Catholic University Law Review

Volume 29
Issue 3 *Spring 1980*

Article 3

1980

National Labor Policy: Relfections and Distortions of Social Justice

Theodore J. St. Antoine

NATIONAL LABOR POLICY: REFLECTIONS AND DISTORTIONS OF SOCIAL JUSTICE*

*Theodore J. St. Antoine***

The impulse behind much of American labor law is profoundly moral. The sufferings and indignities inflicted on working men, women, and even children as the industrial revolution enveloped the western world during the nineteenth and early twentieth centuries led many thoughtful observers to focus their attention on what was commonly called the "social question." From sources as diverse as the classic trade union tracts and histories of Sidney and Beatrice Webb[1] and the great social encyclicals of Popes Leo XIII[2] and Pius XI[3] came increasing demands for fair minimum standards in compensation and working conditions and for meaningful participation by working people in setting the terms of their employment. The Pope in whose honor this lecture series was established could hardly have been more explicit in *Mater et Magistra* in justifying the notion of a living wage and the practice of collective bargaining on the basis of ethical principles rather than free market economics:

> [J]ust as remuneration for work cannot be left entirely to unregulated competition, neither may it be decided arbitrarily at the will of the more powerful. Rather, in this matter, the norms of justice and equity should be strictly observed. This requires that workers receive a wage sufficient to lead a life worthy of man and to fulfill family responsibilities properly. . . .

---

* *This article is based on the fifteenth annual Pope John XXIII Lecture delivered by the author on November 9, 1979, at the Catholic University of America School of Law, Washington, D.C.*

** Professor of Law, University of Michigan. A.B., Fordham College, 1951; J.D., University of Michigan, 1954. The author wishes to thank Vicki Lafer, of the University of Michigan Law School Class of 1979, for her assistance in the preparation of this article.

1. *See, e.g.*, S. & B. WEBB, INDUSTRIAL DEMOCRACY 840-50 (1920); S. & B. WEBB, THE HISTORY OF TRADE UNIONISM 1-63 (1920).

2. Pope Leo XIII, *Rerum Novarum (The Condition of Labor)* (1891), in SEVEN GREAT ENCYCLICALS 1, 8-10, 19-28 (W. Gibbons ed. 1963) [hereinafter cited as Gibbons].

3. Pope Pius XI, *Quadragesimo Anno (Reconstructing the Social Order)* (1931), in Gibbons, *supra* note 2, at 125, 143-52.

> . . . . [E]mployees should have an active part in the affairs of the enterprise wherein they work, whether these be private or public . . . [i]t is of the utmost importance that productive enterprises assume the character of a true human fellowship whose spirit suffuses the dealings, activities and standing of all its members. . . . [T]his is achieved especially by collective bargaining between associations of workers and those of management.[4]

Pope John's words parallel those of the principal architect of the original National Labor Relations Act of 1935, Senator Robert Wagner:

> Genuine collective bargaining is the only way to attain equality of bargaining power. . . .
>
> . . . . [W]ider cooperation [among workers] is necessary, not only to uphold their own end of the labor bargain but to stabilize and standardize wage levels, to cope with the sweatshop and the exploiter, and to exercise their proper voice in economic affairs.[5]

A major supporter of the Wagner bill, Senator David I. Walsh, Chairman of the Senate Committee on Education and Labor, appealed even more pointedly to the "principles of social justice"[6] in arguing for employee freedom to organize and bargain without employer interference. Yet, being practical men, both Senators Wagner and Walsh were also quite willing to stress such pragmatic considerations as the need to end the bitter, spreading industrial strife of the mid-1930's[7] and "to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions."[8]

Senators Wagner and Walsh and all the other advocates of collective bargaining down through the years may well have been the most realistic when grounding their case in ethical considerations and on the least firm footing when relying on facially more solid economic factors. At the same time, while one cannot fault the entirely appropriate resort to moral principles in promoting much of our labor legislation, pitching the debate on such a lofty level may have had some unfortunate consequences. Certain issues have been treated almost as if they posed questions of good and evil, when all they actually presented were problems of finding a proper bal-

---

4. Pope John XXIII, *Mater et Magistra (Christianity and Social Progress)* (1961), in Gibbons, *supra* note 2, at 219, 234, 238, 289.

5. 78 CONG. REC. 3443 (1934), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935, at 15 (1949) [hereinafter cited as LEG. HIST. N.L.R.A.].

6. *Id.* at 10559, *reprinted in* I LEG. HIST. N.L.R.A., *supra* note 5, at 1122.

7. *Id.* at 10351, 10559, *reprinted in* I LEG. HIST. N.L.R.A., *supra* note 5, at 1117, 1122 (remarks of Sen. Walsh).

8. *Id.* at 3443, *reprinted in* I LEG. HIST. N.L.R.A., *supra* note 5, at 15 (remarks of Sen. Wagner).

ance of power between labor and management. This article shall develop these themes in several specific contexts.

I. The Social and Economic Utility of Unions

Unions and collective bargaining have not achieved one of their major avowed economic objectives, an objective many would say was their primary if not quintessential objective. They have not brought about a redistribution of wealth between labor and capital. Since the pioneering studies of Paul Douglas some fifty years ago, it has become a commonplace among labor economists that the growth of unionism in the United States cannot be proven to have effectuated any substantial long-term shift in the distribution of corporate income in favor of the wage-earning class.[9] Since about 1900, employee compensation has ordinarily fluctuated between seventy and eighty percent of corporate income, with at most only a moderate increase in labor's share over the entire century.[10] Whatever modest gains have been scored are chiefly attributable to factors other than unionism. Real wages have increased dramatically, of course, but that appears to be largely a function of improved productivity, not collective bargaining.[11] Nevertheless, some caution must be exercised in drawing this conclusion since we can never know for certain whether labor would have reaped such rich rewards from productivity advances in the absence of unionization or the threat of unionization.

