to the Bargaining Situation

Hale described the second category of legal rules, those structuring the parties' alternatives to remaining in the bargaining situation, as follows:

> If the non-owner works for anyone, it is for the purpose of warding off the threat of at least one owner of money to withhold that money from him (with the help of the law). Suppose, now, the worker

> were to refuse to yield to the coercion of any employer, but were to choose instead to remain under the legal duty to abstain from the use of any of the money which anyone owns. He must eat. While there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community — and that law is the law of property. It can be lifted as to any specific food at the discretion of its owner, but if the owners unanimously refuse to lift the prohibition, the non-owner will starve unless he can himself produce food. And there is every likelihood that the owners will be unanimous in refusing, if he has no money. There is no law to compel them to part with their food for nothing. Unless, then, the non-owner can produce his own food, the law compels him to starve if he has no wages, and compels him to go without wages unless he obeys the behests of some employer. It is the law that coerces him into wage-work under penalty of starvation — unless he can produce food. Can he? Here again there is no law to prevent the production of food in the abstract; but in every settled country there is a law which forbids him to cultivate any particular piece of ground unless he happens to be an owner. This again is the law of property. And this again will not be likely to be lifted unless he already has money. That way of escape from the law-made dilemma of starvation or obedience is closed to him. It may seem that one way of escape has been overlooked — the acquisition of money in other ways than by wage-work. Can he not "make money" by selling goods? But here again, things cannot be produced in quantities sufficient to keep him alive, except with the use of elaborate mechanical equipment. To use any such equipment is unlawful, except on the owner's terms. These terms usually include an implied abandonment of any claim of title to the products. In short, if he be not a property owner, the law which forbids him to produce with any of the existing equipment, and the laws which forbid him to eat any of the existing food, will be lifted only in case he works for an employer. It is the law of property which coerces people into working for factory owners — though, as we shall see shortly, the workers can as a rule exert sufficient counter-coercion to limit materially the governing power of the owners (Hale 1923, 472-73).

At first glance, this second version of Hale's assertion of the centrality of law to distribution seems to say no more than that if we had a different system than capitalism, or a system not based on private property, we would have a different distribution of income. Since what we mean by capitalism or by private property is a particular legal regime, then law, in the form of that regime choice, is responsible for the distribution of income that we actually get.

The point Hale emphasized repeatedly was that this particular property regime allows something close to unlimited accumulation of property, at one extreme, and something close to absolute destitution at the other. Property rights may be formally the same for all citizens, but given the unequal distribution of "factor endowments" or actual property, Hale argued that:

> [T]he law endows some with rights that are more advantageous than those with which it endows others. . . . It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining. . . . With different rules as to the assignment of property rights, particularly by way of inheritance or government grant, we could have just as strict a protection of each person's property rights, and just as little governmental interference with freedom of contract, but a very different pattern of economic relationships (Hale 1943, 628).

This seems uncontroversial but also not very interesting, or only historically interesting. To see the modern power of Hale's insight, we have to follow him in abandoning the on/off all-or-nothing understanding of "capitalism" and "private property." What we have in fact is a "mixed" capitalist system in which (a) nothing like the whole economy is organized in terms of wage labor and the confrontation of worker vs. capitalist, and (b) property rights are neither "absolute" nor self-defining.

In our system, there are well established alternatives to wage labor, and each has a legal structure that affects how available and desirable it is. Six examples are: (1) welfare; (2) criminal activity; (3) independent petty commerce, from the corner store to the street vendor; (4) the status of franchisee; and (5) independent professional activity, from the therapist, to the real estate broker working on commission, to the "consultant;"and providing household services in a marriage, or equivalent form, in exchange for support.

In Hale's initial very global analysis, it seems obvious that having "capitalism" or "private property" just plain "means" that a worker can't compel anyone to give him any money, because he doesn't "own" that money. So he has to "bribe" someone to release money to him by offering to work for him in exchange. It also seems an obvious consequence of the initial regime choice for capitalism or private property that if he can't occupy free land or get free access to capital to go into business on his own, the worker will starve.

But as we have seen already, the mere choice of a regime doesn't settle the thousands of questions that will arise about the ground rules in particular situations. We have private property, but the courts have held that a factory owner must permit various kinds of access to union organizers. Just as legal choice about bargaining conduct and the content of agreements structures the parties' deployment of power in negotiations, so legal choice about the alternatives to bargaining structures the desirability of the alternatives. Increasing welfare payments reduces the incentive to take unskilled, dead end, service jobs. Pervasive licensing of petty commerce (e.g. driving a taxi), designed perhaps both to guarantee quality and to restrict competition, reduces the bargaining power of wage workers.

Whereas it is generally fairly easy to predict the distributional effect of a change in the rules of bargaining, it is often hard to figure out how improving alternatives affects the parties' power. When marriage and the role of wife-homemaker are a widely available alternatives to unskilled labor, the effect may be to make women demand more from their employers to "keep them in the labor market." Or it may be that many women come to see wage labor as temporary or incidental to other obligations and activities, so that they invest less time and energy in securing good terms and conditions for themselves than they would if they saw themselves as committed to the labor market for life. Making divorce easy may increase the bargaining power of women at work by making marriage more desirable, or reduce their power by reducing the security available outside the labor market.

However it works out in particular cases, it seems clear that we can extend the partial equilibrium analysis of rule changes to the alternatives to bargaining. In other words, we can imagine the impact of legal rules on bargaining power by imagining small rule changes that make the alternatives more or less desirable, with the indirect effect of making workers more or less willing to settle for what the employer is offering. And we can do the same with the more general analysis that emphasizes the interdependence and changeability of all the factors making up bargaining power. A change in welfare eligibility rules might set off a cumulative series of changes in the low income job market that would react back on the size of the welfare rolls, cause a crisis, legislative reform, and so on.

To sum up: when people think about what determined the outcome of a conflict over distribution, they tend to ignore the role of law in setting the background conditions of the conflict. As a final example, why was Reagan able to break the Air Traffic Controllers (PATCO) strike of 1981? The factors we think of first are his choice of a public relations strategy, the "power of the Presidency," the effect on that power of a recent massive electoral victory, the choice of a set of demands by the union, the union's strategic mistakes in dealing with the other airline unions, the availability of substitutes, their role in the production process, the overall state of the economy, and so forth.

If we think of law as having played a significant role, we might focus on the fact that the whole strike was illegal, because federal employees have no right to strike. Because the strike was illegal, it was enjoined and some union officials and members went to jail. This may have determined the outcome (although it may also have built striker morale). Then there is the fact that because a public employee strike is not protected under the NLRA, the government can fire all the strikers and permanently replace them. This, too, may have determined the outcome, even though under the NLRA the employer can hire replacements, and the fact that an employer doesn't formally "fire" the strikers may make very little difference.

But of course the employer can hire substitute workers only because she is "legally privileged" to do so. Suppose a law forbidding this practice, so that the employer negotiates from a closed plant. The choice between that legal ground rule and the one we have plausibly "caused" the outcome of the PATCO strike, in the simple sense that the union might have won the strike under the alternative regime.

