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A STRIKE AGAINST THE LAW?*

Tony Weir**

Recent experience having taught me that subjects like the Roman law of property and obligations, being dead and detailed, quickly induce ennui in the late twentieth-century mind, it seemed right to try to find for this Gerber lecture a theme both topical and general. The recent coal-miners’ strike in England suggested itself, though I am by no means a labour lawyer. The strike is topical enough, for we are still trying to recover from it, and it raises the question of the role of law in society, English or not, which is a matter surely sufficiently general.¹

The strike lasted a whole year, bar a day or two.² It had been preceded by a partial stoppage, an overtime ban, for four months. The strike was not total, but two-thirds of our 180,000-odd miners were out, and most of the pits were idle.³ The cost of the strike is very variously computed. The employer, the National Coal Board, says in its Annual Report that the strike cost it £1,750 million.⁴ The Electricity Board says the strike cost them £2,020 million, as they had to burn oil in lieu of the 45 million tonnes of coal they could not get. British Rail had less coal to haul, and lost £250 million, and British Steel had less to burn and lost £180 million.⁵ The cost of policing the strike is put at £200 million.⁶ The total cost may have been as high as £6 billion, or nearly 2% of the gross national product.⁷ Whatever figure one selects, it is clear that the strike was no

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* This paper was presented as the Lawrence I. Gerber Lecture at the University of Maryland School of Law on October 2, 1985.
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3. Only 55 to 60 pits were regularly working. NATIONAL COAL BOARD, 1984-85 REPORT AND ACCOUNTS 4.
4. Id. at 7. Coal sales were reduced by 64.5 million tonnes to 44 million tonnes.
6. Pead, supra note 1, at 1155. Public spending increased by £2.5 billion in 1984-85 because of the strike, and by £1.25 billion the following year by reason of its after-effects. The Times (London), Nov. 19, 1985, at 23, col. 3.
7. According to figures released by the Government’s chief economic advisor, an estimated total of £5-6 billion is broadly correct. The Times (London), Nov. 19, 1985,
small deal.

There were not many deaths. One picket died on 15 March 1984; another was fatally run over two months later.\(^8\) One working miner, Jim Clay, was edged into suicide by harassment and threats. David Wilkie, a cab driver, was killed on 30 November while driving a miner to work:\(^9\) a striking miner dropped a block of concrete on to Wilkie’s cab from a bridge over the motorway.\(^10\) Of non-fatal violence there was a great deal. Nearly 1,400 policemen were injured, 85 severely. There were 2,000 arrests for assault or criminal damage, and 682 miners were fired for violence or sabotage.\(^11\) The cars of 200 working miners were damaged on 7 August when a mob of 1,000 striking miners from a neighbouring county attacked their pits.\(^12\) There was much intimidation, obstruction, and breach of the peace. It was not all loss, of course. There was the human gain of the strong sense of solidarity felt where all the miners were on strike, the warm cohesiveness of feeling exploited and beleaguered together; but as against that there was all the rancour of civil war where some miners were still trying to work.\(^13\) Bad feeling was caused between the police and the miners, between the police and the local police authorities (often siding with the miners), and be-

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8. Pead, supra note 1, at 1154, 1155.
9. Id. at 1155, 1157.
11. Pead, supra note 1, at 1155. The Coal Board dismissed 1,013 miners in all for various misdemeanors; about half of them have been re-employed. National Coal Board, Press Release (June 20, 1985). No miner was dismissed merely for striking, for that is not normal British practice. Even when strikers are dismissed, “no matter what the legalities are, it is the exception rather than the rule for employees who are dismissed during the course of a strike not to be re-engaged after the dispute is ended.”
12. Pead, supra note 1, at 1155.
13. For the sense of solidarity, see Howells, Stopping Out, in Digging Deeper 139 (H. Beynon ed. 1985); Massey & Wainwright, Beyond the Coalfields, id. at 149; Loach, We’ll Be Here to the End . . . and After, id. at 169. As to the civil war aspects, Ray Chadburn, President of the Nottinghamshire Area NUM, said, “We have brother against brother, father against son, man against wife . . . throughout a great deal of the British coalfield.” R. Geary, Policing Industrial Disputes: 1893-1985, at 145 (1985). The average loss to the striking miners was £10,000. National Coal Board, Report, supra note 3, at 7.
tween the police and the central government, which seemed in some
way to have caught the police up in a most displeasing imbroglio. 14

Now when tempers are roused, stones will fly. Minor picket vio-
lence is inevitable—perhaps it is right not to treat it as criminal at all—
though some of our miners’ violence was pretty major. 16 So I
am not principally concerned about the incidental violence, though
it was this violence that primarily affected the public, agitated the
government, and alienated the other unions. What concerns me
most about the strike is that it was in large part directed against the
law itself and was marked throughout by deliberate and public con-
tempt for the law and its processes. And about this the public did
not seem to care in the very least. Although court orders were is-

14. See McIlroy, Police and Pickets: The Law Against the Miners, in DIGGING DEEPER, supra
note 13, at 101, 105.

15. The Hobbs Act, 18 U.S.C. § 1951 (1982), may not be used in respect of violence
during a strike to achieve legitimate collective-bargaining objectives. United States v.
Enmons, 410 U.S. 396 (1973). Other federal criminal statutes, however, may be used.
There is no analogous immunity from criminal liability in England, but in fact prosecu-
tions tend to fail. See infra note 73 and accompanying text.

16. Other societies, being more vital, may be more lethal. Britain has not had any-
thing like the Yablonski murder, see B. McCormick, INDUSTRIAL RELATIONS IN THE COAL
INDUSTRY 66 (1978), or the Blair Mountain Battle of 1919, see N.Y. Times, Sept. 1, 1985,
at H17, col. 4. No British strike would make so poignant a novel as Mary Settle’s THE
SCAPEGOAT (1980). Nevertheless, “the long-drawn-out miners’ strike which began in
March 1984 was more violent than any other post-war industrial dispute.” R. Geary,
supra note 13, at 142. Geary gives the history of industrial violence in England. After
the Peterloo massacre of 1819, memorable names are Featherstone (1893, two deaths),
id. at 7-12; Tonypandy (1911, one shot); and Llanelli (1911, two shot, four killed in an
explosion), id. at 47.

17. Pead, supra note 1, at 1155; Evans, The Use of Injunctions in Industrial Disputes, 23
BRIT J. INDUS. REL. 133, 137 (1985).


19. Pead, supra note 1, at 1156.
that the strike was defeated must mean a victory for the law. It is not as clear as that. Certainly the strike was a failure: the Union obtained no part of what it was demanding. But it is not so certain that it was a victory for the law, though the law would have been defeated if the strike had been successful. For it was not the law that defeated the strike, not the state, not society, but the miners themselves who crept back to work. They did that because the strike was futile, not because it was illegal.

Who were the parties? On the left, so to speak, was the National Union of Mineworkers (NUM), our fourteenth largest union, with 180,000 employed members, a membership down by 20% from five years ago. The NUM is a federation of twenty-one area unions and a few other constituent groups, and it has a quasi-closed-shop in the mines, though there is another union for overmen and deputies called NACODS. The area unions—and this is important—retain separate identities, rule-books, and funds. On the right was the National Coal Board. Coal was the first industry to be nationalised by the postwar Labour Government in 1946, the first of a dozen or so, some of which are now being sold back to private persons and institutions. The National Coal Board is a statutory corporation with a monopoly of winning coal in Great Britain, with a statutory duty to develop the industry efficiently and a statutory requirement to adopt a policy which will secure that in an average year the revenues are adequate to meet proper outgoings. The Chairman and the Board's ten members are appointed by the Government, and the Minister has certain powers of direction in matters affecting the national interest and in laying down guidelines for major reorganisations or developments.

