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Bernard H. Fitzpatrick

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The morality of "Right-to-Work" laws has been seriously questioned by responsible authorities in the field of labor law. The present article is intended to delineate the problem and to point out some factual circumstances in which the author believes the moral justification of "Right-to-Work" laws to be arguable.

The July issue of THE CATHOLIC LAWYER will present the point of view of those who take issue with the position of the present author.

Morality of Right-To-Work Laws

BERNARD H. FITZPATRICK†

IN THIS YEAR'S SESSIONS of many of our state legislatures, "Right-to-Work" bills were introduced. This type of legislation,¹ which is now the law in eighteen of our states,² has been subjected to constant attack on the ground that it is immoral. The seriousness of the charge, the widespread adoption of such laws and the efforts to defeat their spread to other states justify a brief examination of the moral aspects of the right to work.

†Member of the New York Bar.

¹ Louisiana has a typical "Right-to-Work" statute.

Declaration of Public Policy. It is hereby declared to be the public policy of Louisiana that the right of a person or persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. LA. REV. STAT. §881 (Supp. 1954).

Some states have "Right-to-Work" provisions embodied in their constitutions, e.g., Florida.

[R]ight to work. . . . The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer. FLA. CONST., Declaration of Rights §12.

² Four states have constitutional provisions: ARIZ. CONST. art. II, §35 [ARIZ. CODE ANN. §56-1302 *et seq.* (Supp. 1952)]; ARK. CONST. AMEND. XXXIV (1) [ARK. STAT. ANN. §81-201 *et seq.* (1947)]; FLA. CONST., Declaration of Rights §12; NEB. CONST. art. XV, §13 [NEB. REV. STAT. §§48-217, 48-219 (1952)].

Fourteen states have statutory provisions: ALA. CODE tit. 26, §375 (Supp. 1953); GA. CODE ANN. tit. 54, §§54-902 *et seq.*, 54-9922 (Supp. 1954); IOWA CODE ANN. c. 736A (1950); LA. REV. STAT. §§881-888 (Supp. 1954); LAWS OF MISS. 1954, c. 249, §1; NEV. COMP. LAWS §10473 (Hillyer, 1929); N. C. GEN. STAT. ANN. §95-78 *et seq.* (Michie, 1950); N. D. REV. CODE tit. 34, §34-0114 (Supp. 1953); S. C. CODE ANN. tit. 40, §40-46 (Supp. 1954); S. D. CODE §17.1101 (Supp. 1952); TENN. CODE ANN. §§11412.8-11412 (Williams, Supp. 1954); TEX. STAT. arts. 5154c, 5207a (Vernon, 1947); UTAH CODE ANN. §34-16-1 *et seq.* (Supp. 1955); VA. CODE ANN. tit. 40, §40-68 *et seq.* (1947), §40-74.1 *et seq.* (Supp. 1954).

It may not be quite proper for a lawyer to undertake such an examination; he lacks competence in the field of moral disputation;



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he violates the ancient injunction laid upon him "Put not thy sickle into the field of dread theologie." The only excuse that can be offered is that half of the question lies in the field of law; even the moralist, to pass judgment upon a law must know what that law is and what its implications are, and if the lawyer speaks out on a question of law as to the bearing of the law on a moral issue he is in no worse case than the moralist who speaks out on an issue of morals involving a question of law.³

Because the lawmaker must generalize, there is hardly any specific piece of social legislation which in all its applications will completely realize the moral ideal. The best the legislator can hope to accomplish is a rough concordance between the legislation and moral principle as applied to the great mass and the numerically significant components of the mass of people affected. For reasons which we shall presently set forth, the "Right-to-Work" laws in the majority of their applications are perfectly in accord with sound morality and indeed positively required by sound morality: There are, however, numerically significant groups of workingmen whose

³ Cf. *Quadragesimo Anno*, paras. 41, 42, Two BASIC SOCIAL ENCYCLICALS 111, 112 (The Catholic University of America Press, 1943).

legitimate moral rights are destroyed by such laws (and by the Taft-Hartley Act). The indicated course of conduct for the conscientious legislator is, first, to seek to amend the "Right-to-Work" laws to preserve the moral rights of the minorities involved and then to vote for the "Right-to-Work" laws as so amended. It thus becomes important to discover precisely what moral principles are involved and precisely how they bear on the legitimate objectives of labor unions. The question "Are 'Right-to-Work' laws moral?" oversimplifies the problem. More accurately, the question is this: "Wherein do they accord with and wherein do they depart from sound morality?"

The general pattern of "Right-to-Work" laws is that they forbid under various sanctions, contracts, understandings, or policies of employers, making membership or non-membership in a union a condition of employment. We might note that there is a practical problem inherent in maintaining the employees' right to choose a union in the face of closed and union shop agreements to which the critics do not essay an answer.⁴

In deference to those critics who have been at some pains to point out that such laws guarantee no one a job, that fact is stated here, although, unless there were a misconception about the "right to work" in the public mind there would seem to be little point in mentioning the fact.⁵

⁴ Cf. *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 335 (1949).

⁵ It is argued by some that since the right to work is a right of imperfect or inchoate type, *i.e.*, it depends upon the concurrence of an employer, it cannot be called a "right" but is merely a privilege, hence there is no right which can be violated by shop clouture. As a purely semantic

To begin with, no one questions that man has a moral right to work; indeed "... man is born to labor as the bird to fly..."⁶ and it would be most difficult to deny him the right to do what his very nature calls upon him to do. Many laws taking many different forms recognize man's right to work; and no one has dissented from them on moral grounds. There may be mentioned the anti-discrimination laws, the "yellow dog" laws, the labor relations laws and the second injury provisions of the Workmen's Compensation laws.

proposition this might easily be rebutted, *e.g.*, the "right" to marry depends upon such concurrence, so does my property "right" in a grain future contract which would be valueless unless I could find a buyer. More realistically, however, whether my rights or my privileges are involved would seem to make little difference when the question under discussion is how far an interference by another, especially a stranger to the essential concurrence, might be arbitrary. Some of the proponents of this view appear to be confused as to the correlation of right and duty, believing that the correlative duty is to be looked for in the concurring party whereas the correct notion of correlation is that a duty in a given person gives rise to a correlative right in the same person; if others are involved in the exercise of the right they may be under a positive or negative obligation to respect the right, but their obligation has no bearing on the existence of the right *ut sic*.

