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Contributors to the May Issue/Notes

John M. Anderton

Robert F. Burns

B. M. Apker

Thomas F. Broden

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CONTRIBUTORS TO THE MAY ISSUE

Ferdinand A. Hermens, Ph. D., University of Bonn; Student, London School of Economics and Political Science; Professor of Politics, University of Notre Dame; Author of various books and contributor to numerous periodicals.

Clarence E. Manion, A.B., St. Mary's College, Kentucky; A.M., 1916, Ph.M., 1917, Catholic University of America; J.D., 1922, University of Notre Dame; J.U.D., 1942, Boston University. Author of *American History* (1926); *Lessons in Liberty* (1939); *Liberty and the Police Power* (1928); *Catholics in our Country's Story* (1929); Dean and Professor of Law, University of Notre Dame, College of Law.

John H. Merryman, A.B., 1943, M.S., 1944, University of Portland, J.D., 1947, University of Notre Dame. Winner "Certificate of Award" in the Nathan Burkan Memorial Competition of 1947. Now serving a teaching fellowship at New York University.

Alfred Long Scanlan, A.B., Columbia University, 1941; L.L.B. L.L.M., 1947, The George Washington University School of Law; Attorney Federal Power Commission, 1946-7; Professor in Law, University of Notre Dame, College of Law. Contributor *George Washington Law Review*, *Rocky Mountain Law Review*.

NOTES

PATENT LAW—PATENTS AND PRICE FIXING—Corporations relying on their domination of the basic patents in an industry to control the prices of patented articles throughout the industry are standing on dangerous ground in view of the recent rash of suits filed by the Anti-Trust Division of the Justice Department under the Sherman Act, and more specifically in view of two decisions in favor of the government handed down by Mr. Justice Reed on the same day.¹

In *U. S. v. Line Material Co., et al.*,² the restraint arose from a cross-license arrangement between the patent owners, Line Material Company,

¹ *United States v. Line Material Co. et al.*, U. S., 68 S. Ct. 550 (1948); *United States v. United States Gypsum Co. et al.*, U. S., 68 S. Ct. 525 (1948).

² U. S., 68 S. Ct. 550 (1948).

hereinafter referred to as Line, and Southern States Equipment Corporation, hereinafter called Southern, to fix the sale price of the devices, to which arrangement the other appellees,³ licensees to make and vend, adhered by supplemental contracts. The challenged arrangements center around three patents for products which are useful in protecting an electric circuit from the dangers incident to a short circuit or other overload. Two of them are dropout fuse cutouts, while the third is a housing suitable for use with any cutout. Substantially all the dropout fuse cutouts made in the United States are produced under these patents. The dominant patent⁴ in this field was issued to Southern, as assignee, on an application of George Lemmon. The Lemmon application was involved in interference with a co-pending application⁵ assigned to Line by the inventors, Schultz und Steinmayer. The decision of the Patent Office, awarding dominant claims to Southern on the Lemmon application and subservient claims to Line on the Schultz application, made it impossible for any manufacturer to manufacture the products when patents issued, without obtaining licenses from both companies under their respective patents.

Such an arrangement was not long forthcoming. Line granted Southern a license to make and vend the prospective Schultz-patented apparatus with the exclusive right to grant sublicenses to others. Line also agreed to sell equipment covered by the Southern patent at prices not less than those fixed by Southern. Line then proceeded to inform practically all the other manufacturers of dropout fuse cutouts that Southern had authority to grant licenses under the Schultz patent. Later, however, both companies agreed to substitute Line as licensor for the other manufacturers and to delegate the maintenance duties to it. Although price limitation was actively opposed by several of the licensees, including General Electric, the largest producer of the patented appliances, all were forced to accept the terms or cease manufacture. By accepting, they secured release from claims for past infringement through a provision to that effect in the license.

Being convinced that the case of *United States v. General Electric Co.*⁶ controlled and permitted such price arrangements as are disclosed in the aforementioned contracts, the District Court dismissed the complaint in the *Line* case. The *General Electric* case involved an agreement between General Electric and Westinghouse through which West-

³ General Electric, James R. Kearney Corp., Westinghouse, Schweitzer and Conrand, Inc., Railway & Industrial Engineering Co., W. M. Matthews Corp., Porcelain Products Co., Royal Mfg. Co., Pacific Electric Mfg. Co., and T. F. Johnson.

⁴ Patent No. 2,150,102.

⁵ Patent No. 2,176,227; Re 22,412.

⁶ 272 U. S. 476, 47 S. Ct. 192, 71 L. Ed. 362 (1926).

inghouse was licensed to manufacture lamps under a number of General Electric's patents, on condition that it should sell them at prices fixed by the licensor. Chief Justice Taft, supported by a unanimous court, upheld the price agreement as a valid exercise of patent rights by the licensor. Speaking of this arrangement, Mr. Justice Taft said: ⁷

If the patentee . . . licenses the selling of the articles (by a licensee to make), may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly.

