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Henry R. Bernhardt

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Recommended Citation

Henry R. Bernhardt, *Right to a Job*, 30 Cornell L. Rev. 292 (1945)
Available at: <http://scholarship.law.cornell.edu/clr/vol30/iss3/2>

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THE RIGHT TO A JOB

HENRY R. BERNHARDT

The war has led to a reconsideration of a socio-legal problem which for a long time had remained dormant: the right to work. True, this reconsideration has tended to emphasize only one aspect of this right, namely, the right not to be refused employment or union membership because of race, creed, color or national origin. But the problem reaches much farther; it is not only a question of racial discrimination, it also involves such questions as the closed shop. Has the individual a right to live, and if so, has he a right to use his labor to acquire the means whereby he lives?

This is, perhaps, the individual's most vital right. This article does not propose to discuss all aspects of this right. Only the right to use one's abilities in a *dependent* position (the right *to* a job) as well as the right to be protected in one's employment (the right *in* a job) will be discussed here.

A discussion of the right to work seems timely as some steps have already been taken to ensure and safeguard this right, while other, farther reaching measures are under consideration in Congress and some state legislatures. By Executive Orders No. 8802¹ and No. 9346² the President created a Committee on Fair Employment Practice, which, among others, has the duty to "receive and investigate complaints" of discrimination in employment because of race, creed, color, or national origin. The Committee "may conduct hearings, make findings of fact, and take appropriate steps to obtain elimination of such discrimination." This order is addressed to all employers and labor organizations as well as to government agencies.³ Nothing is said in the orders about the enforceability of the "appropriate steps" to be taken by the Committee. Still, the Committee has issued orders to submit reports on the number of Negroes, Jews and Catholics hired or promoted as compared to the number of persons not belonging to these categories hired or promoted, to desist from putting discriminatory "help wanted" advertisements in the papers and from inserting questions as to race, religion, etc., in questionnaires. Labor unions were directed to cease discriminatory practices, especially to change collective agreements which made it impossible for an employer to hire Negroes.⁴

¹6 FED. REG. 3109 (1941).

²8 FED. REG. 7183 f. (1943).

³This last point is an innovation of EXEC. ORDER 9346 (May 27, 1943), not to be found in EXEC. ORDER 8802 (June 25, 1941)

⁴For further details on the Committee's practice see *Discrimination in Employment* (1943) 3 LAWYERS GUILD REV. 32-36.

The weakness of the procedure was obvious. Pressure of public opinion and, in the case of government contractors, the sensitiveness of pocketbooks were the only factors inducing the addressees of the "orders" to comply with them. The need for stronger measures was felt.

In February 1943, Representative Vito Marcantonio of New York introduced a bill⁵ to end job discrimination because of race, creed, color or national origin. The bill was intended to give the President's Committee on Fair Employment Practice broader powers, but was addressed only to public contractors.⁶ It was referred to the Judiciary Committee and never heard of again. In 1944, in his Annual Message to Congress, President Roosevelt said:

We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed. Among these are: The right to a useful and remunerative job in the industries, or shops or farms or mines of the nation.⁷

The Republican platform for the presidential campaign of 1944 pledged "the establishment by Federal legislation of a permanent Fair Employment Practice Commission."⁸

It seems, therefore, that both major parties are agreed on the necessity of perpetuating, and of increasing the powers of, the Fair Employment Practice Committee, which, so far, rests only on the precarious foundation of executive orders. The existing opposition to the Committee was disavowed in the Senate, which, upon the motion of Senator Buck, Republican, from Delaware, exempted the Committee from restrictions imposed on other "presidential" agencies by an amendment to the appropriation bill for the Executive Office.⁹

In the second session of the 78th Congress four bills were introduced "to prohibit discrimination in employment because of race, creed, color, national origin, or ancestry."¹⁰ All four bills declared as their policy that the denial of employment opportunities to, and discrimination in employment against, properly qualified persons by reasons of their race, creed, color, national origin, or ancestry "foment domestic strife and unrest, deprives the United

⁵H. R. 1732, 78th Cong., 1st Sess.; 89 CONG. REC. 663 (1943).

⁶N. Y. Times, Feb. 6, 1943, p. 8, col. 3.

⁷H. R. Doc. No. 377, 78th Cong., 2d Sess. (1944); 90 CONG. REC., Jan. 5, 1944, at 57.

⁸N. Y. Times, June 28, 1944, p. 14, cols. 6, 7.

⁹Offered by Senator Russell of Georgia, 90 CONG. REC., March 24, 1944, at 3120-3122.

¹⁰H. R. 3986, H. R. 4004, H. R. 4005, S. 2048. These bills were sponsored by Representatives Scanlon (Dem., Pa.), Dawson (Dem., Ill.), LaFollette (Rep., Ind.); and Senators Chavez (Dem., N. M.), Downey (Dem., Cal.), Wagner (Dem., N. Y.) Murray (Dem., Mont.), Capper (Rep., Kan.) and Langer (Rep., N. D.).

States of the fullest utilization of its capacities for production and defense, and burdens, hinders, and obstructs commerce." The bills define as "unfair employment practices" the refusal to hire, the termination of employment, and discrimination in compensation or other terms or conditions of employment because of a person's racial, national or religious background; furthermore, they condemn as unfair employment practice the refusal of membership, expulsion, and discrimination by labor unions, if based on these reasons. The bills were to apply to employers having more than five employees, provided the employer was engaged in interstate or foreign commerce, or was under contract to the United States or a federal agency, or was performing work for the United States under a subcontract or otherwise. As far as labor unions were concerned, they came within the purview of the bills if they had five or more members in the employ of one or more employers who would be subject to the bills. The employment practices of the United States, with the exception of the enforcement rules, came under the regulations of the bill.

The agency entrusted with the enforcement of the bills was called the Fair Employment Practice Commission, and was to supersede the existing Committee on Fair Employment Practice. The Commission, to consist of a chairman and six members, who were to serve for seven years, was to have the power to investigate complaints and, upon proper findings of fact, to issue orders "to cease and desist from unfair employment practice and to take such affirmative action, including *hiring* or reinstatement of employees with or without back pay, as will effectuate the policies of the bill."¹¹ (Italics supplied.) The Commission was given the right to petition a circuit court of appeals of the United States, or in some instances, a district court, to enforce the Commission's order. The rest of the procedure was the same as that of the National Labor Relations Act. Likewise, any person aggrieved by a final order of the Commission could obtain a review of such order in a circuit court of appeals. The Commission had investigatory powers and could issue rules and regulations.

All government contracts were required to contain an "anti-discrimination" clause.

Hearings on these bills were conducted in June, 1944, by the House Committee on Labor under the chairmanship of Representative Mary T. Norton of New Jersey.¹² The Committee heard only witnesses favoring the pro-

¹¹H. R. 3986, § 10 d.

¹²*Hearings before the Committee on Labor on H. R. 3986, H. R. 4004 and H. R. 4005, 78th Cong., 2d Sess. (1944)*; hereafter referred to as *Hearings*.

posed bills. At the end of June, the hearings were postponed until after the election, briefly resumed in November, and eventually discontinued entirely.¹³

In spite of their incompleteness, the hearings resulted in giving an outline of the pros and cons that are likely to be raised with regard to the proposed legislation. On the floor of the House, Representative Rankin of Mississippi surmised that if the white people of Indiana (the home state of Mr. La Follette, the sponsor of one of the bills) should ever "find out what that iniquitous proposition is," they would count him (Mr. La Follette) out as well as "every other white man who sponsors any such crazy legislation."¹⁴

This article does not propose to investigate the position of the minorities in the United States. Admirable books have recently been published on this subject,¹⁵ to which one may refer for comprehensive data on the scope of job discrimination. The discussion here shall be confined to the constitutional aspect of the right to work. As a constitutional discussion, it is not dependent on the scope of discrimination; the points to be made are true though there be only a "negligible" number of cases of discrimination. Even if the cases did not show up very impressively from a purely numerical viewpoint, they are far from negligible from the viewpoint of justice and law and from the angle of the individuals affected.