⁶ *Quadregesimo Anno*, *op. cit. supra* note 3, at para. 61, p. 129. Job opportunity may not be unreasonably restricted. *Id.* at para. 74, pp. 135, 137. The necessity for work antedated the fall of Adam. *Rerum Novarum*, para. 27, *TWO BASIC SOCIAL ENCYCLICALS* 21, 23 (The Catholic University of America Press, 1943). One point of view regards the right to work as not embracing a "right to work in the employ of another," the basic argument being that the right depends upon the duty to work which is non-existent in the case of persons of independent means. The quoted matter in the main text appears to relate to work in employee status, but even if it did not, the fact that a right is not universal is no criterion of its existence.

But, it is said, the right to work is not absolute, and this we cannot gainsay. Neither is the right to life absolute; it must yield to superior rights in others, for example, the right of the nation to wage war and conscript its citizens to fight and die therein;⁷ it must yield also to equal rights in others, for example, a seaman in charge of a lifeboat may not throw passengers overboard to lighten an overburdened boat so that the remainder may be saved.⁸ Just as, however, the fact that the right to life is not absolute will not justify promiscuous killing, so the fact that the right to work is not absolute will not justify promiscuous interference with the right to work.

When we say that a right is not absolute all we really mean is that the right may be invaded or denied for reasonable cause, and reasonable cause, in turn, means the existence of equal or superior rights in others. As one of our speculative jurists put it, "My right to swing my arm stops at the end of my neighbor's nose."

For our present purposes we are going to make the assumption that a great number of rights inferior in quality to an asserted individual right may nonetheless constitute a superior right. For example, the paid fireman is often under a moral duty to risk his life even though only the property rights of his neighbors are at stake. It is obvious, of course, that just as the right to life outranks the right to work because the latter is merely a derivative of

⁷ Paralleled in the spiritual order by martyrdom; the right to life gives way to the superior right of God to command fidelity.

⁸ *U.S. v. Holmes*, Fed. Cas. No. 15,383 (C.C. E.D. Pa. 1842). Gilbert's "Yarn of the Nancy Belle" is good rhyme but poor morals.

the former, so the right to organize and bargain collectively and the right to associate in trade unions are subordinate in rank to the right to work because they are purely ancillary to the right to work and exist solely for the purpose of protecting the value of the right to work. If therefore, we examined the question solely on a qualitative basis the matter would end right here; in case of conflict, the qualitatively superior right to work would always prevail over the lesser right to associate in trade unions.

We will make one further assumption. That is that in cases where the whole right is not taken, but merely some relatively minor interference with the right is proposed, a relatively greater interest in a lesser right in others may also constitute a superior right. It is on this principle that quarantine laws operate; I am deprived of liberty, though I be perfectly healthy, that others may be free of disease.

The first question, then, which the legislator must answer is whether the rights of the union are superior to the right to work; but that is not the only question. It must be determined whether the right of the union to insist upon a shop closure is an absolute right. Clearly it is not. If those in possession and control of a field of employment had an unqualified right to exclude all others at will, Pope Leo XIII could not have condemned as he did those labor organizations committed to religious and civil subversion which

... after having possession of all available work ... contrive that those who refuse to join with them [in subversion] will be forced by want to pay the penalty.⁹

⁹ *Rerum Novarum*, *op. cit. supra* note 6, at para. 74, p. 69. The word "possession" in the quoted

The system which permits such exclusion is characterized by the Pope as one of "unjust and intolerable oppression."¹⁰

If shop closure were an absolute right to be exercised at the will of the workers in possession, the Pope could have condemned the subversive commitments of the groups in question, but he could not have called unjust and oppressive their exclusion from work of those who refused to join in subversion. The closed shop and the union shop are, therefore, morally indifferent means which must be judged virtuous or vicious or neutral, from the legitimacy, depravity or neutrality of their objectives or their resultants. Nor are they evil only in the context of subversive motives; they are evil in every case where they are undertaken for motives or productive of results which are evil by any moral test. The structures of corruption on the New York waterfront, at the racetracks and elsewhere, could never have been erected without the closed shop.

matter might better have been "control." "Possession" normally signifies the power to control coupled with the right to control. The original uses "*occupata*" which would not signify right.

¹⁰ *Ibid.* The word "intolerable" has also acquired too passive a meaning to render "*non ferunda oppressione*" accurately; the passage calls for active opposition to take the form of dual unionism. Some interpret *Rerum Novarum* para. 74 as importing a moral obligation to join a union, undoubtedly a sound construction in the particular circumstances but an inadequate foundation for arguing the existence of any general duty to join. It may be inferred from arguments advanced later in this article that a man practicing a craft may be under a moral obligation to observe craft standards to the point of joining the craft union; so also in strict industrial unionism (*e.g.*, coal, garments) there may be such a moral obligation. But in industries not organized along either of these lines, *e.g.*, steel, oil, auto manufacturing, there would be no such obligation.