The government asked the Supreme Court to overrule the *General Electric* case and thus to shatter the precedent that a patentee has power to establish a price below which a licensee may not vend a patented article. Although the decision of the court, written by Mr. Justice Reed, was in favor of the Government, he did not find it necessary to expressly overrule the *General Electric* case in order to do so, holding: ⁸

As the Schultz patent could not be practiced without the Lemmon, the result of the agreement between Southern and Line for Line's sublicensing of the Lemmon patent was to combine in Line's hands the authority to fix the prices of the commercially successful devices embodying both the Schultz and Lemmon patents. Thus though the sublicenses in terms followed the pattern of General Electric in fixing prices only on Line's own patents, the additional right given to Line by the license agreement of January 12, 1940, between Southern and Line, to be the exclusive licensor of the dominant Lemmon patent, made its price fixing of its own Schultz devices effective over devices embodying also the necessary Lemmon patent.

By the patentees' agreement the dominant Lemmon and the subservient Schultz patents were combined to fix prices. In the absence of patent or other statutory authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal per se under the Sherman Act. This is true whether the fixed price is reasonable or unreasonable. It is also true whether it is a price agreement between producers for sale or between producer and distributor for resale.

⁷ *Id.* at 490.

⁸ *United States v. Line Material Co. et al.*, U. S., 68 S. Ct. 550, 560 (1948).

The court further pointed out that as early as 1912⁹ the Supreme Court had unanimously condemned price limitation under pooled patent licenses and held that a price limitation was unlawful per se. In applying the general rule against price limitation to the case at bar, the court stated:¹⁰

When patentees join in an agreement as here to maintain prices on their several products, that agreement, however advantageous it may be to stimulate the broader use of patents, is unlawful per se under the Sherman Act. It is more than an exploitation of patents. There is the vice that patentees have combined to fix prices on patented products. It is not the cross-licensing to promote efficient production which is unlawful. There is nothing unlawful in the requirement that a licensee should pay a royalty to compensate the patentee for the invention and the use of the patent. The unlawful element is the use of the control that such cross-licensing gives to fix prices.

Mr. Justice Douglas, in writing a special concurring opinion advocating that the *General Electric* case be overruled, castigated the price fixing activities of the appellees as a powerful inducement for the abandonment of competition, maintaining that such practices have "saddled the economy with a vicious monopoly" in underwriting the high cost producer by "protecting him against competition from low cost producers."

In the case of *U. S. v. United States Gypsum Company et al.*¹¹ the appellees were likewise charged with violation of the Sherman Act by conspiring to fix prices on a patented article, in this case a patented gypsum board, and also on unpatented gypsum products. The appellees were engaged in the production of gypsum and the manufacture of gypsum wallboard, and gypsum plaster. Gypsum board is made by taking the crushed and calcined mineral, adding water, and spreading the gypsum slurry between two paper liners. When the gypsum hardens, the mineral adheres to the paper and the resulting product is used in construction. In 1912, United States Gypsum received as assignee a patent to one Utzman¹² covering claims on board with closed side edges, the lower paper liner being folded over the exposed gypsum core. This closed-edge board was a revolutionary improvement over the open-edge board previously used, since it was cheaper to produce, did not

⁹ *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 33 S. Ct. 9, 57 L. Ed. 107 (1912).

¹⁰ *United States v. Line Material Co. et. al.*, U. S., 68 S. Ct. 550, 564 (1948).

¹¹ U. S., 68 S. Ct. 525 (1948).

¹² Patent No. 1,034,746.

break so easily in shipment, and was less subject to crumbling at the edges when nailed in place. The patent was involved in considerable litigation,¹³ and each time was upheld as valid and infringed, whereupon United States Gypsum would offer the infringer a license to practice the closed-edge board patent with a provision that United States Gypsum should fix the price at which the infringer sold patented board. Other infringers, when faced with suit, accepted licenses with similar price fixing arrangements, until, in 1937, United States Gypsum had gained complete control over the price and terms of sale of virtually all gypsum board. Thus, United States Gypsum granted licenses and the other defendants accepted licenses with the knowledge that all other concerns in the industry would accept similar licenses, and laid the foundation for the government's charges that competition was eliminated by fixing the price of patented board, eliminating the production of unpatented board, and regulating the distribution of patented board.