LIBERTY OF PURSUIT

Representative Hoffman of Michigan, interrogating a witness during the hearings on the Fair Employment bills, spoke of "some loose talk here about the right to work" and implied that nobody had been denied this right but only the opportunity to hold a job.¹⁶ On the other hand, Representative Scanlon disclaimed that there was anything in his bill "about social equality." So it seems that the problem is narrowed down to this question: is there a right, protected by the Constitution, of free access to jobs, a right giving every person equal *economic* opportunity, if not *social* equality?

Malcolm Ross, Chairman of the President's Committee on Fair Employment Practice, stated before the Committee on Labor that a person had a public right not to be discriminated against in employment.¹⁷ To what extent is this contention justified by our Constitution?

There seems to have been little doubt in the mind of our courts that the

¹³Representative Mary T. Norton, 90 Cong. Rec., Aug. 29, 1944, at 7464.

¹⁴90 Cong. Rec., Aug. 28, 1944, at 7428.

¹⁵See, for instance, MYRDAL, *AN AMERICAN DILEMMA* (1944); NORTHROP, *ORGANIZED LABOR AND THE NEGRO* (1944).

¹⁶Hearings, 73.

¹⁷*Id.* at 161.

right to work is a fundamental right, that it must be counted among "the privileges and immunities of the citizens of the several states." In 1823, Mr. Justice Washington declared that "the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety" was one of the fundamental privileges and immunities which belong, of right, to the citizens of all free governments.¹⁸ In the classic decision upholding "freedom of contract," the Supreme Court included in the term "liberty," as used in the Fourteenth Amendment, "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation."¹⁹ This idea was expressed even more forcefully by Mr. Justice Bradley in his concurring opinion in one of the later *Louisiana Slaughterhouse Cases*.²⁰ Here, "the right to follow any of the common occupations of life" was declared to be an inalienable right. According to Mr. Justice Bradley, this right was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence and formed "a large ingredient in the civil liberty of the citizen." The liberty of pursuit was declared to be one of the privileges of a citizen of the United States.

Thus far, the point has been stated in a very general fashion. The decisions heretofore mentioned were intended to elucidate as to the individual's right to make a living as an entrepreneur, rather than in a dependent position. They express the viewpoint of the pioneer generations that every man has a right to set up in any business free from interference of any kind. The problem of the dependent worker had not come to the fore appreciably; therefore, the decisions fail to deal with his position. Yet, the idea of having a right to earn one's livelihood unmolested by third parties is of fundamental importance both for the independent entrepreneur and for the dependent worker.

So far, no mention has been made of the denial of the right to work because of race, creed, color or national origin. However, in voiding a California statute against Chinese labor, a federal court held²¹ that "no enumeration of the privileges, immunities . . . of man in civilized society would exclude the

¹⁸*Corfield v. Coryell*, 6 Fed. Cas. No. 3230, at 551 f. (C. C. E. D. Pa. 1823); *see also* the opinion of the court and the dissenting opinions of Field and Bradley, JJ., in the *Slaughterhouse Cases*, 16 Wall. 36, 76, 97, 113-114, 21 L. ed. 395, 409, 415, 420-421 (U. S. 1872).

¹⁹*Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431 (1897).

²⁰*Butchers' Union v. Crescent City*, 111 U. S. 746, 762, 764, 4 Sup. Ct. 652, 657, 658 (1884).

²¹*In re Parrott*, 1 Fed. 481, 498 (C. C. D. Cal. 1880).

right to labor for a living." Such right is "as sacred as the right to life, for life is taken if the means whereby we live be taken." This is true especially in the case of foreign persons coming into the United States because "their labor is the only exchangeable commodity they possess. To deprive them of the right to labor is to consign them to starvation."²² And, following this reasoning, Mr. Justice Hughes wrote the opinion of the Supreme Court invalidating an Arizona law requiring that in all enterprises employing more than five persons at least eighty per cent of the employees must be "qualified electors or native-born citizens of the United States." He found that to deny to lawfully admitted aliens the opportunity to earn a livelihood would be tantamount to denying them entrance, "for . . . they cannot live where they cannot work." The result would be segregation of aliens in the more progressive states.²³

On the basis of all this, it may be safely stated that the courts, throughout our history, have considered the right to work as a right that flows both from the right to live and the right to own and acquire property. It is held that this right is "a property right, is incident to the freedom of the individual, and is as fully protected by the law as any other personal or private right."²⁴

The statement that every person, regardless of color or national origin, has a *right* to work has been repeated so many times in the "country of unlimited opportunities" that its repetition here may sound trite. The question which is far more controversial is this: is the claim justified that the right to work is protected? This question can be answered with an unqualified "yes" only if we establish that the law demands respect for the right to work from (a) the government, (b) third persons, (c) employers, and (d) fellow-employees.

DUTY OF GOVERNMENT TO PROVIDE EMPLOYMENT OPPORTUNITIES

American law contains surprisingly little information on the question of whether the government has a duty to safeguard a person's right to work. On the other hand, many foreign countries have, or had, constitutional provisions establishing and guaranteeing the right to work. Germany's defunct Weimar constitution of 1919 provided in its Article 163, § 2: "Every German shall have the opportunity to earn his living by economic labor. So long as suitable employment cannot be procured for him, his maintenance will

²²*Id.* at 506.

²³*Truax v. Raich*, 239 U. S. 33, 42, 36 Sup. Ct. 7, 11 (1915).

²⁴11 AM. JUR., CONSTITUTIONAL LAW, § 338.

be provided for." This opened the way not only to the establishment of job opportunities by the state (public works, public employment services) but gave the unemployed a constitutional right to unemployment relief. The right to work is, or was, further guaranteed in the constitutions or other fundamental laws of Argentina,²⁵ Bolivia,²⁶ Costa Rica,²⁷ Lithuania,²⁸ Nicaragua,²⁹ Paraguay,³⁰ Portugal³¹ and Spain.³² Article 118 of the 1936 Soviet constitution states: "Citizens of the U.S.S.R. have the right to work, that is the right to receive guaranteed work with payment for their work in accordance with its quantity or quality." This guarantee is obviously based on the dogma that the Soviet government is the only employer.³³ It has been stated that the "opportunity for suitable employment for all who seek work" belongs to the "widely recognised objects of social policy to the general principle of which the United Nations are already pledged by the Constitution of the International Labour Organization, the Atlantic Charter . . . and other instruments and statements of policy."³⁴ To provide this opportunity is the ultimate responsibility of the State.³⁵

The "next best thing" to a guarantee of the right to work, namely, unemployment relief, is now fully accepted in the United States.³⁶ Yet, the Federal Government has failed, so far, to exercise its powers to impose non-discriminatory standards. This in spite of the fact that discrimination by municipalities against members of minorities employed by the municipality has been condemned by a federal court as violative of the Fourteenth Amendment in the case of Negro teachers in public schools who received a lower salary than their white colleagues of equal training.³⁷ A valuable precedent was set by the Walsh-Healey Act of June 30, 1936,³⁸ but this act simply

²⁵Constitution of the Argentine Nation as amended 1860, 1866, and 1898, Art. 14.

²⁶Political Constitution of Bolivia of Oct. 30, 1938, Art. 6 (b).

²⁷Constitution of the Republic of Costa Rica of Dec. 7, 1871, as amended 1942, Art. 52.

²⁸Constitution of May 15, 1928, Art. 89.

²⁹Constitution of the Republic of Nicaragua of March 22, 1939, Art. 96.

³⁰Constitution of the Republic of Paraguay of July 10, 1940, Art. 19.

³¹National Labor Statute of Sept. 23, 1933, Art. 21.

