PROTECTION OF TRADE UNION MEMBERSHIP

"Protection of the individual union member against his union is a unique contemporary problem. . . . .the problem of maintaining an actual and meaningful 'democracy' in today's pluralistic society, is far more complex than an elementary State-versus-individual calculus would indicate." [1]

The trade union has power, in some cases almost unlimited power. Expulsion can often mean industrial death. It almost inevitably means hardship and ostracism, not the ostracism which a gentleman card-sharper might suffer when blackballed from his club but ostracism of a more mundane type — industrial ostracism.

Once the expulsion has gone unchallenged there is often no remedy available to the victim of the organization's policy not to work with, or deal with, non-members of the organization. In such a case, any remedy which can be effective must be given at the point of expulsion. If the expulsion is wrongful, full protection can be given by declaring it invalid and enjoining the organization from acting on it. If it is not wrongful there is, of course, no remedy.

In 1915, the Union States Commission on Industrial Relations found closed shop agreements to be justified [2] on the ground that:

> "We are ... of the opinion that where an employer enters into an agreement with a union which stipulates that only union men shall be employed, a thing which he has both a moral and legal right to do, the non-union worker, in that event, can have no more reason to find fault with the employer in declining to employ him than a certain manufacturer would have if the employer, for reasons satisfactory to himself, should confine his purchase to the product of some other manufacturer."

The Commission did not consider that the union should not have the power to enter into such agreements. The existence of agreements of this type — or, in the absence of agreement, of fact situations which, in effect, create a closed shop in practice — is a strong argument in favour of court supervision of expulsion from trade organizations. On

1. Anon. "Procedural 'Due Process' in Union Disciplinary Proceedings" (1948) 57 *Yale L.J.* 1302.

2. *Final Report of the United State Commission on Industrial Relations* (Washington, D.C.: 1915), pp. 427-428 (as quoted by Toner *The Closed Shop* (1944), p.77).

the other hand, however, the philosophy which supports the closed shop should also support the courts' reluctance to interfere in the affairs of a voluntary association — a society of individuals free to have or not have whatever industrial affiliations they desire.

If men choose to join an organization with particular rules that is their business. If other members prefer not to associate with a particular individual why should his society (or even his alliance) be forced upon them? There is no reason, *unless* trade organizations differ from social clubs.

In *Bricklayers P. & S.* v. *Bowen*, [3] the Court said :

> Such associations are not, however, above the law of the land, nor altogether a law unto themselves. Their very nature and frequent manner of operation require and find a jealous supervision, in order to prevent irreparable wrong being done to members under the guise of family chastisement. It is not the policy of the law that our people shall be left to suffer without redress from the whims or at the caprice of those to whom they have in good faith temporarily intrusted themselves and their affairs. Therefore, the law is vigilant to .... insure to every member .... fair play, which in the final analysis is the spirit of the law of the land.

There certainly the domesticity of the union's internal affairs was not found to be an irrebuttable presumption. The Court went on [4] to point out that :

> Labor organizations have become an integral part of our business life and wield a powerful influence upon the everyday affairs of multitudes of our people .... [who] must rely on their honest, fair and efficient management for opportunity to support themselves and their families. These members constitute a goodly percentage of our citizenship, and the state is vitally interested in their welfare.

The big combination of workmen or of employees has created a state within a state, which controls a large proportion of the population. Has this secondary state unlimited power within its own territorial limits ? Can it tyrannize its members — members be it remembered who have no effective choice but to be members — or is the power it exercises over its members to be supervised by the courts of the land? Should judicial scrutiny test the actions of the nation's executive but refuse to limit the power of a union executive over its "voluntary" members ?

Walter Gellhorn [5] comments on the right to work as it exists in the United States today in the following terms :

3. (1920) 183 N.Y. Supp. 855, 859, (as quoted by Copal Mintz Trade Union Abuses (1932) 6 *St. John's L.R.,* p. 293).

