Legal Intervention in Industrial Relations in the United States and Britain: A Comparative Analysis

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As advanced industrial nations, both the United States and Britain shared many problems in the formation of their industrial relations systems. These problems included the right of unions to recognition by employers, the right to bargain collectively, the exercising of industrial sanctions by both unions and employers and the role of government in regulating the interaction of the parties with collective bargaining in order to protect the public interest.

What they do not share, however, are the responses of the law in both countries to the needs of sophisticated industrial relations structures. In the formative stages of both industrial relations systems judicial responses to trade unionism were fairly similar in that judges were, in general, hostile to the objectives of unions and supportive of employers.¹ Judicial hostility to unions, however, continued for a much longer period in Britain than in the United States. Starting from the

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¹ See generally, R. Morris, Government and Labor in Early America (1975).
latter part of the nineteenth century in Britain and the early part of the twentieth century in America, legislative intervention tended to be supportive of the objectives of unionism. But where the American legislative approach favored sweeping, comprehensive reform, the British approach was to address specific problems in a piecemeal manner, reflecting, perhaps, the British propensity for immediate compromise rather than for long-range planning.

In comparison with Britain, the United States enjoys a relatively stable and rational industrial relations system. This comparative tranquility prompted the British Parliament to attempt comprehensive reform of its own system with the Industrial Relations Act of 1971, modeled largely on America's labor law. This attempt proved a total failure and the Act was repealed in 1974. The legislation which replaced it consequently reflects more of the particular problems of Britain, but it does not compare with the better example set by the United States. Nonetheless, it is clear that some major overhaul of the British system is necessary and while the Parliament of that country may today look more toward Europe than to America for alternatives, these writers contend that there is much in the American system which might be profitably emulated in Britain. This article will examine the differing historical, social and political forces in both countries which serve to make extensive transplantation from the American to the British system difficult, if not improbable. It will also examine the effect that these differences have had on the present-day industrial relations structures of both countries, together with some proposals for the reform of the British system based on the American experience.

I. Formative Trade Unionism and the Law

In the young American republic, early union organizing ef-

3. C. Gregory, Labor and the Law 223 (1946) [hereinafter cited as C. Gregory].
5. Industrial Relations Act, 1971, c. 72 (repealed 1974).
6. Professor K. Wedderburn termed the industrial and political upheaval caused by the Act the "government's Industrial Vietnam," The Observer, April 1, 1973, at 1.
7. Trade Union and Labor Relations Act, 1974, c. 52, § 1.
forts were hindered by the application of the criminal conspiracy doctrine. The *Philadelphia Cordwainers' Case* in 1806 held that a combination to raise wages or one that required others to join a union was actionable as a criminal conspiracy. Thus, the very existence of a union, let alone its activities, was placed in jeopardy by law. Conspiracy actions against the fledgling unions continued, although application of the doctrine was eased somewhat with the *Commonwealth v. Hunt* decision of 1842. In *Hunt*, the Massachusetts Supreme Court found that the objectives of a union, or the means used to reach them, must be unlawful in themselves in order to establish the crime of conspiracy.

In England, the use of the doctrine of conspiracy against combinations of workmen began as early as 1721 when journeymen tailors in Cambridge joined forces and refused to work for less than a set wage; this action rendered them guilty of conspiracy. Thereafter, English courts readily applied the conspiracy doctrine against combinations of workmen, although there was no objection at common law to an individual worker bargaining with his employer on his own, or to his refusing to work. From the outset, then, the common law was too narrow in scope to be of any use in the development of unions: "The important point about common-law conspiracy independent of any breach of statute where it aims to do no other act unlawful in itself, is, of course, that the illegality rests upon the judge's disapproval of the combination alone." In addition to common-law conspiracy, English workmen were also subject to a series of anticombination acts which were first enacted in the fourteenth century. Some of these

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15. See, e.g., Statutum de Conspiratoribus, 1293, 21 Edw. 1; Ordinance of Labourers, 1349, 23 Edw. 1; 7 Rich. 2, c. 5 (1383); 11 Hen. 7, c. 2 (1494); Bill of Conspiracies of Victuallers and Craftsmen, 1548, 2 & 3 Edw. 6, c. 15; Statute of Artificers, 1562, 5 Eliz., c. 4; London Tailors, 1720, 7 Geo. 1, c. 13; Woolen Weavers, 1725, 12 Geo. 1, c. 34; Hatters, 1749, 22 Geo. 2, c. 27; Combinations of Spitalfield Weavers, 1773, 13 Geo. 3, c. 68; Combinations in Paper Manufacture, 1796, 36 Geo. 3, c. 111.
were general in application, while others were addressed to specific trades. The Combination Acts of 1799-1800 were passed at a time when the British Parliament was fearful of any mass gatherings among the populace. Just a decade earlier they had witnessed the French Revolution, with its attendant excesses. Also, closer to home than the continental Jacobin uprising, were the mutiny of the British fleet at the Nore in 1797, and in 1798 the uprising of the United Irishmen. These occurrences were enough in themselves to make any government of privileged classes uneasy. With the increasing growth of the factory system, however, and the large numbers of workers crowding into the towns and cities, the government and the courts felt compelled to deal harshly with worker combinations in order to ensure that the potential bargaining strength which workers had was not realized or, if realized, was illegal to act upon. These Acts were so broadly drafted that they could have theoretically applied to price-fixing combinations of employers, but in practice they were used almost exclusively against the workers. Workers engaging in collective opposition were punished for the slightest infringement. Thus, a bootmaker, in concert with six others, who stopped work in order to protest the employers' action of halving wages was prosecuted under the Acts; all seven were sentenced to fourteen days imprisonment with hard labor. Francis Place, a master tailor, fought hard and skillfully for repeal of the Acts. He was very proficient at collecting evidence to prove his arguments and seeing to it that it was received in the right

16. 39 Geo. 3, c. 81 (1799); 39 & 40 Geo. 3, c. 106 (1800).
17. CARTER & MEARS, A HISTORY OF GREAT BRITAIN FROM EARLY TIMES TO THE PRESENT DAY 697 (1937) [hereinafter cited as CARTER & MEARS]:

"Two ideas inspired this legislation. First, workmen's unions were regarded as a political danger, for the government was still nervous of Jacobins. Secondly — Parliament considered that the masters of industry must be given a free hand and therefore that their workmen ought not to combine against them."