³²Constitution of the Spanish Republic of Dec. 9, 1931, Art. 46; Labor Charter of March 9, 1938, c. I, Arts. 3 and 8.

³³For the foregoing see INTERNATIONAL LABOUR OFFICE, CONSTITUTIONAL PROVISIONS CONCERNING SOCIAL AND ECONOMIC POLICY (1944), *passim*.

³⁴*Id.* at Introduction, xv.

³⁵*Id.* at Introduction, xvi.

³⁶SOCIAL SECURITY ACT, 49 STAT. 626 (1935), 42 U. S. C. § 501 ff. (1940); *upheld* in *Steward Machine Co. v. Davis*, 301 U. S. 548, 586-587, 57 Sup. Ct. 883, 890-891 (1937) (as promoting the general welfare; the unemployment problem was *held* to be "national in area and dimension").

³⁷*Alston v. School Board of Norfolk*, 112 F. (2d) 992 (C. C. A. 4th, 1940), *cert. denied*, 311 U. S. 693, 61 Sup. Ct. 75 (1940).

³⁸49 STAT. 2036 (1936), 41 U. S. C. §§ 35-45 (1940).

laid down the rule that government contracts should be awarded only if the contractor undertook to abide by certain maximum hours and minimum wages. It failed, however, to use the government's high credit rating to hold contractors to strict compliance with the National Labor Relations Act;³⁹ nor, prior to the President's Executive Order No. 9346⁴⁰ did the government impose any rules outlawing racial discrimination by public contractors and government agencies. The express addition of a reference to government agencies in the order indicates the occurrence of discrimination by such agencies.

On the other hand, the Federal Government has successfully undertaken to discharge its duty to provide jobs. By the Act of June 6, 1933,⁴¹ the United States Employment Service was created, whose "province and duty" was declared to be "to promote and develop a national system of employment offices."⁴² The Service, originally located in the Department of Labor, was transferred under Reorganization Plan No. I, effective July 1, 1939, to the Federal Security Agency, where it was consolidated with the unemployment compensation function of the Social Security Board.⁴³ From there Executive Order No. 9247 of 1942⁴⁴ transferred it to the War Manpower Commission.

It is thus evident that the Federal Government has taken the necessary steps to discharge its duty toward the citizen looking for work.

VIOLATIONS OF RIGHT TO JOB BY THIRD PERSONS

The law is even less definite with regard to protection of the right to work against interference by third persons (that is, persons who are neither employers nor fellow-employees of the aggrieved person). Even in cases where a person is deprived of a job *he already holds*, the law is not clear as to whether such deprivation constitutes an actionable wrong. The decision of the Supreme Court in *Hodges v. United States*⁴⁵ refuses to recognize any constitutional job protection and declares federal legislation to be inapplicable to such a case. In that case, a number of white men had been indicted for conspiracy to intimidate citizens in the free exercise or enjoyment of rights and privileges secured to them by the Constitution of the United States.⁴⁶ Several white men had threatened some Negroes, forcing them to leave

³⁹Opinion of the Attorney-General, 9 U. S. L. WEEK 2230, 2231 (1940).

⁴⁰8 FED. REG. 7183 f. (1943).

⁴¹48 STAT. 114, 29 U. S. C. § 49 d (1940).

⁴²48 STAT. 114, 29 U. S. C. § 49 b (1940).

⁴³4 FED. REG. 2727 (1939), 53 STAT. 1423 (1939), 5 U. S. C. § 133 t, n. (1940).

⁴⁴7 FED. REG. 7379 (1942), 50 U. S. C. App. § 601. n. (Supp. 1943).

⁴⁵203 U. S. 1, 27 Sup. Ct. 6 (1906).

⁴⁶REV. STAT. § 5508 (1875), 18 U. S. C. § 51 (1940).

their jobs. The Court held that this action did not constitute a conspiracy within the meaning of the federal statute. The Attorney-General, prosecuting the case, thought it "vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens. Even though the right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State."⁴⁷ The Court adopted this reasoning,⁴⁸ while Harlan and Day, JJ., dissenting, claimed that it was "no longer open to question . . . that Congress may, by appropriate legislation, protect any privilege arising from, created or secured by, or dependent upon the Constitution or laws of the United States."⁴⁹ The position of the Court was based, to a large degree, on *United States v. Cruikshank*,⁵⁰ while the dissent relied on *United States v. Reese*⁵¹ and *Logan v. United States*.⁵² However, even those cases that permitted appropriate federal legislation to protect the rights based on the post-war amendments referred only to such legislation that would prevent the *states* from discriminating in the ways forbidden by the amendments. Mr. Justice Gray, speaking for the Court in the *Logan* case, stated expressly that the "fundamental rights, recognized and declared, but not granted or created, in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and cannot therefore be affirmatively enforced by Congress against unlawful acts of individuals."⁵³

It seems, on the basis of these decisions, that the more "fundamental" a right, the less protected is it under the Constitution, except as against infringing legislation. There seems to be a dictum to the contrary in one of Mr. Justice Bradley's opinions in the Circuit Court,⁵⁴ where he declares that individual interference with a person's exercise of his equal rights as a citizen because of his race may be prohibited by Congress. The example given by him is that of a Negro or an Indian leasing a farm in a white community and expelled by a combination of white persons. However, in writing the opinion of the Supreme Court voiding the Civil Rights Act of 1875 the

⁴⁷*Hodges v. United States*, 203 U. S. 9, 27 Sup. Ct. 6, 11 (1906).

⁴⁸*Id.* at 18, 27 Sup. Ct. at 9.

⁴⁹*Id.* at 24, 27 Sup. Ct. at 11-12.

⁵⁰92 U. S. 542, 23 L. ed. 588 (1875).

⁵¹92 U. S. 214, 23 L. ed. 478 (1875).

⁵²144 U. S. 263, 293, 12 Sup. Ct. 617, 626 (1892).

⁵³*Ibid.*

⁵⁴*United States v. Cruikshank*, 25 Fed. Cas. No. 14,897, at 712 (C. C. D. La. 1874).

same Justice held that "civil rights . . . cannot be impaired by the wrongful acts of individuals"; redress, if at all, can be had only by resorting to the laws of the State. "Legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication."⁵⁵

This opinion is clothed in too sweeping a language to be interpreted only as inveighing against federal legislation to protect social rights, such as equal accommodation on public means of transportation; it is a clear indication that federal legislation to protect fundamental rights was frowned upon by the Supreme Court. However, it may be added here that the constitution of New York provides that "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights *by any other person or by any firm, corporation, or institution*, or by the state or any agency or subdivision of the state."⁵⁶

This may be the appropriate place to classify the right to work, which was so amply praised and upheld by the Supreme Court, especially at the turn of the last century. Is it on the same level with the right of "full and equal enjoyment of the accommodations . . . of inns, public conveyances . . . , theaters and other places of public amusement"?⁵⁷ The answer is obvious. Denial of "equal enjoyment of accommodation," while unjustly humiliating, does not deprive a person of the essentials of life. The denial of the right to work does. Therefore, the statement that *social intercourse* cannot be enforced by law, does not apply to the problem of the enforceability of the right to work. The right to work is far more than a "social right"; it is a necessary incident of the right to live,⁵⁸ and it may also be considered as property.⁵⁹

VIOLATION OF THE RIGHT TO JOB BY EMPLOYER OR PROSPECTIVE EMPLOYER

While there seems to be little doubt about the fundamental character of the right, the right seems to be ill protected against encroachment by employers or fellow-workers.

One of the most potent weapons of an employer, in infringing upon a person's right to work, is the blacklist. True, a number of states outlaw black-

⁵⁵Civil Rights Cases, 109 U. S. 3, 13, 17, 3 Sup. Ct. 18, 25-26, 27 (1883).

