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In the July, 1956 issue of THE CATHOLIC LAWYER several viewpoints were expressed concerning "Right-to-Work" legislation, some directed at Mr. Fitzpatrick's earlier article which appeared in April, 1956. The following reply is Mr. Fitzpatrick's answer to some of the objections to his position.

Morality of Right-To-Work Laws: Additional Comments

BERNARD H. FITZPATRICK*

THE "RIGHT OF ASSOCIATION" is a notion relied upon by all disputants save Father Cronin.¹ Father Kelley argues that compulsory union membership is a necessary means to achieve the goal of free association.² Professor Morris, Father Falque and Father Keller rightly point out that this is a contradiction in terms.³ "Freedom to associate," as Professor Morris says, includes "the freedom not to associate, otherwise there is merely the compulsion to associate."⁴

But Professor Morris and Fathers Falque and Keller carry their common observation to a conclusion too rigid by presuming that free association is the sole basis of collective action. While a labor union as such may be a voluntary association, a "bargaining unit" is not.⁵ A man is a member of a "bargaining unit" because the statute says he is or because he is a craftsman whose rate of pay affects the rates of others in a local labor market or because he is a worker whose product competes with the products of others whose homogeneous work is affected by his rate of pay. A "bargaining unit" is determined by matters extrinsic to any individual worker.⁶

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¹ Cronin, *Right-To-Work Laws*, 2 CATHOLIC LAWYER 186 (July 1956).

² Kelley, *A Moral Study*, 2 CATHOLIC LAWYER 190, 194 (July 1956).

³ Morris, *Mr. Fitzpatrick on the Morality of Right-To-Work Laws—Comment*, 2 CATHOLIC LAWYER 183 (July 1956); Falque, *The True Purpose of Right-To-Work Laws*, 2 *id.* at 202; KELLER, *THE CASE FOR RIGHT-TO-WORK LAWS* 42 (1956).

⁴ Morris, *supra* note 3. The voluntary character of the trade union *as such* is recognized. *Quadragesimo Anno*, para. 87, TWO BASIC SOCIAL ENCYCLICALS 145 (The Catholic University of America Press, 1943).

⁵ The writer is using the term "bargaining unit" multifariously to include: (a) the statutory unit determined by the exercise of the legislative function of the N.L.R.B. [29 U.S.C. §159(b) (1952)]; (b) the "trade-territorial" jurisdiction of the craft union which was the basis of its standard setting (roughly, the local labor market); and (c) the "competing industry" jurisdiction of the industrial union.

⁶ Cf. *Quadragesimo Anno*, *op. cit. supra* note 4, at para. 86, p. 143.

Perhaps the closest analogue to aid the understanding is that the union is to a bargaining unit as a government is to a state or smaller political unit. The analogy is quite clear in the case of bargaining units established by statutory authority; bargaining units are delineated by just such a legislative act as lays out the bounds of cities, villages, school districts, irrigation districts and like subordinate governmental units. A portion of the sovereign power sufficient to accomplish the corporate purpose is delegated to the governing body of such corporated universes; in the case of labor, the sovereign powers are chiefly the power to exclude other representatives (usually unions)⁷ and the power to bind, *in invitum*, all employees within the universe which constitutes the bargaining unit in respect of wages, hours and working conditions so that none may contract for himself on other terms.⁸ This latter is precisely the aspect of sovereign power exercised by Congress in the Carriage of Goods by Sea Act,⁹ by the Interstate Commerce Commission in establishing tariffs, by state legislatures in Standard Fire Insurance Policy Acts.

A scheme of taxation, carrying no other obligation, is, therefore, morally indifferent as such; although imposed by a "private" organization, it is imposed in the right not of that private organization but in the right of that "public" or "perfect" society, the "bargaining unit" of which it is, for the time being, the governing body.¹⁰ The remedy of dissidents is, as in any other

"perfect" representative society, to seek to become a majority and change or oust the governing body.