The second question which the legislator must answer, then, is whether, assuming that the rights of the union may in some cases be superior to the right to work, so that an interference with the latter is justifiable, the proposed form of the interference provides adequate safeguards against abuse. In this connection, it should be remarked that the legislator should not permit himself to be deceived as to the magnitude of the interference of shop clature with the right to work. The notion, carefully fostered by advocates of shop clature, that the rights of "only a few holdouts" as compared to the "great majority" are involved is completely false because shop clature binds not only the minority but everyone.¹¹ All that can be said in favor of this argument is "*volenti non fit injuria*," to which it may be answered that often the state must do the thinking for the improvident.

When the state legislator seeks an answer to these two questions he is confronted first by the dichotomy of Federal and State power; his power to legislate with respect to interstate labor is restricted but his power to legislate for intrastate labor is not impaired. He first turns to observing the area of power left him by Federal law.

Congress has left to the state the power to restrict further an institution which is, in popular parlance, called the "union shop," although the resemblance of the "statutory union shop" to the pre-Taft-Hartley "union shop" is somewhat nebulous. Actually, the "statutory union shop" has nothing to do with union membership, except that the union may not charge a dissenter any more than it charges its own members.¹² Con-

gress has said in effect to the state legislatures:

We are giving the union the power to tax (and no more) under the limitations, first, that the tax upon non-members shall not exceed the tax upon members; second, that the employers consent; and third, that a tender of the tax shall discharge all obligations. We remit to you, Mr. State Legislator, the questions of whether such taxes may be collected *in invitum* in your state, and if so, to what extent and under what sanction.¹³

The moral question facing the state legislator in this area is no more, no less than the question of whether the right to work should be interfered with to the extent of permitting the collection of a tax thereon. Since the interference with the right to work is not complete, but rather nominal, and since there is an equal right in others to spread equitably over the members of a given unit the financial burdens, of that unit¹⁴ the question becomes one of which

¹³ It is said that Senator Taft favored the "agency shop," wherein a "service charge" is collected by the incumbent bargaining agent but there are no other membership requirements, but was deterred from an enactment in that form for fear of constitutional objection. Logically, if Congress could create a "bargaining unit," which, in a very real sense is a "municipal corporation," [a true and genuine organ of the state, *Quadregesimo Anno*, para. 93, *TWO BASIC SOCIAL ENCYCLICALS* 151 (The Catholic University of America Press, 1943)] having sovereign powers exercisable *in invitum* it could invest that corporation with the power to tax. Legally, however, there are possibilities of constitutional objection on many grounds, and as a competent constitutional lawyer, Senator Taft may have sought to give the enactment the aura of accepted practice. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272 (1855).

¹⁴ *Rerum Novarum*, para. 50, *TWO BASIC SOCIAL ENCYCLICALS* 45 (The Catholic University of America Press, 1943). An employee is a "citizen of a bargaining unit." See also *Quadregesimo Anno*, *op. cit. supra* note 13 at para. 92, p. 149, for

¹¹ The fact that "preferential" and "proportional" shops exist is obviously not a valid consideration.

¹² *Union Starch & Refining Co. v. NLRB*, 186 F. 2d 1008. *cert. denied*, 342 U.S. 815 (1951).

of two approximately equal rights should prevail. A small diminution of the right to work is to be suffered that an enhancement of the value of the right to work may be brought about. You tax a man to build a road past his property; the road, when built, enhances the value of the property.

We conclude then that as applied to the residual Federal field, the "Right-to-Work" laws are in the category of "morally indifferent" legislation; a legislator is morally free to vote for or against such legislation. The existence of a union is not at stake; the principle of unionism is not at stake;¹⁵ only the union revenues are at stake and the legislator might well conclude that since the revenues are at stake only to the degree in which the particular union has

specific approval of a union taxation scheme where the union is the exclusive representative, though the union may not compel membership. *Quaere* whether the union is entitled to anything more than the reasonable expense of conducting the activities of the bargaining unit and whether an employee who might not want the benefits of union-operated welfare funds should be compelled to pay therefore.

¹⁵ An attack on the "Right-to-Work" laws is based on the apprehension that they tend to undermine unionism. It is true that they undermine craft and strict industrial unions as pointed out *infra* herein. It may be true that where the law of a particular jurisdiction fails to recognize the principle of the "exclusive bargaining agent" other types of union may be jeopardized (see note 26 *infra*). But that a "Right-to-Work" law per se has any such tendency appears to be contrary to the available statistical evidence, e.g., the Railway Labor Act, prior to 1949, incorporated the substance of "Right-to-Work" laws, yet organization progressed between 1926 and 1949. Also, in general industry, so long as closed and union shops were the only organizing methods, hardly any progress was made outside the fields adaptable to craft and strict industrial unionization; but when the Wagner Act made the less restrictive device of the "exclusive bargaining agent" available, organization commenced to flourish.

failed to inspire confidence in its electorate, he will not assist by permitting the collection of a tax *in invitum*. Or he may well apply the normal considerations which control the award of taxing power to any public corporation; for example, he might rely on the analogy of giving a sewer district the right to tax on a frontage or valuation or acreage basis, even though some owners will not use the sewers, or the analogy of a school district having the power to tax all, though many landowners will educate their children privately. From the moral viewpoint his answer to the practical questions involved, whichever way it lies, will not be wrong.

Nor need the legislator concern himself greatly about the abuses which might occur in this Federal residual domain. True, some improvements might be made in the mechanics of dues collection such as requiring a union to state in writing the amount it claims as dues before a discharge for non-payment or such as limiting its enforcement rights to a payroll deduction.¹⁶ True, also, that where a union itself administers pension plans, sick benefits and the like out of monies collected as dues, it should perhaps be regulated at least in this aspect. But these problems do not loom so large that morally the legislator is bound to take notice of them. In the main it may be said that the possible damage to the individual is minimal,¹⁷ and that if the taxpayer to other governmental agencies were as assured that his money will not be frit-

¹⁶ So far as permitted by Taft-Hartley Act §302, 61 STAT. 136, 157, 29 U.S.C. §566 (1947).