4. (1920) 183 N.Y. Supp. 855 at p. 861 (as quoted by Copal Mintz Trade Union Abuses (1932) 6 *St. John's L.R.*, p. 300).

5. *Individual Freedom and Governmental Restraints* at p. 105.

> 'The right to make a living', the Supreme Court of Georgia declared in 1925, 'is among the greatest of human rights.' Two decades later Mr. Justice Douglas of the Supreme Court of the United States gave it a still higher valuation, for he called the right to work 'the most precious liberty that man possesses.' The enthusiasm that led to these appraisals is seemingly not shared by most American legislators. In a country boastful of a free economy and of extending maximum opportunity to ambitious men, the 'right' to work has been legislated into a most precarious condition.

The right to work, it is submitted, should be as free from the arbitrary restraint of others as it is from governmental restraint. The "most precious liberty that man possesses" should not be abandoned by the courts and left entirely to the mercies of union executives, often biassed and vindictive and seldom possessed of judicial impartiality.

This does not mean that trade unions perform only the function of self-aggrandizement and should be done away with.

> The absence of unionism may occasion far greater public burdens than unionism at or near its worst, in the form of police and charitable expenditures. Where labor is unorganized low wages and insecurity are likely to bring with them housing, health, and policing problems that drain community resources, with an enormous relief burden during periods of unemployment. The higher wages and improved working conditions for which unions strive advance the public welfare just as truly as they benefit wage-earners; indeed, the latter form such a large percentage of the public in an industrial community that the terms are synonymous.
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> The labor movement performs other functions of great value to the community. It gives the huge mass of workers a mechanism through which they can bring their influence to bear upon civic as well as industrial problems. Where unions are well organized and intelligently led they are interested in housing, health, education, relief, taxation, and all other civic problems, expressing in community councils the point of view of the lower-income groups. In Detroit, Michigan, the United Automobile Workers, C.I.O., is a vital part of community life, and in other centres a similar situation exists.[6]

The trade union performs an economic and social function but not a social function such as that performed by the social club. The supporters of the unions do not hesitate to point out this fact.[7] How then can they claim that the courts ought not to interfere in the internal management of the union and equate the union to the social club?

6. Joel Seidman: *Union Rights and Union Duties* at pp. 110-111.

7. Charles O. Gregory, for example, says: "The ideal of the common law was to build up a series of sanctions against specific types of behaviour too egregiously bad to tolerate, such as assault and battery, et cetera, leaving plenty of room within which people remained free to operate at will. According to the spirit of the common law, no penalty was to be created against the use of purely economic coercion, so long as it was exercised by means which in themselves were perfectly lawful, which as buying, selling and refusals to deal in any way with others. Perhaps the greatest confusion occurred in the common law when the courts created judicial curbs against the purely economic activities of labor combinations. Yet it must be said on behalf of the early courts that in creating

In 1939, Professor Brooks [8] wrote :

> For more than a century and a quarter, a limited number of human beings occupying strategic positions in our society have held the power to determine whether or not the motives, behaviour, and objectives of unions have conformed to their own conceptions of reason, justice, and social propriety. On the whole, the judicial conceptions of social propriety has been that of the employing and owning groups.

He lamented the fact — if fact it be — and wisely so. However, those same words can now be used *mutatis mutandis* of the control which the established union executive can exercise over those who work in, or do business in, the organization's particular field.

It is true that the trade union cannot possibly achieve, or even begin to achieve, the purpose for which it exists if it cannot exercise some control over its members. Such control can only exist if the organization has disciplinary powers:

> People with common economic interests become reluctant to compete with each other. They organize around the maintenance of the prices of their products and services. They begin to talk in terms of 'a reasonable price', 'fair competition', 'an honest day's pay.' Some individuals refuse to come in, or break away from their groups and group codes. They see a temporary advantage in walking alone. If enough break away, the group disintegrates, 'cut-throat competition' is re-established, the individualists or 'scabs' engage in a struggle for survival. From this struggle a new group, perhaps in much modified form, emerges and reasserts its control over the price of the product or service.[9]

These disciplinary powers should, however, be subject to the control of the courts. Statutory bodies created by the elected representatives of the people are subject to such control as are Ministers of the Crown and inferior courts. The prerogative writs exist to protect the subject from arbitrary condemnation, punishment or even inconvenience as a result of the whims of duly appointed organs of the state. Should a pressure group with equal power, and sometimes less sense of responsibility, be more free of control ?