Now one might think that, coal mining being a nationalised industry, this was a conflict between public employees and a public employer. That would be only half right. In our view the miners are

20. "We knew that there was going to be some price for not succeeding in the dispute," said Jack Taylor, NUM (Yorkshire Area) President. The Times (London), June 8, 1985, at 1, col. 4. As to colliery closures, two more were announced during the strike and thirteen after it. National Coal Board, Press Release (July 3, 1985). As to wages, the original wage offer was accepted on April 11, 1985. National Coal Board, Press Release (Apr. 11, 1985).


not public employees at all, though that does not matter much in itself, since we no longer have any special rules about strikes by public employees. But if the employees are not public, the employer, the National Coal Board, certainly is, and that fact wholly skews the conflict. Everyone knows that right behind the Coal Board stands the Government, able to meet any demand the miners may choose to make. There was no doubt, then, that this was a strike against the Government. After all, the Government already subsidises the coal industry at the rate of 10% of its turnover, or £2 million per day. Why not more? Why not much more?

But the strike presented itself in terms of personalities. Here, very much on the left, is Arthur Scargill, 47 years old, a South Yorkshireman, President for Life of the Union, a talented orator and a very effective organiser, as he had shown in previous strikes. Less gifted in tongues is Ian Kinlock MacGregor, born in Scotland in 1912, educated at my own day school in Edinburgh, and now an American citizen. After being Chairman of British Steel from 1980 to 1983, he was appointed Chairman of the Coal Board by Mrs. Thatcher just before the overtime ban started. So valuable a prospect was he that the United Kingdom agreed to pay Lazard Frères of New York, where he was a partner, the sum of $2.2 million for his services. Needless to say, there were frequent allegations that MacGregor's opposition to the miners' demands was unBritish. Behind the scenes was Mrs. Thatcher, a person with a certain reputation for firmness and determination. I say "behind the scenes," but was she not perhaps in the wings, possibly even in the prompter's box? Views differ.

If these were the personalities, what was the issue? The lapel buttons worn by young and old (and mainly by those two classes of citizen, so far as I could see) said it all: "Coal not Dole." The strike

30. Also unBritish was the use of a baseball bat by strikers on a working miner's head on Nov. 23, 1984. Pead, supra note 1, at 1156.
was not mainly about pay but about jobs: after all, inflation has gone down and unemployment has gone up and up and stayed up.\textsuperscript{31} The trigger was the announcement on 1 March 1984 that two collieries in South Yorkshire were to be closed, followed by the news a week later that the Coal Board planned to reduce production by four million tonnes and cut out about 20,000 jobs.\textsuperscript{32} The issue was about closing pits or keeping them open.

When should a pit be closed? The Board's view was that pits should be closed when they cannot be run economically. The view of the Union, tenaciously held and untiringly reiterated, was that no pit should be closed unless it were either empty or unsafe. In other words, if there were any coal down there that could be safely brought up, it should be brought up, whatever the cost.\textsuperscript{33} Now perhaps the view of the Coal Board required some qualification: perhaps they were viewing economic cost too narrowly, not taking sufficient account of the social value of increased production and the social disvalue of reducing employment. But the Union's view was obviously and evidently unsustainable. The Cortonwood Colliery, one of the two nominated for closure, was 111 years old and was losing £20 per tonne.\textsuperscript{34}

The position adopted by the Union was so unmeritorious that a question put by Barbara Tuchman may be appropriate. In her recent book, \textit{The March of Folly}, she reviews major instances of arrantly stupid behaviour on the part of persons in power—the Trojans letting in the Wooden Horse despite the clash of arms within; the Renaissance Popes blindly failing to reform before the Reformation and to forestall the looming Luther; the English, red in face and coat, stubbornly alienating colonies not a million miles from here, colonies, if I may say so, of considerable promise; and one more recent instance which I forbear to mention. In observing that history afforded her many other examples of amazing human folly, Ms. Tuchman asks, "Why in recent times have British trade unions in a

\begin{itemize}
  \item \textsuperscript{31} From 1976 to 1984 inflation dropped from 16.8\% to 5\% and unemployment rose from 5\% to 12.6\%: \textit{CENTRAL STATISTICAL OFFICE, ECONOMIC TRENDS, ANN. SUPP.} 1986, at 109; \textit{ECONOMIC TRENDS, Dec.} 1985, at 42. In coal mining, colliery manpower was reduced by 9,700 in 1984-1985, and by a further 7,300 in the first 12 weeks of 1985-1986, leaving only 164,000 employed.
  \item \textsuperscript{32} Pead, \textit{supra} note 1, at 1154.
  \item \textsuperscript{33} The views are given in \textit{Pit Closures-The Economic Issues} (\textit{Weekend World, London Weekend Television, LWT Sept. 21, 1984}). History and statistics are given in \textit{Pryke, supra} note 23, at 46-47, 56-57, and the arguments at 66-69, concluding in favour of more closures.
  \item \textsuperscript{34} M. Crick, \textit{supra} note 28, at 11.
\end{itemize}
lunatic spectacle seemed periodically bent on dragging their country towards paralysis, apparently under the impression that they are separate from the whole?"\(^{35}\)

But it must be said that not everyone in England wants England to thrive. Some want it destabilised. Spies, which it is unlawful to be, we have had in plenty, some of the most notorious from my own College in Cambridge,\(^{36}\) and Communists, which it is perfectly lawful to be, we still have in numbers. Arthur Scargill's father has been a Communist almost all his life,\(^{37}\) and Mick McGahey, the Vice-President of the Union, is one now,\(^{38}\) though Arthur Scargill himself, an active member of the Young Communist League, says he never joined the actual Party.\(^{39}\) It is an established fact that the Party sent one Frank Watters to South Yorkshire to activate that area in 1953: he seems to have done well.\(^{40}\) Now there is nothing odd about the Communists infiltrating the unions.\(^{41}\) It is an obvious thing for them to do. If they were not doing it, they would not be doing what they should. George Orwell saw it clearly:

The British Communist Party appears to have given up . . . the attempt to become a mass party, and to have concentrated instead on capturing key positions, especially in the trade unions. So long as they are not obviously acting as a sectional group, this gives the Communists an influence out of all proportion to their numbers.\(^{42}\)

But leaving ulterior or collateral aims aside, could Mr. Scargill hope to win the strike on the chosen ticket? Was the strike plausible? Well, the miners had done pretty well against the Government in

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36. Sir Anthony Blunt, Donald MacLean & Kim Philby, to mention but three.
37. **M. Crick, supra** note 28, at 28.
38. **Id.** at 89.
39. **Id.** at 33.
40. **Id.** at 24.
41. "South Wales, Scotland and Kent have generally been dominated by communists . . . although a communist influence in South Yorkshire only began in the fifties, and then fitfully." B. McCormick, **supra** note 16, at 63-64.
42. **G. Orwell, Burnham's View of the Contemporary World Struggle**, in **4 Collected Essays, Journalism and Letters** (1945-1950) 367 (1970). See also Roberts, Book Review, **23 Brit. J. Indus. Rel.** 163 (1985) (reviewing F. Chapple, **Sparks Fly** (1984)): "Over the past sixty-five years an immense effort has been made by a tiny, but ruthlessly determined, Communist Party to capture control of the policy and actions of the trade unions in Britain." Chapple himself was a Communist for 17 years and, having proved unable to get the Trade Union Congress to act against the rigging of elections, invoked the courts and alerted the public. **See D. MacDonald, The State and the Trade Unions** 170, 180 (2d ed. 1976).
the past. Not in 1926, admittedly, when the General Strike in their support lasted only nine days and the miners crept back to work badly bruised six months later. But in January 1972 the miners struck on a 59% vote, and within a month the Government had to declare an emergency, ration electricity, and cut the working week to three days. Two weeks thereafter the Government capitulated totally, and gave the miners even more than the generous award recommended by an independent review body. In the words of The Annual Register, a sober publication ever since its foundation by Edmund Burke, "in a confrontation with a united and determined trade union the Government had been forced to retreat . . . and lost effective control of the economy." Two years later the threat of another strike by the miners, 81% of whom were for action, was enough to topple the government of Mr. Heath and put paid to his attempt to bring industrial relations under the law. The miners, along with the railwaymen and dockers, got the law repealed. Even more recently the miners had embarrassed Mrs. Thatcher most mightily. On that occasion Mrs. Thatcher gave in so promptly that most people have forgotten about it, but I bet she has not. In February 1981 the Coal Board announced a programme of pit closures. Strikes of miners broke out in South Wales, Durham, and elsewhere. The Government immediately conceded further money to the Coal Board. The list of closures was withdrawn, and television programmes were interrupted so that the grateful public might be speedily informed thereof. The men returned to work triumphant. Last year a writer in The Economist, speaking of the most recent strike, said this: "Mrs. Thatcher did not precipitate this strike any more than did her appointee, Mr. MacGregor. But her previous surrenders to the miners, and the surrenders of her predecessors, helped to cause it."