¹⁷ The Taft-Hartley Act itself contains safeguards against oppressive taxation; among other things it forbids excessive initiation fees. Oppressive taxation is morally wrong. *Rerum Novarum*, *op. cit. supra* note 14 at para. 67, p. 63.

tered away as the "union taxpayer" is that his money will be well spent, he would be well satisfied.

The problem of the legislator with respect to intrastate labor is not as easily solved. Congress has shouldered no part of the moral responsibility in this field, the state legislator must assume the entire burden. However, he finds himself starting with the same initial proposition, viz., that the right to work being fundamental and the rights designed to enhance its value being merely derivative, the burden lies upon him who would intrude upon the right to work to show clearly what circumstances make a merely ancillary right greater than the right from which it springs.

Of course the state is morally bound to protect, at least by negative sanctions, the right of men freely to associate. This right, too, is qualified and not absolute; men, for example, may form a partnership to deal in commodities, but not a partnership to conduct the business of hijacking,¹⁸ nor an association for monopolization of a trade, if unreasonable.¹⁹ While the right of men to associate for the improvement of their condition as wage earners is a right which must be respected under this principle, it must also be observed, that the right of free association is not a justification for compulsory association nor for some, freely associating, to compel others to join them. It is abundantly clear that the moral right

¹⁸ Cf. *Rerum Novarum*, para. 72, TWO BASIC SOCIAL ENCYCLICALS 67 (The Catholic University of America Press, 1943); *Everet v. Williams*, cited in *Michael Jeffrey and Co. v. Bamford*, (1921) 2 K.B. 351, 355.

¹⁹ *Quadregesimo Anno*, paras. 105-110, TWO BASIC SOCIAL ENCYCLICALS 157, 159, 161 (The Catholic University of America Press, 1943); *Standard Oil Co. v. United States*, 221 U.S. 1 (1910).

of association is a freedom, not a compulsion. What follows from this, of course, is not that shop closure is unjustified but that shop closure cannot be justified by the principle of free association. We must look elsewhere.

It has been noted above that the right to work is not absolute. Let us now look at two of the limitations on the right to work. The first of these relates to man's duty to himself and to his family and may be roughly stated in the form that the right to work does not justify a man in working for less than a living wage.²⁰ The second relates to man's duty to society—which includes both his fellow worker and his employer and the employers of his fellow workers, and may be stated, again roughly, that man may not exercise his right to work so as to cause his fellow workers to accept less than a living wage²¹ nor so as to ruin his own employer nor the competitors of his employer.²² For proper understanding of this last statement it should be emphasized that the immorality lies in the misuse of the right to work and not in the damage which may incidentally be done to another by a proper use of the right to work; thus, if I agree to work for 37½ cents per hour and thereby cause another to lose his 75 cent job, my act is immoral; though if I agree to work for 75 cents an

²⁰ *Rerum Novarum*, *op. cit. supra* note 18 at paras. 61, 63, pp. 57, 59; the same would apply to working conditions other than wages. *Id.* at paras. 56-66, pp. 51, 53, 55, 57, 59, 61.

²¹ By "living wage" is meant more than a mere subsistence. *Quadregesimo Anno*, *op. cit. supra* note 19 at para. 71, pp. 133, 135. A "reasonable wage" seems to be indicated reflecting, among other things the "value added by labor in manufacture or service."

²² *Quadregesimo Anno*, *op. cit. supra* note 19 at para. 72, p. 135.

hour but use a tool which doubles efficiency²³ and another 75 cent worker is thereby displaced, my act is not immoral, though the effect on production cost is the same.

Workingmen, whether singly or in association, necessarily have a right to resist, by all reasonable means, immoral acts of other workers which affect adversely their own right to work. If, therefore, it can be demonstrated that some degree of shop clature is, in particular circumstances, an apt means of protecting the reasonable value of the right to work, then there is good cause for men, in association, invading the right of others to work, but, of course, only in the particular circumstances and only to the degree necessary. Also, if some legal institution or device less destructive of the right of others to work than shop clature is available, and practicable, the legislator is bound to adopt that substitute device instead of shop clature.

Here the inquiry becomes a factual one, and there are two aspects to be considered. The first aspect is the relationship between the employee and his own employer. To isolate this problem, assume that the employer in question is a manufacturer of a product so hedged by patents that there is no competition affecting the pricing of the product and, consequently, no employee of any other employer is competing for the jobs via the product market. This manufacturer, which we shall call "Patent Paradise, Inc." requires a relatively steady work force.²⁴ The only pressure therefore against

the employee of "Patent Paradise, Inc." is the pressure of another direct bidder for his job. But such pressure is readily controlled by the ordinary labor contract without any form of shop clature; a rate is normally specified for the job, wherefore no lower rate can be paid; seniority, priority, discharge and force-reduction clauses protect the employee adequately against such pressure. If all employer-employee situations were as serendipital as that of "Patent Paradise, Inc." an invasion of the right to work by shop clature could not be justified morally.²⁵ There is, however, one moral question involved, viz., whether a

a single shop basis, in the rare cases where the "gate hiring" or "shaping" system is still followed so that the possibility of a steady working force is destroyed. It would be prerequisite to the justification to show that the enterprise drew from a pool of labor which regularly followed it as a means of livelihood and clature should not continue after the establishment of a seniority or priority system. Crop pickers recruited locally could not satisfy the "livelihood" test. Migrant labor following a harvest would present a special and difficult case on which the writer would prefer to suspend judgment.