> these curbs, they were trying to fulfil their ideals of free enterprise by protecting business and industry — which they regarded as the life stream of society — from the most determined interferences with achievement of these ideals. Their mistake was a failure to recognize in the interests and activities of labor unions simply another type of economic enterprise — from the angle of trying to get ahead and pursue gain, not much different from the types of enterprise they were trying to foster. It would seem, therefore, that the only way in which the courts could really be impartial, and at the same time achieve their common-law ideals, would have been to treat all purely economic activity as lawful until the legislature declared otherwise or except in cases in which such activity did not conform to some established common-law principle requiring proof justification."

8. *Unions of Their Own Choosing* (1939) at p. 25.

9. Brooks: *Unions of Their Own Choosing* at pp. 82-83.

The situation contemplated by the following note in the Minnesota Law Review does not often occur, but it certainly can, and on occasion has occurred.[10]

> The power of labor unions, often wielded with telling effect against employers, occasionally boomerangs to afflict the workers themselves. Unscrupulous individuals often gain control of these organizations. Using their control of the allotment of jobs as a whip to keep the members in subjection, they establish autocratic systems, with members reduced to the status of 'serfs' obedient to the will of the dictatorial officers.' Racketeering and other abuses flourish.

The American trade organization is admittedly more open to such abuses than are trade unions in most parts of the British Commonwealth. It is, nonetheless, ironic that the greater the success of the trade union in gaining control of the field of influence which it claims, the greater the probability of abuse and the worse the effect of that abuse on the individual.[11]

There is ground for suggesting that if the courts do not protect membership of the trade union there will come into existence, so far as the minority members or non-members of the union are concerned, a true "dictatorship of the proletariat".

> A dictatorship is an iron rule, with revolutionary daring and swift and merciless in the suppression of the exploiters as well as of the thugs (hooligans).[12]

The suppression of the dissentients and non-members could equally be part of the dictatorship. The trade organization must not be permitted to attain dictatorial powers.

10. 20 *Minn. L.R.* at pp. 657-658.

11. Copal Mintz: *Trade Union Abuses* (1932) 6 *St. John's Law Review* at p. 273 has pointed out:

> " At the very outset, it is perhaps pertinent to point out that the problem here considered arises not until, and only where, trade unionism attains its objective to a comparatively high degree. The problem does not arise except where trade unionism is successful for two reasons: (1) while trade unionism is struggling first for organization and then to establish its power with the employers, there is neither time, opportunity nor incentive for inner exploitation, and (2) the leadership at that stage is in persons of more or less idealistic and missionary bent. It is only when power is established and substantial treasures are in existence that 'racketeers' deem it worth while to enter upon the scene. Obviously, the problem is more and more acute in proportion to the extent of success. If the line of progress lies in the extension of the trade union system, the problem here considered must be solved. Otherwise, the lot of the individual worker, in many respects, will be even more intolerable than in pre-union times."
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> The same arguments apply, though less strongly to the organized employer groups.

12. Nicholai Lenin: "Scientific Management and Dictatorship of the Proletariat" in *Trade Unionism and Labor Problems* at p. 192.

A number of interests are involved in the exercise or the control of union discipline, of which the power of expulsion is the strongest implement, and, therefore, the implement most requiring control. The public concern is that industry should operate efficiently to produce both consumer and producer goods, and the public is also concerned that no organization should grow up possessing a power out of proportion to the control exercised over it by the public or the representatives of the public — be they judicial or legislative. The individual's interest is that he should be able freely to enter into agreements, to work, to employ, to do business and (paradoxically) to combine. Organized groups desire that the loyalty of their members should be assured and that their power should grow — if only to improve their bargaining position. The State, as such, is concerned that the ultimate control of group members should lie with it as should their ultimate loyalty.