So there was a fair chance of winning concessions, if the power

45. See C. Balfour, supra note 44, at 75-82; B. McCormick, supra note 16, at 197-209.
47. B. McCormick, supra 16, at 211-17.
49. In Whose Palm?, Economist, Sept. 8, 1984, at 13. The writer noted that whereas since 1964 Labour Governments had closed 335 collieries, the Conservatives had closed only 49. Id. That number has now increased. See supra note 20.
plants and steel mills could be closed, which would depend on a shortage of coal and support from other unions. But there were adverse factors. A number of mines—the most efficient—stayed working. Stocks of coal were higher than ever before; the overtime ban which was designed to reduce them failed to have that effect because the winter of 1983-1984 was a mild one. The relevant proverb here is "Strike while the weather is cold." Coal continued to be imported because the dockers did not strike, except for a few days, at the end of which irritated teamsters waiting at the English Channel threatened to throw the dockers into it unless they resumed work.50 Finally, the Government was ready to contain disorder, for after the trouble at Saltley near Birmingham in 1972, in which Mr. Scargill played a notable part,51 the 43 police forces in the country had set up a National Reporting Centre in New Scotland Yard which could deploy up to 7,000 officers per day wherever they were needed, the officers being supplied voluntarily, but not free of charge, by quieter regions.52 The Prime Minister had power at law to order one force to help another,53 but quite characteristically this power was never used.

Now let us turn to the aspects of the strike which would interest a lawyer, its external and internal legality. I propose to read three of the National Guidelines which the Union issued to its branches.

1. There shall be no movement of coal or coal products into or out of the country nor internally within the country unless by prior agreement with the [Union] . . . . 54

Napoleon himself would have been proud to issue such a declaration of embargo, blockade, and freeze. But this was not the ukase of an enemy emperor. It was an assumption of power by the representatives of 0.35% of the citizenry, actually representing, as we shall see, rather less than half that number. Did we hear a mouse roar?

9. Any action to restrain the Trade Union activities of those involved in industrial action by resort to the courts for injunction, sequestration of Union assets or damages under the provisions of the 1980 and 1982 Employment

50. Enter, Stage Left, Confusion of Dockers, ECONOMIST, Sept. 1, 1984, at 37.
52. Pead, Where can we get 2,000 Officers by 4 p.m.?, 1985 POLICE REV. 1212.
Acts, shall be treated as an attack upon all of the unions.  

In other words, because we are powerful, you may not exercise your legal rights.

8. The . . . Committee . . . are further aware of the use of massive numbers of police deployed to restrict the legitimate and traditional right of workers to peaceably picket other workers. The Committee deplore the use of the Police to enforce the Tory Government's Employment Acts of 1980 and 1982. When such action prevents the proper deployment of a trade union picket, a picket shall be deemed to exist notwithstanding the inability of trade unionists to carry out their normal function.

That is, a picket stopped because it is unlawful is to be treated as both existing and lawful. Note the insistence on the statutes. They were one of the main targets of the strike. But in fact the police were not enforcing these statutes at all, for these statutes gave them nothing to enforce. They were applying the criminal law, most of it old and much of it common, in an attempt to maintain or restore public order.

When such are the aims, the methods are unlikely to be very lawful. Flying pickets drove across the country in hordes like a private army. Some were dispatched to steel works in order to impede the delivery of coke and others to docks to prevent the unloading of imported coal, but most went to other counties in order to harass and intimidate the miners who were working there. This was especially true in Nottinghamshire and Derbyshire. Now in Nottinghamshire, where Robin Hood came from, the miners had voted by more than three to one to carry on working and not to go on strike, so they were clearly entitled to work unless there were a lawful national strike call. In Derbyshire, where they make Rolls-Royces, the local ballot showed a nearly equal split, 50.1% against a strike, 49.9% in favour. The local rules required a 55% vote in favour before a strike could be called, but the local officials called a strike anyway—quite illegally, as the courts later held. This manifestly illegal

55. Id.
56. Id.
58. Pead, supra note 1, at 1154.
59. Taylor v. NUM (Derbyshire Area), 1984 I.R.L.R. 440. In Taylor v. NUM (Derbyshire Area) (No. 2), 1985 I.R.L.R. 99, the court held that union funds must no longer be used to pay strikers for picket duty, but that sums already so disbursed need not be repaid. Payment to the NUM by another union was permissible although the miners'
strike call was obeyed by no less than 85% of the miners there: the bulk of those who had voted against the strike nevertheless obeyed the strike call, illegal though it was. You may imagine how such loyalty puts union members at the mercy of their leaders. You may imagine, too, what treatment the remaining 15% would receive for not obeying an illegal strike call against which they and most of their colleagues had voted.

Now of course if there had been a national ballot with the requisite majority in favour of a strike, the local deviations would have been immaterial. Although the national rules provided that no national strike could be called unless 55% of the voters were in favour of it, no national ballot was ever held. A ballot was not called even after a special meeting had decided that a bare majority was adequate. The pretext for this omission was that no one should be allowed to vote a comrade out of a job. The quibble was this: "We are not calling a national strike, we are just calling the strike a national one." The Union officials proceeded as if the strike were national and lawful, and threatened working miners in Nottinghamshire with sanctions if they continued to work. Those miners went to court, and the court issued an injunction ordering the union and its officials to stop saying that the strike was a national one. The officials went on their way regardless. Fines were imposed for contempt of court. Mr. Scargill refused to pay his fine, but someone else paid it for him, doubtless very much against his will. The Union fines remained unpaid, the ultimate result of which was that its officers were replaced and the union put in the hands of a receiver appointed by the court. It is not clear whether this receivership made very much difference, though it must have made some.
But Mr. Scargill has his own little way with the rules of law when they conflict with what he sees as the interest of his union, as he seems to regard it. Back in 1974 he had been irritated by some observations in the *Sheffield Star* about the handling of the pickets in that year's strike, so he sued the paper for libel. After three days in the witness box he won £3,000 which he paid to the union. But two union members had given evidence for the defendant, and Mr. Scargill did not like that at all. He made a report to the union stating that their conduct was detrimental to the union, chaired the meeting which decided to charge the men, chaired the meeting which tried them, and chaired the meeting which found them guilty and sanctioned them. Although he did not actually vote, it was, of course, a breach of the rules of natural justice for the prosecutor to sit on the bench in this manner, and a contempt of court to punish the men for evidence given in an earlier trial.\(^66\)

Now I have said that the Nottinghamshire miners invoked the law, and the Derbyshire miners did so too. Note that the law they invoked was the common law, not the new legislation with which the draftsman of the National Guidelines was so obsessed. There can therefore be no argument that the strike was illegal only because partisan and punitive laws were being resolutely opposed on grounds of conscience. Another suit was brought by working miners in South Wales who were being badly harassed by mass pickets, and the picketing was held unlawful on the facts at common law.\(^67\) But did no one other than the miners themselves invoke the law against a strike which cost billions of pounds?