⁵⁶N. Y. CONST. Art. I, § 11 (amended 1938); (italics supplied).

⁵⁷CIVIL RIGHTS ACT, 18 STAT. (Pt. III) 335 (1875).

⁵⁸Truax v. Raich, *supra* note 23.

⁵⁹Goldfield Consolidated Mines v. Goldfield Miners Union, 159 Fed. 500, 515 (C. C. D. Nev. 1908).

listing;⁶⁰ some states even prohibit blacklisting in their constitutions,⁶¹ others go so far as to forbid constitutionally any malicious interference on the part of individuals or corporations with a person's obtaining or enjoying employment.⁶² However, the constitutionality of the prohibition of blacklisting is doubtful. In some jurisdictions, such laws have been declared unconstitutional,⁶³ others have upheld them.⁶⁴ But even where these laws were allowed to stand, they were applied only infrequently.⁶⁵ Laws attaching punishment to blacklisting seem to have been applied less than five times.⁶⁶ Wherever civil action was taken against one utilizing a blacklist, the issue turned either on the question of damages or on the more fundamental consideration of the employer's freedom to hire and not to hire whom he pleased. Thus, blacklisting without proof of damages was declared to be not actionable.⁶⁷ Courts went even so far as to brand as erroneous the idea that employers should not have the right to combine freely to refuse employment to any kind or class of workmen,⁶⁸ and it was held that any person might refuse to employ whomever he might wish and could not be "called upon to answer for his judgment in that regard by the public or individuals; nor can the motives which prompted that action be considered."⁶⁹ One court went to great lengths in extolling the right to work as part of every man's civil rights, claiming that wrongful prevention from pursuing a calling represented an actionable injury. A touching picture was drawn of the man's, and "perchance" his wife's and children's "penury and want," and "humanity" was invoked as demanding "redress of a wrong which is followed by such lamentable consequences." The very same decision, however, considers it an equally fundamental right of the employer "to refuse to enter into business relations, whether such refusal be the result of reason, or of whim, caprice, prejudice or malice."⁷⁰ On the other hand, we find a court protecting, in equity, the right to work of blacklisted strikers. The court even condemns

⁶⁰DANGEL AND SHRIBER, *THE LAW OF LABOR UNIONS* (1941), § 85; WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932), 213.

⁶¹ARIZ. CONST. Art. XVIII, § 9; N. D. CONST. Art. XVII, § 212; UTAH CONST. Art. XII, § 19, Art. XVI, § 4.

⁶²N. D. CONST. Art. I, § 23; UTAH CONST. Art. XII, § 19.

⁶³Wabash R.R. v. Young, 162 Ind. 102, 69 N. E. 1003 (1904).

⁶⁴State v. Justus, 85 Minn. 279, 88 N. W. 759 (1902); Joyce v. Great Northern Ry., 100 Minn. 225, 110 N. W. 975 (1907).

⁶⁵WITTE, *op. cit. supra* note 60, at 215.

⁶⁶See, e.g. State v. Dabney, 141 P. (2d) 303 (Okla. Cr. App. 1943); WITTE, *loc. cit. supra*, mentions two cases.

⁶⁷Willner v. Silverman, 109 Md. 341, 71 Atl. 962 (1909).

⁶⁸Atkins v. Fletcher, 65 N. J. Eq. 658, 661, 55 Atl. 1074, 1075 (Ch. 1903).

⁶⁹New York, C. & St. L. Ry. v. Schaffer, 65 Ohio St. 414, 62 N. E. 1036 (1902).

⁷⁰Hundley v. Louisville & N. R.R., 105 Ky. 162, 164-165, 48 S. W. 429, 430 (1898).

interference by an *individual* with the right to work,⁷¹ while usually a *conspiracy* must be proven in such cases. When a conspiracy assumed the proportions of a combination in restraint of trade, the Supreme Court applied the Sherman Act to it.⁷²

On the basis of these decisions legal protection of the right to work seems to be deficient. Even where a person already has a job, he is ill protected: the employer's right to fire him arbitrarily is uncontested. Neither is the power to withhold employment from a person effectively limited, and interference by third persons with the employment relation is, at best, remedied by damage suits, with strict proof of the damage required to make the interference an actionable wrong.

This is a far cry from the resounding phrases upholding the right to work as an essential factor of the individual's very life, but the legal situation seems to be even less favorable in the case of a person who does not have a job, is looking for employment, and finds himself arbitrarily discriminated against by a prospective employer, either for no good reason at all or on account of the applicant's race, creed, color, or national origin. The courts⁷³ do not give protection against "whim, caprice, prejudice or malice" in refusing employment to a person.

During the hearings on the Fair Employment Practice bills Congressmen Hoffman of Michigan and Fisher of Texas objected strongly to any legislation establishing a commission telling an employer whom he could hire or fire. This "would take from the employer . . . any freedom of action that he has enjoyed since the Constitution was written. . . . [It] would rob the employer of his traditional freedom of choice of those whom he wishes to employ on the basis of what he feels is best for his own business."⁷⁴ To those who fall by the wayside in their quest of employment, Mr. Hoffman gave the advice to establish a business of their own; here no discrimination would make itself felt.⁷⁵

It seems that "freedom of contract" still plays an important part in the minds of our legislators; this, in spite of the fact that this concept has been rendered obsolete, to a large extent, by the National Labor Relations Act and kindred legislation. There is no need here to go again into the opinions of the Supreme Court upholding the validity of the Wagner Act, but it

⁷¹Cornellier v. Haverhill Shoe Mfrs. Ass'n, 221 Mass. 554, 559-560, 109 N. E. 643, 644-645 (1915).

⁷²Anderson v. Shipowners Ass'n, 272 U. S. 359, 47 Sup. Ct. 472 (1926).

⁷³See note 70 *supra*.

⁷⁴Hearings, 62 f.

⁷⁵*Id.* at 74.

should be mentioned that, according to the Supreme Court, the Wagner Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."⁷⁶ The Wagner Act outlaws discrimination in regard to "hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."⁷⁷ In numerous decisions the courts, including the Supreme Court, have upheld the right of the employee not to be discharged because of union affiliation. More than that, in the interpretation given it by the Supreme Court, the Wagner Act did away with blacklisting, at least to the extent of outlawing blacklisting because of union activities. In a number of decisions of recent date the courts have interpreted Section 8 (3) of the Wagner Act to include not only discriminatory discharge but discriminatory refusal to hire as well. In *National Labor Relations Board v. Waukegan Mills*,⁷⁸ a mill had refused to employ applicants for the lone reason that they had a "union record," their experience and qualifications being beyond doubt. The court declared this to be an unfair labor practice and upheld the National Labor Relations Board's order to the mill to offer employment, with back pay, to the applicants.⁷⁹ The court said: "This emphatically does not mean that an employer may not lawfully decline to employ a union applicant. . . . The statutory test is whether the applicant was rejected . . . on account of union membership or activity, or on account of some permissible criterion."⁸⁰ In the case of *Nevada Consolidated Copper Corporation*,⁸¹ the Board likewise ordered the "instatement" of persons whom the prospective employer discriminatorily had refused to hire, which order was implicitly upheld by the Supreme Court.⁸² The Court has accepted the theory that discriminatory refusal to hire is covered by the Wagner Act.⁸³ Speaking through Mr. Justice Frankfurter, it stated again that this interpretation of the Wagner Act did not "impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute . . . is directed solely against the abuse of

⁷⁶*National Labor Relations Board v. Jones & Laughlin*, 301 U. S. 1, 45, 57 Sup. Ct. 615, 628 (1937).

⁷⁷Sec. 8 (3), 49 STAT. 452, 29 U. S. C. § 158 (3) (1940).

⁷⁸114 F. (2d) 226 (C. C. A. 1st, 1940).

⁷⁹*Id.* at 233, 235.