> 'A fruitful parent of injustice', Judge Cardoza tells us, 'is the tyranny of concepts. They are tyrants rather than servants when treated as real existences and developed with merciless disregard of consequences to the limit of their logic.' But this tendency is checked to some extent because 'the concept, overgrown and swollen with excess of power, is matched in the end by other concepts which put a curb on its pretensions.' In this fashion concepts are subordinated 'to expediency and justice' and 'symmetry of formulas to symmetry of life'. [13]

In the field of labor law where the injunction is operative, concepts still tyrannize. It is true that these concepts are being checked in their exercise of absolute control. The limitations placed upon them must, however, become real and logical not fragmentary.[14]

In the United States of America a bill known as the Shipstead Bill was introduced in 1928. Section 2 read as follows : [15]

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labour, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to

13. E. Merrick Dodd Jr.: "Dogma and Practice in the Law of Associations" (1929) 42 *H.L.R.* 977.

14. "Present day treatment of labor problems is still tainted by the fictions which gained currency coincident with the beginnings of the breakdown of the economy of the so-called feudal era and the emergence of the industrial age. The endeavour of the business classes to secure their interests and to freeze the economic order which they were building led to a pseudo-sanctification of private rights, especially of rights in property and the security of transactions in relation to property, at the expense of the public interest." J. Louis Warm, "A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation" (1939) 23 *Minn. L.R.* at pp. 255-256.

15. As quoted by Felix Frankfurter and Nathan Greene: "Labor Injunctions and Federal Legislation" (1929) 42 *H.L.R.* at p. 778.

> negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labour, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

At that stage the Senate Committee considered the "individual unorganized worker" to be "commonly helpless" against the big combines. They were right. Today he is equally as helpless against the big organizations of his fellows. In no sense, while trade organizations are treated in the same way as social clubs, is he free from "the interference restraint or coercion" of union majorities and union officials. Nor has he "full freedom of association."

If he is considered entitled to these rights against his employers, why is he not entitled to them against his fellow workmen ? Why is not the small business man entitled to these rights against the organized combination of his fellows ? The trade union is not social. It is concerned with social, industrial, financial and political rights; rights which the courts should protect by injunction if necessary.

> The former club member may suffer in reputation and have difficulty in joining other clubs, but he is able to find companionship and comfortable surroundings elsewhere. Expulsion from a secret society, or the refusal of the grand lodge to give its password to the delegate of a subordinate lodge, or the revocation of the charter of a college sorority, leave no permanent wounds. The minority of a church who resent the new doctrines or ritual introduced by the majority can worship elsewhere with those who share their beliefs, and their faith will be strengthened by the sense of persecution. But the skilled workman who is thrown out of his trade union, the physician expelled from the medical association, or the broker expelled by the stock exchange, will often find it very hard to earn a livelihood. [16]

This right to earn a livelihood is surely worthy of protection by the courts. There is, of course, no absolute right to work. It is only a right (and at that only recently enunciated) that there will be no wrongful interference with the capacity which the individual has to work or with his relations with a particular employer. [17]

16. Zechariah Chafee Jr.: "The Internal Affairs of Associations Not for Profit" (1930) 43 *H.L.R.* at pp. 1021-1022.

17. "Just what does a court mean when it says that a man has a natural right to work or not to work? If he has a natural right to work, what becomes of that right when there is no work? What becomes of it when the employer chooses to lock him out or blacklist him? What value is there to a right not to work unless, when through no fault of his own, the worker finds himself without work, there is another means of support available?" J. Louis Warm, "A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation" (1939) 23 *Minn. L.R.* at pp. 332-333.