It seems to the writer that once you admit the moral validity of the "compulsory collective bargain" you cannot deny the validity of a grant to the bargaining agency of the fiscal rights appropriate to enabling it to drive that bargain. When you have swallowed the camel of compulsory terms of employment, why strain at the gnat of compulsory dues payment? Compulsory terms of employment are surely a much

¹⁰ The sovereign character of "guilds of the various industries and professions" is recognized; the rules of political society are said to be applicable to these bodies. *Quadragesimo Anno*, para. 86, TWO BASIC SOCIAL ENCYCLICALS 145 (The Catholic University of America Press, 1943). The following paragraph, 87, sharply contrasts the voluntary association with the "guilds." The guild (*collegio*) contemplated by the Encyclical is, no doubt, a more extensive organization than the "single employer bargaining unit" which results in most cases under the Wagner Act but both enjoy sovereign powers and as sovereigns would be entitled to tax for their corporate purposes (see *Quadragesimo Anno*, *op. cit. supra*, at para. 92, p. 149, for the taxing power of the guild). The corporate purposes of the "single employer bargaining unit" are limited to the relationship of employer and employee *inter sese* and hence there is no moral power of shop closure in such relationship. On the other hand, both the craft union and the strict industrial union approach the status of a "guild"; their function is to prevent the wage rate from becoming a factor in competition between employers by establishing and maintaining uniformity of wage rates. Hence, if they are justifiable at all, they are entitled to protect the integrity of the craft or industry by requiring all workmen to subscribe to the "laws" of the craft or industry (shop closure). Note that these unions, unlike Wagner Act unions, are no mere representatives; they conceive of themselves as "the craft" or "the industry." If craft and strict industrial unions are wrong, the state should abolish them; if they are rightful organizations, the state should not deprive them of the powers necessary to perform their functions.

⁷ 29 U.S.C. §159(a) (1952).

⁸ *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332 (1944). Guilds are referred to as "self governing" (*jure proprio*) in *Quadragesimo Anno*, *op. cit. supra* note 4, at para. 83, p. 143.

⁹ 46 U.S.C. §1300 (1952).

greater invasion of the right to work than the mere exaction of a non-discriminatory tax thereon.

If the argument based upon freedom of association is valid in respect of dues, it is equally valid against the entire notion of representative collective bargaining, *i.e.*, the labor relations laws are themselves immoral. None of the disputants seems ready to adopt this position.

Nor is the notion of benefit, insofar as it underlies the validity of a tax, necessarily associated with the individual as such. School districts tax bachelors, spinsters and the childless. Sewer assessments are laid upon those with no sewage and those who prefer cesspools. Those who are indifferent to a common benefit, those who oppose or reject the benefit and those who are positively harmed by the benefit may, without violation of any moral principle, be taxed. This is part of the cost of being a social being.

The equation of private unions with public corporations is adverted to by Professor Morris. The distinction drawn above, between the union and the bargaining unit, while it adequately disposes of the objection, raises other questions. May governmental functions be delegated to a private organization? The writer knows of no moral objection to this, and there are many instances in which it is done in practice. The East India Company exercised sovereign powers, even to the making of war and peace;¹¹ the Mozambique Company exercised sovereign powers until 1942.¹² The A.S.P.C.A. exercises sovereign powers

¹¹ *Arcot v. East India Co.*, 4 Brown Ch. 180 (1793).

¹² The government was known as "Goberno do Territorio da Companhia de Mozambique."

in respect to animals.¹³

Another question raised might be the ownership of funds accumulated for use of the bargaining unit; do they belong to the union or to the unit? Presently this seems to be left to determination by private contract, and there would appear to be no moral reason why it should not be so; though there might be reasons rooted in the policy of the N.L.R.A. why they should belong to the unit.

Professor Morris directs his main attack, rightly, at the writer's argument that shop closure may be justified morally where it is necessary to maintain standards. Before attempting a rebuttal, it might be well to take a look at the magnitude of the issue involved.

In substance, the writer is affirming and Professor Morris is denying that the idea of the craft union and the idea of the strict industrial union are ideas consonant with morality. These were the ideas which underlay the whole of the American labor movement from the demise of the Knights of Labor until the enactment of the Railway Labor Act. These same ideas now underlie the large segment of union labor still operating (under legal difficulties) on craft principles, *e.g.*, the building trades and the printing trades, and the other large segment still operating (under similar legal difficulties) on strict industrial union principles, *e.g.*, the coal industry and the garment industry.

While the long and current acceptance of such ideas is, to be sure, no proof that morality inheres in them, it should make us extremely cautious in condemning them. More especially is this so when we consider that the ideas received wide statutory

¹³ *Nicchia v. New York*, 254 U. S. 228 (1920).

approval by such enactments as "prevailing rate of wage" laws, union label laws and the "stranger picketing" clause of the Anti-Injunction Law.¹⁴ And one who remembers the public opprobrium attaching to the term "sweatshop" (*i.e.*, substandard shop) in the first quarter of this century will be extremely slow to condemn a mechanism for maintaining standards even though it may invade the "right to work" for a substandard wage.