Most of the time, the role of legal rules in labor-capital conflict over distributive shares is even less visible than it was in the PATCO strike. There are few occasions on which the police are called in or a party goes to court alleging that the other side is breaking a rule. Law abidingness is usually a relatively small issue. Usually, neither side argues to the legislature or the courts that they should make changes in the ground rules, or that they are unclear in important ways. Yet in the legal realist sense, law plays a very large role, because it is easy to imagine changes in legal rules governing the conduct of the parties that would have brought about a different outcome.

Extending the Realist Analysis to Racial and Gender Conflict

The realists developed this analysis as liberal advocates in the late 19th and early 20th century conflicts between labor and capital, but they soon applied it to distribution between capitalists. Here, the crucial legal rules are those defining the property rights of businesses against competitors. Antitrust statutes are so vague that the judges have had the major role in deciding the issues they merely allude to. Unfair competition law has been largely judge made, and has impacts just as great as antitrust. These bodies of law are important determinants of the level of concentration and the degree of vertical integration, i.e. the dimensions of business enterprise in the US.

The basic point applies to distributive issues wherever they arise. I will illustrate it in the contexts of conflict between blacks and whites and men and women, but I do not at all mean to suggest that these are the only or even the most important non-class distributive conflicts. Nor will I try to give a complete picture of the distributive impact of law in these two cases. My goal is illustrative only.

The realist analysis faded from progressive political consciousness in the 1950s, with the apparent settlement of the labor issue during the New Deal and the tendency to deny the significance of class conflict during a period of economic growth, imperial expansion and Cold War against an enemy preaching orthodox marxism. The civil rights and women's movements seem to have reinvented the realist focus on the centrality of law rather than merely adapting it.

Distributive Conflict Between Blacks and Whites

The focus of the civil rights movement and of the liberal political community on the maldistribution of power and welfare between blacks and whites led in the 1960s and 70s to a search for causes. The realist analysis was not obviously relevant, because the realists were interested in class conflict within a liberal legal order composed of formally equal rights-bearers. Their implicit contrast was with a feudal society in which law heavily regulated all distributive outcomes by assigning distinct legal statuses to members of different social classes. The realist goal was to show that the political enfranchisement and private economic liberty of the working class (the granting to white workers of legal rights — to vote, hold office, sell labor, acquire and dispose of property — equal to those of employers) did not eliminate, but merely changed the manner of the law's influence over distribution.

By contrast, an obvious cause of racial maldistribution was the inferior legal status of blacks. It was hard to deny that de jure segregation in primary elections, schools and public accommodations, and explicit invidious racial categorizing in numerous other areas of law, had massive economic effects. Moreover, the civil rights movement and its allies in the media were gradually able to win the battle to represent both segregation and the violence necessary to maintain it as inconsistent with the equal civil and political rights that most of the society identified with the "American Way." So law was initially salient in the race context not as apparently neutral background rules, but as non-neutral foreground rules.

Law was also obviously important in situations where formally equal legal rights of blacks and whites were unequally enforced, as in the cases of voting rights and protection against racially motivated violence. With time, de facto housing and job segregation led to the demand for legal reform by withdrawing a permission — to engage in private racial discrimination — that had once seemed just an implication of a larger, neutral, natural, pre-legal universal privilege to refuse to enter transactions except when one wanted to.

In short, there was a progressive increase in our consciousness of law's implication in racial maldistribution as the civil rights movement and liberal reformers imagined legislative or judicial action to change the legal ground rules in ways favorable to blacks. By the late 1960s and 70s, there was arguably more consciousness of the ways in which law structures racial inequality than of the ways it structures class inequality.

When the conservatives gained control of the courts, it became apparent that what might look like merely technical modifications in the burden of proof or the measure of damages in civil rights actions could have surprisingly large negative impacts on their effectiveness. The instability of the legal framework, circular causation and crises, often involving attempts at Congressional overturn of regressive Supreme Court interpretations of statutes, have become commonplace aspects of our understanding of race law.

This consciousness of law as active even when it had been the same for many years, of law as active when it merely "permitted" (racial discrimination by public officials or by private parties), and of law as active when it merely failed to grant meaningful remedies for acknowledged legal wrongs (as in voting rights) was focused on racially discriminatory intentions of public and private actors. A second massive mode of impact of law on racial distribution is through the disparate impacts of the application of facially neutral laws, some of which are directly motivated by racism (e.g. the poll tax and literacy test for voting), but others of which are not. In employment discrimination cases, the courts began to throw out work rules that had a disparate racial impact and couldn't be given a business justification.

Our thinking tends to stop short of applying the same analysis to the enforcement of the apparently neutral economic ground rules that structure any poor population's relations with a rich one. In other words, we don't tend to think of the poverty of blacks overall as caused by law any more than we think of the poverty of the working class as caused by law. Yet the outcome of economic conflicts between black workers and white employers, like those between white workers and white employers, have been conditioned dramatically by the "permissive" rules about capital mobility that authorized the de-industrialization of the Northern and Middle Western cities where black men held many skilled and unskilled industrial jobs.

Blacks were particularly vulnerable to de-industrialization because they were skilled and unskilled workers, rather than white collar workers, managers or entrepreneurs. And their job and income status was a consequence of the "disparate impact" on freed slaves of the background regime of legal rules that structured their participation in the economy after Emancipation.

I am speaking now not of the formally unequal rules of civil status or the implicit rules of racially discriminatory enforcement, but of our particular legal regime of property and freedom of contract. This regime structured black agriculture in the South in one way, so as to maximize the poverty and dependence of farm labor and minimize the chances of black farm entrepreneurs, when it might have structured it in the opposite way, with different outcomes.

Distributive Conflict Between Men and Women

Distributive issues arise in every context in which men and women have conflicting or competitive goals. The power of men as a group and the power of women as a group are constituted through the legal system, just as is the case with labor and capital or black and white.

For example, that most women could be raped or beaten by most men is an important physical datum. Its actual effect on the balance of power between men and women depends on how often rape and battery actually occur, and on the way men and women see society as viewing it when it occurs. That effect is modified by the legal remedies available to women in these cases, to the extent that legal remedies deter men from raping and battering through punishment, and convey a social message of disapproval.

But the legal rules are substantively limited, for example when they impose particular evidentiary requirements in rape, or legalize marital rape. They may impose on the wife who kills a battering husband in his sleep the "neutral" requirement that action in self-defense occur in response to an "immediate" threat of bodily harm. And protective rules are dramatically limited in their impact by the decision to make available only a given quantum of resources for enforcement, a quantum of resources that means that rape and marital battery will be sufficiently common experiences so that their possibility is part of the background of all relations between the sexes.

The impact of battery, threats of battery, and, in the absence of threats, women's calculations of its likelihood, are easy to see when we are talking about relations between violent men and their partners. But the point goes deeper. The continually present reality of the practices of rape and battery constitutes the bargaining context for men and women who see their relationships as non-violent, or even of an exemplarily consensual, equal kind, because it defines the possibilities of male behavior in a particular way, within a particular structure.