²⁵ An argument advanced in support of shop clature is that if an employer and union agree in collective bargaining that some form of clature would aid industrial relationships the clature is proper because the union and the employer are charged with laying down rules for the common good of the enterprise. The argument is perhaps valid, but it merely identifies the persons in whom the sovereign power resides without establishing any criteria by which to judge the morality of their act. *Cf. Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *In the Matter of Monsieur Henri Wines, Ltd.*, 44 NLRB 1310 (1942). Where the morality is good or indifferent a legislative act is binding within the scope of the legislative powers; but the character of an immoral or ultra vires act is not altered by the addition of a legislative fiat. In connection with the argument itself the writer would reserve judgment on the morality and the wisdom of giving the employer any voice in a matter of union organization.

²³ Efficiency is a moral duty of business. *Ibid.* It follows that labor is morally bound to use the more efficient method. *Opera on Tour v. Weber*, 285 N.Y. 348 (1941), is clearly in accord with sound morality.

²⁴ It is perhaps possible to justify shop clature on

labor relations statute is reasonably required to achieve the stated result. If an exclusive bargaining agent is requisite to achieve the result, *i.e.*, if a "members only" contract would be insufficient, then the legislator would be under a moral duty to provide the statutory basis for an exclusive bargaining agent.²⁶ The answer to the question involves a matter with which we have had little experience, and the safer answer from the moral viewpoint probably is that if the state is sufficiently industrialized a labor relations statute is required.

Decidedly less simple, however, is the employer-employee situation in which the employer competes with other employers in the product market. In those cases, it is possible that the competing employer, by using a lower wage scale can drive the employer who pays a reasonable wage out of the market and thus force the latter to lay off his employees or reduce their wages. It is in these cases that there is possible a misuse of the right to work which would justify an invasion of the right to work by shop clature.

The apologists for shop clature, using

²⁶ The rather absurd decision in *Piegts v. Amalgamated Meat Cutters*, 28 CCH Lab. Cas. 69,242 (La. 1955), would seem to indicate that a labor relations statute is required. The decision is not to be taken as a correct construction of the intent of "Right-to-Work" laws. None of the several opinions filed by the sitting judges appear to display any knowledge of the framework of industrial relations. While it is true that there is an abridgement of the right to work where there is an exclusive bargaining agent, the abridgement is independent of membership or non-membership in a union, *i.e.*, the rates and conditions apply to all regardless of union membership. If the union had demanded a "members only" contract, would the Court have found that it sought to make union membership a condition of enjoying the contract benefits?

the classical appraisal of the labor market furnished by Adam Smith and Karl Marx—a tremendous oversimplification—jump to a conclusion at this point by a rough sorites which runs:

(Practically) all employers are in competition.

Employers in competition cut wages. Wage cutting is prevented by shop clature.

Ergo: Shop clature of all employers is justified.

Now the fact is that there are a number of occupations and industries where that sorites would hold true. But the first error in the sorites lies in its universality. It presupposes that wage-cutting is the sole method of competition. The second error lies in the assumption that shop clature of itself is a remedy for wage cutting. Let us analyze these two somewhat related errors.

Unions, for as long as they have existed in the United States, have had a ready answer to the wage cutter; it is a good and sound answer thoroughly in accord with our American concepts of fair play. What is more, it was a practical answer and received the support of the honorable employer. The answer to the wage cutter was this:

We shall set a standard of wages and related conditions uniform for all employers and non-discriminatory as between them, and we shall compel all employers and all employees to observe that standard.

By the use of this formula the unions sought to eliminate wage rates as a factor in competition so that the workingman—the least able to bear the burden of competition—would escape the brunt of it.

The general formula was, in practice, worked out in two ways. The craft union worked it out on a labor market basis, that is, it allocated jurisdiction to locals which set up standards within their respective local jurisdictions usually based on time rates; and it made an effort to keep up the skill level of its members so that they would be worth the standard rate.²⁷ This system required that all workmen of the craft pledge to work for no less than the standard rate; that they pledge to work for no employer who had not agreed to observe the standard rate and that they pledge to work with no member of the craft who was not pledged to observe the standard.²⁸ The

²⁷ There are some industries characterized by high labor mobility and a close relationship of wage rates to "consumer competition" between employers in which the craft union technique is applied although the labor is not, strictly speaking, a craft, e.g., stevedoring, merchant trucking. Shop closure is justified in these cases upon like principles. Where, however, the mobility results not from hiring conditions but from mere "turn-over" closure is not justifiable in the absence of competitive conditions which dictate an industry standard. An example of the latter would be the sales forces of variety stores where the jobs are steady but the personnel are not. In the variety store industry standards would not be feasible, for the comparative norm "sales volume per employee hour" relates in very small part to employee effort, since goods are "merchandized," not "sold" and wage rates tends to depend upon rather than determine pricing policy, with some tendency to vary inversely with price.

²⁸ The craft union method of operation, even though it involves monopoly and invasion of the right to work, is regarded by the writer as the modern analogue of the oft-approved medieval guild [but see the criticisms of monopoly abuse in *Quadregesimo Anno*, para. 97, and *Rerum Novarum*, para. 74, TWO BASIC SOCIAL ENCYCLOPICALS 153, 69 (The Catholic University of America Press, 1943)]. While the strict industrial union method of operation, a creature of modernity, has no ancient analogue, the basic principle

only way to obtain such pledges was to make the craftsman a union member wherefore their understandings with the employers required the employer to hire none who were not so pledged, i.e., none but union members. This was the origin of the closed shop. Observe that it is tied in with the maintenance of a standard; it has neither point nor purpose when the standard is removed. Observe, too, that the standard is the device whereby the moral right of employees to resist wage cutting is enforced; hence, if the standard falls, the moral justification for the closed shop falls.