18. E. BROWN, supra note 2, at 178:

"The wisdom and humanity of Parliament," a Committee reported to the House in 1806, "would shrink from sanctioning the Combination Law if it appeared to them, at the time of the enactment, likely to operate only in favor of the strong against the weak: if it had any apparent tendency to secure impunity to oppressors, and to give undue advantage to the masters who can combine with little danger of detection, and who can carry their projects into execution with little fear of opposition."

19. CARTER & MEARS, supra note 17, at 794.
quarters. He and his friend Hume, a radical member of Parliament, succeeded in getting sufficient parliamentary support to secure the passage of legislation repealing the Combination Acts of 1799-1800.20

The pent-up resentment of English workers burst forth with repeal of the Acts in 1824,21 causing a wave of strikes, many violent, over the entire country. An alarmed Parliament then passed an act in 182522 which expressly legalized certain combinations, and at the same time made the exercise of union functions more difficult. Section 3 of the Act established a number of loosely defined criminal offenses, dealing with the violence brought about through the pressures of industrial conflict. These were “threats,” “molestation,” “intimidation,” and “obstruction.” The judiciary, in general, did not try to confine the application of these offenses to circumstances involving violence, but sought instead to broaden the definitions to encompass most instances that today would be considered legitimate union activities.24 A mere threat to strike, for example, was considered to be “molestation.”25

Judicial ingenuity in restricting union activities was by no means exhausted in this period, as evidenced by the case of

20. Combination Laws Repeal Act, 1824, 5 Geo. 4, c. 95.
22. Combination Act, 1825, 6 Geo. 4, c. 129.
23. Section 3 provided in pertinent part that:

[I]f any Person shall by Violence to the Person or Property, or by Threats or Intimidation, or by molesting or in any way obstructing another, force or endeavor to force any Journeyman, Manufacturer, Workman or other Person hired or employed in any Manufacture, Trade or Business, to depart from his Hiring, Employment or Work, or to return his Work before the same shall be finished, or prevent or endeavor to prevent any Journeyman, Manufacturer or other Person not being hired or employed from hiring himself to, or from accepting Work or Employment from any Person or Persons; or if any Person shall use or employ Violence to the Person or Property of another, or Threats or Intimidation, or shall molest or in any way obstruct another for the Purpose of forcing or inducing such Person to belong to any Club or Association, . . . or if any Person shall by Violence to the Person or Property or Business, or by Threats or Intimidation, or by molesting or in any way obstructing another, force or endeavor to force any Manufacturer or Person carrying on any Trade or Business, . . . every Person so offending or aiding, abetting or assisting therein, being imprisoned and kept to Hard Labour, for any Time not exceeding Three Calendar Months.
25. H. PELLING, supra note 21, at 31.
the Tolpuddle Martyrs, a case whose infamy has passed into British trade union folklore. Six men from the village of Tolpuddle in Dorset, England, were arrested in 1834 for the offense of taking the oath of their union. Even though joining a union was no longer unlawful because of the repeal of the Combination Acts, a leap of the judicial imagination equated the administration of union oaths with the kind of activity associated with a naval mutiny. The unfortunate six were sentenced to seven years transportation and hard labor in Australia by ingenious use of the Unlawful Oaths Act of 1797, which was passed after the major naval mutiny at the Nore. After serving four years of their sentence, and following a campaign of widespread indignation and protest on the part of both labor and the liberal establishment, they were released.

The objectives of a trade union could also render them in "restraint of trade" at common law. Some judges in the nineteenth century even thought that the existence of any association in restraint of trade was criminally "indictable at common law as tending to impede and interfere with the free course of trade." This same restraint of trade doctrine deprived unions of any lawful civil status.

It became clear that the common law held little hope for the development of the growing union movement. Statutory law promised some relief with the Trade Union Act of 1871. This statute was passed by a legislature which had become more responsive to the needs of urban workers after the exten-

26. Id. at 41.
27. 37 Geo. 3, c. 123 (1796). In this period of labor history joining a union often involved elaborate rituals designed to stress the need for secrecy. Prior to repeal of the Combination Acts in 1824, and even after repeal, the rituals survived as a tradition; skeletons, masks and robes being used in the ceremonies — see B. COOPER & A. BARTLETT, INDUSTRIAL RELATIONS — A STUDY IN CONFLICT 36 (1976) [hereinafter cited as B. COOPER & A. BARTLETT].
28. H. FELLING, supra note 21, at 42.
29. See Hilton v. Eckersley, 119 Eng. Rep. 781 (1855), per Campbell L.C.J., at 789, where he noted that the upholding of the union agreement: would establish a principle upon which the fantastic and mischievous notion of a "Labour Parliament" might be realized for regulating the wages and the hours of labour in every branch of trade all over the empire. The most disastrous consequences would follow to masters and to men, and to the whole community.
30. K. WEDDERBURN, supra note 14, at 313.
31. 34 & 35 Vict., c. 31 (1871).
sion of the franchise in 1867.\textsuperscript{32} Section 2 of the Act stated that the purposes of a trade union should not render any member liable to criminal prosecution merely because they were in restraint of trade. Also, the Criminal Law Amendment Act, 1871,\textsuperscript{33} restricted the definitions of "threats" and "intimidations," making a mere threat to strike no longer a statutory offense. But these protections proved illusory, for in 1872 Mr. Justice Brett held in \textit{Regina v. Buni},\textsuperscript{34} that the common law had not been abrogated by the 1871 Act. A threat to strike by London gas workers to secure reinstatement of a fellow worker discharged for union activity resulted in their prosecution for criminal conspiracy and in a sentence of twelve months' imprisonment. This decision instigated the appointment of a Royal Commission in 1874, whose report resulted in the Conspiracy and Protections of Property Act, 1875.\textsuperscript{35} Section 3 of the Act provided that an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute should not be actionable as a conspiracy if such act, when committed by one person, would not be punishable as a crime. This major turning point in British labor law finally established the right of trade unionists to engage in union activities without the taint of criminal conspiracy. However, a strong aversion to the courts had been built up in the attitudes of most British union leaders by this time, an aversion which has persisted to this day:

In 1800 trade unions were utterly illegal. The fact remains today a critical feature of their legal situation. The explanation of this paradox will provide us with the key to the peculiar structure of our law, concerning trade unions and industrial conflict. The most powerful influence on that law . . . has been the union's struggle to emerge from that illegality.\textsuperscript{36}

II. Judicial Circumvention of Pro-Union Legislation

Judicial hostility in the United States to the activities of unions was evident in the issuance of injunctions to prevent

\textsuperscript{32} J. Griffith, \textit{The Politics of the Judiciary} 57 (1977) [hereinafter cited as J. Griffith].
\textsuperscript{33} 34 & 35 Vict., c. 32 (1871).
\textsuperscript{34} 12 Cox 316 (1872).
\textsuperscript{35} 38 & 39 Vict., c. 86 (1875).
\textsuperscript{36} K. Wedderburn, supra note 14, at 304.
strikes, picketing and boycotts. There was also judicial support for the "yellow dog contract," which was an agreement signed by a worker as a condition of employment that he would not join a union or engage in union activities under pain of forfeiture of his employment. Injunctions had been issued freely by the state courts in labor disputes toward the end of the nineteenth century, but this anti-union utilization of a remedy which should have been extraordinary in labor-management disputes, received its greatest boost when the federal government obtained an injunction to end the Pullman strike in 1894. This abuse of injunctive relief continued in both federal and state courts until the passage of the Norris-LaGuardia Act, 1932, which provided that injunctions could only be issued in labor disputes under very stringent circumstances. "Yellow dog contracts" had been used with devastating effect against union organizing efforts, and various state legis-
tures enacted laws prohibiting their use. The Congress sought to ban their use by interstate carriers in the Erdman Act, 1898, but such attempts were consistently declared invalid by the Supreme Court. The climate of opinion, however, continued to militate against their use and they were expressly banned by the Railway Labor Act, 1926, and rendered unenforceable in federal courts by the Norris-LaGuardia Act.

Judicial inventiveness was further illustrated by use of the Sherman Antitrust Act, 1890, against unions. This Act addressed itself to "combinations in restraint of trade" and "attempts to monopolize trade," giving the Supreme Court sufficient leeway to apply its provisions against such union industrial sanctions as the boycott. The Sherman Act was subsequently amended by the Clayton Act, 1914, which sought, inter alia, to relieve unions of this judicially imposed liability. The courts were quick to circumvent the Clayton Act, however, holding that the protection accorded a union's "existence and operation" did not extend to certain union ac-

43. C. Gregory, supra note 3, at 174-84.
46. 45 U.S.C. § 152 (1926). In Texas & New Orleans Plywood Co. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930) the Supreme Court distinguished the Adair and Coppage cases by pointing out that the Railway Labor Act did not interfere with the right of the employer to select and discharge employees but was aimed rather at protection of the right of employees to have representatives of their own choosing.
49. Loewe v. Lawlor, 208 U.S. 274 (1908).
51. Id. ch. 323, § 6 (15 U.S.C. § 17):

[T]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.
tivities. Thus, judges in both countries seemed to display an extraordinary ability to apply the law against trade unions even when laws were passed with the express object of protecting unions from judge-imposed liabilities.

The process of judicial circumvention also continued in Britain during this period. According to the House of Lords, the protection accorded to unions from charges of criminal conspiracy at common law, provided by the Conspiracy and Protection of Property Act of 1875, did not extend to actions for civil conspiracy. Adding to the travails of British unions was the Taff Vale decision in 1901. There the court held that trade unions could be sued in their registered names for actions in tort and that liabilities so incurred could be satisfied from union funds. Prior to this decision, union leaders felt that they were adequately protected financially as they were not corporations, nor had the Trade Unions Act, 1871, conferred corporate status upon them. Justice Farwell, however, found no difficulty in overturning the argument concerning a union's unincorporated status. The learned judge observed that the privileges conferred upon trade unions by the Trade Union Act, 1871, implied a correlative liability on the part of a union to be sued in its own name for any tortious acts committed on its behalf. Professor Wedderburn recently characterized this decision:

55. Id. at 429:
Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law.

The finding of Farwell, J., was reversed in the Court of Appeal but later affirmed by the House of Lords, the Earl of Halsbury, L.C., observing, at 436:

If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement.
Nothing did more to embitter relations between the courts and the workers than the Law Lords' decision that a registered union could after all be sued. . . . The Taff Vale case became part of working class culture, part of the way "they" treat trade unions if they can. Such feelings have not died. 56

Trade unionists throughout the entire country expressed great alarm at this decision. Unrest became widespread, and pressure from trade unions and concerned liberals mounted upon Parliament for statutory intervention. The Liberal Party won the general election in 1906 and, in the same year, the Trade Disputes Act 57 was passed. The Act was a response to the Report of the Royal Commission on Trade Disputes and Trade Combinations, under the chairmanship of Lord Dunedin. 58 The Commission highlighted the need for legislative action on both the Taff Vale 59 case and the question of union liability for civil conspiracy. Section 1 of the Act provided that an act done by two or more persons in contemplation or furtherance of a trade dispute should not be actionable unless the same act, done without any such agreement or combination, would be actionable. Section 3 provided that any act performed by a person in contemplation or furtherance of a trade dispute should not be actionable on the ground only that it induced another person to break a contract of employment. Thus union officials or stewards who called a strike and actually induced a breach of contract could not be proceeded against at law because the Act gave an "immunity" to such activities. The wording of section 3, however, gave protection to the inducement only; the words "on the ground only" precluded the use of unlawful means such as violence or threats to procure the inducement. This sting in the tail of the 1906 Act was to be revealed much later. The Taff Vale situation was covered by section 4 of the Act, which ensured that an action against a trade union or against any members or officials of such unions in respect to tortious acts alleged to have been committed by or on behalf of the union, would not be

56. K. Wedderburn, supra note 14, at 1317.
57. 6 Edw. 7, c. 47 (1906).
58. Minutes of Evidence of the Royal Commission on Trade Disputes and Trade Combinations, (Cd. 2826 of 1906) majority report.
entertained by the courts. But section 4 did not protect union officials and union members from proceeding as individuals. Consequently, after 1906, in actions against their officials, most unions continued to back their people financially when the act complained of occurred in the course of union business.  