Men may not often threaten rape in disputes over housework, but men who categorically renounce rape do so as part of a complex bargain with women. It seems plausible that they get more cooperation, in return, than they would if the idea that all men are potential rapists was simply not part of our culture. Since we can imagine a legal program that would very radically reduce the incidence of rape, the impact of rape on the relative bargaining power of non-violent men and women is a function of the legal system.

This is only the beginning of the story. The relative bargaining power of men and women in situations when they confront each other from gendered positions is affected by hundreds of discrete legal rules. For example, the following legal practices structure women's bargaining power within marriage: the availability of contraception and abortion; no-fault divorce; a presumption of custody in the mother; some enforcement of child support rules; and alimony without a finding of fault in the husband.

Rules governing the alternatives to wife-homemaker status influence bargaining as well. We have to take into account the availability and amount of AFDC, limited legal protection against sex discrimination and sexual harassment in employment, and facially neutral rules structuring women's participation in the governance of unions that represent them in collective bargaining. Taken one by one and together, these legal rules put wives in a better bargaining position vis-a-vis their husbands than they would be in under a set of imaginable alternatives. And they leave them in a worse bargaining position than they would be in if the rules were modified in their favor. (We shouldn't make facile assumptions about how "well off" women as a group have been under different legal regimes. We are talking about bargaining power in specific situations, rather than about overall social welfare, and each rule is likely to have a different impact according to the race and class of the people it affects.)

Some Objections to the Claim of Pervasiveness of Distributive Impact

When we want to explain why something happened, we look to the options that seemed open to the actors at the time of the conflict, rather than at factors that were stably present before and are expected to be present after. We don't explain the outcome of a strike by looking to the absence of superhuman powers in the strikers, though such powers would have changed the outcome. We assume the legal ground rules are stable, and that what "counts" is the ability of actors to work within them, "bend" them, or get good interpretations "at the margin." Law as ground rules therefore seems uninteresting as a focus of explanation.

Yet even if we remedy this blindness by looking hard at the ground rules, and begin to trace the ways in which they structure bargaining, it does not follow that we will reach the conclusion that law is an important cause of distributions we consider unjust. There are limits to the plausibility of legal explanations of distribution that might lead us to award the causal palm to other factors in the situation.

Limits on the Ability of the Legal System to Affect Behavior

I keep saying that law constitutes bargaining power in the sense that the content of background rules conditions the outcome of conflict. I make this point by showing that changing the legal rules would change the bargaining outcome. But what of the response that the legal system, and the state apparatus in general, including police, prosecutors, judges, hearing officers, and so on, just don't have the capacity to enforce legal rules in the way that would be necessary if we were to make the changes I'm suggesting?

We shouldn't assume that the remedial availability of the legal system is just fixed, so that if a given law is unenforced it is unenforceable. We may be dealing with a covert legal permission, which would often be highly controversial if formalized. Thus the remedies for a worker discharged for union activity are not adequate to assure a realistic person contemplating getting involved in organizing that her employer will have to leave her alone. This looks like one of those situations in which the law is not a factor because it is ineffective. But the legal system could dramatically increase enforcement efforts if those who define the ground rules decided that would be a good idea.

Maybe it wouldn't work. We operate with a weak federal government, inept and unprofessional state government, and local institutions that have shown over and over again that they are terrible at affecting behavior, whether it be local sanitation codes, the collection of taxes, assuring competence among school teachers or whatever. The law in books is different from the law in action, according to this view, because there is a lot less law in action than law in books.

To the extent the legal system just can't get a deterrent handle on an aspect of social reality, its role in distributional issues is less than it appears to be. But it is easy by focusing on non-compliance to underestimate how much difference ineffectual enforcement makes by comparison with no enforcement at all, or legalization. The NLRB is ineffective at protecting workers from being discharged for exercising their right to organize, but if there were no protection at all, there would be a lot more discharge. We shouldn't believe claims about the limits of legal ordering in any particular context until we've tried massive enforcement, and kept it up long enough to change people's expectations of future enforcement.

Still, the argument for the pervasive causal significance of law in distribution is meant to be more than the tautology that because the legal system could imaginably make anything happen, it is causally responsible for everything that does happen. Limits on the effectiveness of law, whether we attribute them to the "nature of bureaucracy" or to "human nature," are limits on the claim that law is causally central.

Social Norms Rather Than Legal Rules are Responsible for Distribution

Another critique of my position goes like this: The legal system deals with extreme cases, and with only a few of those. Most people go through their lives without ever invoking them one way or another. Most men aren't rapists. Most employees never go out on strike. Very few blacks are lynched. Most people pass their whole lives with little or no direct contact with the legal system. So the legal rules governing these behaviors can't possibly be as important in constituting bargaining power as this makes it sound.

But it is clear that background rules may be important even if never invoked. The prohibition against murder would have the greatest, not the smallest, impact on everyone's bargaining power vis-a-vis everyone else if the rules against it were successful in completely eliminating murder. So the mere frequency of invocation doesn't mean much.

In another version the objection cuts deeper: it is that the behavior controlled by law should be understood as the violation of widely internalized social norms. If the restraint on rape or union-busting or lynching is that people are socialized to have internal inhibitions against them, then law is a mere tidying-up operation. It is important because "there has to be some mechanism of social control to deal with deviance," but not "constitutive."

First, the legal system draws lines in thousands of situations in which there are no deep-seated, internalized norms that are the same across the culture, shared by the disputing parties, about what behavior is clearly wrong or crazy. Workers and employers don't assess the legitimacy of tactics in labor disputes from a position of agreement about what, in the absence of legal rules, it would be fair to do to each other. Neither do couples living together, or hites and blacks working out the difference between kidding and racial harassment in bureaucracies like the FBI.

I think it would be possible to make "revolutionary" changes in the distribution of income, wealth, power and knowledge between social groups by changing only ground rules (without using, say, the tax system), and only ground rules governing areas where there is normative conflict rather than deeply internalized consensus.

Second, the legal system creates as well as reflects consensus (this is true both of legislation and of adjudication). Its institutional mechanism "legitimates," in the sense of exercising normative force on the citizenry. Even when we are dealing with very deep-seated norms, like that against intentional killing of another person, the legal system can be an important vehicle of change, as is shown by the example of the evolution of the battered woman's right to kill in self-defense.

My point is only that legal ground rules are more important to distribution than conventional liberal or marxist accounts have recognized. There are often non-distributive reasons for a rule that would prevent us from changing it in order to modify a particular distribution. When that is the case, it is implausible to hold that rule responsible for the distribution in question. The law forbids murder as an aggressive tactic in labor disputes. But it wouldn't be sensible to figure out what the distribution of income would be if murder were legalized in collective bargaining, and then attribute to law the difference between that distribution and what occurs in fact.[6]

The Importance of Judicial As Opposed To Legislative Law Making

After all this, there remains what I suspect is the most important objection to the claim that law is pervasively important in distribution. To some extent, law is simply the medium for popular consensus worked out within a set of democratic procedures. When this is the case, we can plausibly disregard it in analysis, when we are trying to explain a given distribution, in favor of the forces that shape consensus.