The police deserve a word, though it was not the new legislation that they were enforcing: it naturally contains no criminal law. Even so we should note that the trade unions want the next Labour Government to abjure entirely the use of the police in industrial disputes.\(^68\) I wonder who would protect the Nottinghamshire miners then. In this strike the police arrested nearly 10,000 people and charged nearly 8,000.\(^69\) The local magistrates could not (and in some cases would not) cope, and stipendiaries from elsewhere had to be sent in.\(^70\) It is also notable that despite the gravity and public-

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68. 1985 POLICE REV. 1213.
69. *Pead*, supra note 1, at 1155.
70. *Id.* at 1156.
ity of the violence, prosecutions for serious offences have been extremely unsuccessful. Take the events at the Orgreave Coke Depot. One day at the end of May 1984 the police in riot gear clashed with the pickets, perhaps 7,000 in number. Sixty-nine persons were injured, including forty-one policemen. Eighty-two pickets were arrested that day, and thirty-five the next, including Mr. Scargill himself who spent all of seven hours in a cell. Three weeks later he had to spend the night in hospital, one of the eighty persons wounded in that day's work (18 June) when one hundred more arrests were made. The disorders were serious and notorious. Yet in July 1985 fifteen of the accused were acquitted by a jury after a forty-one day trial; the prosecution withdrew charges against fourteen more the following day; and on 5 August the prosecution decided to offer no evidence against a further seventy-nine. The law that people bark at does not seem to bite. Indeed, the police have even been blamed for bringing serious charges against the pickets, however seriously criminal their conduct. Perhaps the situation will improve when the new independent prosecution service is in operation, or when the Government's proposals for updating the public order offences, as they have updated police powers, are implemented. Meanwhile, it would seem that those guilty of mayhem should be charged with obstruction and nothing more. That was what Mr. Scargill was found guilty of at Orgreave, and fined £250.

But could the Government not intervene? No. It has no power to do so. We do have provisions for emergency powers, but our

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71. Id. at 1154-55.
73. Id. The police have also been blamed for charging very violent pickets with conspiracy in addition to the main offence. See R. v. Jones, 1974 I.C.R. 310 (C.A.); O. Kahn-Freund, supra note 26, at 252. The problem of securing and maintaining convictions is a recurrent one. In 1912 the Home Secretary was forced to use the prerogative of mercy and reduce sentence on five convicted labour leaders. R. Geary, supra note 13, at 34. It happened again in 1937. Id. at 132. The thirteen strikers charged with "mobbing and rioting" at Saltley in 1972 were all acquitted. Id. at 77.
74. See Prosecution of Offenders Act, 1985, ch. 23; see also An Independent Prosecution Service for England and Wales, Cmnd. 5, No. 9074 (1983).
76. Police and Criminal Evidence Act, 1984, ch. 60.
77. Pead, supra note 1, at 1157.
78. See Emergency Powers Act, 1920, 10 & 11 Geo. 5, ch. 55. Emergency powers have been invoked nine times since 1945. R. Geary, supra note 13, at 67. The special emergency provisions for industrial disputes contained in the Industrial Relations Act, 1971, ch. 72, § 138, were invoked only once, in the rail strike of 1972. See C. Balfour, supra note 44, at 84-86; B. Weekes, M. Mellish, L. Dickens & J. Lloyd, Industrial
definition of emergency is narrower than yours. In any case the powers do not include the power to order strikers back to work, not that such powers would have been used even if they had existed, since they would have been totally ineffectual. Nor, as I have said, are the miners, though employed by a public body, public employees. Your Government, I understand, has obtained sixteen injunctions since 1947, and actually enforces them, as the PATCO leaders discovered in 1981, but our Government, very uncharacteristically, maintained a very low profile during the miners' strike. All they did, apparently, was to wring their hands over the violence and then put them in our pockets to pay for the police presence in areas where the local authorities were unwilling or unable to pay for it.

What of the employer, the National Coal Board? It started bravely by going to court for injunctions against the flying pickets which the Yorkshiremen were sending forth. It obtained the injunctions, too. But the Union ignored them entirely, and the Coal Board did nothing except announce with great publicity that that was what it was going to do. What of British Steel, Mr. MacGregor's previous fief, a secondary victim whose premises were illegally picketed and which says it lost £180 million through the strike? Not a suit. The odd thing is that the major victims of the illegal conduct ostentatiously refrained from invoking the new legislation and vindicating their rights under it. It may be worth noting that they were also nationalised industries.


79. Our definition of emergency includes an event "on so extensive a scale as to be calculated to deprive the community, or any substantial portion of the community, of the essentials of life . . . ." Emergency Powers Act, 1920, 10 & 11 Geo. 5, ch. 55, § 1. Section 2(1) specifically provides that regulations may not impose "any form of . . . industrial conscription" or make it an offence for any person "to take part in a strike, or peacefully to persuade any other person . . . to take part in a strike." Compare 29 U.S.C. § 178 (1982) (includes in "national emergency" a threatened or actual strike or lock-out that affects at least a substantial part of an industry engaged in trade, commerce, transportation, transmission, or communication and that would imperil national health or safety).

80. The difficulties of implementing the law against industrial offenders were made clear in the Betteshanger débacle in 1942. See D. MacDonald, supra note 42, at 191.


83. Pead, supra note 1, at 1156.

Suit was brought by a small private haulage company—it had only twenty-two vehicles to start with, and some of those were unaccountably destroyed by fire one night after the suit. Its drivers were to haul coke being supplied by a third party to British Steel, and were being gravely discommoded, to put it no higher, by the mass pickets outside the steel-works. Injunctions were issued and served. They were ignored. But these little plaintiffs persevered, and fines of £50,000 were imposed on the South Wales Union, which showed its contempt for the court by not even appearing at the contempt proceedings. Sequestrators were appointed and the fines paid. But not even these plaintiffs sought to have the officers imprisoned for flouting the law.85

What about the courts themselves? Their position was an awkward one. Their orders were being publicly flouted and the judges themselves were the object of “critical and abusive comments.”86 The recent Vice-Chancellor was resigned about the obloquy: “For my part I have been little affected by any such comments, apart from feeling a somewhat mild curiosity about what will be said next.”87 However, he did deplore the fact that there was nothing the courts could do proprio motu to ensue compliance with their orders. “For the courts to say, as they often say, ‘Orders of the courts must be obeyed,’ becomes idle if there are daily instances of open and notorious disobedience remaining unpunished.”88 In sum, then, the law had little effect on the strike, though the strike was designed to have a large effect on the law. The time has come to ask why.

The answer, or part of it, seems to me to be that in England, unlike the United States, law is not, and is not regarded as being, a very important force in society. Lawyers there are much less involved in disputes than here. They are also very much less numerous. The eminence of our judges is purely social and ceremonial. Resort to the law is reluctant, infrequent, and deplored. This is especially evident in the case of industrial disputes, but I believe that to be simply an instance, though an obvious and important instance, of a general view of the role of law in society.

Let me suggest the contrast between our two societies on this point by a quotation from Henry James, as subtle a psychologist as

87. Id.
88. Id.
he was a syntactician, whose eye and ear were as sharp as his pen and who was marvellously familiar with the scene in his native and adopted countries alike. Bessie Alden, a serious young lady from Boston (a city which, James makes a New Yorker say, is so intellectual that in order to enter it you must pass an examination and on leaving it you get a kind of degree),\(^89\) is cross-examining Lord Lambeth, the amiable and susceptible, if languid, heir to the Duke of Bayswater.

"Lord Lambeth," said Bessie Alden, "are you an hereditary legislator?"

"O, I say," cried Lord Lambeth, "don't make me call myself such names as that."

"But you are a member of Parliament," said the young girl.

"I don't like the sound of that either."

"Doesn't your father sit in the House of Lords?" Bessie Alden went on.

"Very seldom," said Lord Lambeth.