III. MAJOR STATUTORY UNDERPINNINGS IN THE UNITED STATES

The main problem facing American unions in the post-World War I period was the struggle for recognition by employees. Employers used various means to keep their employee relations from being interfered with by institutions they considered alien to their own particular enterprises, i.e., unions. Among their more important weapons were the establishment of company unions (unions established, controlled or dominated by employers) and the use of discrimination against workers who joined unions or engaged in union activity. It should be noted here that the Norris-LaGuardia Act merely made "yellow dog contracts" unenforceable, not illegal. In addition, the protection accorded workers by the Railway Labor Act of 1926 applied initially only to railroads. What was needed was an act to cover interstate commerce generally. This requirement was met with the passage of the Wagner Act in 1935. Among the more important measures the Wagner Act secured for employees were the legal right to organize, to engage in organizing activities and to bargain collectively through chosen representatives. It also established a

60. H. Pelling, supra note 21 at 123-39.
61. R. Gorman, Basic Text on Labor Law § 1, at 209 (1976) [hereinafter cited as R. Gorman].
62. Department of Labor, Proceedings of the First Industrial Conference (1919), at 82: "No employer should be required to deal with men or groups of men who are not his employees or chosen from among them."
63. R. Gorman, supra note 61, at 195.
67. Id. at ch. 372, § 7 (29 U.S.C. § 157): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activi-
list of unfair labor practices which could be levelled against employers.68

The Wagner Act was passed at a time when collective bargaining forces tended to favor employers.69 It was deemed appropriate and necessary to redress this bargaining imbalance in the 1930's, but over the years the Act received the continued criticism that its provisions were considered to be too heavily weighted in the union's favor.70 The problems of reconstruction in the period immediately following the Second World War led to a great deal of industrial unrest and conflict.71 Public concern about the activities of unions in this period led eventually to the passage of the Taft-Hartley Act in 1947.72 This Act sought to meet many of the criticisms levelled at the Wagner Act and it established a list of unfair labor practices73 which employers could use against unions, thus seeking to equalize their respective collective bargaining positions in the eyes of the law. Thereafter, the report of the Mc-
Clellan Committee\textsuperscript{74} indicated the existence of widespread corruption and the abuse of basic democratic rights on the part of union members in the internal affairs of some major unions. The final result was the Landrum-Griffin Act, 1959,\textsuperscript{75} which primarily addressed the problems of corruption within union leadership. The British were to wait many more years before even attempting major comprehensive reforms of the kind that had taken place in the United States.

IV. The Movement for Reform in Britain

For some years after the passage of the Trade Disputes Act, 1906, the British statutory underpinning seemed well established and promised some protection for unions from judicial interference in their functions. Their long struggle against illegality had resulted in statutory recognition of their right to exist, security of their funds and protection for their basic functions. Some judges even propounded decisions in their favor; Lord Wright, for example, noting in the 1942 Crofters' case:\textsuperscript{76} "Where the rights of labour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right of workmen to strike is an essential element in the principle of collective bargaining."

Then, virtually out of nowhere, came the \textit{Rookes v. Bernard} decision,\textsuperscript{78} in 1964. The House of Lords held that a threat by persons that employment contracts would be broken unless the employer conceded to their demands, was a threat to do something unlawful and constituted the tort of "intimidation." Thus, persons sued for civil conspiracy could not rely on the protection afforded by the Trade Disputes Act, 1906.\textsuperscript{79} Although calling workers out on strike was still not illegal even though it was inducing a breach of contract, the question concerning the offering of a threat to induce a breach, \textit{e.g.}, a strike threat, remained for the Law Lords to ponder. While in

\textsuperscript{74} See J. McCLELLAN, CRIME WITHOUT PUNISHMENT (1962).
\textsuperscript{76} Crofter Hand Woven Harris Tweed Co. v. Veitch, [1942] A.C. 435.
\textsuperscript{77} \textit{Id.} at 463.
\textsuperscript{78} [1964] A.C. 1129.
\textsuperscript{79} 6 Edw. 7, c. 48, § 1.
the 1901 *Taff Vale*

case the Lords were willing to "imply" a quasi-corporate status to unions in order to attack their funds, in the *Rookes v. Barnard* case in the 1960's, they were unwilling to imply a protection for the offering of a strike threat, where clearly Parliament had expressly protected the act of inducing a strike. Earlier, in the Court of Appeals, Lord Justice Donovan noted the absurdity of such a finding:

> If that be that true position, as I think it is, then the situation is reached . . . that a strike is not unlawful, but the threat to do so is. In other words, the policy which workmen should pursue in order to avoid liability is to strike first and negotiate afterwards.

The House of Lords affirmed the trial court's findings, and their decision rocked the British trade union movement to its foundations, as seriously as had the *Taff Vale* case:

> What startled the trade union world was that, after the *Trade Disputes Act, 1906*, and more than half a century of case law, in which the courts had shown a deepening understanding of the vital role of the trade unions in running British industry and their need to enjoy freedom of economic action to protect the legitimate interests of their members, there still remained coiled in the common law the possibility of an action against union officials for crushing damages and costs for threatening strike action in the breach of contracts of employment, whether to remove an objectionable employee — or to pursue any other industrial purpose, like a claim in respect of wages or any other terms or conditions of employment.

Once more Parliament was forced to intervene in order to protect unions in the exercise of their basic functions. The result was the *Trade Disputes Act, 1965*.

V. THE DONOVAN COMMISSION

The *Rookes v. Barnard* decision followed its predecessor, *Taff Vale*, into trade union lore, and served to add fuel to the
fires of industrial conflict in British industrial relations during the 1960's. That conflict was evidenced by the rising incidence of unofficial or "wildcat" strikes, flagrant breaches of collective agreements and general disorder in the collective bargaining system. A Royal Commission was established in 1965 to examine and recommend changes in the British system of industrial relations. This commission, popularly termed the "Donovan Commission," was the fifth Royal Commission set up to enquire into British industrial relations since 1867. Previous commission reports had resulted in some modifications of the system, particularly in the legislative sphere, but only on a piecemeal basis. The difference with Donovan however, lay in the range and scope of its field of enquiry; nothing less than a full-scale revision of the entire system was envisaged. The Commission, with this end in mind, received a staggering amount of evidence and testimony from unions, employers and the government. It observed that Britain had two systems of industrial relations, which it termed the formal and informal. The formal system assumes that national or industry-wide agreements, drawn up between representative unions and employers' associations, apply and are honored in each of the business undertakings they cover. Reality, though, favors the informal system whereby factory management and local branches of national unions negotiate terms and conditions which make national or industry-wide agreements a mere starting point for local additions. The formal system,