But Professor Morris' position is entitled to examination on its merits. He makes the following points:

Point—The reasoning behind the writer's position that the maintenance of wage standards justifies shop closure would also justify the restriction of output to the level of the least productive worker.

Answer—(a) This cannot happen under the scheme of the strict industrial union for the standard is a "piece rate." Since a worker who produces less is paid less in exact proportion, the least productive tend to be excluded from or to leave the industry.

(b) In theory this should not happen under the craft union scheme, and while there are exceptions, in practice it usually does not. Theoretically, a craft union is an organization of skilled workers. A skilled worker is not merely one who can perform a given task, but one who can perform the given task in a commercially practicable time. The craft union, by theory, excludes the unproductive worker from the field; this indeed, before the Wagner Act, was the "selling point" of the craft union to the employer. "We have," they would say, "the men who can perform your work in the optimum time, therefore if you hire our men even at our standard wage rates your undertaking will be more profitable." In

¹⁴ 29 U.S.C. §§111-115 (1952).

most instances, they made good on the promise, which was one of the reasons for their success. In many crafts these are powerful forces operating to exclude the unproductive, *e.g.*, in the building trades the unproductive worker is soon spotted and contractors refuse to hire him.

(c) Even in theory, Professor Morris' point involves a non-sequitur. The wrong done to a displaced worker is not the loss of his job as such; it is the diminution of the value of his right to work by another's undertaking to work for less than the job is reasonably worth. As pointed out in the writer's original article, displacement of the less efficient worker by the more efficient involves no moral stigma.¹⁵ Employers themselves under moral obligation to operate efficiently,¹⁶ cannot be saddled with inefficient help; labor has the positive duty to be efficient.¹⁷ The moral law sanctions no premium on inefficiency; "to each according to his contribution to the product" is a fairly accurate summary of the moral viewpoint.

Point—Standards are wrong because "the values of the services which different people are able or willing to render are of varying worth."

Answer—This is a generalization which is true in some aspects and untrue in other and crucial aspects. Obviously, the value of a ton of coal drilled, blasted and lying on the mine floor ready for loading is not any greater or any less because Miner Smith rather than Miner Jones drilled and blasted. A union which sets a standard piece rate on a ton of coal, therefore, has,

¹⁵ Fitzpatrick, *Morality of Right-To-Work Laws*, 2 CATHOLIC LAWYER 91, 97 (April 1956).

¹⁶ *Quadragesimo Anno*, para. 72, TWO BASIC SOCIAL ENCYCLICALS 135 (The Catholic University of America Press, 1943).

¹⁷ *Id.* at para. 61, p. 129.

as between Miners Jones and Smith, achieved equity. It has also achieved a rough equity of labor cost as between Mineowner "A" and Mineowner "B." And it has prevented either mineowner and his employees from operating a "sweatshop" to the detriment of the other and his employees.

Although it is perhaps more difficult for the uninitiated to see, the time rate of the crafts works out in just about the same way. The mason contractor, for example, must compute his bid price in most cases without knowledge of which particular bricklayers may be available to do his job. He resorts, therefore to a computation based upon his knowledge of what the average bricklayer will produce. In effect, he has agreed to sell to the property owner *inter alia* the labor of bricklayers at a price computed by applying a standard wage rate to a standard production. If, in the execution of the job, an individual bricklayer fails to meet the standard production, he will be "knocked off." Thus a rough sort of equity is achieved both between individual bricklayers and between competing employers. So, in commercial practice, the "varying values of the services" of individuals are roughly standardized.

Point — "The mere erection and maintenance of fixed 'standards' cannot be surrounded with an aura of morality."

Answer — The establishment of common standards is unquestionably moral in order that workers "each alone and defenseless" be protected not only from "the inhumanity of employers" but also from "the greed of competitors."¹⁸ Nor can "the right ordering of economic life be left

¹⁸ *Rerum Novarum*, para. 6, TWO BASIC SOCIAL ENCYCLICALS 5 (The Catholic University of America Press, 1943).