Being based on the "labor market" theory, the craft union has sometimes a very close and sometimes a very nebulous relation to competition between employers. It is obvious, of course, that if two competing contractors are handed a blueprint for the construction of a brick wall and asked to quote a price they will be faced with the situation that the brick will cost about the same for each bidder, so will the mortar, wherefore the labor cost will be about the only factor of differentiation and the temptation to cut the wage will be great. Even where a union has set a standard in such a case, various techniques such as the employment of "pacers" and production bonuses are used to lower the unit cost. On the other hand, the newspaper printers follow the craft system although there is

would appear to be the same as that of the guilds; they may be (the writer has some doubt) specifically approved in *Quadregesimo Anno*, op. cit. supra at para. 92, p. 149. Unions following the "heterogeneous contract policy" present no such problems; negatively, they do not need justification as institutions against the charge of monopoly and affirmatively their operational resemblance to the guilds is so faint that it cannot be inferred that the "closed shop" of the guilds is justified in such unions.

hardly any relation between the "mechanical labor cost" and the "price structure" of a newspaper; advertising revenue and subscription revenue are influenced primarily by circulation which is a reflection of editorial work and not of mechanical work. There is a tendency in this situation for the employer least able to pay to furnish the standard for the craft, and the more prosperous newspaper thereby reaps an additional benefit; it is, therefore, somewhat difficult to see why the unions do not follow the heterogeneous contract policy. The principal reason why this policy is not followed appears to be that the members deem it more to their long term advantage to put a uniform price on the skill rather than risk a depreciation of the skill for the sake of what may be a short term advantage.

The formula was worked out in a somewhat different way by the strict (as opposed to loose) industrial union. This type of union was invented, as its name indicates, to remove wage rates as a competitive factor in a specific industry such as coal or garments. This involved, among other things, organization of all the significant competing firms in that industry. Instead of operating on a labor market basis, it operated on a product market basis, *i.e.*, it sought to organize all the shops wherever located pouring goods into the specific product market. In each shop it organized those employees regardless of skills whose work figured directly in the labor cost of the product. It soon discovered that in many cases the most convenient way of eliminating wages as a factor in product competition was to put as many elements of the working force as possible under a piece rate, rather than a time rate basis,

and to make that piece rate uniform for all employers. Thus the unit labor cost of each competing employer would be approximately equal. With such a control it found that, unlike the craft union, it did not need a closed shop; its system was a system of shop control rather than of job control. Therefore the union shop, rather than the closed shop became a fixture of the industrial union. But the union shop arrangement involved disciplinary control by the international union, which (not the locals) set the standard, so that no local could, by special arrangement with the employers of its own members, render the standard ineffective and throw the product market into chaos by permitting the favored employer to cut prices to his customers. Observe here, too, that the standard is the device whereby the moral right of employees to resist wage cutting is enforced; hence, if the standard falls, the moral justification for the union shop falls.

But how many unions today are concerned with either craft standards or industrial standards? Certainly a minority, whether judged by the yardstick of numbers of unions or of numbers of members. Apart from the craft unions in the printing and construction trades and the coal miners and garment workers on the industrial side, it is difficult even to think of unions maintaining standards. Most unions today are concerned only with making contracts with the individual employer and these tend to preserve (pattern bargaining) rather than to abolish differentials between competitors.

Most unions, therefore, lack a moral justification for either the closed shop or the union shop, and, therefore, the legislative grant to them of powers of shop clature

is immoral. However, the denial of shop clouture powers to the unions which can and do maintain standards, which though a minority are by no means a small minority, on the grounds that employees should have the right to bargain with their respective employers is also immoral as an exaltation of the derivative right of collective bargaining over the right from which it immediately derives, the right to a reasonable wage.

In a "damned-if-you-do — damned-if-you-don't" situation such as this, the judgment of the legislator is in the class of prudential judgments; the moral factors are about evenly balanced. For a prudential judgment made in good faith no legislator is subject to moral criticism. The legislator would, of course, have the moral obligation (since insufficient facts are now available) to work for an investigation of the practical questions involved in the legitimate claims of the craft and strict industrial unions to shop clouture. For the reasons that will be explained below, the writer would be inclined, at the moment, to vote for the "Right-to-Work" law now and conduct the revisory investigation thereafter; this partly for the reason that while we are on an economic plateau, the pressures against the craft and strict industrial unions are not serious. But if someone thought it should be done the other way around he would not be subject to criticism on moral grounds.

We have noted the fact that most unions today, instead of maintaining standards, follow a heterogeneous policy. Since we have made the point that shop clouture is not of itself a remedy for wage cutting it is of some importance to demonstrate the reasons behind the heterogeneous policy.

The answer may be summed up in the simple statement that the unions do not set standards because they cannot set meaningful standards and they cannot set meaningful standards because competition is not the simple thing the classical economists appraised it as. Price is not the sole element of competition; value, design, service, reputation and other elements enter into it. Nor is price governed by wage rates save in a limited number of competitive situations; in most industrial situations the wage rate is merely one of the several factors including method or process, tooling, adaptability of available materials and management efficiency in labor utilization which enter into the labor cost. It not infrequently happens that the employer with the highest wage rates operates at or near the lowest labor cost.

What meaning would standards have, for instance, in the automobile industry? At one competitive cycle of that industry the Ford V-8 was competing in the same price range with Chevrolet and Plymouth both of which were powered by straight six engines. Ford had to manufacture a complicated engine block and two heads whereas its competitors had a relatively simple block and a single head. On the other hand, Ford was using a distributor driven by a simple axial extension of the crankshaft whereas competitors had distributors actuated by a complex drive through transverse shafting. Here was a keen competitive situation; yet the wage rates were an incommensurable factor in that situation. What point would it serve, assuming the tooling was relatively simple, to have the machinist who might be making the spot facings on a Ford block which, being angular, would be more difficult, receive the same time wage

rate as his opposite number in Chevrolet or Plymouth who had simpler facings in fewer number? And to attempt to standardize by the piece rate method in this situation would be fantastic; assuming the cylinder heads to be forged would you standardize by paying the Ford hammersmith at half the rate per head paid to Chevrolet and Plymouth hammersmiths — since two Ford heads were the competitive equivalent of one competing head?