"Is it an important position?" she asked.

"Oh dear no," said Lord Lambeth.

"I should think it would be very grand," said Bessie Alden, "to possess simply by an accident of birth the right to make laws for a great nation."

"Ah, but one doesn't make laws. It's a great humbug."

"I don't believe that," the young girl declared. "It must be a great privilege, and I should think that if one thought of it in the right way—from a high point of view—it would be very inspiring."

"The less one thinks of it the better," Lord Lambeth affirmed.\(^90\)

Is it perhaps "thinking of it in a high way" that leads you to have a Law Day every year?\(^91\) Such a thing is simply unimaginable in England where, like Lord Lambeth, we think about law as little as possible and do not think very much of it when we do.

Let me give three instances of our reluctance to use law even where to use it is evidently easy and appropriate. We have a Crimi-


90. *Id.* at 281.

91. Law Day was first proclaimed by President Eisenhower for Feb. 7, 1958, 23 Fed. Reg. 821 (1958), and in 1961 was moved to May 1 and rendered annual by Pub. L. No. 87-20, 75 Stat. 43, (codified at 36 U.S.C. § 164 (1982)). In Europe May 1 is Labour Day, while in Britain they have a Bank Holiday instead.
nal Injuries Compensation Scheme which provides compensation from public funds for the victims of violent crime. It disburses very large sums of money every year because there is a lot of criminal violence these days, especially in Ulster. 92 It was set up in 1964, but it was not set up by statute or under any statute. The scheme was drawn up by the Home Secretary and approved by the Houses of Parliament, 93 but as everyone knows that does not make a law. So we have a text but no law. At least two disadvantages flow from this. The first is that the text is not easy to locate. 94 I am not saying that statutory instruments, regulations, or delegated legislation are themselves easy to locate, but at least we know in which morass to look. Because the text of the Criminal Injuries Compensation Scheme was not in any of the law books, because it was not law, it filtered rather slowly into the professional consciousness and to that extent failed to perform its apparent function. 95 Secondly, it was perplexing for the courts to find a basis for reviewing the decisions of the non-court which was applying this non-law. 96 What difficulty or disadvantage would there have been in putting this scheme on a proper formal footing? None. Why was it not done? Perhaps as Lord Lambeth said: “Ah, but one doesn’t make laws. It’s a great humbug.” Years later a Royal Commission was established to consider the law relating to compensation for personal injury and death. The Commission naturally approved of the Criminal Injuries Compensation Scheme, and said in its report, rather mildly, that perhaps the time had come to put it on a proper statutory basis. 97 It is hardly necessary to state that nothing of the sort has been done. 98

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92. In 1982-83 the Criminal Injuries Compensation Board paid out over £29 million to over 29,000 applicants, bringing the total paid out since 1964 to £152 million. See Criminal Injuries Compensation Board, Nineteenth Report, Cmnd. 5, No. 9093, at 3, 38 (1983) [hereinafter Nineteenth Report]. Rather oddly, Ulster has a statutory scheme, for which there are many precedents, such as Criminal Injuries (Ireland) Act, 1919, 9 & 10 Geo. 5, ch. 14, amended by Criminal Injuries (Ireland) Act, 1920, 10 & 11 Geo. 5, ch. 66.

93. See Nineteenth Report, supra note 92, at 54-61; the latest modification is to be found in Home Office, Circular No. 27 (1983), in 133 New L.J. 253 (1983).

94. It was observed in the House of Lords that a large number of policemen apply to the Board for compensation. 446 Parl. Deb. H.L. (5th ser.) 285 (1983). The reason is that the police are informed about the Scheme and many other victims are not.


97. See the debate on a motion (withdrawn) for legislation, at 446 Parl. Deb. H.L. (5th ser.) 283-309 (1983), in which Lord Bridge adverted to the “really remarkable constitutional anomaly inherent under present arrangements in the relationship between the board, the courts and the executive.” Id. at 297. At long last, however, it was an-
Why formalise something that is working quite well in an informal manner? Lawyers would see a reason for doing so. But lawyers don't count for very much in England.

Second example. Victims of highway accidents in England get no damages unless someone was at fault, but if anyone is at fault, we think that victims should actually receive the damages to which they are entitled. Thus, everyone who puts a motor vehicle on the road is required by law to have a policy of liability insurance in an unlimited amount. Even so, some wicked people do drive uninsured and doubtless cause more than their proper share of accidents. What can be done for their victims? Well, the Minister of Transport thought it would be a good idea if they could get their money from the insurers as a group, but the insurers thought less well of the idea of paying out in cases where they should have received a premium but had not. Then the Minister hinted at the possibility of legislation and the insurers promptly agreed. Their agreement was recorded in a letter between the Motor Insurers’ Bureau and the Minister. In this agreement the Bureau promised to indemnify claimants under the specified conditions. All well and good. That seemed to save a lot of trouble. However, it is an established rule in England, as every schoolboy knows, that if A promises B to pay C, C cannot sue A: you have to be party to an agreement in order to acquire any rights under it. Thus, the method chosen by the Minister for granting rights to the victims of uninsured drivers was legally incapable of having that result. So now what is to be done? You simply ignore the law. In one case Lord Denning said: “No point is taken by the Motor Insurers’ Bureau that it is not enforceable by the third person. I trust that no such point will ever be taken.” To suppress an argument because it is clearly right is an odd proceeding for a judge. But that odd proceeding flows from

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100. The text of the agreements can be found in Hepple & Matthews, Tort Cases and Materials 696-700 (2d ed. 1980), or at [1964] 3 W.L.R. 450 and [1971] 3 W.L.R. 175. The original agreement was dated 17 June 1946, and was based on recommendations of a Departmental Committee Report, Cmdn. 4, No. 5528 (1937).


102. Hardy v. Motor Insurers’ Bureau, [1964] 2 Q.B. 745, 757. Of the agreements Lord Hailsham L.C. has said, “Their foundations in jurisprudence are better not questioned any more than were the demises of John Doe and the behavior of Richard Roe in the old ejectment actions.” Gardner v. Moore, 1984 A.C. 548, 556.
the odd proceeding of the Minister in choosing an informal method of effecting his wishes instead of simply getting a law passed, as he easily could.

Third example. All the universities in Britain except one are publicly funded. Furthermore, the tuition fee they charge to students is paid from public funds in respect of students who have been resident in Britain for three years prior to matriculation.\(^{103}\) The Government decided that it wanted foreigners to pay realistic fees, so it told the universities to charge foreigners not less than a certain amount. Two difficulties arose. First, it transpired that it was incompatible with the Treaty of Rome, with the obligations we had assumed on entering the Common Market, to charge higher fees to residents of France or Italy, for example, than to those of England. Secondly, as we recently learned from a decision of the House of Lords, it was unlawful under our Race Relations Act to charge higher fees to \textit{anyone} not resident in Britain, unless that person was British.\(^{104}\) Now doubtless there was nothing the Minister could have done to avoid the situation under the Treaty of Rome, since it is a sort of Constitution, though a Constitution of rather a peculiar sort; but he could easily have done something to avoid the illegality of charging non-European foreigners, because the Race Relations Act itself provides that he may render such discrimination lawful. But in order to effect that result, he has to use juridical means, a statute, a statutory instrument, or even a certificate of approval of the arrangements in question.\(^{105}\) None of these was used, or used in time. And so we have the embarrassment of a judicial decision that doing what the government wants you to do is illegal. The reluctance to do things in the proper way, the legal way, seems to be very strong. Finally, of course, a statute had to be passed.\(^{106}\) This time there was no option.