The government relied very strongly on documentary evidence in the *Gypsum* case, such evidence including the licenses containing the price fixing provisions, correspondence leading up to such licenses, and a series of bulletins which United States Gypsum issued which defined in minute detail both the prices and terms of sale for patented gypsum board. One memorandum from one Blagden, president of a company which infringed U. S. Gypsum's patents, to Sewell Avery, president of United States Gypsum, pointed out that if his company settled on the terms offered by Avery, the result would enable U. S. Gypsum to "maintain a lawful price control and avoid the necessity of a reduction by U. S. Gypsum of current prices to meet competition."¹⁴ Subsequently, he accepted a license on the terms offered by Avery. Another damning bit of evidence introduced by the government was the unveiling of the activities of a subsidiary owned by U. S. Gypsum named Board Survey, Inc., which was established in order to insure compliance with the price bulletins issued by U. S. Gypsum. Licensees were invited to send in complaints as to violations of pricing bulletins to Board Survey, and that organization forwarded the complaints to the alleged delinquent licensees. Board Survey was authorized to make a thorough check-up of all reported violations and to take such action as it might deem necessary or proper to protect U. S. Gypsum's rights under the license agreements and patents.

When the authors of these damaging documents were called to the witness stand, they denied in most instances that they had acted in concert in securing patent licenses or that they had agreed to do

¹³ *Bestwall Mfg. Co. v. United States Gypsum Co.*, 270 Fed. 542 (C. C. A. 7th 1921).

¹⁴ *United States v. United States Gypsum Co. et al.*, U. S., 68 S. Ct. 525, 531 (1948).

the things which were, in fact, done. By way of reprimand, the court stated,¹⁵ "Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."

Defendants in this case, like the defendants in the *Line* case, placed great reliance on the *General Electric* case previously mentioned. Although Justice Reed refused to overrule the *General Electric* case (which he could hardly do in view of his decision in the *Line* case), he nevertheless held that:¹⁶

The General Electric case affords no cloak for the course of conduct revealed in the voluminous record in this case. That case gives no support for a patentee, acting in concert with all members of an industry, to issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.

The Justice added that this conclusion followed despite the attempt to make each individual license legal under precedent set down in the *General Electric* case, adding, "lawful acts may become unlawful when taken in concert." Repeating his argument upon which he relied in the *Line* case that price fixing, without authorizing statutes, is illegal per se, the Justice concluded:¹⁷

Patents grant no privilege to their owners of organizing the use of those patents to monopolize an industry through price control, through royalties for the patents drawn from patent-free industry products and through regulation of distribution. Here patents have been put to such uses as to collide with the Sherman Act's protection of the public from evil consequences.

The broad problem presented by these cases is not a new one. Shocking disregard for the public good brought control of monopoly abuses in the English Statute of Monopolies in 1623.¹⁸ The act, however, recognized the need for granting letters patent for a term of one and twenty years to the first true inventor or inventors of any new manufacture.

The framers of our Constitution authorized Congress to establish a patent system in Article I, Section 8.

¹⁵ *Id.* at 542.

¹⁶ *Id.* at 544.

¹⁷ *Id.* at 544.

¹⁸ 21 Jac. I, c. 3.

The Congress shall have power . . . To promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .

Congress passed the first patent act in 1790 and revised it in 1836. It is generally agreed that the rapid progress in England and America in the industrial arts since the Industrial Revolution has been greatly stimulated by a protective patent system, by free liberal government and by free enterprise. Monopoly is an abhorrent word to the true believers in free responsible enterprise.

Committed nationally as we seemed to be to free competitive enterprise, we passed the Sherman Anti-Trust Act on July 2, 1890. The historical reasons for that act must of necessity lie beyond the scope of this note. The Act stated: ¹⁹

Every contract, combination in the form of trust or otherwise or conspiracy in restraint of trade or commerce among the several States, or with foreign nations is hereby declared to be illegal . . .

Since the enactment of that law it has been the duty of the courts to draw the fine line between the legally granted monopoly of a patent and the legally prohibited monopoly in restraint of trade. A twilight zone does exist and since powerful corporations have chosen to operate within that penumbra to extend their patent monopolies, the courts are called upon to determine exact boundaries. If court decisions are incapable of protecting the general public welfare, legislation will come of necessity.

The *Bement v. National Harrow Company* case,²⁰ decided in 1902, would not call all restraint of trade illegal, but would divide restraint of trade into reasonable and unreasonable categories and decide each case upon the merits of the surrounding circumstances. The Court stated: ²¹

But that statute (Sherman Anti-Trust Act) clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.

¹⁹ 26 STAT. 209, 15 U. S. C. 1 (1890).

²⁰ 186 U. S. 70, 22 S. Ct. 747, 46 L. Ed. 1058 (1902).

²¹ *Id.* at 92.

The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it, or sell the right to manufacture and sell the article patented, upon the condition that the assignee shall charge a certain amount for such article.

As was previously stated, in 1926 the *General Electric* case approved as lawful a patentee, licensee contract to make and vend the patented article, wherein the licensee was required to sell the articles made by him at a price set by the licensor.