We are here confronted with that question-begging adjective "wrongful". Rather, however, than attempt to explain it, we shall content ourselves with the fact that where a wrongful expulsion interferes with the right to work then the consequent interference is wrongful.

> As union membership becomes an indispensable condition to securing employment and earning a living, what was formerly purely a matter of private association among union members obviously becomes a matter of public interest. Whether the 'consent' to submit to unreasonable requirements for retention of membership in unions is, where union membership is required as a condition to securing or retaining employment, any more real than the 'consent' which in the pre-union period led a worker to 'contract' to work at a starvation wage, is questionable. As Hegel observed, 'When liberty is mentioned, we must always be careful to observe whether it is not really the assertion of private interests which is thereby designated.' Surely immortality glinted for a brief moment on the judge who shattered at a stroke the fiction of freedom of contract in such a context with the statement 'a stockholder of a corporation, if dissatisfied with its management, can sell his stock and invest elsewhere; a member of a union can resign — and starve'.[18]

This factor must never be forgotten. The inability of the dissatisfied union member to enter into a new contract with the union, the power of the union to impose its own terms and to expel for non-compliance with those terms give it more than enough arbitrary power. If, in addition, the organization can ignore natural justice and the substantive merits of the case without fear of court intervention, its powers are limitless — and certainly far greater than those of any democratic government.[19]

> A worker may not only be banned from his chosen trade by virtue of his expulsion but in those communities where unionization is almost complete, exclusion from membership may deny him the right to work at all. To exclude a man from a club may be to deny him pleasant dinner companionship, but to exclude a worker from a union may be to deny him the right to eat.[20]

18. Ralph A. Newman, "The Closed Union and The Right to Work" (1943) 43 *Col. L.R.* at p. 44.

19. "If unions are recognized as a form of industrial government, then the rights of a member within the union should be equivalent to the rights of a citizen within a democratic society. Unions should have no more power to punish individuals for exercising free speech than civil governments. Freedom to criticize should receive equal protection, and the privilege to bring charges within the union should be equivalent to the privilege to bring suits at law. " It is submitted that if the courts recognize their function as one of protecting democratic processes within the union, then in the analogy of the rights of citizenship they have a standard which will enable them to determine what offences should be punishable and what conduct should be protected. In the constitutional limitations on the power of government, the courts can find familiar guides for marking the minimum of decency which union discipline must maintain." Clyde W. Summers, "Legal Limitations On Union Discipline" (1951) 64 *H.L.R.* at p. 1074.

20. Clyde W. Summers, "The Right to Join a Union" (1947) 47 *Cot. L.R.* at p. 42.

The arbitrary basis which can exist for such a denial of the "right to eat" is illustrated by two cases quoted by Professor Summers,[21] *Thompson* v. *Grand International Brotherhood of Locomotive Engineers,*[22] and *Ford Motor Co.* v. *United Auto Workers (CIO).*[23] Professor Summers says :

> A catchall clause may also be used to restrict a member's rights outside the union. Thus when the widow of an engineer who had been killed in a railroad accident was unable to make a satisfactory settlement with the company, a member of the Locomotive Engineers urged her to sue and at the trial testified in her behalf. Union officers who were apparently in collusion with the railroad charged him with 'conduct unbecoming to a member and violating his obligation' and had him expelled.
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> A widely publicised case arose in the Edgewater plant of the Ford Motor Company. Two of the test drivers were testing trucks in half the time that other drivers were taking. Mutual recriminations of 'soldiering' and 'sloppy work' created considerable hard feeling and threats of violence. The two 'speeders' were finally charged with 'conduct unbecoming to a union member' and expelled from the union. Because of a union shop agreement they were then discharged.

" Conduct unbecoming a member" may be interpreted by the trade union to include anything which the majority or the officials of the organization do not like. The construction of the rules should be in the hands of the courts; but, of course, it cannot be (and if it were would be ineffective), unless the courts accept jurisdiction to protect those members who are wrongfully expelled from the organization.