Nor is this more than a fragment of the total problem. Suppose one competitor decides to forge his heads and another to cast them? Suppose one competitor develops a multiple spindle machine capable of doing all the spot facings on the block in one operation? Or suppose one competitor is able to organize his assembly line more efficiently than the rest? What then?

To produce competitive parity of labor cost in the automobile industry the union would have to start with the allocation of the competitor's capital, control his plant layout, his tools, dies, jigs, fixtures and conveyors and it would have to design his product for him and specify his manufacturing methods. No union is either capable or desirous of assuming such power or the responsibility that would go with it. And if some union were to try such controls to produce competitive parity, the industry would be standardized into stagnation.

So it is with the major industries of the country. Steel, other basic metals, metals fabricators, mass production generally, cannot be fitted into the wage formula of either the craft union or the strict industrial union. The unions in these fields directly recognize the facts of their particular industries by adopting the heterogeneous

contract policy under which a different contract is made with every employer with whom they deal, suited to his particular situation. Indirect recognition of the same facts is accorded by the tolerance the unions show for such devices as job evaluation²⁹ and incentive (as distinguished from "piece rate") plans. Indirect recognition is also found in the tendency of these unions toward "pattern" bargaining which tends to perpetuate rather than abolish differences between competitors.

The industries mentioned above, however, are not the only industries where the methods of craft and strict industrial unionism are inapplicable. In some industries the ratio of labor cost to selling price is so low that there is little competitive significance attached to wage levels, *e.g.*, in paper converting the ratio is about 15% requiring about seven cents wage differential to produce an effect of one cent on the price. Other industries, such as electric power, do not present competitive situations at all. Some companies produce premium priced goods and compete on a quality rather than a price basis.

The maintenance of a wage standard would seem to require either a relative homogeneity of skill in a relatively active labor market or a relatively homogeneous

²⁹ The factor comparison method is frankly intramural. The point method, starting with externally erected and valued job element standards originally had some notion of comparing companies who competed in the labor (not necessarily the product) market on the basis of the ratio of points to dollars. A. L. Kress, protagonist of the system, stated to the writer that, beyond a small group in Milwaukee which exchanged wage information on a point ratio basis, the employers displayed little interest in such comparison. The inference is that the comparison had too little significance in the competitive side of operations.

product produced by hand or by man-paced³⁰ machine without substantial process variations accompanied by a wage ratio competitively significant and a wage structure capable of being made commensurable.³¹

Now the bearing of all of this on the moral question lies in the consequence that shop clature in such industries, if granted, would accomplish nothing toward protection of the wage rates and standards of the personnel of the industry simply because there are no standards and none can be erected by the unions. Whatever protection can be accomplished is accomplished by the ordinary exclusive bargaining agency contract binding the particular employer and his particular employees. Therefore, the grant of shop clature would be the grant of a power arbitrary because unrelated to the accomplishment of the reasonable ends of the union. An invasion of the right to work by the grant of such a power would be immoral.

There is a further reason why shop clature powers in these "heterogeneous contract" industries might be offensive to morality. There is a doctrine of the moral law roughly comparable to our political notions of "states rights" and "home rule." This moral doctrine is generally called the "principle of subsidiarity." It has been stated thus:

... it is an injustice . . . a grave evil and dis-

³⁰ *E.g.*, a sewing machine, a potter's wheel, a mucking machine.

³¹ Some artificial devices are used, *e.g.*, price-wage stratification under which "popular priced" merchandise is produced at a lower wage rate than premium goods; averaging travel time in mining, or mining "face to face"; machine-hand loading differentials.

turbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.³²

The vesting of a mechanism of control, such as shop clature, in a body larger than the actual bargaining unit would be a violation of this principle, unless special reasons justifying interference with autonomy exist.

Barring some novel or really extraordinary circumstances,³³ there are two forms of activity which might be advanced as reasons for a broader control. The first of these is so-called "pattern bargaining." While limitations of space prevent a full examination of "pattern bargaining" it may safely be said that a strike for the sole purpose of enforcing a pattern (as distinguished from a strike to uphold a standard and as distinguished from a simple wage strike) would not be morally justified. The second activity which might be looked to as furnishing a reason for a broader control is what might be called the "anti-public strike" in which by shutting off the public supply of a given product or service the union tries to force government intervention. While the incidental infliction of harm upon the public in the course of activity directed against the employer is justifiable if not excessive, it is plainly immoral designedly to injure a "non-combatant" to force him to take action against the opponent. Thus while an industry-wide strike against all commercial coal operators is justifiable, since a common standard is involved, an industry-wide oil or steel strike

³² *Quadregesimo Anno*, *op. cit. supra* note 28 at para. 79, p. 141.

³³ *Cf.* National Ass'n. of Window Glass M'frs. v. United States, 263 U.S. 403 (1923).

would be immoral. Also it may be incumbent upon the miners to separate the captive from the commercial mines in timing strikes.

Since neither reason will support a union-wide control there would be apparently a violation of the principle of subsidiarity. It might be appropriate at this point to note that a great deal of the sentiment in responsible quarters favoring shop cloture is tied in with the notion that industry-wide bargaining is a goal to be sought after; some adherents of this notion regarding it as an advance toward a "corporative society." Assuming that we need a society more corporate than it is (the craft and the true industrial unions with their respective employer groups constitute corporate elements) no element of it can be larger than the need which brings it into being, if the principle of subsidiarity is to be observed. Hence, there is no warrant for shop cloture in advance of the formation of the larger element. European industry-wide bargaining may be justified by European cartelization, but American competition justifies the heterogeneous contract policy unless labor standards are involved. Heterogeneity removes this justification for shop cloture.