Is there any explanation for this attitude to law, shared apparently by legislators not related to the Duke of Bayswater? I believe that the absence of a written Constitution counts for something here. We have no basic text to respect or to lend respect to the body which interprets it. "Unconstitutional" is a word we might use to describe the miners' strike. We do not even have a Bill of Rights

\(^{104}\) Orphanos v. Queen Mary College, 1985 A.C. 761.
\(^{105}\) Race Relations Act, 1976, ch. 74, §§ 41, 69(2).
\(^{106}\) Education (Fees and Awards) Act, 1983, ch. 40.
to make us conscious of our rights.\textsuperscript{107} For example, in Britain the right to strike is nowhere explicitly conferred,\textsuperscript{108} as it is in your legislation and in most of the Constitutions of European states.\textsuperscript{109} We have signed the European Convention of Human Rights, but we have not enacted it. That is getting us into trouble with the Court in Strasbourg, which has come close to saying that rights must be in writing.\textsuperscript{110} The next thing will be for us to be told, as the German Constitutional Court told its Parliament, that statutes must be comprehensible, on pain of unconstitutionality.\textsuperscript{111} And that may be another reason for our distaste for the law: it takes such ghastly forms. The legislation on industrial disputes, but not it alone, is drafted in a dauntingly inspissated manner,\textsuperscript{112} and the decisions of the courts are hardly such that he who runs may read them. By contrast, your labor legislation reads quite nicely.\textsuperscript{113} Beneath all this is an English preference for the inexplicit, the \textit{sous-entendu}, the thing understood but not said. After all, those who like understatement might prefer no statement at all.

The reasons for this preference may be uncertain and debatable, but the fact is clear. So is another fact. We cannot go on like this. It was all very well in a homogeneous and mutually trusting society to dispense with the rule-book and proceed on the basis of common understanding, but "homogeneous and mutually trusting society" is not a description of Britain today. Nor are we an independent society any longer: our subjection to foreign courts is bound to make us change our \textit{mores} into \textit{leges} as well as our yards into metres. When things are no longer understood they must be spelled out. And when people cannot be trusted not to abuse their liberties, those liberties may have to be constrained. We were slow to follow you in putting brakes on monopolists and cartelists, and

\begin{itemize}
\item \textsuperscript{107} See L. Scaman, \textit{English Law - The New Dimension} 76-82 (1974); M. Zander, A \textit{Bill of Rights}? (2d ed. 1979); J. Jaconelli, \textit{Enacting a Bill of Rights} (1980).
\item \textsuperscript{108} "The freedom to strike is hidden in the interstices of procedural immunities and privileges." O. Kahn-Freund, \textit{supra} note 26, at 254. "[W]hatever may be the arguments against a right to strike, they have yet to be convincingly made." Elias & Ewing, \textit{Economic Torts and Labour Law: Old Principles and New Liabilities}, 1982 \textit{Cambridge L.J.} 321, 358.
\item \textsuperscript{111} 5 Entscheidungen des Bundesverfassungsgericht [BVerfGE] no. 7 (1956) (Apothekengesetz).
\item \textsuperscript{112} See the criticisms of Sir John Donaldson M.R. in Merkur Island Shipping Corp. v. Laughton, 1983 A.C. 570, 594-95 (C.A.), approved by Lord Diplock, \textit{id.} at 612.
\item \textsuperscript{113} The declarations of purpose and policy in American labor legislation, \textit{see}, e.g., 29 U.S.C. §§ 141, 151, 171 (1982), are rather reminiscent in their stately style of an Elizabethan Preamble.
\end{itemize}
we long trusted the financiers in the city to behave like city gents, but finally we have been forced to deploy the law.\textsuperscript{114} So, too, in the area of race relations, when it finally became clear that the "Well, it will be best if folks just work it out" theory would not answer.\textsuperscript{115} But nowhere has the intervention of law been so strongly resisted as a thing not just unnecessary or inappropriate, but as a thing actually mischievous, as in the area of industrial relations.

The list of those who have opposed any intervention of the law in industrial relations is long and illustrious. Sir Winston Churchill once said: "It is not good for trade unions that they be brought in contact with the courts, and it is not good for the courts."\textsuperscript{116} The Royal Commission on Trade Unions which reported in 1968 said: "[I]t has been the traditional policy of the law as far as possible not to intervene in the system of industrial relations. The evidence which we have received shows a wide measure of agreement that this non-intervention should continue to be the normal policy."\textsuperscript{117} The late Sir Otto Kahn-Freund, doubtless the most revered labour lawyer in Britain since the War, shows all the passion of a convert from the interventionism of his native Germany when he says: "I regard the law as a secondary force in human affairs, and especially in labour relations."\textsuperscript{118} And from Professor Griffith of the London School of Economics we hear the view that "industrial conflicts... can be solved only by compromise and by the exercise of economic and political strength, not by the application of legal principles or guidelines."\textsuperscript{119}

Not all have spoken thus. Lord Scarman, for example, has said:

The Industrial Relations Act 1971 was an attempt to subject the power of the trade unions to the rule of law as interpreted and applied by a court forming part of the general legal system of the land. The unions have overthrown it... The challenge which faces lawyers is to win and re-

\textsuperscript{114} Fair Trading Act, 1973, ch. 41; Financial Services Bill 1986.

\textsuperscript{115} Race Relations Act, 1965, ch. 73, extended by Race Relations Act, 1968, ch. 71, greatly extended by Race Relations Act, 1976, ch. 74. For the debate on the wisdom of the original legislation, see 711 PARL. DEB. H.C. (5th ser.) 926 (1965); 716 PARL. DEB. H.C. (5th ser.) 969 (1965); 718 PARL. DEB. H.C. (5th ser.) 958 (1965); contrast 906 PARL. DEB. H.C. (5th ser.) 1548 (1976).


\textsuperscript{117} ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYER'S ASSOCIATIONS 1965-68, REPORT, CMND. 5, No. 3623, at 203 (1968).

\textsuperscript{118} O. KAHN-FREUND, supra note 26, at 2.

tain public confidence in the law as the instrument of control.\textsuperscript{120}

Now what is the particular difficulty in letting the law in on industrial relations, given that we are not very keen on the law at all? I think it is this.

Unions think they have a vested right to immunity from the law.\textsuperscript{121} Because for seventy-five years they have been free from civil accountability for any wrong they did, they have come to think they can do no wrong.\textsuperscript{122} They have felt free to act as they pleased because they were free from civil liability however they acted. This immunity, or irresponsabilité, as the French might call it, stemmed from the legislation of 1906 when unions were given total immunity in tort and unionists were exempted from liability for specified torts committed “in contemplation or furtherance of a trade dispute”—the famous golden formula which has become a sacred cow.\textsuperscript{123} Sporadic attempts were made by the courts to control unionists by inventing new forms of liability not covered by the specific statutory immunities, but these were all countered by statutory amendments passed at union insistence.\textsuperscript{124} The courts could, of course, do nothing about the block immunity of the trade unions themselves: that could be altered only by legislation. Furthermore, the unions were as little bound by their word as by their acts. Collective agreements are generally not binding in England:\textsuperscript{125} it is true that they are generally barely coherent. Although the courts have sought to make the

\textsuperscript{120} L. Scarmar, supra note 107, at 62.

\textsuperscript{121} The unions' rooted antipathy to law is demonstrated by the fact that in 1961, 44 unions out of 57 decided against having statutory protection against unfair dismissal. Dickens, Hart, Jones & Weekes, The British Experience Under a Statute Prohibiting Unfair Dismissal, 37 INDUS. & LAB. REL. REV. 497, 499 (1984).

\textsuperscript{122} The power of the trade unions is politically expressed through the Labour Party. The unions cast 90% of the votes at the Party's Annual Conference, which formulates Party policy; they control 18 of the 27 places on the National Executive; they sponsor nearly half the Labour Members of Parliament; and they provide most of the Party's finances. England & Weekes, Trade Unions and the State: A Review of the Crisis, 12 g INDUS. REL. J. 11 (1981), reprinted in TRADE UNIONS 424 (W. McCarthy 2d ed. 1985). “[U]nion power, even if only a modest nuisance in the 1960s, has become a major obstruction by the early 1980s.” Minford, Trade Unions Destroy a Million Jobs, 1982 J. Econ. AFF. 73, reprinted in TRADE UNIONS 365, 368 (W. McCarthy 2d ed. 1985).