Albert Rees, a leading labor economist, estimates that unions may have succeeded in raising the wage rates of their members an average of ten to fifteen percent in recent years, but they have not succeeded in increasing labor's share in the distribution of income at the expense of capital, even in their own industries.[12] This paradox is explained by a well-recognized reaction to unionization on the part of management. Over time, employers will substitute capital for labor, installing more efficient productive processes that require fewer workers. Employment will contract, thereby offsetting the rise in wage rates and leaving the total wage bill relatively unchanged. Under this analysis, gains won by unionized workers are not secured at the expense of profits but at the expense of employees or poten-

9. *See, e.g.*, D. Bok & J. Dunlop, Labor and the American Community 284-89, 463-65 (1970); P. Douglas, Real Wages in the United States 1890-1926 (1930); L. Reynolds, Labor Economics and Labor Relations 243-46 (7th ed. 1978); Kerr, *Labor's Income Share and the Labor Movement*, in New Concepts in Wage Determination 260, 280-87 (C. Taylor & F. Pierson eds. 1957).

10. L. Reynolds, *supra* note 9, at 243-45.

11. *Id.* at 246-49.

12. A. Rees, The Economics of Trade Unions 79, 94-96 (1962). *See also* L. Reynolds, *supra* note 9, at 506-08.

tial employees who are squeezed out of the jobs that are eliminated in organized industries.

From a purely economic perspective, therefore, a genuine question exists about the utility of unionism and collective bargaining. Indeed, in the judgment of many careful observers, the strongest arguments for these institutions lie in quite different directions.[13] First, collective bargaining gives the employee a voice in the workplace, an opportunity to participate in determining the conditions under which he shall perform his duties and at least the form of the compensation to be received for his labors. By pressing for health and other insurance plans, pensions, supplemental unemployment benefits, and similar nonwage types of compensation, for example, unions have obviously had a significant and beneficial influence on the shape of labor's slice of the economic pie, even if they have had little effect on its overall size. Second, perhaps the single most important contribution of collective bargaining to industrial life was the creation of the grievance and arbitration process.[14] Under this system, labor and management have a formalized procedure for resolving disputes arising during the term of a collective bargaining agreement, either by voluntary settlements between the parties themselves or by reference to an impartial outsider, without resort to economic force or court litigation.[15] Today, about ninety-five percent of the major labor contracts contain a grievance procedure capped by final and binding arbitration.[16] The mere existence of a grievance and arbitration system helps to eradicate such former abuses as favoritism, arbitrary or ill-informed decisionmaking, and outright discrimination in the workplace.

Finally, unions provide working people, and often the poor and disadvantaged generally, with effective access to the political forum. This also was a mission propounded by the Webbs and the papal encyclicals. Labor organizations are naturally alert to changes in labor relations laws, tax laws, social security laws, and other laws that might directly affect them

---

13. *See, e.g.*, D. BOK & J. DUNLOP, *supra* note 9, at 463-65; A. REES, *supra* note 12, at 194-95; Freeman & Medoff, *The Two Faces of Unionism*, PUB. INTEREST 69 (Fall 1979).

14. *See, e.g.*, M. TROTTA, ARBITRATION OF LABOR-MANAGEMENT DISPUTES (1974); Farmer, *Compulsory Arbitration — A Management Lawyer's View*, 51 VA. L. REV. 396 (1965); Feller, *Compulsory Arbitration — A Union Lawyer's View*, 51 VA. L. REV. 410 (1965); Jones, *Compulsion and the Consensual in Labor Arbitration*, 51 VA. L. REV. 369 (1965). *See also* Abrams, *The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231 (1977).

15. *See, e.g.*, F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (3d ed. 1973); R. FLEMING, THE LABOR ARBITRATION PROCESS (1965); Davey, *Arbitration as a Substitute for Other Legal Remedies*, 23 LAB. L.J. 595 (1972).

16. UNITED STATES BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-6, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES 3 (1966).

institutionally or their members individually. But they act most nobly when they champion the cause of the unorganized and the oppressed in the public arena. It is frequently forgotten that the AFL-CIO and several international unions played major, possibly crucial, roles in the enactment of Title VII of the Civil Rights Act of 1964.[17] Organized labor has also consistently fought for the extension of the minimum wage, for consumer protection, and for similar social legislation, even when the interests of its own largely middle-class membership were marginally involved.[18] It is in the furtherance of humane values in these various circumstances, then, and not in supposed economic triumphs on behalf of working people, that organized labor finds its truest vindication.

II. Recurring Issues in Labor Policy

A. Mandatory Subjects of Bargaining

One of the more important tasks of the National Labor Relations Board is to define the so-called "mandatory subjects" of bargaining. These are the matters, in the central area of wages, hours, and working conditions, about which either union or employer is required by statute to negotiate if the other party insists.[19] Moreover, neither party is required to sign a contract if it does not finally agree on any particular mandatory subject. These topics include employee compensation in almost any form — not only straight wages but also vacations, insurance, retirement programs, and even Christmas bonuses. Included also are job classification schemes, seniority arrangements, promotion procedures, shift times, physical conditions of work, and the like. The nearer one draws to the core of entrepreneurial control, however, the harder the questions become.[20] Should an employer have to bargain about subcontracting work? About closing a department? About moving a plant? About introducing some technological innovation? About starting a new line of products?

A highly esteemed and hard-headed industrial relations expert, Neil

17. *See* R. Marshall, The Negro Worker 40-41 (1967); Rathbun, *Organized Labor: Changing of the Guard*, The Atlantic 6, 12 (Dec. 1979).

18. *See* D. Bok & J. Dunlop, *supra* note 9, at 465.

19. *See, e.g.*, Allied Chem. Workers & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958).

20. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). *See generally* Goetz, *The Duty to Bargain About Changes in Operations*, 1964 Duke L.J. 1; Platt, *The Duty to Bargain as Applied to Management Decisions*, 19 Lab. L.J. 143 (1968); Schwartz, *Plant Relocation or Partial Termination—The Duty to Decision-Bargain*, 39 Fordham L. Rev. 81 (1970); Swift, *Plant Relocations: Catching Up With the Runaway Shop*,' 14 B.C. Indus. & Com. L. Rev. 1135 (1973).