The two cases, as used in attempts to justify extension of patent rights beyond situations or conditions actually passed on therein, seemed to set a favorable legal stage for the technical broadening of the patent monopoly which could and did result in regimentation of whole industries by license and cross license agreements, which could include or exclude producers, control resale prices, require the purchase of unpatented materials, allocate or limit production, prescribe sales areas, establish and control the selling price of articles, and eliminate a whole class of dealers whenever such was wished. During this period of "freedom" and "free enterprise" the Hartford Empire, the United States Gypsum Company and numerous other combinations were growing.²²

It is to the credit of President Roosevelt, that in a message to Congress April 29, 1938, he called attention to the "need for a thorough study of the concentration of economic power and its injurious effects on the American System of free enterprise." This message stimulated the creation of the Temporary National Economic Committee by a joint resolution of Congress.²³ The sound and fury over the testimony before that committee as well as over its final report still reverberates. Books and articles have been written explaining, criticizing and defending it.²⁴ Abuses were revealed and have perhaps had some influence upon current court decisions. Many other articles assuming that

²² Footnote 15 to the opinion of the court in *United States v. United States Gypsum Co. et al.*,U. S., 68 S. Ct. 525, 542 (1948).

²³ Public Resolution No. 113, 75th Congress, approved June 16, 1938.

²⁴ FOLK, PATENTS AND INDUSTRIAL PROGRESS (2d Ed. 1942); BARNETT, PATENT PROPERTY AND THE ANTI-MONOPOLY LAWS (1943); Thurman Arnold, *The Abuse of Patents*, *The Atlantic Monthly*, July, 1942; Langer, *We Depend on Invention*, July, 1942 (An answer to Thurman Arnold).

we are still a people believing in competitive free enterprise have appeared in current periodicals charging injustices and abuses in the use of our patents.²⁵ Neither courts nor legislatures will ignore for long this rising tide of protest.

The patent bar and corporate executives will be asking in the light of the *Line Material Company* decision and the *United States Gypsum* decision, how broad is a patent monopoly? What is the advisability of any price control in license agreements, in view of the aim of the Department of Justice to secure an overruling of the *General Electric* case, and in view of the acceptance by a minority of the Supreme Court of the philosophy of the Justice Department? What is reasonable restraint of trade in the exercise of the patent monopoly rights? In view of the growth of concentrated industrial power and regimented industries, even to the extent of world cartel systems,²⁶ what is to be our future judicial and legislative direction in this field?

Basic assumptions may guide in prophecy. If free competitive enterprise is our aim, then vigilant and rigid control of restraint of trade and of monopolies is a necessary concomitant. We rightly stake out limited monopolies by our patent grants in that field of freedom. But free enterprise is the broad rule and patent monopolies are the narrow exceptions. Chief Justice Taft said in the *General Electric* Case:

It would seem entirely reasonable that he (the patentee) should say to the licensee, "Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself."

An answer might be, you (the licensee) pay me (the patentee) a reasonable royalty and if you can manufacture and sell my patented article cheaper than I can, and still bear the royalty overhead from which my manufacturing efforts are free, you should be manufacturing the article, I should be living on my royalty, and the consumer should be buying the article cheaper.

That seems to be the core of free competitive enterprise and seems to be the encouragement and challenge which should be held out to the efficient even as patent grants are held out to the inventive.

Even if the *General Electric* case stands as "rule of reason" law permitting selling price control by the patentee over his licensee, it still seems that when patentees and licensees, otherwise normal competitors,

²⁵ *War and Peace and the Patent System*, Fortune, August, 1942; Chase, *The Rise and Fall of the Great Bottle Trust*, Reader's Digest, December, 1947; Maisel, *Combination in Restraint of Health*, Reader's Digest, February, 1948; Maisel, *Better Vision . . . With a "Kickback"*, Reader's Digest, January, 1948; *What's Holding up the Nickel Cadmium Battery?*, Consumer Reports, March, 1948.

²⁶ *No Peace With I. G. Farben*, Fortune, September, 1942.

combine in agreements to control or fix prices, they invade the "unlawful per se" area of the Sherman Act. Such agreements with competitors yield more than lawful remuneration, they yield also suppression of competition and resultant monopolies.

We are a free and freedom loving people who by and large do not like monopolies or "price controls" either by bureaucrats or Sewell Avery. Our future attitudes toward patent monopolies will be conditioned by their uses and abuses. We grant patents for the purpose of promoting the progress of science and the useful arts. We grant to the inventor a protected right to make, use or vend his invention for a period of time. Both these grants are absolutely secondary to the general welfare of all the people. So long as our enterprise remains free, patent monopolies must not be a tool for a regimentation of industries or for other purposes inconsistent with, or not clearly within the spirit of, the aim to promote invention.

Our patent system is accepted as beneficial and sound by intolerable current abuses will and should sharpen the anti-trust laws and their application, even as other abuses created them.

John M. Anderton

Robert F. Burns

CIVIL RIGHTS—THE KU KLUX KLAN MENACE.—An Associated Press release of March 9th reports that the Ku Klux Klan claims an increase in membership because of the civil rights issue raging in Congress and throughout the South. "A newly issued pamphlet states that the Klan is ready for a period of 'constructive planning and activity'."¹ Such storm warnings should bring forcefully to the mind of every American the need for affirmative action against this menace in American society.