\textsuperscript{123} Trade Disputes Act, 1906, 6 Edw. 7, ch. 47, § 3.


\textsuperscript{125} Ford Motor Co. v. Amalgamated Union of Eng'g & Foundry Workers, [1969] 2
unions behave responsibly towards their members, those attempts have limits and have been greatly resisted.\footnote{126}

Legislation has not been unattempted. Although the 1968 Report of the Royal Commission I mentioned was very far from interventionist,\footnote{127} the Labour Government of the day very bravely produced a much farther-reaching proposal, \textit{In Place of Strife}, and drafted legislation including a cooling-off period and actual monetary penalties on unions.\footnote{128} Union pressure and ministerial pusillanimity saw to it that those proposals never became law,\footnote{129} but the next year Mr. Heath’s proposals for the new Conservative Government did reach the statute book. As we shall see, they did not stay there long.

"Taft-Hartley comes to Great Britain" is the title of an article by a leading American labor lawyer on the Industrial Relations Act 1971, which he describes as "more comprehensive than all of the major labor legislation enacted by Congress in 1935, 1947 and 1959 viewed together . . . ."\footnote{130} It was not only by taking us into Europe that Mr. Heath planned to make a fundamental change in our ways. But while he won a cash prize for his European venture,\footnote{131} the Industrial Relations Act got him no credit at all and lost him his job. Apart from that, it was an unmitigated disaster. It was the Law that Failed.\footnote{132}

Only the bare elements of such a complex enactment can be given here.\footnote{133} Essentially the Act contained two trade-offs. First, it improved the position of the individual employee by protecting the

\textit{Qua. 303.} Relevant terms are imported into individual contracts of employment, not without ensuing problems; \textit{see} Gibbons v. Associated British Ports, 1985 I.R.L.R. 376.


\footnote{127} \textit{Supra} note 97. Feeble regarding industrial conflict, the Commission was slightly bolder regarding the form of collective bargaining. \textit{See} P. Davies & M. Freedland, \textit{supra} note 126, at 163-65.

\footnote{128} \textit{In Place of Strife, A Policy for Industrial Relations,} CMND. 5, No. 3888, at 36-37 (1969).

\footnote{129} \textit{See} C. Balfour, \textit{supra} note 44, at 24-35.


\footnote{132} "In a period of little more than two years the unions had defied, defeated and destroyed one of the most significant Acts of Parliament of the century." H. Clegg, \textit{The Changing System of Industrial Relations in Great Britain} 327 (1979); B. Weekes, \textit{supra} note 78, at 220-32, gives conclusions resulting from a study of the impact of the Act.

\footnote{133} Its main provisions are attractively compared with the American legislation in Iserman, \textit{Labor Laws: Anglo-American Style}, 58 A.B.A. J. 1054 (1972).
employee against unfair dismissal, but imposed constraints upon the unions. Secondly, unions that registered were given considerable advantages. A registered union could have a sort of closed shop and be recognised as sole bargaining agent. Though it would, like the employers, be liable monetarily for what were styled “unfair industrial practices,” this liability would be limited in amount. Liability would be determined by a special court, expert yet perhaps sympathetic by reason of the presence of lay elements; in the ordinary courts the immunities of the registered union and its members would actually be increased. A union which failed to register, on the other hand, obtained none of these advantages and was exposed to unlimited liability for all manner of things before the ordinary courts. Indeed, it even forfeited the name of “trade union.”

But registration gave the Registrar certain powers over the unions’ rule-books, and this assault on their autonomy was what the unions most resented. The Trades Union Congress (TUC) therefore instructed its members not to register, and it cast out those who did. For a time also it told its members to ignore the special court, the National Industrial Relations Court, and all its works. The TUC’s instruction mattered less than one might have thought, because most employers boycotted the court as well. But eventually there was a confrontation. Three dockers were in flagrant contempt of an order of the National Industrial Relations Court. It looked as if they would be imprisoned, as they certainly desired. But then from the murkiest recesses of our legal lumberroom—how wise it is never to clear out a lumberroom—there emerged a barely

134. Industrial Relations Act, 1971, ch. 72, §§ 22-33.
135. On the closed shop, see B. Weekes, supra note 78, at 33-63. A full closed shop was practised by 11 of the nationalised industries and by half of the 77 largest companies. H. Clegg, supra note 132, at 324.
136. The National Industrial Relations Court. See Donaldson, supra note 78.
137. The disadvantages are listed in A. Campbell, The Industrial Relations Act 55-56 (1971). Full common law liability is provided for in the Industrial Relations Act, 1971, ch. 72, § 154.
138. Industrial Relations Act, 1971, ch. 72, § 61(3).
139. O. Kahn-Freund, supra note 26, at 190, 212-13.
140. Thirty-two unions were suspended from the TUC for registering and twenty expelled. H. Clegg, supra note 132, at 324.
141. C. Balfour, supra note 44, at 101-02.
142. “[T]he larger companies . . . quietly ignored the Act.” Id. at 5. “The law was not extensively used during the miners dispute, not because it was not available but because the injured parties chose not to use it.” B. McCormick, supra, note 16, at 223-24.
recognisable figure, the Official Solicitor. On behalf of the men and against their will, the Official Solicitor appealed to the Court of Appeal, and the Court of Appeal, under Lord Denning, held that there was insufficient evidence that the men had picketed in breach of the court order. So the men did not go to prison, the Industrial Relations Court was made to feel foolish, and the Court of Appeal certainly seemed disingenuous.

But then came the Pentonville Five. They were actually sent to jail. Mr. Wedgwood Benn spoke movingly of the Tolpuddle Martyrs of yesteryear, though they were sent rather further—to Australia—and went less eagerly. A national strike was called. Matters looked grave. Then the House of Lords accelerated its decision in a quite different case and held that unions, and not just the men themselves, might be responsible under the legislation. By a smart piece of doublethink the decision was taken to mean that the men themselves were not liable and they were released with speed from durance vile. Once again the legal system had shown more ingenuity than integrity and the enforcement of the Act was avoided. To the hatred with which the unions had always regarded the courts was now added unpunished contempt and consequently gross ridicule.

Two days before the miners were to go on strike in 1974 the Conservatives called a general election. They lost it. The Labour Government, a minority government, promptly set about repealing the Industrial Relations Act and abolishing the Court. The Con-

143. The story is told by J.A.G. Griffith, supra note 119, at 70-74; see also C. Balfour, supra note 44, at 86-97.
145. See A. Denning, supra note 144, at 39.
146. C. Balfour, supra note 44, at 93.
149. B. Weekes, supra note 78, at 197-98.
150. "No official of an organisation will be sent to prison for contempt of court," said the National Industrial Relations Court. C. Balfour, supra note 44, at 98, quoting The Times (London), Nov. 13, 1972.
servatives announced that they would not reintroduce it if re-elected. But they were not reelected. The larger Labour majority of October 1974 was able to restore and indeed extend the immunities which trade unions and unionists had enjoyed since 1906, while retaining and expanding the benefits which the Act had granted to individual employees generally, except in a quarrel with a union, a matter which led to Great Britain being found in breach of the European Convention of Human Rights. With the repeal of the legislation the non-interventionists were gleeful. Professor Kahn-Freund said this:

The failure of the Industrial Relations Act has reinforced our insight that neither the legislature nor the courts should attempt to burden the law with tasks which it cannot fulfill . . . . The economic situation of the country may compel both sides of industry to adopt policies of adjustment and of restraint. To these, however, the law can make no significant contribution.