Chamberlain, has written so eloquently on the moral implications of such questions that it would be superfluous to do more than offer a taste of his rhetoric. I therefore present him plain — but hardly unadorned:

> The problem is highly charged with an ethical content. Judgments are required as to the moral validity of legal relationships, the justification for economic powers and distributive shares, the degree of weight to be accorded technological efficiency, the philosophical foundations for political arrangements. Here indeed lies the final basis for decision. We should be missing the heart of the problem if we failed to realize that legal and economic arguments, technological and political considerations must give way before widely held moral convictions. What is the ethical basis of the workers' struggle for increasing participation in business decisions? On what standards of justice and rightness does management rest its defensive tactics? Such questions should not produce wry smiles from those recalling union terrorism and intimidation, and management use of *agents provocateurs*, bribery, and tear gas. Such condemned activity reveals the deep roots of ethical persuasions.[21]

B. The Duty of Fair Representation

Under the National Labor Relations Act, all prohibited acts of restraint, coercion, or discrimination by employers or labor organizations against employees for engaging, or not engaging, in union activities are denominated "unfair" labor practices.[22] That term by its very nature carries an ethical connotation. But I should like to concentrate on one particular obligation imposed on labor organizations by the Labor Act which poses in the sharpest way the dilemma of giving operational content to ethical injunctions in certain morally ambivalent industrial situations. I refer to the union's duty of fair representation.[23] Under the Labor Act, a union that obtains the support of a majority of the employees in an appropriate bargaining unit is the exclusive bargaining representative of all the employees in that unit, dissenters and nonmembers included.[24] This is an extraordi-

21. N. CHAMBERLAIN, THE UNION CHALLENGE TO MANAGEMENT CONTROL 8-9 (1948) (emphasis in original).

22. National Labor Relations Act § 8, 29 U.S.C. § 158 (1976).

23. *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Murphy, *The Duty of Fair Representation Under Taft-Hartley*, 30 MO. L. REV. 373 (1965).

24. National Labor Relations Act § 9, 29 U.S.C. § 159 (1976). *See* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). *See generally* Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?*, 123 U. PA. L. REV. 879 (1975).

nary power, the power to bind every employee through a collective contract, whether he likes it or not, as to the wages he will receive, the hours he will work, and nearly every other facet of his industrial existence. In 1944, the Supreme Court concluded that this congressional grant of exclusive representational authority would raise grave constitutional questions unless it could be inferred that the power carried with it a concomitant obligation toward every member of the bargaining unit, supporter and dissenter alike.[25] Thus was born the duty of a majority union to represent all employees "honestly and in good faith and without invidious discrimination or arbitrary conduct."[26]

The early cases fleshing out this duty were comparatively easy. They involved various kinds of racial discrimination against black workers, and the Supreme Court invariably found violations.[27] But knottier issues lay ahead. To what extent should a union, for example, even if acting in accordance with its honest judgment, be allowed to sacrifice individual interests for the sake of the group? Should a union be able to trade off or compromise some claims in order to gain concessions on others? Perhaps the most poignant reported instance of conflict between individual and group interests is a case that arose in the Sixth Circuit.[28] A lunch counter employing twelve persons suffered unexplained losses of food or money and dishonesty among the workers was suspected. The employer threatened to fire the entire crew. Rather than have this happen, the union acquiesced in the employer's trial layoff of five employees. Losses dropped, the five employees were permanently discharged, and the union refused to process a grievance on behalf of one protesting worker, even though there was no direct proof of her dishonesty. Did the union act "arbitrarily"? Or, to put it more personally, was some harried union busi-

25. Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944) (decided under Railway Labor Act). *See* Syres v. Oil Workers Local 23, 350 U.S. 892 (1955) (decided under NLRA). *See generally* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Lewis, *Fair Representation in Grievance Administration: Vaca v. Sipes*, 1967 SUP. CT. REV. 81.

26. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570 (1976). *See* Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977). *See also* Fowks, *The Duty of Fair Representation: Arbitrary or Perfunctory Handling of Employee Grievances*, 15 WASHBURN L. REV. 1 (1976); Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L.F. 35.

27. *See, e.g.*, Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952). *See generally* Boyce, *Racial Discrimination and the NLRA*, 65 NW. U.L. REV. 232 (1970); Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 COLUM. L. REV. 563 (1962). *See also* Hill, *The National Labor Relations Act and the Emergence of Civil Rights Law: A New Priority in Federal Labor Policy*, 11 HARV. C.R.-C.L.L. REV. 299 (1976).

28. Union News Co. v. Hildreth, 295 F.2d 658 (6th Cir. 1961).

ness agent trying gamely to make the best of a bad situation, to save the jobs of at least seven employees rather than lose all twelve? What ethical considerations should a reviewing court take into account in shaping the value-laden duty of fair representation in so strained a setting? Should learned judges or academics, after long, quiet deliberations in their chambers or studies, apply their ultimately derived best moral choice as a statutory imperative to the time-pressured decision of the unlettered business agent on the firing line? If not, how will any such business agent or his peers in other unions ever be enlightened concerning the objectively superior ethical judgment?

C. Secondary Boycotts

To speak of secondary boycotts is, for many persons, to conjure up chilling visions of hapless victims in the toils of overweening union power. Before attempting to assess the reality, we should be sure we have some sense of just what a secondary boycott is — a concept that a number of us are not certain the NLRB itself has ever fully mastered.[29] Ace Manufacturing Company makes widgets. Local 100 is trying to organize its employees and secure recognition as bargaining representative. Local 100 calls a strike and puts up a picket line at the entrance to Ace. That is traditional "primary" strike activity because it is directed at the very party, Ace, with whom the union has the dispute.[30] Suppose the strike does not bring a halt to Ace's operations; through the use of nonstrikers, replacements, and supervisory personnel, Ace is able to maintain at least partial production. At this point Local 100 sends pickets out to Black Retailers, which sells Ace widgets, appealing to Black's employees to strike him unless Black stops handling Ace's widgets. Since Black is not a direct party to Local 100's dispute with Ace, Black is denominated a "secondary" rather than a "primary" party, and the strike or boycott against him is classified as "secondary" activity. This is now forbidden by section 8(b)(4)(B) of the amended National Labor Relations Act.[31]

When the Taft-Hartley bill was before Congress in 1947, Senator Robert Taft, its principal sponsor, commented: "It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee

29. A classic article is Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962). Other useful articles include: Farmer, *Secondary Boycotts — Loopholes Closed or Reopened?*, 52 GEO. L.J. 392 (1964); Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KAN. L. REV. 651 (1971); St. Antoine, *What Makes Secondary Boycotts Secondary?* in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS, PROCEEDINGS OF THE ELEVENTH ANNUAL INSTITUTE ON LABOR LAW 5 (1965).