For example, if we want to explain the shift in bargaining power between labor and capital during the New Deal, it would seem odd to focus on law as a significant causal factor, as opposed to focusing on Roosevelt's Presidential and Democratic Congressional victories in national elections. While it is true that the NLRA affected distribution, it did so as an instrument of the will of a political majority. To the extent the NLRA still structures distribution, it still does so as an instrument.

This view is complex, as well as intuitively plausible and familiar, and I think quite misleading. My line of critique is legal realist. It is that there is an (often implicit) untenable assumption behind the notion that it is consensus rather than legal institutions that is responsible for distributive outcomes. That assumption is that there is a meaningful distinction between lawmaking and adjudication, with lawmaking allocated to democratically controlled legislatures, and adjudication (including enforcement of the Constitution) to courts. We can therefore dismiss the distributive impact of background rules by referring it to the combination of consensus in legislative lawmaking (subject to constitutional constraints) and judicial adherence to the constraints implicit in the role of adjudicator.

The case for the distributive significance of law turns out to be linked to the realist critique of adjudication. I would put it as follows: It makes sense for the social theory of law to attribute distributive importance to the background rules just because the above assumptions are wrong. The background rules are largely the responsibility of judges who have made and continue to make and unmake them without seeing, and without other political actors seeing, that what they are engaged in is independent decision-making about distribution. From the social theoretical point of view, the background rules are causally significant just because they are made in large part by a group acting politically, but using a technique of rationalization that (a) denies the political component, and (b) justifies limited democratic control of their work.

This is not the place to argue the case that adjudication should be understood as a mystified political activity, or to examine the distributional consequences of doing politics in this rather than in some other way. My purpose here is only to show the link between Hale's analysis of the distributive role of background rules and the more familiar part of the realist project (see Singer 1988, 499-503).[7] Here are three qualifying remarks.

First, no one involved in academic legal theory believes anything quite so simple as the primal argument that judges apply rather than make law. Indeed, one might say that academic jurisprudence is mainly concerned to show that there is some attenuated, highly sophisticated judge/legislator distinction that legitimates our form of judicial lawmaking, and preserves judges from responsibility for distributive justice in society, without falling into the vulgar error of formalism.

On the other side, the attack on the distinction by the realists and their successors doesn't, and doesn't need to, deny that much judicial activity is "just" rule-following. Or that, for all its sacred cow status, the rule of law, in the basic sense of judicial independence, is a very good thing, even if judges exercise their independence in a political culture that mystifies their political role and, thereby, as a matter of fact, reinforces social injustice of various kinds.

Second, the stakes in the discussion of the judicial role are high because judicial activity has a very large place in the total legal picture. Judges seem to be involved in constant making and remaking of the background rules for distributive conflict. This is most obvious in the case of constitutional law, and particularly the lawmaking activity of the United States Supreme Court. Indeed, for several decades we have thought of the Supreme Court as perhaps the single most important institution influencing the structure of distributional conflicts between whites and blacks and between men and women.

The role of the courts in interpreting broad statutes, like the Reconstruction Civil Rights Acts, the Sherman and Clayton antitrust statutes, the NLRA, modern voting rights laws, and anti-discrimination statutes governing employment and housing, is also obviously important. But one of Hale's most basic points was that the very visibility of the role of the courts in these "exceptional" cases tends to obscure the power over distribution they exercise in the course of their "normal," common or garden activity of resolving what look like purely private civil disputes.

For example, it never occurred to me until I went to law school that the basic ground rules defining property, tort and contract had no other textual authority behind them than judicial decision. I knew perfectly well that we have a "common law" rather than a "code" system. But I hadn't really absorbed the idea that this meant there was no other basis for the enforcement of contracts than cases, citing earlier cases, citing earlier cases . . . . And it hadn't occurred to me to understand the body of statutory law as a set of ad hoc changes in a complete pre-existing judge-made system presumed "still in effect everywhere except where modified."

What this means is that judges, not the legislature, typically decide in the first instance whether a new technology or a new resource is "property" or not, whether a new contract clause is enforceable, and so on. In other words, in cases where it is obvious to everyone that there is a gap, or a conflict or an ambiguity in the system, the judges resolve it.

But it also means that it is up to the judges to decide when to change the rules of the complete pre-existing system even in the absence of a gap, conflict or ambiguity. Again, I knew that judges overrule cases, but I had not absorbed the importance of the fact that the rules about when to overrule are judge-made rules. The judges see themselves as empowered to overrule any rule in the whole system if there are "good legal reasons" for doing so, and good legal reasons include both the notion that the rule was "wrong" or "unjust" from the beginning, and the idea that though it may once have been good, "changing circumstances" "mean" that it is now bad.

Against this background, it should be clearer why so much depends on the notion that judges have a well defined role in settling disputes "according to law." If, but only if that is the case, we can concede that judges play a major role in setting ground rules, and could change the distribution of income dramatically by changing those rules, but still deny that either the judges or the ground rules are "really" that important. To change outcomes, we might imagine, judges would have to violate the "well defined procedures" that they are supposed to follow in interpreting constitutions and statutes and common law precedents. It's not very interesting to say that judgemade rules play a major role, if what we mean by judges is people following these procedures, and these procedures determine their rule making.

Third, the social theoretical assertion of the distributive importance of the ground rules of economic struggle is as valid for code as for common law systems. True, in code countries, adjudication is far less salient as lawmaking than it is in the United States. It may actually be true (though I doubt it) that legislatures play a larger and judges a smaller role in determining the actual content of law. It is certainly true that judges do not play the counter-majoritarian role that they do here.

But the crucial similarity is that civilian legal culture presupposes a radical difference between the general law of property and contracts, understood as neutral background rules, or as rules derived from regime-defining abstractions, and special legislation (e.g. labor law) understood as distributively motivated. Legal ideologists legitimate distributional outcomes by depoliticizing them — just as they do in the United States. The difference is merely that a sovereign legislature has formally enacted the neutral background, and academic theorists and authorities produce the legitimating discourse, rather than leaving these functions to the judges (see Kennedy 1989).

Hale and Foucault!

It is, I think, instructive to compare Hale's approach with Michel Foucault's. Both start from the more or less categorical rejection of two great traditions: that of classical liberalism, which tended to restate the outcomes of social conflict as voluntary agreements, and that of orthodox marxism, which tended to restate these same outcomes as the unilateral exercise of the power of capital over labor. Both writers choose power over "liberty" as a central concept (and in this extend the marxist tradition), but both reject an understanding of power as unilateral imposition, emphasizing its situational, bilateral, and indeterminate character (and in this extend the liberal tradition).

For Hale, the point is that bargaining power is exercised within an institutional context all of whose elements influence the outcome, but none of which can be said to organize and determine it according to a single logic. "Law" is an element of the context, constitutive of bargaining power, and influential on the outcome, not as a single bloc that directs, but rather as an almost indefinitely long list of particular legal rules, each of which has a part in the strategic calculations of the parties.[8]

Owners coerce workers, deploying their legal right to withhold money unless they are offered labor, but workers coerce owners, deploying their legal right to withhold labor, unless offered money in return. When the bargaining begins, labor threatens to strike, picket and boycott, within the parameters set by the legal system, while capital threatens to lock out, blacklist and permanently replace, likewise within legal parameters. "Bargaining power" is a complex, odd concept, ultimately a black box referring to all the factors that allowed each party to get so much but no more, within that particular context.