The history of the Klan is fairly a matter of common knowledge. The name and anti-Negro program are descendants of the old Ku Klux Klan of the Reconstruction period; its nativism and anti-Catholic program are akin to the Know- No- thing Party and the American Protective Association.² The Klan reached its greatest strength in the 1920-1930 era, then abruptly subsided and engaged in very little publicized activity, although a similar hate element manifested itself as the Black Legion, and more recently, the Columbians. Now it threatens "con-

¹ Associated Press release of March 9th, 1948.

² See the excellent discussion of the history of the Klan, as well as legislation and judicial attitude: Note, 14 CORN. L. Q. 218 (1929).

structive activity" to combat an effort to secure to all citizens the rights guaranteed them by the Constitution and laws of the United States. Such threats should not go unchallenged. It is the purpose here to consider means to check this outrage.

In the past, courts have generally lent their aid to protect the Klan in its civil operations. Klan members have been told to exhaust their remedies within the society before appealing to the courts, when challenging an expulsion.³ Again, the Klan has been allowed to enjoin the use of a similar name by another organization.⁴ However, a courageous federal court has rendered a decision⁵ which can point the way to judicial disfavor of the society. In an action to enjoin an unauthorized use of its name, and recover property allegedly stolen, and an accounting of misappropriation, the court refused the Klan equitable relief. The opinion is so forceful and direct that it deserves to be quoted at length:

In view of all the facts disclosed by the evidence, the plaintiff corporation, stigmatized as it is by its unlawful acts and conduct, could hardly hope for judicial assistance in a court of the United States, which is highly commissioned to extend to all litigants before it, without distinction of race, creed, color, or condition, those high guarantees of liberty and equality vouchsafed by the Constitution of the United States. A court whose duty it is to recognize and uphold religious freedom as the first fruits of our civilization, to secure to every accused the right to full knowledge of the accusation against him, and a fair and impartial trial of the issue before a jury of his peers; a court which fully recognizes that this is a government of law, and not of men, and that no man shall be deprived of his life, his liberty, or his property without due process of law.⁶

As has been said, "If this rule is upheld by courts of equity, and adopted by the courts of law, the Klan will be practically an outlaw."⁷ It is difficult to see how the principle could be applied in an action at law, but the appeal to the conscience of an equity court is persuasive, and could be adopted generally. Since it resorts to its own peculiar administration of justice, the Klan should not be allowed to claim for itself what it denies to others.

³ *Terrell v. Knights of the Ku Klux Klan*, 155 Ga. 135 374, 116 S. E. 289, 793 (1923).

⁴ *Knights of the Ku Klux Klan v. Independent Klan of America*, 11 F. (2d) 881 (D. Ind. 1926).

⁵ *Knights of the Ku Klux Klan v. Strayer*, 26 F.(2d) 727 (W.D. Pa. 1928).

⁶ *Knights of the Ku Klux Klan v. Strayer*, 26 F. (2d) 727, 729 (W.D. Pa. 1928).

⁷ 14 CORN. L. Q. 218, 222. (1929).

Undoubtedly, immediate and effective action is possible at the state level. There are two courses open to the several states to combat such organizations. The first is through control of their incorporation: to refuse to charter them, if their nature can be ascertained beforehand; to revoke charters already existing, if their true nature becomes known. Their claim of being fraternal organizations is fraud; they neither promote the general welfare of the members, nor do they uphold traditional American patriotic principles. Revocation of charters would remove the protection and condonation of the states. If they then continued to operate, they would violate state laws regarding incorporation of such societies.

The second course of action is direct state legislation under the police power. Several states have laws making it a crime to wear a hood or mask in public, or imposing more stringent penalties for crimes committed while masked, or making trespass while masked presumptive of an intent to commit a felony.⁸ The courts of New York⁹ have upheld a law¹⁰ requiring the filing of names of officers and members, against a challenge of invalid classification and deprivation of due process. Florida¹¹ has outlawed secret societies in the public schools, and that legislation has been sustained.¹² In the absence of specific legislation, Klan activities could be prosecuted as riot¹³ or unlawful assembly.¹⁴

Since the Civil War, there have been various attempts at federal action under the Fourteenth and Fifteenth Amendments. The Act of 1871,¹⁵ a force act, was fairly effective, but was subsequently declared unconstitutional in *United States v. Harris*,¹⁶ in 1882. It was there

⁸ See, as typical: WILLIAMS TENN. CODE ANN. (1934) §§ 11,030-11,033; CODE OF IOWA (1946) § 694.3; and see 14 CORN. L. Q. 218 (1929), citing also LA. "Hood and Mask Law," LA. REV. STAT. (Marr. Supp. 1926) 999-1007; MISS. LAWS (1870) c. 17.