30. *See, e.g.*, NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

31. National Labor Relations Act § 8(b)(4)(B), 29 U.S.C. § 158(b)(4)(B) (1976).

heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts."[32] Senator Taft's language would seem to elevate the issue of secondary boycotts to the status of a special branch of the Problem of Good and Evil, a dignity I do not think the question deserves. For me, this is a perfect example of a misguided application of moral absolutes to circumstances that are inherently relativistic, not to mention extremely variegated. The boycott is essentially a device for exerting economic force, and, as such, morally neutral. Its allowance or disallowance should depend on a careful balancing, on the basis of empirical evidence, of union need against business and consumer injury.

Excessive emphasis should not be placed on the position of the supposedly disinterested and innocent bystander, the secondary employer. As several other scholars have previously observed, he really cannot be neutral, even if he tries.[33] The secondary retailer handling the primary manufacturer's nonunion-made goods will help the manufacturer if he continues distributing the product and will help the union if he ceases. Furthermore, if the retailer is buying a particular nonunion item because it has a price advantage over its union competition, even the retailer's subjective neutrality is of a dubious quality.

Some time ago I surveyed ninety-nine cases in which the NLRB had found secondary boycott violations over a twenty-eight month period.[34] Several conclusions emerged. First, the secondary boycott is largely a construction industry phenomenon. The building trades account for seventy percent of all violations. If the Teamsters were added in, only fifteen percent of the secondary boycotts in my sample were left for the unions in all other industries combined. Quantitatively, this should greatly reduce apprehensions about the ravages of the secondary boycott. Picketing and strikes at a common situs in the construction industry would not constitute violations of section 8(b)(4)(B) were it not for the much-criticized *Denver Building Trades*[35] decision. There, the Supreme Court may have flown in

32. 93 CONG. REC. 4198 (1947) (remarks of Sen. Taft).

33. *See, e.g.*, Brinker & Cullison, *Secondary Boycotts in the United States Since 1947*, 12 LAB. L.J. 397, 403-04 (1961); Fleming, *Title VII: The Taft-Hartley Amendments*, 54 NW. U.L. REV. 666, 691-92 (1960); Miller, *The Boycott: Some Recommendations*, 13 LAB. L.J. 83, 94-96 (1962). *See also* Irving, *Struck Work Under the Ally Doctrine: Some Issues and Answers*, 9 GA. L. REV. 303 (1976).

34. St. Antoine, *The Rational Regulation of Union Restrictive Practices*, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 1968, PROCEEDINGS OF THE FOURTEENTH ANNUAL INSTITUTE ON LABOR LAW 1, 11-14 (1968).

35. NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951). *See also* Building & Constr. Trades Council of New Orleans, 155 N.L.R.B. 319 (1965), *enforced sub*

the face of reality by refusing to categorize the general contractor and the subcontractors on a building project as "economic allies" and thus to be treated as a single primary employer for section 8(b)(4)(B) purposes.

Second, my study indicated that over three-fifths of all secondary boycotts had an organizational objective. It has been suggested elsewhere that since national labor policy officially favors collective bargaining, boycotts for organizing purposes should be lawful.[36] That point now has additional validity since union membership is down to only about one-fifth of the labor force.[37] But I am not ready to conclude, for this reason alone, that the restrictions on the boycott should be loosened. Against this evidence of union need must be set the evidence of damage caused by secondary boycotts to primary employers, secondary employers, and the public generally. Another empirical study conducted at the University of Oklahoma found that the injury to neutral parties was "negligible."[38] My own inquiry was not quite so sanguine although it did indicate that primary employers have a larger stake than secondary employers in the enforcement of the secondary boycott provisions of the Act.[39] But even if third parties not privy to a dispute are little inconvenienced by a boycott, this does not automatically mean that the statute is betraying its purpose. Protection of the "neutral" is plainly the most appealing quality of antiboycott laws. Yet it is evident that the proponents of such legislation were also concerned about the plight of the primary employer who is subjected to pressures emanating from outside his workplace, regardless of whether his own employees desire union representation.[40] In any event, if it could be established that unions have a pressing need to use the secondary boycott for organizational purposes, and that neutrals suffer only small harm from it, Congress might be forced to a much more discriminating judgment than any rendered heretofore on the availability of this particular economic weapon.

Congress has already drawn some antiboycott lines on an industry-by-industry basis, and this may be a promising approach to pursue. For ex-

---

nom. Markwell & Hartz, Inc. v. NLRB, 387 F.2d 79 (5th Cir. 1967), *cert. denied*, 391 U.S. 914 (1968). Since *Denver* was decided, every administration except President Ford's has favored legislation to overrule it and to authorize "common situs" picketing against a general contractor and the subcontractors at the construction site.

36. *See* Brinker & Cullison, *supra* note 33, at 403. *See also* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 273-74 (1959).

37. *See* note 70 and accompanying text *infra* .

38. *See* Brinker & Cullison, *supra* note 33, at 403.

39. In the 99 cases examined, primary employers sustained "substantial" damage to their businesses on 65 occasions while secondary employers sustained such damage on only 46 occasions. St. Antoine, *supra* note 34, at 11-12.

40. *See, e.g.*, S. REP. No. 105, 80th Cong., 1st Sess. 22 (1947); H.R. REP. No. 741, 86th Cong., 1st Sess. 21 (1959).

ample, the garment industry is so highly integrated that collective bargaining could not exist if employers could subcontract to nonunion firms. Congress has responded by exempting that industry, in practical effect, from the antiboycott strictures of the statute.[41] Congress has also recognized the special relationships of general contractors and subcontractors at a construction site and has permitted building trades unions to seek all-union jobs there.[42] In light of the massive power of the International Brotherhood of Teamsters vis-a-vis small individual truckers, one might always wish to retain bans on boycotts in the trucking industry, even if they were relaxed elsewhere.[43] For present purposes, however, it is immaterial how these particular boycott issues are resolved. The lesson is they should be dealt with as highly practical questions of power balancing, and not as moral abstractions.

D. Union Security

Even more than secondary boycotts, union security is an issue that many have sought to transform into a moral question when at bottom it too is a matter of regulating power. In this instance, what is at stake may not be so much the respective strengths of unions and employers as the strength and stability of collective bargaining itself. So much has been written and said about union security that I hesitate to add to the cacophony.[44] But I do not see how anyone addressing the topic I have chosen can avoid the issue completely.

Union security takes several forms. The common denominator is a union-employer agreement that employees must support their bargaining representative, either by joining the union or by paying the equivalent of the regular dues. The arguments against union security can be shortly stated. No one should have to join a union to get a job. No one should have to pay money to support causes he doesn't believe in. No one should ever have to pay money to a private organization against his will.