86. H. Pelling, supra note 21, at 267.
87. Royal Commission on Trade Unions and Employers' Association (1965-68) H.M.S.O. CMND 3623; [hereinafter referred to as Donovan Report].
88. For legislative developments, see generally, B. Hepple & P. O'Higgins, supra note 4, at 3-39.
89. Donovan Report, supra note 87, at 11: "It may fairly be said therefore that as a Royal Commission we have been sitting at a time when the basic principles of our system of industrial relations are in question."
90. Id. at 319: [W]e received a considerable volume of written evidence. Memoranda were received from Government Departments, the Trade Union Congress, the Confederation of British Industry, numerous trade unions and employers' associations, companies, nationalised industries, organizations connected with industrial relations, individuals having specialist knowledge of the subject, and members of the public. In all some 430 organizations, persons or groups of persons sent us written submissions.
then, is a relic of the past, hindering an already developed movement toward local bargaining and agreements, while keeping the trappings of national or industry-wide bargaining.  

Britain, therefore, has local unions which deal with local management in much the same manner as their American counterparts, but this has never been acknowledged by unions and employers’ associations at the national level, so that: “The informal system is founded on reality, recognizing that organizations on both sides of industry are not strong. Central trade union organization is weak, and employers’ associations are weaker.” The lack of strong central union authority goes some way toward explaining why Britain is plagued by unofficial or wildcat strikes.

The Donovan Commission recommended many changes in the British system. Among them were proposals for the reform of the collective bargaining system in order to bring the formal system into accord with industrial realities and to bring greater order to the informal system. The report envisaged the introduction of factory-wide agreements to develop the informal system and the confinement of industry-wide agreements to such areas as they might effectively cover.

91. Id. at 36:  
The formal and informal systems are in conflict. The informal system undermines the regulative effect of industry-wide agreements. The gap between industry-wide agreed rates and actual earnings continues to grow. Procedure agreements fail to cope adequately with disputes arising within factories. Nevertheless, the assumptions of the formal system still exert a powerful influence over men’s minds and prevent the informal system from developing into an effective and orderly method of regulation.

92. Id. at 12.

93. Id. at ch. 8 passim, see further at 261:  
The bargaining which takes place within factories is largely outside the control of employer’s associations and trade unions. It usually takes place piecemeal and results in competitive sectional wage adjustments and chaotic sectional wage adjustments and chaotic pay structures. Unwritten understandings and “customs and practice” predominate.

These developments help to explain why resort to unofficial and unconstitutional strikes and other forms of workshop pressure has been increasing.

94. Id. at 261-67 passim.

95. Id. at 262-63:  
Factory-wide agreements can, however, provide the remedy. Factory agreements (with company agreements as an alternative in multi-plant companies) can regulate actual pay, constitute a factory negotiating committee and grievance procedures which suit the circumstances, deal with such subjects as re-
the informal system was to be a rational and stable alternative for Britain, it became obvious that major and far-reaching changes in the law were necessary. The British Labor Party, then in power, set out its proposals for reform in its White Paper (a Government Consultative Document) entitled "In Place of Strife—A Policy for Industrial Relations." It advocated cautious changes, in general, based partly upon the Donovan Report and partly upon political realities, i.e., the British Labor Party receives substantial funding from the trade union movement. The stance of the British Conservative Party, however, was much more radical. In its consultative paper entitled "A Fair Deal at Work," it advocated sweeping changes based largely on the American system of collective bargaining and labor law. The Conservatives won an unexpected political victory in the general election of 1970 and, in August, 1971, their government succeeded in passing through Parliament the first British attempt at comprehensive statutory reform of the industrial relations sphere, the Industrial Relations Act, 1971. This statute, in 170 sections, introduced many concepts heretofore totally unknown to British employers and unions, e.g., bargaining units, bargaining agents and agency shops. It also required, for the first time, that all written collective agreements entered into after the commencement of the Act be conclusively presumed to be legally binding on the parties unless stipulated to the contrary. This measure provided a supreme example of the British propensity for compromise. The Conservative Government was undoubtedly aware of the problems that would inevitably have followed from the direct imposition of legal enforceability upon British collective agreements, and therefore allowed em-

97. Trade Disputes Act, 1906, 6 Edw. 7, c. 48, § 4; see also H. Pelling, supra note 21, at 133-48.
99. Unexpected, that is, because Gallup pollsters and the like had predicted a landslide victory for the Labor Party.
100. Industrial Relations Act, 1971, c. 72 (repealed 1974).
101. Id. at § 34.
ployers and unions an escape route to follow if they wished. The Government had hoped that legal enforcement of labor contracts would eventually prove as acceptable in Britain as it had become in the United States. Unfortunately though, this escape clause was taken advantage of so avidly that legally enforceable agreements became the exception rather than the rule. It was the unions’ belief that if the agreements could be enforced legally, they would again be at the mercy of the courts which had historically supported employers.

The unions were implacably opposed to the Act from its very inception and the Trades Union Congress (T.U.C.), the British counterpart of the AFL-CIO, led a concerted campaign for its immediate repeal. Some trade unions tried to secure some of the advantages of the Act by registering; a union which did not register was termed simply an “organization of workers” and did not enjoy most of the Act’s major advantages. The T.U.C. responded by requiring its member unions not to register or use the machinery of the Act, except in purely defensive roles; any union which had registered was ordered to take positive steps to deregister. The 1972 T.U.C. suspended thirty-two unions for failing to deregister, and twenty more were expelled at the 1973 Congress. Employers, on the other hand, found the Act totally irrelevant since most unions with which they had to deal were unregistered anyway and thus could not have access to those parts of the Act which might have furthered union-employer relationships. There were those who believed the legislation had some beneficial side effects, however. For example, many companies, some for

102. B. Cooper & A. Bartlett, supra note 27, at 119:
All written collective agreements made after the commencement of the Act were presumed to be legally enforceable contracts unless the parties stipulated otherwise . . . . However, the parties continued to express the wish for collective agreements to be binding in honour only; therefore, a great deal of legal energy was expended on drawing up non-enforceability clauses — popularly termed TINA LEA (This Is Not A Legally Enforceable Agreement).