⁹ *People ex rel. Bryant v. Zimmerman*, 213 App. Div. 414, 210 N.Y.S. 269 (1925); *affirmed*, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184 (1928).

¹⁰ CIVIL RIGHTS LAW N. Y. (Cahill Supp. 1928) c. 7 §§ 53, 56.

¹¹ F. S. A. (ch. 21777 1943) § 242.46.

¹² *Satan Fraternity v. Board of Public Instruction for Dade County* Fla., 22 So. (2d) 892 (1945).

¹³ *Perkins v. State*, 35 Okla. Cr. App. 279, 250 Pac. 544 (1926).

¹⁴ "An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner, as to cause persons in the neighborhood to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly, and without any reasonable occasion, provoke other persons to disturb the peace tumultuously." *Aron v. City of Wausau*, 98 Wis. 592, 74 N.W. 354, 355 (1898). This case was cited in *Shields v. State*, 187 Wis. 448 204 N.W. 486 (1925), which held that a Ku Klux Klan parade conducted in an orderly and peaceful manner, permission therefor having been obtained from the city's mayor, was not an unlawful assembly.

¹⁵ 17 STAT. 13, Act of April 20, 1871.

¹⁶ 106 U.S. 629, 1 S. Ct. 601, 27 L.Ed. 290 (1883).

held that the Fourteenth Amendment would not support federal legislation against the activities of individuals, but only against invasions by the states. This principle has been reiterated in *United States v. Cruikshank*,¹⁷ and many other cases.¹⁸ Here again, however, we have a judicial declaration that may pave the way for effective federal action. *United States v. Ellis*,¹⁹ decided in 1942, declares that Congress intended the re-enactments of 1909²⁰ to protect the free enjoyment of any right or privilege under the Constitution or laws of the United States. These re-enactments may therefore play an important role in support of federal action. This first section²¹ forbids a conspiracy to deprive any person of secured rights and privileges:

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined . . . , and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

The second section²² prescribes a penalty for deprivation of those rights under "color of law":

Whoever, under color of any law, statute, ordinance, regulation, or custom, wilfully subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1000, or imprisoned not more than one year, or both.

¹⁷ 92 U.S. 542, 23 L.Ed. 588 (1876).

¹⁸ See, e. g., *Ex Parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (1880); *Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883). Cf. *U. S. v. Classic*, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). For a thorough discussion of the Fourteenth Amendment as the basis of federal legislation, see Callison and Rawl, *Federal Prosecution of Civil Rights Cases*, 8 YEAR BOOK OF THE SELDEN SOCIETY 30 (1947).

¹⁹ 43 F. Supp. 321 (W.D. S.C. 1942).

²⁰ Criminal Code of March 4, 1909, 35 STAT. 1088, c. 321. See *United States v. Mosley*, 238 U.S. 383, 35 S. Ct. 904, 59 L.Ed. 1355 (1915).

²¹ 35 STAT. 1092, 18 U.S.C. §51 (1909).

²² 35 STAT. 1092, 18 U.S.C. §52 (1909).

It is noteworthy that the first section will support an indictment for the conspiracy alone, no overt act in pursuance thereof being necessary.²³

*To secure these rights: The Report of the President's Committee on Civil Rights*²⁴ suggests another means of supporting federal legislation. *Missouri v. Holland*,²⁵ in 1920, held that Congress may enact statutes to carry out treaty obligations, though in the absence of a treaty, it has no power to pass such a statute. Under the United Nations Charter, all members pledge themselves "to take joint and several action in cooperation with the Organization for the achievement of purposes set forth in ART. 55."²⁶ (emphasis supplied). ARTICLE 55(c) requires promotion of "Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."

It is acknowledged that any legislation under the authority of a treaty provision must necessarily have limitations, but . . . "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .",²⁷ and it is not beyond reasonable supposition that such legislation could be predicated upon the treaty clause.

The President's Committee also urges strengthening the existing federal laws, clearly defining the rights protected to withstand the charge of vagueness, and the establishment of a separate Division in the Department of Justice to carry out the federal program.²⁸ To date, the House Un-American Activities Committee has issued no reports of hearings on activities of the Klan.²⁹

The foregoing considerations concern effective regulation of the Klan and similar societies, both by controlling the organization and by penalizing activities calculated to deprive others of human rights. It is often proposed that some means be devised to outlaw the Klan. The difficulties in the path of such a plan are great. There is nothing objectionable about a truly fraternal organization, although it be secret. There are grave constitutional doubts regarding an outright ban, and

²³ *Montoya v. United States*, 262 Fed. 759 (C.C.A. 8th 1919). §51 was not repealed in 1909, and stands good for whatever it properly covers. *Powe v. United States* 109 F.(2d) 147 (C.C.A. 5th 1940).

²⁴ Report of The President's Committee on Civil Rights, *To Secure These Rights*, pp. 110, 111.