The first three of these claims make little or no sense in the light of

41. National Labor Relations Act § 8(e), 29 U.S.C. § 158(e) (1976).

42. *Id. See generally* Hickey, *Subcontracting Clauses Under § 8(e) of the NLRA*, 40 NOTRE DAME LAW. 377 (1965); Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. PA. L. REV. 1000 (1965); Note, *Rational Approach to Secondary Boycotts and Work Preservation*, 57 VA. L. REV. 1280 (1971). *See also* Leslie, *Right to Control: A Study in Secondary Boycotts and Labor Antitrust*, 89 HARV. L. REV. 904 (1976).

43. *See* Cox, *supra* note 36, at 273-74; Fleming, *supra* note 33, at 688.

44. *See, e.g.*, Haggard, *A Clarification of the Types of Union Security Agreements Permitted by Federal Statutes*, 5 RUT.-CAM. L. REV. 418 (1974); Mayer, *Union Security and the Taft-Hartley Act*, 1961 DUKE L.J. 505.

existing law. The closed shop, under which only union members could get jobs, was outlawed by Taft-Hartley.[45] The union shop, under whose terms a new employee must become a union member after a certain grace period, usually thirty days, does not actually require true union membership with the accompanying duty to participate in union affairs, perform picket-line duty, and so on.[46] An employee can be discharged under a union security contract only for refusing to provide support money for his bargaining representative.[47] Even here, all that can be demanded is the union's pro rata cost of negotiating and administering the collective bargaining agreement on the employee's behalf; if a worker objects, the union must refund to him that portion of the dues money used for political, social, or other non-bargaining activities.[48] Moreover, under several recent decisions of the federal courts of appeals, a worker may not have to pay anything at all to a union, not even to cover the organization's costs of representing him, if he can demonstrate that he has genuine religious scruples against payments to a secular body.[49]

The fighting issue, then, is whether unions and employers should be left free to contract that all employees, at least all employees without contrary religious beliefs, must contribute to the support of their bargaining representative as a condition of continued employment. The argument that convinced Senator Taft and the 1947 Congress to permit the union shop was, of course, the "free rider" theory.[50] No one should be entitled to the benefits of collective bargaining without paying a fair share of the costs. There is validity to that claim, but it does not reach the heart of the matter. A collective bargaining relationship without union security is a collective bargaining relationship in jeopardy. "Union security" is just what the name implies: wholly apart from the financial assistance it ensures the union, it provides the even more important assurance that the employer has accepted the union as a full-fledged participant in an ongoing system

45. Labor Management Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).

46. *See generally* Blumrosen, *Legal Protection Against Exclusion From Union Activities*, 22 OHIO ST. L.J. 21 (1961); Lang, *Toward a Right to Union Membership*, 12 HARV. C.R.-C.L.L. REV. 31 (1977).

47. *See* Marlin Rockwell Corp., 114 N.L.R.B. 553 (1955); Union Starch & Ref. Co., 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951). *See generally* Toner, *The Union Shop Under Taft-Hartley*, 5 LAB. L.J. 552 (1954).

48. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (public sector); Machinists v. Street, 367 U.S. 740 (1961). *See generally* Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49.

49. *See* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 2848 (1979); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978).

50. *See* S. REP. NO. 105, 80th Cong., 1st Sess. 6-7 (1947).

of industrial self-governance.[51] It means the employer in all probability will not seek to divide the union's constituency by playing on the natural antagonisms that develop between those who are and those who are not bearing the cost of the union's operations. In all this, I may seem to have paid too little heed to the rights of the individual worker who does not wish his money to go to the union. But I consider that a false issue. The real objection for one concerned about organizational control over the individual should not be to the exaction of some ten or twenty dollars a month but to the whole concept of exclusive representation, a far more significant institutional authority.[52] As long as we adhere to the American tradition of collective bargaining, however, that is a question settled for each bargaining unit whenever a majority of the employees vote to install a union.[53]

Despite all we were taught in our undergraduate logic courses, there is often much to be learned from the *argumentum ad hominem*. It is instructive to contemplate just who favors and just who opposes the notion of union security in this country. It is plainly the consensus of the nation's foremost labor scholars that union security is desirable or, at least, that it should be left to the process of labor-management negotiation.[54] Union security has also been endorsed by the social action organs of major religious faiths.[55] On the other hand, legislative and judicial campaigns against the union shop, and for so-called right-to-work laws prohibiting union security arrangements, are commonly financed by nonunion businessmen whose solicitude for the welfare of working people in other contexts is something less than pronounced.[56] One need not be a cynic to suspect that these professionally managed drives are frequently less concerned with employee freedoms than with union-employer power relationships. If I may paraphrase without sacrilege: by their funding ye shall know them.

---

51. *See, e.g.*, L. REYNOLDS, *supra* note 9, at 467; S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 95-97 (1941).

52. *See* text accompanying note 24 *supra*.

53. *See generally* Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945); note 24 *supra*.

54. *See, e.g.*, D. BOK & J. DUNLOP, *supra* note 9, at 98-100; L. REYNOLDS, *supra* note 9, at 466-69; Pulsipher, *The Union Shop: A Legitimate Form of Coercion in a Free-Market Economy*, 19 INDUS. & LAB. REL. REV. 529 (1966).

55. *See* Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233, 266 nn.146-47 (1959) (citing the Division of Christian Life and Work of the National Council of Churches, the Board of Social and Economic Relations of the Methodist Church, the Rabbinical Council of America, and the Catholic Committee of the South, as well as a number of the country's most distinguished clergymen).

56. *See* D. BOK & J. DUNLOP, *supra* note 9, at 101-02.

E. Union Democracy

Union security is not the only battleground where crusaders have appeared from an unexpected quarter. One of the happier ironies of recent labor history can be found in the impetus given union democracy by the Landrum-Griffin Act of 1959.[57] At the time the Act was passed, the thinking of disinterested observers had not yet crystallized on the merits of running a union's affairs democratically.[58] It is probably fair to say that the main push in Congress for Landrum-Griffin and, particularly, its "bill of rights" title, came from a conservative coalition that was less concerned with promoting the individual rights of working people than with blunting the effectiveness of labor organizations.[59] There is hardly anything unique in such a situation; the purification of any well-established institution is likely to require a sizable (if unwitting) contribution by its enemies. Yet today, most commentators would likely agree that the foes of unionism in the 1959 Congress performed their role in especially commendable style. By and large, the provisions of the Landrum-Griffin Act respecting internal union affairs have significantly advanced the cause of union democracy while doing little, if any, damage to the structure of organized labor.