The notion of "power" Foucault expounds in his (post-structuralist) discussion of "Method" in the first volume of his *History of Sexuality* (1978) has many of the same qualities as Hale's (pragmatist, legal realist, institutionalist) "bargaining power."

By power, I do not mean "Power" as a group of institutions and mechanisms that ensure the subservience of the citizens of a given state. By power, I do not mean, either, a mode of subjugation which, in contrast to violence, has the form of the rule. Finally, I do not have in mind a general system of domination exerted by one group over another, a system whose effects, through successive derivations, pervade the entire social body. . . . It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them. . . . [Power] is the moving substrate of force relations which, by virtue of their inequality, constantly engender states of power, but the latter are always local and unstable. The omnipresence of power: not because it has the privilege of consolidating everything under its invincible unity, but because it is produced from one moment to the next, at every point, or rather in every relation from one point to another. Power is everywhere; not because it embraces everything, but because it comes from everywhere. . . . [P]ower is exercised from innumerable points, in the interplay of nonegalitarian and mobile relations. . . .

— Power comes from below; that is, there is no binary and all-encompassing opposition between rulers and ruled at the root of power relations, and serving as a general matrix — no such duality extending from the top down and reacting on more and more limited groups to the very depths of the social body. One must suppose rather that manifold relationships of force that take shape and come into play in the machinery of production, in families, limited groups, and institutions, are the basis for wide-ranging cleavages that run through the social body as a whole. . . . [N]either the caste which governs, nor the groups which control the state apparatus, nor those who make the most important economic decisions direct the entire network of power that functions in a society (and makes it function) . . . .

— Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power. Should it be said that one is always "inside" power, there is no "escaping" it, there is no absolute outside where it is concerned, because one is subject to the law in any case? Or that, history being the ruse of reason, power is the ruse of history, always emerging the winner? This would be to misunderstand the strictly relational character of power relationships. Their existence depends on a multiplicity of points of resistance: these play the role of adversary, target, support,

> or handle in power relations. These points of resistance are present everywhere in the power network. Hence there is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case . . . (Foucault 1978, 92-96; see also 1979, 26-27).

Along with the similarities, there are great differences between the approaches of Hale and Foucault. There is, I think, a sense in which Foucault is inferior to Hale, and that is in his presentation of the role of law.[9] There is also a sense in which Foucault is his superior, and that is in his understanding of the pervasive constituting role of power in the "social body."

Foucault's totalizing scheme (yes, he quite evidently has one) does not include the market, but rather brackets it. On one side, there is the state, the Law-and-Sovereign nexus. On the other, there are institutions — the army, the prison, the church, the mental hospital, the medical hospital, the boarding school, the family — and professions. Foucault criticizes a particular vision of the relationship between these bookends, a vision he sees as shared by liberalism and marxism. This vision is that citizens either hand over power to the sovereign state, which then uses law to order society, with the issue being the prevention of abuse of state authority (liberalism), or have power expropriated from them by the ruling class (marxism).

The first problem with this transactional analysis of power is that it overestimates the significance of ordering by the state (or the capitalist class), and underestimates the autonomy of actors in the institutional/professional sector, who do a great deal of "disciplinary" ordering under broad grants of legal authority. They pursue their own agendas of "control, surveillance, prohibition, and constraint" (Foucault 1977, 213). At the same time, private actors endlessly resist not just state ordering but all the other kinds of ordering as well.

Second, the "Law-and-Sovereign" theory overestimates the autonomy of the private actors who delegate power to the state, because it leaves out of account the processes not just of control but also of "subject-creation" that are located in the liminal institutions. In the institutions, professionals of all kinds are busy developing and deploying the "power/knowledge" that creates the particular effect or experience of individual subjectivity characteristic of our societies. For example, Foucault traces our modern understanding of "human" sexuality, an aspect of individuality, to the exercise of pastoral (confessional) power, to the practice of surveillance of boarding school students, and so forth (see Foucault 1978, 17-35). The "modern soul" is "the effect and instrument of a political anatomy" (Foucault 1979, 30), and likewise the "delinquent" (277).[10]

Foucault's understanding of power might have led him to explore economic life, including institutions like the factory and the firm, and the role of law in the outcomes of economic conflict. He believed that disciplinary power was a "fundamental instrument in the constitution of industrial capitalism" (Foucault 1980, 105). In "The Subject and Power" (1989) he proposes a scheme of dimensions for the study of power that treats the economic as strictly parallel to the specialized institutional domains that mainly interested him. Moreover, he presents laws and legal institutions as elements in power situations without sharply distinguishing them from other elements, such as professional knowledge and disciplinary authority (see Foucault 1989, 792).

But this text, the closest that (so far as I know) he got to Hale, is truly exceptional in Foucault's work. He almost never focuses on the exercise of power in a bargaining situation where the bargainers are cooperators in producing a joint product. Negotiation in the shadow of the law is just not part of his project. Neither are strikes, legislative reform movements, the transformation of the material conditions of working class life, the vulgar category of the distribution of income. When he focuses on the family, it is on the control of infantile sexuality, say, rather than on the division of housework through a process that includes recrimination, slacking, and explosive anger, all against the background of legal rules as well as the background of disciplines.

Foucault takes, over and over again, the first step across this gap, by listing the factory or the workshop as one of the disciplinary institutions.[11] In *Discipline and Punish* (1979), he takes a second step, explicitly linking the development of disciplinary power/knowledge to the accumulation of capital and the modern transformation of the techniques of production. "[T]he two processes — the accumulation of men and the accumulation of capital — cannot be separated; it would not have been possible to solve the problem of the accumulation of men without the growth of an apparatus of production capable of both sustaining them and using them; conversely, the techniques that made the cumulative multiplicity of men useful accelerated the accumulation of capital," and technological change as well (see Foucault 1979, 221, 224-25).

The third step should be to incorporate worker activity, resistance, into the story of the factory, and the personal/political battle between men and women into the story of domestic production. Foucault repeatedly insists that there is no power without resistance, never a one-way imposition from above (see Foucault 1978, 92-96; 1979, 26-27, 219, 285-92; 1977, 148-52; 1988, 780-81, 790-95). The outcome of these confrontations is both the distribution of income and wealth between classes through bargaining, and the concrete forms of disciplinary power/knowledge in the presence of resistance. The two kinds of outcomes are related: the distributional outcome affects the forms of power/-knowledge and vice-versa.

To understand both, we need to bring law back in. We need to bring it back in as rules and enforcement institutions that condition the struggle, in the mode of Hale. Foucault doesn't do this. I think the reason is that the factory and marriage play compromised roles in the theory: they are unquestionably "like" the other disciplinary institutions, but at the same time operate under a legal/ideological regime that sharply distinguishes them.