²⁵ 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920). See *Hauenstein v. Lynham*, 100 U.S. 483, 25 L.Ed. 628 (1880).

²⁶ U. N. CHARTER, ART. 56.

²⁷ U. S. CONST. ART. VI, §2.

²⁸ *To Secure These Rights: The Report of the President's Committee on Civil Rights*, pp. 151-153.

²⁹ Release of House Committee on Un-American Activities, April 1, 1948.

it is probably unnecessary to attempt that drastic a measure. When a government attempts to set itself up as a censor of thought, it teeters on the brink of tyranny.

But it is not impossible to prevent the terrible effects of intolerance. The true solution is legislation to curb abuses by individuals and organizations which deprive others of the freedoms they demand for themselves, coupled with a sincere and determined effort to eradicate through education the ignorance that engenders bigotry. Only by a clear understanding and appreciation of God-given rights and equality and fundamental freedoms can the American nation resolve the problems it faces. True Brotherhood of Man depends upon a recognition of the Fatherhood of God. With our own house in order, we can accept our duties of leadership in democratic action in the world.

B. M. Apker

LABOR LAW—COMMENT ON THE TAFT-HARTLEY ACT, TITLE III.—A fair and just discussion of the Taft-Hartley Act¹ is impossible without a fair determination of the purpose for which it was enacted. The Act itself explains that its purpose is to protect by legal procedures the rights of employees, employers, and the public concerning labor disputes affecting commerce. But to understand fully the basic purpose for this or another law applicable to labor-management relations, we must examine the justification for government activity in the economic sphere.

The purpose of government is to guarantee the common happiness. All agree that a certain amount of material goods are absolutely necessary to the happiness of men. It is the primary purpose of economic activity to produce and distribute these material goods. If the economic forces acted so as to guarantee that amount of material goods requisite to the happiness of all individuals within their sphere, there would be no justification for governmental regulation of economic activity, provided, of course, that all of the other rights of the individual were also guaranteed.

Our nation has embraced the capitalistic system. Therefore, it is the duty of this economic system to guarantee to all individuals within its sphere the production and distribution of material goods relating to their happiness. If the economic system does not guarantee this production and distribution, it is the duty of the government, then, to take the necessary steps in regulating capitalism so that happiness of all will result.

¹ Labor Management Relations Act, 1947, 61 STAT. 120.

It is beyond denial that "free"—that is, *laissez-faire*—capitalism failed to exercise the before-delineated function of the economic system. During the period of rampant industrial expansion of the late Nineteenth and early Twentieth centuries, large segments of the propertyless working classes and the farmers were reduced to economic slavery. The unregulated capitalistic system, which, by its very nature, gives an advantage to the employer² had demonstrated its incapacity to serve the wants of human beings. Therefore, since this natural advantage could best be offset by workmen combined together, for the purpose of presenting their collective grievances, labor unions came into existence. But these, without governmental protection, were placed at a great disadvantage themselves because their activities were looked upon with disfavor by all employers, most courts, and some legislators. Therefore, since the capitalistic system had shown its inability to function properly without being regulated, the government at last stepped in between labor and management and secured to each the right of collective bargaining which is the very life blood of trade unionism.

Legislation which is generally regarded as "favorable to labor" culminated in the National Labor Relations Act, passed in 1935.³ The policy of this Act—that of encouraging amicable settlements of labor disputes by collective bargaining—is the guiding principle of all governmental interference with labor-management relations.

As long as both parties come to the bargain table in good faith, neither party may be forced to concede any of its positions. The National Labor Relations Board has the power to determine—upon the complaint of either of the parties—whether or not an unfair labor practice is being perpetrated by the other party. The Board has never tried to decide summarily the primary incidents of labor relations. Statutory enactments cannot solve the basic problems of labor and management; to pretend to do so would be to destroy the basis of our free enterprise system. These basic issues must be left to the disputants themselves. The bargaining power of both parties must be equal.

Nevertheless, there are those who reached the conclusion that the scales had swung far in favor of the unions. A series of particularly spectacular strikes, coming upon the heels of the war, stirred up a wave of emotionalism against the unions. The proponents of change in the Wagner Act wrote the Taft-Hartley Act, which is the subject of discussion here.

² ADAM SMITH, *WEALTH OF NATIONS* Chapter 4, enunciates the fact of employer or master supremacy by the very nature of a capitalistic economy. Whether this is to be considered an inherent weakness in the capitalistic system depends upon the economic philosophy of the individual, but the fact of the advantage can hardly be questioned.

³ 49 STAT. 449.

The Taft-Hartley Act has been divided into five titles. Title I⁴ and Title II⁵ have been discussed in previous issues of the *NOTRE DAME LAWYER*. We shall discuss Title III.