(wholly) to a free competition of forces."¹⁹ Some trades and industries are so constituted that unless a standard (the negation of free competition) be maintained, the weaker bidder for jobs will set the tone of and demoralize the labor market. In a demoralized market "those who give least heed to their conscience"²⁰ will crush their "more conscientious competitors."²¹ Demoralization of the labor market tends toward a demoralization of the product market in which the employers willing to pay a reasonable wage ("fair" employers) are squeezed out of competition and must either cut wages or cease to operate.

In the course of any such cycle, the value of the right of the whole craft or industry to work is depreciated. The question then is clearly:

May a man so exercise his own right to work that the right of many others to work is damaged or may he be restrained in the exercise of his right to work by the requirement that he observe the standard of the industry or craft for work of like quantity and quality?

Clearly, if it is right to require me to exercise my right to drive my jeep so as not to injure my neighbor's Cadillac, it is right to set a minimum on the exercise of my right to work; and the fact that private organizations set the minimum has no bearing on its morality.

Point — Standards require monopoly which is wrong because it is the improper application of force.

Answer — Standards, it is true, require monopoly. But *Rerum Novarum* recognizes

¹⁹ *Quadragesimo Anno*, *op. cit. supra* note 16, at paras. 87, 107, 110, pp. 145, 157, 159.

²⁰ *Quadragesimo Anno*, para. 107, TWO BASIC SOCIAL ENCYCLICALS 157 (The Catholic University of America Press, 1943).

²¹ *Id.* at para. 134, p. 179.

that monopoly of a sort (*quoddam monopolii privilegium*) may be necessary to a (craft or industry) labor agreement and further recognizes that such agreements may be made binding on dissidents.²² The caution against excessive raising or lowering of wages seems to be directed against monopolistically established rates.²³

While there is force in a monopoly, the wrongfulness of its exercise cannot be determined without reference to the objective for which it is brought to bear. If the objective is rightful, force which does no other damage may be used. If the objective is wrongful, the force is wrongful. Hence we are thrown back to the question of whether the maintenance of a standard is a rightful objective. If the standard be not unreasonable (*e.g.*, too high) there would appear to be no moral objection to its maintenance. "A monopoly is no immoral act, but only against the politic part of our law. . . ." ²⁴

Point—Material benefits which flow from the maintenance of standards cannot justify the restriction on man's freedom necessary to maintain standards.

Answer—The economic and moral orders are not entirely independent of each other.²⁵ Man's freedom may be and often is circumscribed by material considerations. He may not, for instance, use his freedom to make noise on his own land to injure the business of his neighbor,²⁶ nor his

right to hire an employee so that he injures his competitor.²⁷

While it is true that man does not owe his freedom to society or to the state, it does not follow that society is impotent to restrict his freedom for good cause. The burden is, of course, upon society or the state to show that the restriction is limited to the achievement of an end *intra vires* the society which imposes it. The prevention of the ill effects of unbridled competition in certain trades is within the proper ambit of society;²⁸ the method of establishing a standard to accomplish that end restricts the individual no more than is necessary to prevent the damage; a man may work for any but a substandard wage.

In general, right-to-work laws are consonant with and required by morality. A mere tax imposed for the purposes of the bargaining unit, though payable to a union, is not immoral and the act of a legislature granting or withholding the right to tax is morally indifferent. The use of shop clature to establish standards of wages and conditions uniform for all workers and all employers engaged in a given craft or industry wherein such standards are required to prevent destruction of reasonable wage levels by unregulated competition is consonant with morality, and legislatures are under moral obligation either to permit shop clature or to arrange a substitute device capable of accomplishing the preservation of reasonable wage levels. If shop clature is permitted it is the duty of the legislature to regulate the resulting monopoly to prevent damage to workers, employers and the public.

²² *Rerum Novarum*, para. 72, TWO BASIC SOCIAL ENCYCLICALS 67 (The Catholic University of America Press, 1943).

²³ *Id.* at para. 74, p. 69.

²⁴ *East India Co. v. Sandys*, 10 How. St. Tr. 371 (1684).

²⁵ *Quadragesimo Anno*, para. 42, TWO BASIC SOCIAL ENCYCLICALS 111 (The Catholic University of America Press, 1943).

²⁶ *Keeble v. Hickeringill*, 11 East. 574 (1809).

²⁷ *Lumley v. Gye*, 2 Ell. & Bl. 216 (1853).

²⁸ *Quadragesimo Anno*, *op. cit. supra* note 25, at para. 110, p. 159.