The objects of discipline in the prison, the mental hospital, the barracks and the school do not yet have, have never had, or have forfeited "normal" contractual capacity and many other rights as well. Workers and wives are supposed to be "free," in the sense of enjoying the "universal" rights of the citizen in a liberal state.

Foucault might have responded that this is a liberal distinction without a difference, that the appearance of bargaining and negotiation, of limits on mutual coercion in the style of Hale, are an illusion; the reality is discipline. There would have been an analogy to Marx's story of worker powerlessness, in Volume One of *Capital*. And sometimes this <u>seems</u> to be just what he is doing. The problem is that his critique of legalist mystification of relations of domination applies equally to all disciplinary institutions. He doesn't take seriously the liberal claim that the factory and the suburban bungalow are different from the mental hospital or the barracks.

> The disciplines should be regarded as a sort of counter-law. They have the precise role of introducing insuperable asymmetries and excluding reciprocities. First, because discipline creates between individuals a "private" link, which is a relation of constraint entirely different from contractual obligation; the acceptance of a discipline may be underwritten by contract; the way in which it is imposed, the mechanisms it brings into play, the non-reversible subordination of one group of people by another, the "surplus" power that is always fixed on the same side, the inequality of position of the different "partners" in relation to the common regulation, all these distinguish the disciplinary link from the contractual, and make it possible to distort the contractual link systematically from the moment it has as its content a mechanism of discipline. We know, for example, how many real procedures undermine the legal fiction of the work contract: workshop discipline is not the least important (Foucault 1979, 222-23).

Foucault's goal is to refute a liberal legalist mystification: the claim lines that because the worker-employer relation is contractual it is "free." Fair enough. But the value of Hale is to show that we can recognize the coercive element without ending the analysis there. Every contractual situation involves a different set of <u>legal</u> parameters, there is coercion from both sides, and the possible outcomes are various. Foucault is content to stop as soon as he has debunked the liberal myth, rather than proceeding to develop his own insight that there is worker and feminine agency in modern societies, and conflict and bargaining and many kinds of distributions. But then he would have had to produce something that seems unnecessary when discussing prisons, barracks, schools and asylums: an analysis of <u>the intersection of disciplinary with market power</u>.

In "Two Lectures" (1980), one sees how his attitude toward the market (or toward the general phenomenon of bargaining over joint products) fits with a particular attitude toward law. To begin with, there is the claim that "the essential function of the discourse and techniques of law has been to efface the domination intrinsic to power," so that "law is the instrument of this domination — which scarcely needs saying." Foucault aims to show "the extent to which, and the forms in which, law (not simply the rules but the whole complex of apparatuses, institutions and regulations responsible for their application) transmits and puts in motion relations that are not relations of sovereignty, but of domination" (Foucault 1980, 95-96).

But then it turns out that in order to avoid overestimation of the role of the "Law-and-Sovereign" complex, the study of power "should not concern itself with the regulated and legitimate forms of power in their central locations . . . . On the contrary it should be concerned with power at its extremities, in its ultimate destinations, with those points where it becomes capillary, that is, in its more regional and local forms and institutions" (Foucault 1980, 96). These are "extreme points of its exercise, where it is always less legal in character" (97).

The end point, in "Two Lectures", is Foucault's insistence on a radical discontinuity between legal power and disciplinary power, through which, he asserts, the real ordering of the society is produced piecemeal in its heterogeneous professionally dominated institutions. "But in the seventeenth and eighteenth centuries, we have the production of an important phenomenon, the emergence, or rather the invention, of a new mechanism of power possessed of highly specific procedural techniques, completely novel instruments, quite different apparatuses, and which is also, I believe, absolutely incompatible with the relations of sovereignty. . . . This type of power is in every aspect the antithesis of that mechanism of [legal] power which the theory of sovereignty described or sought to transcribe. . . . The discourse of discipline has nothing in common with that of law, rule, or sovereign will" (106). They are "two absolutely heterogeneous types of discourse" (107).

The relation between the two domains is that "the theory of sovereignty, and the organisation of a legal code centered upon it, have allowed a system of law to be superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures, the element of domination inherent in its techniques, and to guarantee to everyone, by virtue of the sovereignty of the state, the exercise of his proper sovereign rights" (105). In order for the "effective exercise of [disciplinary] power to be disguised, a theory of sovereignty was required to make an appearance at the level of the legal apparatus, and to re-emerge in its codes" (106; see also 1979, 221-22).

I don't find Foucault's assertion of "absolute heterogeneity" between legal and disciplinary discourse convincing,[12] nor his very tight connection between law and sovereignty, nor his call to fight disciplinary power through "a new form of law, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty" (Foucault 1980, 108). But the first point I want to develop here is that Foucault's totalizing scheme brackets, along with the market, a whole area of legality — namely the "private law" rule system that constitutes bargaining situations — that is crucial to understanding economic (as opposed to disciplinary or sovereign) power. The second point is that Foucault's typical formulation of the role of legal rules in domination effaces legal institutions as loci of power/knowledge in their own right.

As to the first point, Holmes criticized the great English positivist John Austin on the ground that he approached law as a "criminalist," meaning that he was obsessively focused on the fact that the sovereign orders or prohibits acts on pain of a sanction. Holmes was much more preoccupied with law as a structure (rules of the game) within which people pursue objectives (see Howe 1963). In this perspective, which became that of the realists, law is important not because it orders in the sense of telling people what to do and not to do, but because "what the courts will do in fact" is an aspect in everyone's calculation of what they can get and get away with <u>in their</u> relationships with other people.

This is the perspective of the student of "private" as opposed to "criminal" law, whose main preoccupation is with how courts and legislatures, by defining and administering contract, tort and property rules, influence <u>the vast range of conduct that criminal law neither compels nor forbids</u>. For example, the ordering of the workplace through collective bargaining agreements is neither compelled nor forbidden by the criminal law. To regard the sovereign as responsible for a particular agreement, in the sense in which we can say that the sovereign is responsible for attempts to stamp out witchcraft or consensual homosexual intercourse, seems absurd. Yet the whole point of the realist analysis is that the apparently "non-directive" background rules of contract, property and tort <u>do</u> powerfully <u>influence</u> the social order that emerges from bargaining, even though they neither compel nor forbid that ordering.

Foucault is unmistakably a "criminalist" in his understanding of law, though his goal is to show that law so understood is far less important than European social theorists of the left and right have tended to think. What he is worried about is the misconception that the sovereign is the crucial ordering agent in the society, using commands and prohibitions to bring about desired patterns of behavior.

> The analysis, made in terms of power, must not assume that the sovereignty of the state, the form of the law, or the over-all unity of a domination are given at the outset; rather, these are only the terminal forms power takes. . . . It seems to me that power must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate . . . and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies. Power's conditions of possibility . . . must not be sought in a central point, in a unique source of sovereignty from which secondary and descendent forms would emanate; it is the moving substrate of force relations. . . .
>
> . . . . It is in this sphere of force relations that we must try to analyze the mechanisms of power. In this way we will escape from the system of Law-and-Sovereign which has captivated political thought for such a long time. And if it is true that Machiavelli was among the few — and this no doubt was the scandal of his "cynicism" — who conceived the power of the Prince in terms of force relationships, perhaps we need to go one step further, do without the Prince, and decipher power mechanisms on the basis of a strategy that is immanent in force relationships (Foucault 1978, 92-97).