⁸⁰*Id.* at 234; *but see National Labor Relations Board v. National Casket Co.*, 107 F. (2d) 992, 997 (C. C. A. 2d, 1939).

⁸¹26 N. L. R. B. 1182 (1940).

⁸²*National Labor Relations Board v. Nevada Consolidated Copper Corp.*, 316 U. S. 105, 62 Sup. Ct. 960 (1942).

⁸³*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 61 Sup. Ct. 845, 133 A. L. R. 1217, 1235 (1941).

that right by interfering with the countervailing right of self-organization."⁸⁴ Murphy and Stone, JJ., partially dissenting, agreed with the majority of the Court in declaring a discriminatory refusal to hire to be a violation of the Wagner Act and an unfair labor practice. This view has become the established opinion of the courts.⁸⁵

It is thus accepted that a person who has been refused employment on account of union affiliation may obtain redress, not merely in the form of damages, but in the form of the employment he was seeking. It is even held (though not unanimously) that he may be given a claim for back pay, dating from the day he was refused employment to the day he was employed following the Board's order.

Now, if this form of discrimination on account of union activities is outlawed, the outlawing of job discrimination on account of race, creed, color, national origin or ancestry must be all the more constitutionally valid. Union affiliation is created more or less voluntarily; its purpose is to obtain bargaining equality with the employer and thus to win better conditions of employment. The right of self-organization has been approved by federal statute and by the courts, and discrimination on account of union activities has been condemned as disturbing industrial peace. Arguing *a minore ad maius*, racial, etc., discrimination must be considered as "burdening or obstructing interstate or foreign commerce." All "minorities" taken together, exceed the number of unionized workers by far. True, minorities, being largely unorganized, do not have the weapon of the strike, which is at the disposal of organized labor, and thus they cannot resort, as minorities, to walkouts which might endanger interstate and foreign commerce and industrial peace, but it would be more than inequitable to deny them relief because they are less dangerous to industrial peace (a situation which may some day change). They are discriminated against not for something they did out of their own free will, such as joining a union, but for something with which they were born: the color of their skins, their creed, their national origin. The Supreme Court has recognized the parallel between the positions of union workers, persecuted and discriminated against because of their union affilia-

⁸⁴*Id.* at 186-187, 61 Sup. Ct. at 849, 133 A. L. R. at 1235 (1941).

⁸⁵National Labor Relations Board v. Milan Shirt Mfg. Co., 125 F. (2d) 376 (C. C. A. 6th, 1942); National Labor Relations Board v. Chattanooga Bakery, 127 F. (2d) 201, 204 (C. C. A. 6th, 1942), *cert. denied* 317 U. S. 676, 63 Sup. Ct. 157 (1942); National Labor Relations Board v. Moore-Lowry Flour Mills, 122 F. (2d) 419, 426 (C. C. A. 10th, 1941); National Labor Relations Board v. Security Warehouse, 136 F. (2d) 829, 834 (C. C. A. 9th, 1943). For earlier Board orders to the same effect *see* Kelly-Springfield Tire Co., 6 N. L. R. B. 325 (1938); Knoxville Publishing Co., 12 N. L. R. B. 1209 (1939).

tion, and of members of minority groups. The latter's "desire for fair and equitable conditions of employment . . . and the removal of discriminations against them . . . is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions. . . . Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation."⁸⁶

The fear expressed by opponents of the proposed Fair Employment Practice bills,⁸⁷ that employees would be forced upon an unwilling employer by action of a government agency, is not any more justified than the fear that union men would be forced upon an anti-union employer. It is still his right to refuse employment to a person whom he does not want to employ. The Supreme Court's decisions upholding the employer's right of selection would be directly applicable in cases of racial discrimination. True, the task of the board or commission that deals with unfair employment practice would be as "delicate" as that of the National Labor Relations Board when it delves into the motive for the refusal to hire an applicant.⁸⁸ There are many legitimate reasons for not wanting to have a person in one's employ. However, it is established that an unfair labor practice on the part of an employer makes his ordinary right to select his employees "vulnerable";⁸⁹ his "freedom to hire" is modified and the relation between him and the persons he discriminated against is no longer based on purely private law, but veers into the realm of public law.

It appears thus that the law, at least in recent times, has developed so as to make the right to work something more tangible than a mere rhetorical expression. It is now universally admitted that the right to work "constitutes a property right, the continued interference with which equity will enjoin where the legal remedy is inadequate."⁹⁰ This statement applies directly to all cases where an employee is deprived of his job by a malicious act, but it must also apply, at least by analogy, to cases where an applicant is maliciously refused employment, especially in cases of racial discrimination. The *Waumbec* and *Phelps Dodge* decisions point the way in the right direction.

⁸⁶*New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 561, 58 Sup. Ct. 703, 707 (1938).

⁸⁷*See, e.g.* Congressman O. C. Fisher of Texas, *Hearings*, 86-87.

⁸⁸*National Labor Relations Board v. Waumbec Mills*, 114 F. (2d) 226, 234 (C. C. A. 1st, 1940).

⁸⁹*Black Diamond S.S. Corp. v. National Labor Relations Board*, 94 F. (2d) 875, 879 (C. C. A. 2d, 1938), *cert. denied* 304 U. S. 579, 58 Sup. Ct. 1044 (1938).

⁹⁰*Dorrington v. Manning*, 135 Pa. Super. 194, 201, 4 A. (2d) 886, 890 (1939).

VIOLATION OF RIGHT TO A JOB BY FELLOW EMPLOYEES

While the right to work is recognized as against the unfairly discriminating employer, its protection against fellow-workers is less securely founded in law. It is strange to see that at a time when unions were frowned upon as conspiracies, their right to admit, or refuse admission to, applicants for membership, was fully recognized on the ground that they were voluntary and obviously lawful private associations. In *Mayer v. Journeymen Stonecutters Ass'n*,⁹¹ it was held that no court had power "to require the admission of any person to original membership in any voluntary association," such as trade unions. "No person has any abstract right to be admitted to such membership; that depends solely upon the action of the society." While decisions like that might have worked relatively little damage to the unsuccessful applicant for membership at a time when the unionization of industries was still in its initial stages, we might expect a change of opinion in the more recent period of our history when unions, far from being outlawed, were tolerated, and, even more recently, encouraged and their activities protected. Nevertheless, many courts continue to follow the doctrine of the union as a voluntary private association, which may grant or deny membership at will, and this although the union dominates the labor market by way of closed-shop agreements.⁹² Even if the arbitrary rejection of the candidate prejudices his material interest, no court of equity, it has been held, will interfere with the union's decision.⁹³ The advent of the New Deal labor legislation, immeasurably strengthening the position of union labor, did not change the outlook for the rejected candidate. Few people seemed to realize that, once union labor was no longer the underdog, there might be other underdogs requiring at least as much protection under the law as union labor had struggled for and won. The unions, having disposed of discrimination against themselves with the help of powerful federal legislation, now practised the same discrimination freely, while at the same time monopolizing jobs in important centers of industry by closed-shop agreements. The Wagner Act, breaking down the bars to collective bargaining, did not provide for the non-union worker, desirous of joining a union of his own choosing, in case the union chose not to accept him as a member. The courts adhered to the old doctrine, unmindful of the fact that membership in a union, in

⁹¹17 N. J. Eq. 519, 524, 20 Atl. 492, 494 (Ch. 1890).

⁹²These agreements are expressly protected by Sec. 8 (3) of the Wagner Act, 49 STAT. 452, 29 U. S. C. § 158 (3) (1940).