> The most dangerous factor which is involved in every aspect of union discipline is the political factor. Various types of political activity within the union are expressly prohibited. Members who seek to challenge those in power by engaging in internal political action may be accused of violating either general or specific constitutional provisions. They are found guilty by a procedure which may be completely controlled by those whose positions are threatened, and their appeal may be to officers who are political allies of the prosecutors.[24]

Thus, for example, a strongly established administration may keep itself in power by repressing and expelling its opponents. Moreover, the union members may be compelled to support a particular political party in the State itself by means of levies for that purpose. These are matters over which the Courts must exercise control, and by what better way than by preventing wrongful expulsion. The trade organization, whatever its form, must cease to be equated to the really voluntary associations such as sporting and social clubs. As Professor Lloyd[25] so clearly points out:

21. "Disciplinary Powers of Unions" (1949) 3 *Ind. & Lab. Rel. R.* at p. 507.
22. (1905) 41 Tex. Civ. App. 176, 91 S.W. 834.
23. (1944) 14 L.R.R.M. 2625.
24. Clyde Summers, "Disciplinary Procedures of Unions" (1950) 4 *Ind. & Lab. Rel. R.* at pp. 29-30.
25. "The Right to Work" (1957) 10 *Current Legal Problems* at p. 40.

> We may recall Maitland's remark in relation to an earlier epoch, that 'liberties in legal language meant freedom to oppress others.' Indeed any intelligent layman would be astonished to learn that in disputes such as this, where a man's livelihood is at stake, there could be any doubt whatsoever as to the jurisdiction of our courts of law to ensure that justice has been done. Yet, until very recently, our judges were still tending to approach this type of problem as though it was comparable to that of a gentleman being expelled from his club by a resolution of the committee and therefore one which should be approached on tip-toes, without encroaching on the inalienable right of Englishmen to decide whom they desire to consort with in the club-room.

This approach is, it would appear, changing. The courts are now less reluctant to interfere. From every point of view (except perhaps that of the union or combine dictator) such interference is not only desirable but essential if the individual is to retain any real freedom of action.

Copal Mintz points out[26] that:

> We regulate by law the conduct of banks, insurance companies, pawnbrokers, employment agencies; the administration of estates, the sale of stock, the breeding of domestic animals. We compel by law the education of our children. We coerce by law, the observance of health, safety and sanitation standards, in the construction, equipment and maintenance of dwellings and other buildings, preparation and dispensing of food, maintenance of street and public conveyances, etc. We prohibit monopolies. We regulate public utilities. Why should we not regulate trade unions?

The trade organization whether of workmen or of employers is equally a social phenomena — a method of social regulation, a part of the life pattern — which should be controlled, not allowed to go its own haphazard and often irresponsible way.

This social need to protect membership of trade unions was acknowledged by Proskauer J.,[27] as early as 1924:

> 'The procedure of these defendants was tyrannical and sinister. Instead of meeting the charges against themselves, they tried to destroy these plaintiffs for their temerity in making the charges. Equities most persuasive in plaintiff's favor, therefore, prompt the court to find a legal ground upon which to give redress.' (at 284, 205 N.Y. Supp. at 7). And the court did find legal ground.

Failure to protect members of a trade union is to defeat the very purpose of the trade union movement and give the individual into the hands of a master other than his employer, but a master no more reliable, though less open in his tyranny.

26. "Trade Union Abuses" (1932) St. *John's L.R* at pp. 310-311.

27. *Jose* v. *Savage* (Sup. Ct. N.Y. Co. 1924) 123 Misc. 283, 284, 205 N.Y. Supp. 6, 7, (as quoted by Copal Mintz "Trade Union Abuses" (1932) 6 *St. John's L.R.* at p. 287).