Nevertheless, some reservations are in order about too hasty and naive an equation of ethical unionism with union populism. Unions are not merely debating societies. They are militant organizations that must act quickly and decisively in times of crisis. Real friends of the worker would not insist that every union decision be argued out and voted upon in town-meeting fashion.[60] At the same time, however, both management and the

57. Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1976). *See generally* Berchem, *Labor Democracy in America*, 13 VILL. L. REV. 1 (1967); Cox, *supra* note 36; St. Antoine, *Landrum-Griffin, 1965-1966: A Calculus of Democratic Values*, in PROCEEDINGS OF THE N.Y.U. NINETEENTH ANNUAL CONF. ON LABOR 35 (1967).

58. A number of respected American and English authorities could be cited in 1959 in support of the proposition that "democracy is as inappropriate within the international headquarters of the UAW as it is in the front office of General Motors." Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy*, 12 INDUS. & LAB. REL. REV. 503, 525 (1959). The trend of opinion, however, has clearly been the other way. *See, e.g.*, W. LEISERSON, AMERICAN TRADE UNION DEMOCRACY 53-82 (1959); S. LIPSET, M. TROW & J. COLEMAN, UNION DEMOCRACY 3-16 (1962); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 830 (1960); Summers, *The Impact of Landrum-Griffin in State Courts*, in PROCEEDINGS OF THE N.Y.U. THIRTEENTH ANNUAL CONF. ON LABOR 333, 335 (1960).

59. *See* Cox, *supra* note 58, at 820-21, 831-33. *See also* Thatcher, *Rights of Individual Union Members Under Title I and Section 610 of the Landrum-Griffin Act*, 52 GEO. L.J. 339 (1964).

60. *See generally* Atleson, *A Union Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 MINN. L. REV. 403 (1967); Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577 (1973).

public arguably stand to suffer from the irresponsibility in collective bargaining which is a possible side-effect of a massive injection of democracy into labor organizations. Two such savvy onlookers as Harvard's Derek Bok and John Dunlop have thus suggested, now that Landrum-Griffin has installed basic safeguards, that the issue of union democracy should move toward particular problems which vary from one organization to another. They add:

> in every case, the question should be, not whether any given change will make the union more democratic, but whether it will serve the ends of the modern union — to respond to the interests of the membership, to promote them effectively, to deal fairly with individuals and minorities within its ranks, and to exhibit a due regard for legitimate interests of those beyond its walls.[61]

III. Ethical Dilemmas and New Directions

Federal labor laws nearly as old as the Wagner Act and federal labor laws not yet written also pose substantial ethical questions, sometimes in painful juxtaposition to substantial competing economic or institutional considerations. Discussed below are merely a few examples.

A. The Minimum Wage

Labor reformers for over a hundred years have sought legislation setting maximum hours and minimum wages. With the passage of the Fair Labor Standards Act[62] in 1938, the United States became the last major industrial nation to adopt such guarantees. One can hardly disparage a concept like a legal minimum wage; it is, after all, the legislator's realization of the ethician's "living wage" — a necessity for maintaining a family in decent though modest circumstances. Yet not everyone has to support a family, and there is evidence that the ever-rising federal minimum wage has had some deleterious side-effects. It has apparently resulted in higher structural unemployment in low-paying industries throughout the country.[63] In particular, the minimum wage seems to be a factor in the astronomical unemployment of black youths in urban ghettos where the jobless figure has approached forty percent.[64] This, of course, does not mean that we should abolish the minimum wage. It does mean, however, that we should be conscious of the costs of an ethical society and should be prepared to

61. D. Bok & J. Dunlop, *supra* note 9, at 91.

62. Ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-219 (1976)).

63. L. Reynolds, *supra* note 9, at 528-29.

64. *See, e.g.*, N.Y. Times, May 14, 1979, § D, at 9, col. 2; N.Y. Times, May 5, 1979, § 1, at 10, col. 4.

shoulder those costs collectively, not letting them fall totally on a few. It also means that we may need to exercise some common sense in pursuing this moral mandate. For instance, while there are always dangers in carving out statutory loopholes, some prudent adjustments in the minimum wage might open up many more summer jobs for minority youths in our cities.

B. Unorganized Employees

Whatever its merits, collective bargaining is not the only way in which employers and employees can cooperate in industrial affairs. As Pope John wisely noted in *Mater et Magistra*, the exact format "must be determined according to the state of the individual productive enterprises."[65] Today in this country there are both large and small companies whose employees, by their own free choice, are unorganized. Whether some of them have been beguiled by wily, duplicitous employers is not for me to say. At least insofar as any of us can be said to exercise free choice, they have exercised it. Moreover, many of these employees are in highly technical fields and their numbers are bound to grow. But even though they are not unionized, their employers do not wish to ignore them. Indeed, companies often wish to solicit their views in a systematic way. Inevitably, the employer or some worker will come up with the idea of a "representative committee."[66] The company is even happy to provide an office and a typewriter. We have this sort of thing all over the country. And nearly every one of these arrangements is, under the wooden logic of the applicable NLRB decisions, unlawful employer "assistance" to a union under section 8(a)(2) of the Labor Act.[67] As some federal courts of appeals have realized, however, section 8(a)(2) was aimed at quite different targets, at the shabby "company unions" of the 1930's and at the employer who gave aid and comfort to his favorite as between two or more competing unions.[68] If, in the contemporary situation I have described, the employees chose freely and knowingly and the committee or other body acts truly on their behalf and for their benefit, no reason exists for objection save

65. Pope John XXIII, *Mater & Magistra (Christianity and Social Progress)* (1961), in Gibbons, *supra* note 2, at 238.

66. *See* Sangerman, *Employee Committees: Can They Survive Under the Taft-Hartley Act?*, 24 LAB. L.J. 684 (1973).

67. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1976). *See, e.g.*, St. Joseph Lead Co., 171 N.L.R.B. 541 (1968); Newman-Green, Inc., 161 N.L.R.B. 1062 (1966).

68. *See, e.g.*, Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967); Coppus Eng'r Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1956). *See generally* H. PELLING, AMERICAN LABOR 146, 160 (1960).

ideology.[69] Should the weight of precedent be too heavy to permit validating such arrangements, the law should be changed.