But in 1979 the Conservatives were back, radical and uncompromising, abrasive, strident and contestative. They did not agree with the professor. They had a professor of their own. They

152. Enter the Trendy Tartan Tories, ECONOMIST, Sept. 14, 1974, at 35.
154. The fluctuations in policy are reflected in the changes in the period of employment that qualifies the employee for statutory protection from unfair dismissal: two years in 1971 (Industrial Relations Act, 1971, ch. 72, § 28); 26 weeks in 1975 (Trade Union and Labour Relations Act, 1974, ch. 52, sched. 1, cl. 10); one year in 1979 (Unfair Dismissal (Variation of Qualifying Period) Order, STAT. INST. 1979, No. 959); two years if less than twenty employees (Employment Act, 1980, ch. 41, § 8(1)); now two years for all employees (Unfair Dismissal (Variation of Qualifying Period) Order, STAT. INST. 1985, No. 782). See 135 NEW L.J. 1090 (1985).
156. O. KAHN-FREUND, supra note 26, at 276. His views are appraised in B. ROSHER & H. TEFF, LAW AND SOCIETY IN ENGLAND 218-20 (1980). “Unfortunately, if the law cannot solve such problems, there is always the danger that more authoritarian solutions will begin to present themselves in a more favourable light.” Id. at 220.
were determined to bring in a law. But they had learned something, namely not to bring in a big law. So instead of a big bill there were sporadic charges, short Acts in 1980 and 1982, and then, after their resounding victory in 1983, another Act the following year. This is the legislation against which the miners' strike was in part directed.

Let us look at the position achieved by this legislation. Let me say first what it does not do. It does not set up a special court. The memory of the National Industrial Relations Court is too strong and painful—perhaps especially as its President is now Master of the Rolls, President of the Court of Appeal. Nor is there any requirement for a union to register. This government is not so silly as to expect cooperation from the unions. Nor are collective agreements made binding or presumptively so. Nor is there any provision for a forced return to work during a cooling-off period. Indeed, the present legislation goes less far in some directions than the legislation proposed by the Labour Government of 1970.

What the recent legislation does is this. First, the blanket immunity of trade unions is abolished. They can now be sued and enjoined. Their liability in damages is limited in proportion to their membership—up to £250,000 in the case of the largest unions—and certain funds may not be attached; but of course their monetary liability in respect of legal costs or fines for contempt of court is unlimited. Secondly, although the protection of unionists for conduct "in contemplation of furtherance of a trade dispute" (the golden formula) is retained in terms, it is substantially qualified. First, the definition of "trade dispute" is very much narrowed so as to include only a dispute which is between workers and their own employer and which relates wholly or mainly to specified matters. Sympathy strikes and political strikes attract no protection. Next, even where there is a trade dispute as so narrowly defined, secondary action is protected only within certain limits. Picketing else-

159. Lord Donaldson M.R. has given his views on the National Industrial Relations Court in Donaldson, supra note 78.
160. See the proposals in In Place of Strife, supra note 128.
163. Id. §§ 16-17.
where than at one’s own place of work is unprotected, though protection is not actually required unless the picketing constitutes a nuisance or other common law wrong. Finally, provision is made for ballots, both for union offices and for industrial action. In particular, before any conduct in an official strike is protected there must have been a ballot with a majority in favour of it. Public money is made available to defray the cost of these ballots.

This, then, is the legislation which is thought to be a wicked, wanton, and brutal attack on the natural rights of trade unions. Yet in most countries trade unions have no greater rights than this legislation leaves them. It was the prior position in Britain which was quite exceptional, not the present one. While it is natural to howl and stamp if a privilege is taken away, one cannot expect much sympathy if the privilege is an unjustified or obsolete one. Perhaps most people in Britain not obsessed with hatred of the present regime would think the present position fair enough. But of course the question is not whether the law is fair. The question is whether it will be accepted. It is not enough to say “Fiat lex.”

One hopeful sign is that employers are beginning to use the legislation, to invoke the courts, and to obtain orders for fines and damages. One can only get used to court orders if court orders are issued, and they will only be issued if they are sought. After all,

167. Id. § 16.
170. See id. § 10.
172. See Evans, supra note 17, and now Austin Rover Group v. Amalgamated Union of Eng’g Workers (TASS), 1985 I.R.L.R. 162. When the two main railway unions had a one-day strike in support of the miners, British Rail, the employer, demanded that they pay £200,000 compensation. The Times (London), June 8, 1985, at 1, col. 6. The Labour Research Department has traced 70 actions at law brought by employers against trade unions and their members in the four and one-half years to August 1985, half of them in the last eighteen months. The Times (London), Oct. 7, 1985, at 3, col. 1(3). That the NLRB has 60,000 cases a year astonishes the English reader. See Verkuil, Whose Common Law for Labor Relations?, 92 YALE L.J. 1409, 1414 (1983) (replying to Epstein, A Common Law for Labor Relations: A Critique of New Deal Labor Legislation, 92 YALE L.J. 1357 (1983)). During the life of the Industrial Relations Act, 1971, only 39 employers “applied to the NIRC for relief from industrial action or its threat,” B. Weekes, supra note 78, at 217, and only one case reached a judgment for damages, paid after sequestration of the contemptuous union’s assets by an anonymous donor. See Evans, supra note 17, at 470. Of course, the number of cases of unfair dismissal is quite large: in 1983 the industrial tribunals dealt with 37,158 appeals, applications, and references under
for only three years in the past eighty have unions been subject to court orders. They are not used to the process, but perhaps they will become so, if time permits. Secondly, there are some parts of the legislation that the present Labour leadership would like to retain. Of course the good bits of the Industrial Relations Act were retained, too, but here we are talking of the provisions regarding balloting, and those the unions do not care for. And it is not at all certain that a Labour Government, much less a coalition government excluding the Conservatives, would defer to union wishes on all points. The shiftless and shifty Labour Government of 1974-1978 was certainly spineless on this matter, but its predecessor had had the nerve at least to propose legislation undesired by the unions, if not the will to enact it.

The unions, of course, are adamant against the legislation, as we have seen. The Trades Union Congress, not finding much not to cooperate with, has instructed its members not to take the free money made available for the statutory ballots, and proposes to cast out the quite powerful unions which have done so. The demands for the repeal of this legislation are vociferous, all the more so since the demands for the repeal of the previous legislation were effective. Even on the union front, however, there is a glimmer of hope. First, the unions themselves are readier than they were to invoke the law. They had great fun going to court to embarrass the government over the GCHQ (Government Communications Headquarters) affair, when Mrs. Thatcher told the union members at the high security government communications headquarters to quit their union or leave the premises: of course those people really were public employees, even in our understanding, but it is a matter on which the Court of Human Rights in Strasbourg has yet to speak. Secondly, the Trades Union Congress has agreed to try to work out a "positive legal framework" within which it would be possible for them to work


174. See Council of Civil Service Unions v. Minister for the Civil Service, 1985 A.C. 374 (another instance of the troublesome consequences of informal methods of proceeding). Fentiman regards as very significant that the NUM, which did not appear in court when sued, itself went to court on July 11, 1985, to seek (unsuccessfully) an injunction to prevent the Nottinghamshire miners from seceding and forming their own break-away union. NUM had already gone to court on December 19, 1984, to try to stop a preliminary move toward secession. Pead, supra note 1, at 1157; Fentiman, supra note 1, at 89.
under a Labour administration.\textsuperscript{175}

That is hopeful. But it would not do to be very hopeful. At the same meeting, the Congress voted for certain motions moved by the National Union of Mineworkers.\textsuperscript{176} The motions were, first, that all sums paid by the union by way of fines and costs should be refunded—i.e., that they should get back what they lost; and, secondly, so that they may now have what they failed to gain, that no pit be closed until it is physically exhausted. This makes one reflect on the status of a victory when the victors will not claim it and the losers will not admit defeat.

\textsuperscript{175} The Times (London), Aug. 24, 1985, at 30, col. 1.
\textsuperscript{176} And Now for Pandora's Ballot Box, ECONOMIST, Sept. 7, 1985, at 61-62.