> Granted that the degree of individual liberty that should be permitted in such a collective movement as a trade union is not capable of dogmatic definition, sight must not be lost of the fact that the inspiration and essence of the movement is promotion of individual weal, and, therefore, the greatest possible tolerance should prevail. Of course, disloyalty in matters fundamental cannot be brooked, but beyond that, there should be free reign to individuality and independence, except as that may be restrained by the harmonizing force of moral leadership.[28]

Professor Cox[29] puts the same point in a slightly different form :

> While one might concede the importance of union democracy and yet deny the usefulness of law as a means of achieving it, there are several reasons for believing that a heavy burden of persuasion rests upon those who espouse this position.
>
> First, preserving union democracy often involves protecting individuals and minorities against numerical majorities or an officialdom which acts with majority assent. In the United States we have not been willing to trust even governmental self-restraint in dealing with basic liberties. We rely upon written constitutions enforced by an independent judiciary. A private organization has no greater claim to untrammelled power. Further, labor unions play a more important role in the community than other private organizations. Their powers are greater and their functions are different from those of a fraternal benefit association or social club. A corporation rarely affects a shareholder to the same degree that the bargaining representative influences the lives of employees in the bargaining unit. Finally, labor unions occupy their present position largely by force of law. Under the National Labor Relations Act a union which acts as the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and other conditions of employment without his assent. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. As a matter of practice, if not in legal theory, the union also controls the grievance procedure through which a man's contract rights are enforced. The government which gives unions this power has the concomitant obligation to provide safeguards against abuse. The most effective safeguard is legal assurance that unions will be responsive to the desires of the men and women whom they represent.

This fear of abuse of power in unions is widespread. Church organizations, for example, recognize the capacity for abuse inherent in the existence of powerful trade organizations, particularly if they are allowed to create conditions which in practice if not in theory amount to a closed shop. The Reverend Worth M. Tippy, a representative of the Federal Council of the Churches of Christ in America said :[30]

> The Federal Council is convinced of the necessity for labor organizations, but it has never stood for the closed shop, and does not favor it. It stands rather against coercion by either side and for the educational methods under a co-

28. Copal Mintz: "Trade Union Abuses" (1932) 6 *St. John's L.R.* at pp. 278-279.

29. "The Role of Law in Preserving Union Democracy" (1959) 72 *H.L.R.* at pp. 610-611.

30. "Policy and Program of the Protestant Churches" (1922) 103 *Annals of the American Academy of Political and Social Science,* p. 127 (as quoted by Toner, *The Closed Shop* (1944), p. 176).

> operative leadership. It does not believe that the 100 per cent union shop is essential to the safety of the union, and it is convinced that to attempt to force it is in the long run against the welfare of labor itself.

The views of Dr. Sidney Goldstein [31] support at least indirectly the closed shop but not necessarily the tyrannical use of it. He says of competition among workmen :

> [I]t leads to unnecessary and unworthy struggle and to strife and suffering in human relationships. . . . men are not to compete with each other for personal gain but are to co-operate with each other for the common good.

In 1940, the following condemnation of the misuse of the closed shop came from Catholic Bishops and Archbishops in the United States : [32]

> It is not . . . the excessive claims of labor on the income from industry which constitute the most immediate problems in labor relations today, but rather the *abuse of power* which not infrequently results in violence, riot and disorder. Employers at times abuse their economic power by discriminating unfairly against unions, by establishing lockouts, by importing from outside the community strike-breakers who are furnished with arms, and by provoking in other ways ill-feeling which precipitates violent disorder. Employees on their part allow themselves at times to be misled by men of evil principles so as to engage in the criminal use of violence both against persons and property.

We may disagree with the bishops' views as to what is evil. We cannot disagree that union power can be, and is, abused.

The Catholic Church certainly does not condemn the closed shop. One Jesuit commentator[33] has said :

> The right of any worker to a job must be interpreted against the background of this social fact. (The history of 150 years of tears and blood to establish workers' rights). Accordingly, instead of talking about the right of a worker to join or not to join a union, would it not seem more appropriate, and more practical, to discuss a possible duty to join his fellows in a spirit of fraternal solidarity? At any rate, *where the closed shop is essential to a union's security,* I do not believe that the union violates a worker's right to a job by demanding that he join the union.