Before concluding the discussion of the question of comparative rights, it might be well to note that in our discussion of "standards" we have been talking primarily about money standards and the industrial practices closely related thereto. There are, however, a few specialized situations in particular industries where standards which are not money standards will be of sufficient importance to justify shop cloture. Among such special situations might be mentioned the "road show" and rehearsal rules of the theatrical business designed

primarily to protect the performer against the insolvency or failure of the venture. Such situations must be considered by the legislator in passing judgment on the "Right-to-Work" laws.

On the other hand, there are claims made on behalf of shop cloture on the ground that unions need disciplinary powers to ensure that their members will not, in collusion with an employer, violate a contract. An instance typical of those cited in support of such claims is that of a union member who works as a shipwright in the absence of a firewatch. It seems sufficient to remark that the union has its remedy against the employer by contract and that there is nothing in the law which prevents it from writing into its contracts a provision for the suspension or discharge of the offenders. Such claims will not justify any general invasion of the right to work.

We have now established the proposition that on the basis of comparative right none but the unions operated on the craft and the strict industrial methods can justify shop cloture and a grant of such powers to all unions would be immoral. We have also established the proposition that unions operated on craft and strict industrial lines can justify, on the basis of comparative rights, some degree of shop cloture. It remains to be considered whether the abuses of shop cloture noted in the forepart of this article are possibly so great as to preclude its use. Popularly put: Is the cure worse than the disease?

Let us first observe that the device of shop cloture is broader than is justified by the end it seeks to accomplish. A mere commitment to observe a standard is a sufficient pledge to accomplish the legitimate end of the union, and if the obligation

stopped there (with the added requirement of dues payment) none could question its reasonableness. But the writer has before him a union constitution in which the penalty for working under scale is \$25 for the first offense, \$75 for the second and expulsion for the third, and that same constitution permits (the "trials" are now in progress) the expulsion of a man for having testified in the criminal prosecution of a union official. It is certainly a topsy-turvy concept which treats an offense tending to defeat the primary end of an organization more lightly than an offense in the nature of *lese majeste*. A conscientious legislator might well trim such powers down to size before voting for shop clature.

Next let us note that both the craft and the strict industrial methods are methods of monopoly.³⁴ A standard which necessitates monopoly and shop clature is quite useless (in any legitimate way) to a craft or industrial union unless the road is left open to the union to seek a monopoly via the shop clature device.

That the legislature should permit such monopolistic activities by unions is, morally speaking, quite clear; for in no other way than by the maintenance of a standard is the union able to protect the worker against the fly-by-night employer and his employees.³⁵ For like reasons, most legis-

³⁴ The publicists of the employers and unions involved in the maintenance of standards avoid the word "monopoly"; they say that the industry has been "stabilized."

³⁵ Quebec has sought to solve this problem by legislation making the craft union contract scale (prevailing rate theory) the legal minimum wage. The writer is not sufficiently acquainted with the actual operation of the statute to know whether it furnishes adequate protection, but if it does, it would probably destroy *pro tanto* the justification

latures have permitted similar business monopolies; the example most comparable being that of the insurance rating bureaus, which fix tariffs to ensure adequate premiums and, hence, solvent insurance. It is certainly as much a proper legislative concern that a man receive an adequate wage as that his insurance carrier be solvent.

But wherever legislatures have affirmatively permitted monopolescent practices they have been careful to lay down a set of protections for those falling under the power of the monopoly. Their rates and services are required to be, for example, "reasonable, adequate and non-discriminatory." Such restrictions on monopoly are in accord with moral principle. And it is at least as important that a monopoly which may "charge a man his livelihood" be properly regulated as that a monopoly which may charge a man a slightly higher telephone bill or gas bill or insurance premium be regulated.

Before granting a labor monopoly, the legislator is under a moral duty to inquire whether that monopoly should be restrained in its power to damage the worker, the employer and the public, and to enact such qualifications into the grant as will give adequate protection, so far as can be legislated practically, to those who may be the victims of monopolistic oppression. Should a union be limited in the grounds for re-

for both monopoly and shop clature. For both practical and constitutional reasons American legislatures desirous of experimenting along these lines to avoid or limit the necessity for shop clature might try expedients milder than the Quebec scheme, *e.g.*, making the craft rate of all contracts of employment, waivers to be in writing and signed by the employee to be charged. The problems of territorial and trade jurisdiction would have to be reduced to certainties. *Connally v. General Const. Co.*, 269 U.S. 385 (1926).

voking membership? Should a union be required to prove those grounds in a tribunal of the state, rather than in its own tribunal? Should a union which functions in the hiring field be required to serve its members without discrimination? Should a union be required to serve without discrimination employers who agree to its standards?³⁶ Should a union be permitted to deprive the public of the benefits of technological advance?³⁷ These are some of the questions upon which the conscientious legislator would inform himself before affirmatively authorizing a monopoly. No adequate legislative studies of these questions have been made.

Now for some conclusions practically applied to the legislative forum:

³⁶ The results in *Hunt v. Crumboch*, 325 U.S. 821 (1954), and *Reinforce, Inc. v. Birney*, 308 N.Y. 164 (1954), are morally indefensible.

³⁷ *Opera on Tour v. Weber*, *supra*, note 23, reaches a correct result by a very circuitous and somewhat fortuitous route. The route should be shortened.

1. If the "Right-to-Work" law is proposed in statutory form, it is probably better morally to vote for it; the rights of the greater number are preserved.
2. If the proposal is in constitutional form, it is probably better morally to vote against it unless it can be amended to give subsequent legislatures the right notwithstanding, to permit unions which establish standards among competitors to require membership in such unions or conformity to standards as a condition of employment, subject to such limitations and qualifications as the legislature may deem appropriate. If such amendment can be procured, it is better to vote for the bill.
3. In any case, the moral obligation of the legislator to seek proper organic law under which the legitimate ends of craft and strict industrial unions may be served, remains.