This brings me to a final point about the implications of declining union membership in the United States. While labor organizations now number well over twenty million members, the labor force has been expanding even more rapidly, and union membership has fallen to only 21.8% of the total.[70] That is, proportionately, less than half the union population in Great Britain or Western Europe. Were it not for the spectacular growth of public employee unions in the past two decades, the figures would be even more startling. The principal cause for the shrinkage is the shift of jobs from the manufacturing to the service industries. Unless the unions eventually crack the formidable bastions of white-collar workers in the office, clerical, technical, and retail trades, their numbers will continue to dwindle.

Whatever the ultimate fate of traditional labor unions, for the foreseeable future, unorganized workers are going to constitute the bulk of the labor force. Although they may be willing to forego the full range of benefits provided by collective bargaining, it is inevitable that they will come to demand, and an increasingly just society will grant them, that most fundamental of job protections: protection against arbitrary, unfair discharge or discipline. "Just cause" will thus become a legal standard and not simply, as today, a standard imposed by labor contracts.[71] Europe has already gone this route, and I am confident we will follow. Whether we shall do so by statute or common law, by judicial or administrative procedure, I do not know.

C. Civil Rights Laws

Of all our labor laws, none is more clearly an embodiment of moral and ethical principle than Title VII of the Civil Rights Act of 1964 which prohibits discrimination in employment "because of an individual's race, color, religion, sex, or national origin."[72] The passage of such legislation was quite expressly and quite rightly characterized by Senator Hubert Humphrey during the congressional debates as "one of the great moral

69. *See generally* Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973).

70. UNITED STATES BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 2000, in HANDBOOK OF LABOR STATISTICS 1978 507 (1979). *See generally* L. REYNOLDS, *supra* note 9, at 352-58.

71. *See generally* Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

72. 42 U.S.C. §§ 2000e-2(a) to (d), 2000e-3(b) (1976).

challenges of our time."[73] His views were echoed by many others, and there is no need to elaborate on the theme. What must be said, however, is that the application of overarching moral precepts to particular cases is seldom easy in a world as infinitely and as subtly complex as ours. In practice, Title VII has presented us with a cruel moral dilemma.

The Civil Rights Act of 1964 was adopted in an atmosphere of monumental naivete. Congress apparently believed that equal employment opportunity could be achieved simply by forbidding employers and unions to engage in deliberate or at least direct acts of discrimination. Any intention to require "preferential treatment" under Title VII was disavowed.[74] Perhaps animated by the Supreme Court's stirring desegregation decisions of the 1950's, the proponents of civil rights legislation made "color-blindness" the rallying cry of the hour.[75]

Today we know better. The dreary statistics, so familiar to anyone who works in this field, tell the story. Others have provided exhaustive surveys of the figures,[76] and I shall not review them at any length. It is enough to observe that after a decade and a half of federally enforced nondiscrimination in employment, minorities are still twice as likely as whites not to have jobs.[77] The median family income of blacks as compared with that of whites has improved negligibly, from fifty-four percent in 1964 to fifty-eight percent in the mid-1970's.[78] Under the worsening economic conditions of 1979 that figure fell back to fifty-seven percent.[79] Minorities continue to occupy a disproportionately low percentage of the more attractive

73. 110 CONG. REC. 6428 (1964) (remarks of Sen. Humphrey). For discussions of the controversies surrounding the Act's passage, see Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966). *See also* Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1 (1977).

74. *See* 42 U.S.C. § 2000e-2(j) (1976).

75. *See* H.R. REP. NO. 914, pt. 2, 88th Cong., 1st Sess. 29 (1963); 110 CONG. REC. 8921 (1964) (remarks of Sen. Williams); *id.* at 7213 (interpretive memorandum submitted by Senators Clark and Case).

76. *See, e.g.*, G. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971); H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM I: RACE, WORK AND THE LAW (1977); Edwards, *Race Discrimination in Employment: What Price Equality?*, 1976 U. ILL. L.F. 572.

77. UNITED STATES COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT — 1974, VOL. V, TO ELIMINATE EMPLOYMENT DISCRIMINATION 470 n.1459 (1975) [hereinafter cited as CIVIL RIGHTS ENFORCEMENT]; UNITED STATES BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SPECIAL STUDIES, SERIES P-23, NO. 54, in THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES — 1974, 1, 64 (1975) [hereinafter cited as BLACK POPULATION STATUS].

78. BLACK POPULATION STATUS, *supra* note 77, at 2, 25.

79. Kusnet, *Black Depression*, THE NEW REPUBLIC 15, 16 (Nov. 24, 1979).

positions.[80] The employment situation of women in relation to white males is similarly bleak.[81]

If we are to secure genuine equality of job opportunity for the races and the sexes within the foreseeable future, something more is plainly needed than the mere prohibition of positive acts of discrimination and the substitution of a policy of passive neutrality.[82] "Affirmative action" of the sort that has been ordered by the federal courts and federal agencies has held out the greatest promise of success and, at the same time, has aroused the fiercest opposition. In addition, in a momentous early decision under Title VII, *Griggs v. Duke Power Co.*,[83] the Supreme Court held that the Act did not merely proscribe conscious, purposeful discriminatory treatment. Employment practices entirely neutral on their face and even in their design, such as job qualifications or aptitude tests, were also barred if in actual practice they had a disproportionately adverse impact on protected classes like minorities and females and if they could not be justified by "business necessity."[84]

Elsewhere I have argued at length that, despite its very real risks, affirmative action in employment should be sustained under both Title VII and the federal constitution.[85] Furthermore, preferential admission to educational institutions was the subject of Professor Guido Calabresi's lecture in this series last year.[86] I therefore do not wish to revisit this ground so soon. As a footnote to Professor Calabresi's presentation, however, I should mention that since he spoke, the Supreme Court, in *United Steelworkers v.*

---

80. *See* CIVIL RIGHTS ENFORCEMENT, *supra* note 77, at 470-72; BLACK POPULATION STATUS, *supra* note 77, at 2, 73.

81. *See* CIVIL RIGHTS ENFORCEMENT, *supra* note 77, at 470-72. The median income of full-time female workers in the 1970's was only 60% that of males. *Id.* at 470 n.1459.

82. *See generally* Blumrosen, *Quotas, Common Sense, and the Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1976); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

83. 401 U.S. 424 (1971). *See generally* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Company and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844 (1972). *See also* Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69.