I cannot agree that one abuse is justified, in attempting to prevent a repetition of another abuse. Whatever the historical facts, the unions now possess power. This power must be controlled for the protection of the individual worker, otherwise the unions defeat their own purpose. As Pope Pius XI pointed out : [34]

> The State here grants legal recognition to the syndicate or *union,* and thereby confers on it some of the features of a *monopoly,* for in virtue of this recognition, it alone can represent, respectively, working men and employers, and it can conclude labor contracts and labor agreements. Affiliation to the syndicate is *optional* for everyone; but in this sense only can the syndicate organization be said to be *free,* since the contribution to the *union* and other special taxes are

31. "Judaism and the Industrial Crisis" *ibid*., p. 89 (as quoted by Toner, *The Closed Shop* (1944), p. 177).
32. "The Church and Social Order" (1940), p. 13 (as quoted by Toner, *The Closed Shop* (1944), p. 183).
33. Benjamin L. Masse: *Does the Closed Shop Destroy the Right to Work?* America, Vol. LXVI, No. 16, Jan. 24, 1942, at p. 426 (as quoted by Toner, *The Closed Shop* (1944), p. 184)

> *obligatory* for *all* who belong to a given branch, whether working men or employers, and the labor contracts drawn up by the legal syndicate are likewise *obligatory.*

This freedom is often completely illusory. The freedom to join, to behave oneself, and to conform or alternatively to starve.

> One of the most important values of unions in a democratic society is that they give working men and women the power to govern themselves in their economic and related social affairs.[35]

When this ceases to be the case the union is partly redundant and partly the overlord of a new regime as pitiless as any oppressive employer of the old order. Even the most devoted unionist does not desire this. Therefore to prevent such an eventuality the courts must be able to exercise a restraining influence on the disciplinary measures of trade unions (and other trade organizations) and particularly on the most powerful corrective - expulsion.[36]

To refuse to restrain the wrongful expulsion of a worker from his union is to ignore the facts and foster oppression. The courts are instruments of justice not of oppression and there is no reason historical or logical why membership of a trade union should not be protected. The authorities permit such protection, the social realities clamour for it.

P. G. NASH. *

34. *'Quadragesimo Anno'* (1951) 29 *The Catholic Mind* at p. 286, (as quoted by Toner, *The Closed Shop* (1944) at p. 180).
35. Joseph Kovner: "The Legal Protection of Civil Liberties Within Unions" (1948 *Wisconsin L.R.* at pp. 18-19.
36. The opposing views are put very clearly by Robert Abelow: "The Closed Shop in New York" (1938) 7 *Brooklyn L.R.* at pp. 461-2 :

> " So far as employees who are affected are concerned, their views must necessarily differ. Those who are members of the union are of course strongly in favor of any provision which makes their bargaining position stronger. The non-union employees, however, take a different view for they feel that they are in fact being coerced into joining the union under penalty of losing their jobs if they do not. They object, too, because they feel that they are assuming a new master, namely, the union, and must pay initiation fees and dues and subject themselves to rules, regulations, and general principles to which they do not subscribe. Where the employer is engaged in a monopolistic enterprise, a refusal to join a union may effectively destroy the opportunity of earning a livelihood, and the compulsion of joining a labor union is regarded by objecting employees as an arbitrary and substantial impairment of their right to engage in honest and useful work for compensation. To these objectors fellow-employees who are members of the union point out that the strength of their position as a collective group is maintained only if union conditions prevail and a unified front is presented. Every non-union employee is a menace to the common interests of his fellow-workers if he does not join with them, and since non-union employees share equally with others in the advantages obtained by collective agreement, they should join the union and share the obligations and responsibilities as well as the benefits. They say, too, that if the union is willing to receive any competent person into its ranks, no man may complain of being deprived of his right to work."

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