What is problematic here is that Foucault's critique of the fetishizing of sovereignty has led him to picture law as "only the terminal form" or "crystallization" of processes of power that take place at a distance from legal institutions. This understanding is doubtless superior to the animation of the legal form as something at once rational, authoritative and all-powerful. But it ignores what I have been calling the legal realist insight: that the play of forces that gets crystallized or formulated in a bargain or settlement between parties, or in a legislative compromise, is itself conditioned through and through by a preexisting legal context.

Suppose we want to understand the play of forces between labor and capital or husband and wife as always involving both power and counter-power, power and resistance, and suppose we conceptualize resistance as the "adversary, target, support or handle in power relations." Then we should see state officials administering legal rules as the instruments of the combatants, and the anticipated outcomes of litigation as part of the context or field within which workers, owners, husbands and wives pursue their strategies. There may be no new crystallization or "terminal form", but that doesn't mean that law played no role. If there is a new formulation of law, say, the NLRA or a change in marital rape rules, it will be the end result of the play of power relations. But an earlier crystallization, defining, for example, picketing as a crime, was one of the conditions of that play.

If there is a tendency in the intellectual surround to reduce all social order to the working out of the will of the sovereign, it may be an intelligent first move in analyzing, say, the distribution of power between married couples, to "do without the Prince, and decipher power mechanisms on the basis of a strategy that is immanent in force relationships." This frees you from the fictions and pious hopes that judges and legislators deploy in explaining the legal rules.

But it is only a first step. The formal description of the marital relationship, say, as one in which neither party has legal power to compel any performance other than the provision of support, may give us no clue as to the typical constellations of forces within relationships in the real world. But that doesn't mean we should ignore the various ways in which the legal context of marital relations affects the bargaining power of the parties. The law of divorce says nothing about who gets to choose a city for a two-career family, and yet may exert a not so subtle influence on that choice by empowering one partner to make threats that the other cannot ignore.

My second point is that the images of crystallization and formulation make it seem that the processes of lawmaking that intervene at the end of a social struggle are not only removed from but also different in kind from the processes of power in the rest of society. They register and then administer outcomes (while "concealing" and "disguising" them at the level of discourse), rather than transforming them (see Foucault 1980, 105-06). The same view is implicit in his presentation of the relationship between legal and disciplinary power through phrases like "law is, in a general way, the instrument of this domination," or "[t]he system of right, the domain of the law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation" (95-96).

Foucault doesn't seem to see lawmaking (or judging) as a "praxis" in its own right (see Klare 1979, 123). Because it is a praxis in its own right, it adds or subtracts something. This happens in part through the deployment of power inside lawmaking institutions. We need to bring Foucault's methodology into the courthouse, so to speak, rather than checking it before we go through the metal-detector.

Again, in fairness to Foucault, his purpose in speaking of "formulation," "crystallization," "instruments" and "agents" of solutions worked out elsewhere is to combat the notion that the content of law flows in a necessary way from the combination of regime-defining abstract premises and technical legal reasoning. But in rejecting this notion (easier to do in the U.S. than in Europe), there is no need to go to the opposite extreme of reducing law to a reflection.

The problematic aspects of Foucault's treatment of law may flow from his complex relationship to marxism. On the one hand, he critiques (deliciously) its pretensions to scientificity and the indeterminacy of totalizing "class interest" analysis (see Foucault 1980, 84-85, 99-101). On the other, he seems to have thought that we have a theory of "exploitation," meaning marxism, that has more or less solved the problem of understanding the economy. In "Intellectuals and Power" (1977), he says, "We know with reasonable certainty who exploits others, who receives the profits, which people are involved, and we know how these funds are reinvested. But as for power . . ." (Foucault 1977, 213). Perhaps we should see him as trying to undo the marxist project by completing it, rather than by taking on its legal/economic core.

Completing it by doing for institutional life what Marx did for the economy — revealing that in institutions, as in the market, results that look like mere consequences of "human nature" in a condition of "freedom" are socially constructed with a vengeance, that is, coerced. Law and legal discourse play superstructural and mystificatory roles in Foucault's disciplinary society analogous to their roles in Marx's political economy.[13]

The disciplinary society that underlies modern capitalism may have had its most perfect expression under communism. "Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?" (1979, 228) — is a question he was addressing to the East as well as the West.

Foucault is also undoing the marxist project by an end run around it: given the plurality of centers of disciplinary power, there is and can be no total system logic (though there are overarching tendencies — such as the development of that kind of power); neither the People (through the democratic state) nor the capitalist class is or could be in charge; the economy certainly doesn't drive the society; "freedom" and "human nature" (species being) in the common sense of marxists (and liberals) are incoherent notions. "The man described for us, who we are invited to free, is already in himself the effect of a subjection much more profound than himself" (Foucault 1979, 30). "[I]t is not that the beautiful totality of the individual is amputated, repressed, altered by our social order, it is rather that the individual is carefully fabricated in it, according to a whole technique of forces and bodies" (217).

But even if Foucault is wrong, and the state is no more the executive committee of the disciplinary than of the capitalist class, his understanding of power relations makes it possible to move beyond Hale once we decide to take law seriously. I mentioned above that Hale seems to me deficient in that he never tried to apply his theory of the impact of law on bargaining power to the legislative or judicial processes.

A second important lacuna was his single-minded focus on worker-owner and consumer-producer conflict, to the total neglect of the other "wide ranging cleavages that run through the social body as a whole," to use Foucault's phrase. A third is that he writes throughout using the economist's (even the institutional economist's) assumption that the actors who fight, bargain and cooperate exist independently of those activities as "subjects" (i.e. as autonomous, individual beings) with goals that are just a given of the analysis.

Foucault's approach has two great strengths. The first is that he sees the play of force as pervading all aspects of social relations, including particularly institutions like the prison, the hospital and the family, and the domain of sexual activity. The second is that he sees the distribution of power as one of the factors that determines the evolution of human knowledge in one direction rather than another. Power deployed across the whole range of social life shapes the consciousness of people who at any given moment in history pursue what appear to them to be their "freely chosen" or just their "natural" "human" goals through the strategic deployment of that very same power. In short, Foucault adds yet another system of circular causation and stable or unstable equilibrium to those sketched above.

Law is one of the things that constitutes the bargaining power of people across the whole domain of private and public life. One of the things this power produces is a distribution of income, understood as a distribution of whatever people value that is scarce. But another product of the deployment of power in unequal relations is knowledge, meaning particular understandings of the world and how it works.

Knowledge conditions the valuation process, indeed creates valuing subjects, as well as the particular values of valuing subjects. The knowledges produced by those empowered in earlier processes of private bargaining and lawmaking alter future bargaining, future lawmaking and future knowledge production. Thus individuals and groups organized along cross cutting lines of cleavage are themselves reconstituted through exercises of power that seem merely instrumental to pre-existing goals. Then they bargain again from the new starting point.