84. 401 U.S. at 431-32. *See generally* Portwood & Schmidt, *Beyond Griggs v. Duke Power Company: Title VII after Washington v. Davis*, 28 LAB. L.J. 174 (1977); Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 CATH. U.L. REV. 605 (1979); Comment, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination*, 43 MO. L. REV. 451 (1978).

85. *See* St. Antoine, *Affirmative Action: Hypocritical Euphemism or Noble Mandate?*, 10 U. MICH. J.L. REF. 28 (1976).

86. Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U.L. REV. 427 (1979).

Weber,[87] upheld against statutory attack a private, voluntary race-conscious affirmative action job-training program initiated under a collective bargaining agreement between a union and an employer. That, of course, does not resolve the constitutional equal protection issue raised by the practically far more significant affirmative action plans imposed through government contracts.[88]

There is no gainsaying the fact that affirmative action and preferential treatment in favor of one race or sex raise grave moral questions, as well as questions going to the core of American traditions of individual merit and group neutrality. The essence of affirmative action is an effort to achieve justice among *groups*; in ordinary circumstances the essence of morality and law alike is justice among *individuals*.[89] The Appalachian white or the white ethnic from a ghetto may, personally, be far more disadvantaged by his background than the third-generation offspring of a professional black family, and yet it is the latter who will be favored under the usual affirmative action plan. I justify this, not without misgivings, on the ground we are dealing with no ordinary situation but with a national problem of staggering dimensions. A group wrong has been perpetrated for generation upon generation, and the wounds are deep, pervasive, and persistent. Heroic measures are called for in the treatment; specifically, a group remedy to cure this group wrong.

Even as we indulge in this strong medicine, however, we must try to maintain a clear head. For the sake of all of us, black and white, male and female alike, we must not allow the drug of race-conscious and sex-conscious behavior to become habit-forming. Affirmative action must cease when its goals have been substantially accomplished. Termination of these programs may not be as difficult as some might imagine. The common sense, not to mention self-interest, of society at large will make itself felt in due course. The pride of the beneficiaries themselves will call for an end to favored treatment when it is no longer needed. Certain special admissions programs for Oriental students are already being phased out on the West Coast.

As we move beyond the primitive initial stages of affirmative action plans, we must avoid being enthralled by unrefined statistics in measuring

87. 99 S. Ct. 2721 (1979).

88. Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *cert. granted*, 99 S. Ct. 2403 (1979).

89. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (any individual, whether white or black, is protected under Title VII and 42 U.S.C. § 1981 (1976)). *See also* City of Los Angeles v. Manhart, 435 U.S. 702 (1978) (female annuitants must be treated as individuals instead of components of a sexual class for Title VII purposes). *But see* Cohen, *Justice Debased: The Weber Decision*, 68 COMMENTARY 43 (Sept. 1979).

our progress. To allude to what has become the unthinkable in many academic circles today, we should not even assume that all the world's talents, ambitions, and career preferences have been evenly distributed with mathematical precision as if by some impersonal computer among every race or other classifiable group on the face of the earth.[90] I wonder, for example, what a government affirmative action officer would think if informed that although Jews constitute a mere two percent of the population, persons of Jewish background currently hold the deanships of six of the country's eight most prestigious law schools.[91] I shall not hazard a guess whether that is a matter of genes, family upbringing, cultural heritage, or just poor taste in choosing an occupation, but it surely defies explanation in terms of standard statistical deviations. True moral judgments must start with the facts, and there may conceivably be some facts about the rich and splendid variety of human beings, collectively as well as individually, that we simply cannot blink.

IV. CONCLUSION

The labor movement deserves a few final words. There have been moments in its past that were touched with glory, times when it was the hope of the oppressed, the darling of liberal intellectuals, and a magnet for young, ardent idealists. But in the 1970's opinion polls show there is no other major institution in our society whose leadership so consistently lacks the confidence of the general public.[92] Organized labor has lost ground with its academic and media supporters,[93] and, more importantly, with the workers themselves. Its membership is down to a bare 21.8% of the total labor force. Unions consistently lose over half the representation elections in which they participate.[94] While not yet a terminal case, organized labor is plainly not in the pink of health.

If it is to recover the fervor of the 1930's, perhaps the labor movement must rediscover the best of its own traditions. This will not be all that easy: middle-class suburbia is far removed from the battlements, and it is

90. *See, e.g., The Return of Arthur Jensen*, TIME, Sept. 24, 1979, at 49. *But cf.* AMERICAN ETHNIC GROUPS (T. Sowell ed. 1978).

91. Reputations do not necessarily mean "best" in any objective sense, and certainly not best for any particular student. For what it is worth, however, the eight law schools that have almost invariably wound up at the top of various polls and studies conducted in recent years are, in alphabetical order: Berkeley, Chicago, Columbia, Harvard, Michigan, Pennsylvania, Stanford, and Yale.

92. Ladd, *The Polls: The Question of Confidence*, 40 PUB. OPINION Q. 544, 545 (1977).

93. D. BOK & J. DUNLOP, *supra* note 9, at 30-34; Freeman & Medoff, *supra* note 13, at 69.

94. 42 NLRB ANN. REP. 18 (1977).

hard to mount a crusade from a duck blind or a cabana. But if employees no longer respond so readily to the lure of material benefits or if they may even have come to share the economists' skepticism about the economic advantages of collective bargaining, the brightest hope may lie in a return to appealing to that fundamental interest that unions have advanced so effectively in the past: the dignity of the individual working person and his full, genuine participation in the life of his workplace and of the broader community.[95] That, at any rate, would be a reflection without distortion of the principles of social justice in forming our national labor policy.

---

95. One of the wisest contemporary observers of the labor scene, Archibald Cox, has commented:

> None except a democratic union . . . can achieve the idealistic aspirations which justify labor organizations. . . . Only in a democratic union can workers, through chosen representatives, participate jointly with management in the government of their industrial lives even as all of us may participate, through elected representatives, in political government.

Cox, *supra* note 58, at 830.

Walter Reuther put it even more pointedly:

> The labor movement will become less of an economic movement and more of a social movement. It will be concerned with the economic factors, of course, but also with the moral, spiritual, the intellectual, and the social nature of our society, and all of this in terms of an ultimate objective—the fulfillment of the complete human being.

D. BOK & J. DUNLOP, *supra* note 9, at 362 (quoting Walter Reuther).