⁹³*Harris v. Thomas*, 217 S. W. 1068, 1076-1077 (Tex. Civ. App. 1920); *Simons v. Berry*, 210 App. Div. 90, 205 N. Y. S. 442 (1st Dep't 1924); *Greenwood v. Building Trades Council*, 71 Cal. App. 159, 172, 233 Pac. 823, 828 (1925).

many fields of industry, was no longer merely a factor in obtaining *better* working conditions, but had become an indispensable factor in getting *any work at all*. In the late 'thirties, the courts still disclaimed power to force a person's admission upon a union.⁹⁴ The New York Court of Appeals has held that "a union, *with perhaps some exceptions not material here*, is free to choose its own members."⁹⁵ Though the decisions are discouraging, it is heartening to note that one of these decisions at least raised the question of what is to become of the rejected applicant who is unable to obtain employment at his chosen vocation because he is not a member of the union. However, the court threw this problem, one of public policy, into the lap of the legislature and refused to grant relief.⁹⁶

The courts, about the turn of the century, had been very favorably inclined toward recognition of the worker's right *not* to join a union. Freedom of contract was freely quoted as upholding the worker's "constitutional right" to enter into a "yellow-dog" contract.⁹⁷ Now the issue is reversed, and the courts protect the union's right to refuse admission to applicants at will, although unions have come to be, with the blessing of the law, dispensers of jobs.

However, here, too, a trend away from the "private" concept of the union becomes distinct. The danger of a job monopoly in the hands of unions has not been overlooked. Strikes for the purpose of doing away altogether with non-union labor and of gaining a general monopoly of the labor market have been declared unlawful.⁹⁸ Concerted labor action based on racial discrimination was enjoined in an Ohio case.⁹⁹ Here a union picketed an eating place because it employed non-union colored help. The colored employees applied to the union to form a local for colored restaurant employees and the union refused. The court held that this was not a fight of union men against non-union men but a case of white men opposing colored men and indirectly protected the colored men's jobs by granting the employer's petition for an injunction. Strikes and other concerted labor action have been outlawed if they were begun with the primary purpose of injuring others

⁹⁴Maguire v. Buckley, 301 Mass. 355, 360, 17 N. E. (2d) 170, 172 (1938); Shein v. Rose, 12 N. Y. S. (2d) 87, 89 (Sup. Ct. 1939); Murphy v. Higgins, 12 N. Y. S. (2d) 913, 915 (Sup. Ct. 1939), *aff'd without opinion*, 260 App. Div. 854, 23 N. Y. S. (2d) 552 (1st Dep't 1940).

⁹⁵Boro Park Market v. Heller, 280 N. Y. 481, 487, 21 N. E. (2d) 687, 688 (1939); italics supplied.

⁹⁶Miller v. Ruehl, 166 Misc. 479, 2 N. Y. S. (2d) 394 (Sup. Ct. 1938).

⁹⁷Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277 (1908); Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. 240 (1915).

⁹⁸Folsom Engraving Co. v. McNeil, 235 Mass. 269, 278, 126 N. E. 479, 480 (1920).

⁹⁹Wills v. Restaurant Employees, 26 Ohio N. P. (N. S.) 435 (C. P. 1927).

without promoting the interests of those taking the action.¹⁰⁰ Even in a case where the union dominated the whole field of an enterprise (the New York transportation system), the court upholding the right to strike for the purpose of excluding non-union men, stated that the strike must not be conducted "simply and solely for the purpose of keeping [non-union employees] out of work."¹⁰¹

An even more notable breach in the doctrine of the "private" character of unions was accomplished in *Dorrington v. Manning*,¹⁰² where the court held that the refusal, without reason, of admission to a union, followed by a strike of the union members to expel the applicants from their employment, constituted a malicious act. These decisions, however, have to do only with the injury inflicted upon employed non-union workers by the union.

But in other cases the courts have held more generally that job monopolies held by unions are unlawful. A Connecticut decision condemned the sweeping closed-shop agreement, *i.e.* one "which takes in an entire industry of any considerable proportions in a community, so that it operates generally in that community, to prevent or to seriously deter craftsmen from working at their craft, or workmen from obtaining employment under favorable conditions without joining a union." The court waxed bitter over "monopolies of things of common use and need, whether created by governmental grant or by the acts of private persons or corporations. . . . [Such monopolies] are especially intolerable where they concern the basic resource of individual existence, the capacity to labor."¹⁰³ While this decision might not carry too much weight, having been handed down at a time when unions were more than slightly suspected of sinister doings, the idea of the unlawful character of a job monopoly is sound. This idea was more clearly interpreted in a number of New Jersey decisions. In *Harris v. Geier*,¹⁰⁴ the court pointed out the vital importance of union membership for workers in union-dominated trades. While a dissatisfied stockholder of a corporation may sell his stock and invest elsewhere, a dissatisfied union member "can resign—and starve." While the case had to do only with an intra-union controversy, the court made a far more general statement by demanding that unions, to be lawful, must be "governed on democratic principles" and that membership

¹⁰⁰See *e.g.* *Cohn & Roth v. Bricklayers' Union*, 92 Conn. 161, 101 Atl. 659 (1917).

¹⁰¹*Williams v. Quill*, 277 N. Y. 1, 7, 12 N. E. (2d) 547, 549 (1938); *appeal dismissed*, 303 U. S. 621, 58 Sup. Ct. 650 (1938).

¹⁰²135 Pa. Super. 194, 4 A. (2d) 886 (1939); see also RESTATEMENT, TORTS (1939) § 810.

¹⁰³*Connors v. Connolly*, 86 Conn. 641, 651, 86 Atl. 600, 603, 604 (1913); *Polk v. Cleveland Ry.*, 20 Ohio App. 317, 321, 151 N. E. 808, 810 (1925).

¹⁰⁴112 N. J. Eq. 99, 106, 108, 164 Atl. 50, 53 (Ch. 1932).

in them must be "open, on reasonable terms, to all persons of good character and of skill in the trade."

Wherever a union has a substantial monopoly by having concluded closed-shop agreements with a sizable majority of the shops in a given field of industry, such monopoly creates duties which may be enforced against the possessors of the monopoly. "A union may restrict its membership at pleasure; it may, under certain conditions, lawfully contract with employers that all work shall be given to its members. But it cannot do both."¹⁰⁵ However, a distinction must be drawn between a closed shop in a single factory, or group of factories, and a closed shop in substantially an entire industry throughout a considerable area. In the latter case there is the further distinction between a closed shop sought by a union as a protective measure, and one sought in order to create a monopoly of labor. "By the great weight of authority," it has been held, "the last case is . . . contrary to public policy."¹⁰⁶ Some decisions go even farther. A Massachusetts decision held that a union which had a closed-shop or a preferential agreement with an employer "would open itself to serious criticism if it refused to admit to membership men qualified to perform the work done by members of the union in question."¹⁰⁷ As Ludwig Teller¹⁰⁸ aptly formulates it:

Labor unions are no holier than the workers who compose them, nor are non-union workers outcasts of the industrial life except, in a realistic sense, to the extent that the industrial economy is unable to afford them employment. Labor unions which close their ranks to the public thereby assume a sovereignty which it is not theirs to assume. The closed shop at the hands of a labor union which substantially excludes the public from its benefits . . . is a means whereby an anti-social monopoly is foisted upon the industrial body politic.¹⁰⁹

Another aspect of the problem was dealt with in the case of *Cameron v. International Alliance*.¹¹⁰ Here the union management had discriminated between "senior" and "junior" members, imposing heavier dues and offering less employment opportunities to the latter. The court, while upholding the union's right to refuse membership to applicants, condemned "arbitrary or capricious discrimination between the members of the union in respect of

¹⁰⁵*Wilson v. Newspaper and Mail Deliverers' Union*, 123 N. J. Eq. 347, 351, 197 Atl. 720, 722 (Ch. 1938).

¹⁰⁶*Four Plating Co. v. Mako*, 122 N. J. Eq. 298, 300, 194 Atl. 53, 55 (Ch. 1937).

¹⁰⁷*Shinsky v. O'Neil*, 232 Mass. 99, 104, 121 N. E. 790, 792 (1919).