I will close by suggesting two local studies that might combine realist with post-structuralist methodology. I argued above that the complex of legal rules governing marriage constitutes the bargaining power of men and women in the particular context of unhappiness. But men and women get to understand themselves as such partly through anticipating, living in, thinking about leaving, and sometimes actually leaving marriages. Men are people who can be husbands and women are people who can be wives.

The rules make it "sensible" for women to trade services for security and for men to renounce violence in exchange for care, and this much the Hale perspective helps us to understand. But the face becomes the mask; particular male and female subjects are the products of as well as the actors in the bargaining drama. To understand how this happens we need Foucault's perspective.

The complex of legal institutions, including legal education, law firms, courts and administrative agencies, is less universally experienced than marriage, but it may well be important in the constitution of the modern subject in an analogous way. The themes of this institutional complex are "rightness" and coercion. People in these institutions <u>have to</u>, in order to act within them, learn to "be" right, in the sense of offering trans-personal justifications of their actions.

Having the ability to produce an argument from legal necessity to justify coercion is a prototypical way of being a person in our society. By this I mean that it is one of the models for all the other kinds of rightness, in the "human" but also in the natural sciences, in the professions, in bureaucracies and in informal peer networks. To the extent Foucault helps us understand it as an effect of disciplinary power, we are better able to deploy Hale's analysis of the effects of this effect, the mystified background rules for cooperative/competitive struggle.

NOTES

1. The works of Hale on which this article is based include the following: *Freedom Through Law: Public Control of Private Governing Power* (1952); "Coercion and Distribution in a Supposedly Non-Coercive State" (1923); "Bargaining, Duress and Economic Liberty" (1943); "Prima Facie Torts, Combination and Non-Feasance" (1946); "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion" (1935). See also John R. Commons' *Legal Foundations of Capitalism* (1924); Richard Ely's *Contract and Property in Their Relations to the Distribution of Wealth* (1914). For more on Hale's life and times as well as his thought, see Neil Duxbury's "Robert Hale and the Economy of Legal Force" (1990). Warren Samuels' article, "The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale" (1973), contains an invaluable collection of unpublished Hale materials, as well as a thorough summary of non-doctrinal aspects of his work.

Three earlier attempts at an appropriation of Hale's work are: Duncan Kennedy and Frank Michelman, "Are Property and Contract Efficient?" (1980); D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982); and D. Kennedy, "The Role of Law in Economic Thought: Three Essays on the Fetishism of Commodities" (1985).

To my mind, the best extant discussion of legal realism is Joseph William Singer's "Legal Realism Now" (1988).

2. The works of Foucault on which this article is based are the following: *Discipline and Punish: The Birth of the Prison* (1979); *The History of Sexuality, Volume I: An Introduction* (1978);

"Two Lectures," as taken from *Power/Knowledge: Selected Interviews and Other Writing, 1972-1977* (1980); "The Subject and Power" (1989); and "Intellectuals and Power: A Conversation Between Michel Foucault and Gilles Deleuze," as taken from *Language, Counter-Memory, Practice: Selected Essays and Interviews* (1977).

3. Although Hale was intensely aware of the distributive importance of the rules governing bargaining conduct (see Hale 1946), I think it is fair to say that the main emphasis of his work is on the way the general legal regime permitting unlimited acquisition and relatively free disposition of property produces inequality by structuring alternatives (see also Samuels 1973, 332, 343).

4. I think both Warren Samuels and Neil Duxbury miss the importance of Hohfeld to Hale's position (see e.g. Duxbury 1990, 425; Samuels 1973, 274-75).

5. Hale did not use unstable equilibrium analysis, at least so far as I am aware. Some texts utilizing this mode of analysis are the following: Gunnar Myrdal's *An Approach to the Asian Drama* (1970); Rolf Goetze's *Understanding Neighborhood Change* (1979); Daniel Fusfeld and Timothy Bates' *The Political Economy of the Urban Ghetto* (1984); Duncan Kennedy's "The Effect of the Warranty of Habitability on Low Income Housing: 'Milking' and Class Violence" (1987); and Lawrence Kolodney's "Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement" (1991).

6. There is therefore some exaggeration in Hale's statement that, "in fact the property rights are part of a legal arrangement whereby the law curtails the liberty of different individuals in different degrees, and the justice of the particular arrangements depends on the justice of the economic results rather than the reverse" (Hale 1927, 140).

7. Hale himself almost makes this connection many times, insisting over and over again that the issues in tort, property, contract and constitutional law are "policy issues" and involve "choice" (see e.g. Hale 1946, 200-01). But he never seems to have adopted the generalized kind of internal critique represented by Felix Cohen (1935). He seems indeed to have believed that there is an appropriate role for judges in protecting "normal" market functioning, while leaving distributive intervention to the legislature (see Hale 1923, 624-25; 1946, 218). This fit the political context of the New Deal, the Nine Old Men, and reactionary state judiciaries. But, in hindsight, the idea of facilitating "normal" functioning seems question-begging, given Hale's own insistence on the pervasive market-structuring role of law, and the general realist insistence that legal issues are policy issues (see Kennedy 1976, 1756-60).

8. Samuels describes Hale's "basic paradigm" as follows (the quotes are from Hale's unpublished papers): "The results do not take a completely 'predetermined pattern from the coercive powers which condition [them]'; since '[e]ach individual is subject to compulsion, in that he must make a choice between loss of one liberty or another,' the results are also a function of the acts of will or choice on the part of the individuals and groups. Whatever the structure of coercive capacities, the process is at least a partially open and not a closed one" (Samuels 1973, 291).

9. In a brilliant unpublished essay, "Foucault for Lawyers," Al Katz argues that the realists should be understood as "disciplinary" and "normalizing" legal theorists, in the mode of criminology, industrial psychology, and so forth. For Foucault as an antidote to Fish, see Alan Hutchinson's "Part of an Essay on Power and Interpretation (With Suggestions on How to Make Bouillabaisse)" (1985).

10. Foucault writes that, "[i]n fact, power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production" (1979, 194).

11. For example, in the chapter on "Panopticism" in *Discipline and Punish*, which to my taste is his single most brilliant production, the factory or workshop gets listed along with the prison, the hospital, over and over again etc. (see 1979, 203-05, 211, 215, 218-19, 224).

12. I think Foucault's radical dichotomy rests on a typically European but utterly misconceived picture of the legal system as a domain governed by rules (as opposed to standards), by individualist (as opposed to altruist) definitions of legal rights, and by deductive (as opposed to "policy-oriented") reasoning. A basic legal realist insight was that this picture is an ideological misrepresentation, no less false for being supremely plausible to both legal and lay publics (see generally Kennedy 1976; 1989). If one understands law as contradictory in all of the areas where Foucault thinks it is coherent, his model of conflict between legal and disciplinary power falls apart. The disciplinary is always already an element in legal power.

13. See Foucault's statement in *Discipline and Punish*: "The contract may have been regarded as the ideal foundation of law and political power; panopticism constituted the technique, universally widespread, of coercion" (1979, 222).

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