103. J. Griffith, supra note 32, at 57 passim.

104. For discussion of historical reasons for union antagonism toward the judiciary and preference for collective bargaining between trade unions and employers over legislation, see B. Hepple and P. O’Higgins, supra note 88, at 3; and H. Pelling, Popular Politics and Society ch. 4 (1968).


the very first time, were forced to examine their industrial relations policies in order to conform to the Act's requirements. The Labor Party returned to power in the 1974 general election and, in keeping with one of the planks of its party platform, duly repealed the Industrial Relations Act, 1971, with the passage of the Trade Union and Labor Relations Act, 1974. The new Act resurrected some provisions of the old, especially in the area of individual rights, but some measures such as bargaining agents and agency shops were not brought back. The position of the 1971 Act on collective agreements was completely reversed. With the commencement of the 1974 Act, all collective agreements were to be presumed non-enforceable at law unless they were made in writing and the parties had expressly stipulated that they wished to be legally bound. Thus, Britain's one and only attempt at comprehensive legislative reform of its industrial relations system and labor law is now nothing but another unhappy memory in trade union history.

VI. ACCEPTANCE AND REJECTION: THE MOTIVE FORCES

Many different factors operated to provide the United States with both the opportunities and the willingness to make its system of industrial relations and labor law work, and an entire complex of factors militated against British emulation of the American success story. America's giant industrial unions were forming when the Wagner Act started to take effect; not only were they not hostile to the Act — they welcomed it as, indeed, many owed their very existence to its

In general most employers in almost all industries managed to continue their voluntary arrangements without recourse to the law. But many employers would also argue that the very existence of the law had an effect in various small but significant ways. They would argue that unions and shop stewards became more careful about giving proper advance notice of industrial action and that some procedure agreements have been more easily reformed than would have been possible without the law.

108. Trade Union and Labor Relations Act, 1974, c. 52.

109. Id. at schedule 1.

110. Id. at § 18.

provisions.\textsuperscript{112} The Act was saved from the path taken by its later, unfortunate British counterpart by the determined stance of the Roosevelt administration, which served to persuade the Supreme Court of the wisdom in not destroying the legislation on constitutional grounds.\textsuperscript{113} The landmark \textit{Jones \& Laughlin} decision\textsuperscript{114} saved the Wagner Act from the fate of the National Industrial Recovery Act.\textsuperscript{115} Britain’s Conservative Government was as determined to make its 1971 Act work, but the unions which it faced were mature, settled institutions who felt their vested interests threatened. In the United States, however, both the fledgling CIO unions and the mature AFL unions welcomed the Wagner Act.\textsuperscript{116} Their experience with the courts did not coincide with the experience of British unions. In fact, judicial interpretations under the Sherman Antitrust Act during the 1940’s were supportive of organized labor.\textsuperscript{117}

Many British unions are older than their American counterparts, and so when they were engaging in many of their early struggles they were faced with a hostile and unrepresentative Parliament.\textsuperscript{118} But faced with a hostile judiciary, they had little option save resort to the legislature for redress of their problems. At first such resort involved making representations to the radical element in the Liberal Party, which had learned the value of the working-class vote. Eventually an alliance of many unions and socialist bodies produced the Labor

\begin{itemize}
  \item \textsuperscript{112} E. Beal, E. Wickersham, \& P. Kienast, \textit{The Practice of Collective Bargaining}, ch. 5 \textit{passim} (1976).
  \item \textsuperscript{113} R. Cortner, \textit{The Wagner Act Cases} 150-55 (1964).
  \item \textsuperscript{114} NLRB v. Jones \& Laughlin Steel Corp., 301 U.S. 1 (1937).
  \item \textsuperscript{115} National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933). The NIRA was declared unconstitutional in \textit{Schecter Poultry Corp. v. United States}, 295 U.S. 495 (1935).
  \item \textsuperscript{116} H. Wellington, \textit{supra} note 38, at 189-90: "The ideal must be pursued by union leaders, and it is not when union leaders are shown to be uninterested in the quest, there is a shock of betrayal and a demand for reform, which often means for law."
  \item \textsuperscript{117} E.g., \textit{United States v. Hutcheson}, 312 U.S. 219 (1941).
  \item \textsuperscript{118} See, e.g., S. Meachman, \textit{A Life Apart — The English Working Class, 1890-1914}, at 205-07 (1977).
\end{itemize}
Representation Committee in 1900. This organization became the Labor Party in 1906 and British unions to this day have a political party. While it is by no means their own, the Labor Party relies on the union movement for a large portion of its funding. This ability to pressure its favored party when it is in government is in direct contrast to the American labor movement which must resort only to indirect pressure and lobbying tactics even when the Democrats, their favorite party, are in power. If the American labor movement had had a party of its own in 1947 it might have been successful in defeating the Taft-Hartley Act but, as it turned out, even cooperative political lobbying and campaigning between the AFL and CIO were unsuccessful. American unions, lacking a direct political influence, have therefore learned to live with labor laws. American labor bases its approach to collective bargaining on what it terms "business unionism," which stresses collective bargaining issues in a primarily economic vein rather than in a political or ideological manner. Both the term and the concept would seem strange to British unions, which sometimes undertake concerted action against a particular government, a phenomenon from which the Labor Party itself is by no means immune. A legislative body can afford to take a more objective and sometimes unpopular stance than can employers or unions, but this is not true when it is di-

119. B. Cooper & A. Bartlett, supra note 27, at 12.
120. For discussion of the challenge to trade unions' support of a political party in 1909, see H. Pelling, supra note 21, at 130-32. See also Trade Disputes Act, 1906, 6 Edw. 7, c. 48, § 4.
121. That is not to say that union leaders are without tremendous influence over the American public; see, e.g., S. Lens, supra note 40, at 375:
In criticizing Franklin Roosevelt for failing to come to the aid of the Little Steel strikers, John L. Lewis on Labor Day 1937, told a nationwide audience: "Those who chant their praises of democracy but who lost no chance to drive their knives into labor's defenseless back must feel the weight of labor's woes even as its open adversaries must ever feel the thrust of labor's power.
Labor, like Israel, has many sorrows. Its women weep for their fallen and they lament for the future of the children of the race."
For a thorough discussion of unions and political power, see H. Wellington, supra note 38, at 215-38.
122. See A. Goldberg, AFL-CIO: Labor United 9-11 (1956) (detailing America's unions rejecting a political party of their own).
123. Id. at 203-07.
125. See H. Pelling, supra note 21, at 281-84.
rectly influenced by one of the interested parties. Therefore, the British Labor Party, faced with the hostility of the trade union movement and the indifference of employers toward the Industrial Relations Act, 1971, had little choice but to promise repeal of the Act in return for union support in its electoral efforts.