¹⁰⁸TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* (1940), Vol. I, § 99.

¹⁰⁹Quoted with approval in *Schwab v. Moving Picture Machine Operators*, 165 Ore. 602, 623-624, 109 P. (2d) 600, 608 (1941).

¹¹⁰118 N. J. Eq. 11, 176 Atl. 692 (1935).

equality of opportunity to work."¹¹¹ This was followed by a later decision¹¹² wherein the "claim that all jobs within the jurisdiction of the union are the property of the local" was called "modified slavery." A similar recognition of the vital importance of union membership can be found in the decision of the New York Court of Appeals overruling *Simons v. Berry*.¹¹³ Expulsion from a union, it was held, may mean the impossibility for the expelled worker to find employment in his trade; if the expulsion was done arbitrarily, equitable relief should be granted to prevent irreparable injury.¹¹⁴

While a certain duty is thus recognized on the part of unions not to bar their ranks to qualified workers and to treat their members with equality, a federal court has upheld a union's right to establish "separate lodges" for its colored members, these lodges to be represented in union board or convention meetings "by the delegates of the nearest white local." Such an action, having been taken by a private association and not by a state government, was not a violation of the Fourteenth Amendment; therefore, the court was without jurisdiction in the matter.¹¹⁵ A union's right to enter into an agreement with an employer under which white union members were preferred to colored union members, regardless of seniority, was upheld for the same reason; the federal court refused to take jurisdiction because no federal constitutional issue was involved. It admitted that the appellant had a grievance and suggested that "somewhere must reside judicial power to adjudicate it, and grant him and others of his class adequate relief," but claimed that it was not within the court's province to say how and where.¹¹⁶ In another case, however, the question was whether a railroad brotherhood that made colored personnel ineligible for membership could be considered the designated bargaining agent for "Red-Caps" who never had an opportunity to vote for the brotherhood as the union of their choosing. In this instance a federal court refused to recognize the union as the representative of the "Red-Caps."¹¹⁷

However, an important new interpretation of the law concerning labor unions has been developed here, culminating in two significant deci-

¹¹¹*Id.* at 26, 176 Atl. at 699-700.

¹¹²*Collins v. International Alliance*, 119 N. J. Eq. 230, 242, 182 Atl. 37, 44 (Ch. 1935).

¹¹³*Simons v. Berry*, 210 App. Div. 90, 205 N. Y. Supp. 442 (1st Dep't 1924).

¹¹⁴*Simons v. Berry*, 240 N. Y. 463, 148 N. E. 636 (1925).

¹¹⁵*National Federation of Railway Workers v. National Mediation Board*, 110 F. (2d) 529, 537 (App. D. C. 1940), *cert. denied*, 310 U. S. 628, 60 Sup. Ct. 975 (1940).

¹¹⁶*Teague v. Brotherhood of Locomotive Firemen*, 127 F. (2d) 53, 56 (C. C. A. 6th, 1942).

¹¹⁷*Brotherhood of Railway and Steamship Clerks v. United Transport Service Employees*, 137 F. (2d) 817 (App. D. C. 1943).

sions of the United States Supreme Court of December 18, 1944. In 1931, a state court had to deal with the question of whether a colored railroad employee who was excluded from membership in the union because of his race, was entitled to union wages as stipulated in the collective agreement negotiated by the union as exclusive bargaining representative for the whole craft in a certain district. The court held¹¹⁸ that in such a case the union wages must apply to all employees of the railroad regardless of color or union membership, and this opinion was followed in a federal decision.¹¹⁹ Recently, the Supreme Court went considerably farther in the same direction.¹²⁰ Again the problem was that of discrimination against a colored man by a union that did not accept colored members. The union was a brotherhood of railroad employees. It had been chosen by the majority of the employees (colored personnel, not being members, of course could not vote) to be their bargaining agent. This meant that under the Railway Labor Act it was the *exclusive* bargaining agent for *all* employees. The Court, speaking through Mr. Chief Justice Stone, deviated from earlier federal decisions and assumed jurisdiction because a federal statute, the Railway Labor Act, had to be interpreted. It held that Congress, in granting exclusiveness of representation to the union chosen by the majority of employees, "did not intend to confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority of the craft, without imposing on it any duty to protect the minority."¹²¹ Otherwise "the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed."¹²²

The Court thus recognized the power over person's lives wielded by a union. It extended the argument for the union's public responsibility (corresponding to its public power) even further, by demanding that the union grant equal protection to all members of the craft in the same manner "as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." The union has powers "comparable to those possessed by a legislative body." Therefore hostile discrimination, such as racial discrimination, by a union was declared to be "obviously irrelevant and invidious."¹²³

¹¹⁸Yazoo & M. V. R. v. Sideboard, 161 Miss. 4, 133 So. 669 (1931).

¹¹⁹Yazoo & M. V. R. v. Webb, 64 F. (2d) 902 (C. C. A. 5th, 1933).

¹²⁰Steele v. Louisville & N. R.R., 323 U. S. —, 65 Sup. Ct. 226 (1944); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, *id.* at —, 65 Sup. Ct. at 235.

¹²¹Steele v. Louisville & N. R.R. 323 U. S. —, 65 Sup. Ct. 226, 230 (1944).

¹²²*Id.* at —, 65 Sup. Ct. at 231.

¹²³*Id.* at —, 65 Sup. Ct. at 232.

Mr. Justice Murphy, concurring (there was no dissent), felt even more strongly about the problem. While holding that a union was "essentially a private organization,"¹²⁴ he emphasized that the exclusive character of the union's bargaining power was "derived solely from Congress" and that it could not be assumed that Congress meant to authorize the union to violate the Fifth Amendment.¹²⁵ Mr. Justice Murphy thus denies the public character of unions but implies, by a novel interpretation of the Constitution, that civil rights are protected against encroachment by *private* organizations as well as against acts of the government.

While it cannot be claimed that the issue of the right to work, as against fellow-workers, is firmly settled by these decisions, so much may be said: a union which refuses admission to membership arbitrarily, while at the same time dominating the labor market in a fairly exclusive manner, creates a monopoly in conflict with public policy. We have come a long way in recognizing the closed shop as a legitimate means to raise labor standards. In recognizing it, we have recognized, likewise, the lawful character of a strike to defend a closed-shop agreement. But, on the other hand, it is established that strikes directed against fully qualified non-union workers may have as their sole purpose hurting them without any appreciable advantage to the strikers. Such strikes constitute an actionable wrong.

If, while dominating the labor market, a union admits members freely, but discriminates among its membership arbitrarily as to job opportunities, it misuses its power contrary to public policy. Union membership is recognized as being of literally vital importance to the worker in many branches of trade.

It is erroneous to put union membership on the same level as membership in a bowling club and to leave untrammelled the union's power to refuse admission. A distinction must be made because of the economic consequences of the refusal in the case of the union, as compared to the social consequences of a bowling club's refusal to admit members. The former may lead to starvation or sub-standard earnings, while the latter will frequently entail merely an injury to social pride.¹²⁶

¹²⁴*Id.* at —, 65 Sup. Ct. at 235.

¹²⁵*Id.* at —, 65 Sup. Ct. at 235.

¹²⁶After these lines were written, the Supreme Court of California handed down a unanimous decision which ruled that a labor union which maintained a closed shop must not be conducted as a closed union. Where the union has attained a monopoly of the supply of labor by means of closed-shop agreements and other forms of collective labor action, the union occupies a quasi-public position and has certain corresponding obligations. This means that it may not "claim the freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its members does

The realization is growing that powerful organizations, though established on a private basis, may, in the course of time, grow into public or quasi-public agencies. The long struggle between the Democratic Party in Texas and the Supreme Court over the Texas "White Primaries" is a case in point. In the well known case of *Smith v. Allwright*,¹²⁷ the Supreme Court rejected the contention that the Democratic Party in Texas was a "voluntary association", that could bar applicants at will. Membership in the party might not be a right, but a privilege; however, when "that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State."¹²⁸

If we apply this reasoning to the role of unions at the present time, the similarity of the situations is striking. While the unions, in their initial stage of development, might justly have been considered private associations for the promotion of their members' interests, this is no longer so. The closed-shop agreements, as approved by the Wagner Act, may be deemed a legitimate protection of the unions' hard-won standards of employment conditions. It seems fair to limit the advantages of a collective agreement to those who live up to union standards of skill and are ready to back the union in times of stress by solidarity of action, while those who kept aloof from the union are barred from reaping the advantages of the collective agreement. If, however, the closed shop spreads over a whole industry or a sizable part of it and at the same time the union's doors are slammed shut to "new-comers," however willing to make amends for their tardiness in joining, a situation arises where the union becomes an entrenched interest within the state, which, by its ability to determine the means of livelihood of a worker, practically wields over him the power of life and death. By having, on the one hand, the right to conclude a closed-shop agreement protected by statute, while, on the other hand, held to be a private association that may grant or refuse admission at will, the union becomes an organization too powerful not to be regulated by law. If the privilege of voting is stronger than the alleged voluntary character of a monopolistic political party, the right to work, which is the basis of human existence, must be considered as even

not merely relate to social relations; it affects the fundamental right to work for a living."

On the basis of this reasoning the court held that in this case either the union must admit Negroes on equal terms with white persons or refrain from enforcing the closed-shop agreement against Negroes. The latter alternative was directed against the employer as well. *N. Y. Times*, Jan. 3, 1945, p. 11, col. 4.

¹²⁷321 U. S. 649, 64 Sup. Ct. 757 (1944).

¹²⁸*Id.* at 664-665, 64 Sup. Ct. at 765.

more fundamentally deserving of protection. As little as the political party, whose organs determine the participants in an election, remains on a level with a bowling club, so little may a union dominating the labor market be considered free to decline admission to qualified applicants. This is, of course, not merely a question of racial discrimination; it is a question of any individual's right to make an honest living.

The unsettled character of the situation is demonstrated by a recent Florida decision. Discussing the legal situation under a closed-shop agreement, the court admitted that "every man and woman not lawfully incarcerated or otherwise incapacitated" had "the right to work and earn a livelihood." However, the decision continued: "It does not follow that all have the right to require any particular person, firm or corporation to give them employment as a matter of right of contract between the employer and the employee."¹²⁹

On the other hand it seems that where it is a matter less of membership in a union than of exclusiveness of representation by a union, the individual is well protected against discrimination by the labor organization. The latter case must be distinguished from the "closed shop—closed union" cases.

The Fair Employment Practice Bills, as introduced in the Seventy-Eighth Congress, went a long way toward protecting this right. Considering the growth of the unions beyond state lines, the power of the federal legislature to intervene can hardly be doubted. Even more sweeping measures might be taken in due course to prevent any sort of arbitrary refusal by unions to admit members. To tolerate the establishment of unions as impenetrable guilds would be un-American in the highest degree. They are as little entitled to untrammelled power over the public as a whole as are large corporations.

A weak advance in this field can be noticed in a few state laws. Under the Wisconsin Employment Peace Act, the Employment Relations Board (whose functions resemble those of the National Labor Relations Board) may terminate an "all-union" agreement whenever it finds that the labor organization "has unreasonably refused to receive as a member any employee" of the employer with whom the agreement was concluded.¹³⁰ Similarly the Pennsylvania Labor Relations Act¹³¹ permits closed-shop agreements only if the labor organization involved "does not deny membership in its

¹²⁹International Ass'n of Machinists v. State, 153 Fla. 672, 683, 15 So. (2d) 485, 491 (1943).

¹³⁰WIS. LAWS 1939, c. 57, WIS. STAT. (1941) § 111.06, 1 (c), second sentence.

¹³¹PA. LAWS 1937, No. 294, PA. STAT. (Purdon, 1936) tit. 43 § 211, 6 (c).

organization to a person or persons who are employees of the employer at the time of the making of such agreement." These state laws obviously do not protect the non-union worker who is not an employee of the employer at the time the closed-shop agreement is entered into, but only the non-union worker who happens to be already employed at such time. The unions are not required to accommodate "newcomers" in the field. This gap should be filled by federal and state legislation in the respective fields of the national and state governments.

To some extent anti-discriminatory legislation has been brought about by the necessities of war. New York,¹³² New Jersey,¹³³ and Illinois¹³⁴ outlaw racial discrimination in the hiring of employees by war contractors. New York, furthermore, forbids racial discrimination by labor organizations and imposes a penalty, to be recovered by the aggrieved person, upon violators of the law.¹³⁵ Nebraska enjoins unions from negotiating collective agreements that discriminate against workers on account of their race or color, and charges the state department of labor with enforcing this policy "in conformity with Article I of the constitution of Nebraska and *section 1 of the Fourteenth Amendment to the Constitution of the United States of America*,"¹³⁶ thus applying the Constitution to a violation of civil rights by *private* associations. Kansas denies the right to be a bargaining agent to a union which "discriminates against, or bars, or excludes from its membership any person because of his race or color" but excepts the transportation industry.¹³⁷

The controversy about alleged or real abuses of the closed shop recently has led to the proposition of constitutional amendments outlawing the closed shop in several states. While amendments to this effect were voted in Arkansas and Florida on November 7, 1944, the voters of California rejected the anti-closed shop proposition.¹³⁸ At any rate, while the trend is worth noticing, state constitutions or statutes banning the closed shop will be largely ineffective as long as the National Labor Relations Act protects it.

Senator Dennis Chavez has already reintroduced his Fair Employment Practice bill,¹³⁹ so it seems that the idea of protecting the right to a job

¹³²N. Y. LAWS 1941, c. 478, § 1, amended, LAWS 1942, c. 676, § 1, N. Y. CIVIL RIGHTS LAW § 44.

¹³³N. J. LAWS 1942, c. 114, p. 387, §§ 1-3, N. J. STAT. ANN. (1939) 10:1-10 to 10:1-12.

¹³⁴ILL. LAWS 1941 c. 557, §§ 1-7, ILL. ANN. STAT. (Smith-Hurd, 1931) c. 29, §§ 24 a-g.

¹³⁵N. Y. LAWS 1940, c. 9, § 1, N. Y. CIVIL RIGHTS LAW § 43.

¹³⁶NEB. LAWS 1941, c. 96, p. 406, NEB. COMP. STAT. (Supp. 1941) § 48-801. Italics supplied.

¹³⁷KAN. LAWS 1941, c. 265, § 1, p. 428, KAN. GEN. STAT. ANN. (Supp. 1941) § 44-801.

¹³⁸N. Y. Times, Nov. 9, 1944, p. 15, col. 3.

¹³⁹Ithaca Journal, Dec. 27, 1944, p. 1, col. 3.

both against employers and against unions has taken a firm hold in the mind of our legislators. However, in offering protection against racial and religious discrimination, the bills proposed thus far fall short of the wishes of another group complaining of discrimination, the women of America. The problem of women's right to work is still unsolved and leaders of women's organizations complain bitterly of the advantage granted to racial and religious minority groups over American women.¹⁴⁰ They point out that Negroes were granted the vote 55 years before woman suffrage became part of the Constitution, and that now again, with regard to discrimination in employment, the position of Negroes and other racial groups may be improved before women are given equality in employment with men.

Thus the proposed bills, while constitutionally sound, are likely to run into opposition not only from those who think the bills go too far toward government control, but also from those who claim that the bills do not go far enough toward establishing true equality of economic opportunity.

¹⁴⁰"The Anti-Discrimination Bill," Letter to the Editor, N. Y. Herald-Tribune, Dec. 17, 1944, sec. II, p. 5, cols. 7 and 8.