VII. Arbitration and the Collective Bargaining System

The Taft-Hartley Act provided, inter alia, for the legal enforcement of collective agreements as contracts, in section 301(a). This section was faced with constitutional challenges initially, but was eventually upheld in the Lincoln Mills decision in 1957. This vital section together with this crucial decision gave the American industrial relations system a marked advantage over the British approach. Not only are American collective agreements given a valuable legal underpinning, but also a robust labor arbitration system was permitted to flourish. Though labor arbitration would remedy the chief causes of British "unofficial" or wildcat strikes, it remains out of reach to the British. It is firmly established in British labor relations that unions do not like resort to the courts, yet,

126. Industrial Relations Act, 1971, c. 72 (repealed 1974).
127. H. Pelling, supra note 21, at 283.
129. Id. at ch. 120, § 301(a) (29 U.S.C. § 185(a)); Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
132. Donovan Report, supra note 87, at 100: [A]bout half of all unofficial strikes — 1,052 a year — concern wages . . . . [A]fter wages, the next most prolific immediate causes of dispute are working arrangements, rules and discipline (646 or 29% of the total) and redundancy, dismissal, suspension, etc. (326 or 15% of the total). These are matters which are usually dealt with at the workplace and not at industry level; the prevalence of stoppages due to these causes is a reflection on the adequacy of the procedures available to settle them.
133. K. Wedderburn, supra note 14, at 13: "Most workers want nothing more of the law than that it should leave them alone. In this they can be said to display an
were they to enjoy a sophisticated grievance arbitration system as their American counterparts do, they would have a speedy and informal means of grievance adjustment without the necessity for court intervention. Labor arbitration in the United States has received considerable judicial encouragement in its development;\textsuperscript{134} similar judicial support and encouragement in Britain would be highly unlikely from the court that decided the \textit{Rookes v. Barnard}\textsuperscript{135} case.

Arbitration machinery has been available for some time in Britain by law under such statutes as the Conciliation Act, 1895,\textsuperscript{136} and the Industrial Courts Act, 1919.\textsuperscript{137} However, resort to the process has been minimal, as indicated by the written evidence of the Ministry of Labor to the Donovan Commission.\textsuperscript{138} There is little support for arbitration in the private sector, but some in the public sector.\textsuperscript{139} Labor arbitration in the United States often aids the parties in drawing up the provisions of their contracts to cover deficiencies revealed by the arbitration award.\textsuperscript{140} British arbitrators, however, traditionally render awards without giving the reasons for arriving at their conclusions.\textsuperscript{141} On first inspection then, it would appear that employers and unions in Britain have been deprived of a valuable aid to contract administration. It must be emphasized,
however, that a large portion of what passes for arbitration in Britain concerns what is known in the United States as "interest" arbitration, i.e., arbitration over what the terms of a contract should be, as opposed to "rights" or "grievance" arbitration which involves interpretation or application of an already agreed contract.\textsuperscript{142} In the United States, the overwhelming bulk of arbitration proceedings involves grievance or rights arbitration,\textsuperscript{143} while the British rarely distinguish between the two concepts at all.\textsuperscript{144} The Conservative Party, while in government, hoped that among other measures, employers and unions would resort more to conciliation and arbitration, and they recommended that both parties should regard themselves as being bound by arbitrators' awards.\textsuperscript{145} The Trades Union Congress did not look kindly upon the prospect of arbitration as a means of resolving disputes, preferring instead the machinery of negotiation.\textsuperscript{146}

The Labor Party, upon its return to power in 1974, stressed the strengthening of free collective bargaining and proposed to establish a Conciliation and Arbitration Service to aid in the resolution of disputes and to provide assistance and advisory services to both employers and unions.\textsuperscript{147} Like its American counterpart, the Federal Mediation and Conciliation Service, it was required to maintain lists of arbitrators for use by the parties when requested. It was initially set up on an adminis-

\begin{itemize}
  \item \textsuperscript{142} F. Elkouri & E. Elkouri, \textit{How Arbitration Works} 47 (3d ed. 1974).
  \item \textsuperscript{143} H. Wellington, \textit{supra} note 38, at 94-95: "Ninety-six percent of collective bargaining agreements today provide for some form of grievance arbitration."
  \item \textsuperscript{144} \textit{Id.} at 44:
        The distinction is not at present important in Britain because most collective agreements lay down minimum standards which are improved and elaborated on by further negotiation at subsidiary levels. Moreover shopfloor agreements are closely linked with customs and practices which are not set down in any agreement, so that at this level no clear distinction exists between disputes of right and disputes of interest.
  \item \textsuperscript{145} \textit{Industrial Relations Code of Practice} (1972), H.M.S.O., at 27:
        Independent conciliation and arbitration can be used to settle all types of disputes if the parties concerned agree that they should. Arbitration by the Industrial Arbitration Board or other independent arbitrators is particularly suitable for settling disputes of right, and its wider use for that purpose is desirable. Where it is used the parties should undertake to be bound by the award.
  \item \textsuperscript{146} \textit{Trade Union Congress, Good Industrial Relations — A Guide for Negotiations} (1971), at 15: "[I]t must be recognized that an excessive reliance on arbitration can weaken the effectiveness of the negotiating procedures in resolving disputes."
  \item \textsuperscript{147} See B. Hepple & P. O'Higgins, \textit{supra} note 4, at 69-73.
\end{itemize}
trative basis in September, 1974,148 and established on a statutory footing in 1975.149 Whereas the provision for advice in the field of industrial relations and personnel management came to be a major part of its work, the new service changed its name to that of the Advisory Conciliation and Arbitration Service.150 The main thrust of its work, however, still consists of conciliation rather than arbitration.151 This lack of resort to arbitration in the resolution of disputes reflects not only the parties' indifference to the process, but also a basic weakness of the British collective bargaining system:

When collective bargaining has been reformed, however, and companies negotiate comprehensive and effective agreements, the parties may conclude that their arrangements would be strengthened by providing for arbitration on all unresolved differences relating to the application of the agreement during its currency (which might be for a fixed term) with voluntary acceptance of the awards as binding.152

VIII. CONCLUSION

The British system of industrial relations and labor law lends itself readily to historical, if not logical, analysis. The outside observer, particularly one looking from the standpoint of the American system, might be tempted to despair. Without a doubt it is impossible to paint an attractive picture of the present British situation in the hope of thus lifting that despair. And unless we are to consign the entire future of the British nation to mindless industrial anarchy and chaos, we must pursue the search for solutions. Clearly, employers and unions in that country are not enamoured of sweeping comprehensive reform, yet it is evident that the gradualist approach leaves much undone that is in need of pressing reform. Perhaps a more effective way of shaping the future course of legis-

149. DEPARTMENT OF EMPLOYMENT GAZETTE, vol. LXXXIII, No. 11, November [1975], at 1175.
150. DEPARTMENT OF EMPLOYMENT GAZETTE, vol. LXXXIII, No. 1, January [1975], at 47.
151. DEPARTMENT OF EMPLOYMENT GAZETTE, vol. LXXXIII, No. 9, September [1975], at 905.
152. Donovan Report, supra note 87, at 121.
relative intervention might be to draw up a list of required reforms as if we had a blank check and a chance to start all over again without the horrendous web of complexity which the history of the British system has spun. Prospective reformers would, of course, be somewhat limited in that we have only the experience of other systems to follow. Perhaps examples might be gleaned from Scandinavia with its laudable consultation and cooperation at all levels. Relying on these systems alone, unfortunately, would leave little to proceed with when we returned to reality because the historical legacy of British labor law does not bode well for consultation and cooperation. The West German system with its remarkable worker participation might give us some direction. However, worker participation works well in that country because management wishes it on one hand, and, on the other, there are only sixteen unions covering the entire work force. These unions are responsible and authoritative ones that try very hard to make their system work. A major restructuring of British unions along these lines would be impossible, given the numerous unions of Britain and their respective interests.

The quest for solutions would inevitably lead back to the

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153. List, In Sweden the Byword is Cooperation, in WORKERS' CONTROL 164 (1973): But the big difference between Sweden and North America is that, in the Scandinavian country, compromise is preferred by labor and management to conflict, and reason to emotion. Unions are fully accepted as equal partners in the Swedish economy and labor has responded by a display of responsibility unmatched in North America. In Sweden, the byword is cooperation.

Labor violence is unknown, picketing is a rarity, wildcat strikes are almost nonexistent and both unions and management have a respect for each other seldom found in Canada. It is almost the idyllic state in terms of industrial relations. Sweden is one of the world's most highly developed industrial countries, yet the stability of its labor relations sets it apart from other developed lands.

Id. at 165.


155. Donovan Report, supra note 87, at 7:
At the beginning of the present century there were 1,323 trade unions with a membership of 2,022,000 workers . . . . At the end of 1966 there were 574 trade unions with a total membership of 10,111,000 . . . out of the total of 574 unions 170 are affiliated to the Trades Union Congress . . . but these unions between them have a total membership of nearly 9 million employees.

By 1973 there were, mainly as a result of amalgamations, 495 unions in Britain. See DEPARTMENT OF EMPLOYMENT GAZETTE, vol. LXXXII, No. 11, November [1974], at 1017. But they had a combined membership of 11,507,000.
United States. Having once shared a common legal system there might be some things left that both labor law systems might share. British and American unions have felt that brunt of judicial hostility in the past and both have been permitted to develop, though in different ways, by means of statutory intervention. The fate of the Industrial Relations Act, 1971, makes it clear that there cannot be a wholesale importation of American labor law into the British system. However, the major change recommended in the Donovan Report, that local agreements be constructed to deal with local matters and national agreements be confined to national matters, is already the norm in the United States. Restructuring British agreements raises the question of their legal enforceability. Although legal enforcement was rejected outright by employers and unions in Britain, two things must be borne in mind. First, unlike section 301(a) of the Taft-Hartley Act, Section 34 of the Industrial Relations Act, 1971, its British counterpart, permitted the parties to avoid legal enforceability. Second, the Act did not last long enough for the parties to become accustomed to legally enforceable agreements. Andrew Shonfield, in his note of reservation to the Donovan Commission stated: “Instead of making it complicated and difficult for unions to enter into contractual obligations which are enforceable at law, so that it has become an eccentric thing for a union to do, unions and employers should be encouraged to treat it as the normal thing to do.”

Legally enforceable agreements would then pave the way for a system of grievance arbitration, which would serve to reduce Britain's "unofficial" strike problem. A grievance arbitration system would also help in inducing the move toward more local agreements. If each new local agreement incorporated an arbitration clause, employees would then have the opportunity to consider peaceful alternatives to the wildcat strike and, hopefully, grievance arbitration would become the

156. 1971, § 44 c. 72 (repealed 1974).
159. Industrial Relations Act, 1971, c. 72, § 34 (repealed 1974).
rule rather than the exception. These proposals could not be considered a wholesale incorporation of American labor law, and thus they might escape the fate of the Industrial Relations Act, 1971. Given the history of judicial hostility to unions in Britain such a system of arbitration could only be acceptable to unions if judicial review of arbitration is expressly excluded, as evidenced in the United States by the Steelworkers Trilogy. It would be unthinkable even today to expect the British bench and bar to adopt a policy of judicial abnegation similar to the United States Supreme Court in the Steelworkers Trilogy, and the curtailment of judicial review would, of necessity, be in the form of legislation. Thus, although the sweeping attempt at incorporation of American labor law concepts failed in Britain in 1971, it is still possible to envisage the use of aspects of American labor law. After all, the American system does curb wildcat activity by offering alternative devices while insulating labor unions from a hostile judiciary. Therein lies the seed of a meaningful lesson for the intelligent and cautious use of legislative intervention in Britain.

162. Industrial Relations Act, 1971, c. 72 (repealed 1974).