Section 301 of the Taft-Hartley Act reiterates the already accepted fact that unions are liable in court actions for violations of any contracts into which they may enter. Any district court of the United States may now, however, assume jurisdiction of a case involving a labor dispute without the ordinary requisites concerning the amount involved or diversity of citizenship. The requirement of the Norris-LaGuardia Act⁶ that the liability of labor unions for acts of its agents could only be imputed to the union when there was authorization or ratification by the union has been changed by the Taft-Hartley Act. Now the authorization or ratification is not to be controlling. Mr. Taft has indicated that this provision was included in the Act to render unions liable for wildcat strikes which the unions have neither ordered nor approved. It is, of course, the prerogative of the National Labor Relations Board, in each particular case, to determine whether or not a person acted in the particular circumstances as an agent of the union. This provision, however, will undoubtedly render the agency relationship more readily attachable to the labor union and thus reduce their financial power according to the damages assessed against them for an act they did not direct or approve. Thus we see that more responsibility for labor union members' actions has been placed on the union while many provisions of the Act lessen the control that a union may exercise of its members.

Section 302 of the Act makes any payment of part of the worker's paycheck by an employer to a labor union a crime. This provision is aimed at the "check-off" of union dues, initiation fees and assessments, a system whereby union financial obligations are paid directly from the employer to the labor union. This system may be reinstated if the employee makes a written assignment signifying that he so desires the dues to be taken out of his paycheck and paid directly to the union.

At present writing, many unions are exerting great effort to have all union members make this assignment so that their dues may continue to be checked off. The purported purpose of this provision was to prevent unwilling members from being forced to pay dues against their will. It cannot be doubted, however, that all who reap the benefits of labor union activity should share in the burden of its expense, particularly those who are members. If a member should pay dues, it seems inconsequential how he does so. Forcing unions to create added facili-

⁴ Note, 23 *NOTRE DAME LAWYER* 238 (1948).

⁵ Note, 23 *NOTRE DAME LAWYER* 349 (1948).

⁶ 47 STAT. 106 (1932), 29 U. S. C. § 71 (1934).

ties for collecting their dues appears, then, to be merely another method of reducing labor union efficiency.

Section 302 (c) (5) also provides that life, health or accident insurance, or other like pension funds may be created and that the employer may contribute directly to the trust fund provided that the administration of the fund complies with the procedure outlined in this section of the Act.

This section will take added importance in the view of the National Labor Relations Board decision in the *Inland Steel* case in which the Board decided by a four to one decision that pension plans come within the scope of the Taft-Hartley Act which requires both employers and unions to bargain collectively, "with respect to wages, hours, and other terms and conditions of employment."⁷ This decision met, of course, with violent disapproval by reactionary *laissez faire* capitalists who immediately claimed it to be another trend toward socialism in American economy. The government of the United States has determined, however, that such old age or emergency security is a necessary requisite to an individual's material happiness. For management and labor without government intervention to provide this requisite material benefit themselves is rather a retention of the free enterprise economic system than a trend toward socialism as claimed. Since it is the role of the economic system to produce and distribute material wealth, these incidents of material security seem to be necessarily within the role of economic activity.

Section 303 of the Act outlaws many secondary boycotts on the part of labor unions and gives to the injured party a right to an action for damages. By virtue of this provision, unions may not engage in strikes or partial work stoppages which have as their objects certain benefits which will indirectly accrue to the unions. Unions may not force other workers or working employers to unionize; they may not force others to discontinue doing business with a third party; they may not force another employer to bargain with a union not certified according to the Taft-Hartley Act;⁸ nor may a labor union force an assignment of work by an employer to a particular union or craft.

This section of the Act specifically declares the above secondary boycotts unlawful and gives a right of damages to the party injured by such a boycott. It is to be distinguished from section 8(b)(4) of the Act which makes the same secondary boycotts unfair labor practices, for which the National Labor Relations Board may secure preventative injunctions. An injunction has been issued, however, at the

⁷ Sec. 8 (b) (6) (d).

⁸ Title I of the Labor Managements Relations Act, 1947, sets out union certification procedure.

instance of the injured party under section 303, the court determining that the action at law for damages was inadequate and that the prospective damages because of the boycott would be irreparable. This court also upheld the constitutionality of this provision of the Act.⁹ This was the first action grounded on section 303 to be presented to a federal court. A subsequent case also upheld the constitutionality of this section outlawing certain secondary boycotts by enjoining a labor union from the picketing of a third party who was doing business with the labor union's disputant.¹⁰

By outlawing such secondary boycotts, the Taft-Hartley Act has taken tremendous influence from the labor unions in jurisdictions in which courts had recognized the boycott as a legitimate method of enforcing labor's just demands. Unions now are limited greatly in exerting collective pressure on all those members of management who are doing business with an individual with whom the union is disputing. To say that these other businesses dealing with an unfair employer can be of no assistance to the union by refusing to deal with the unfair employer is childish naivete. Secondary boycotts have been considered unlawful, though, prior to the passage of the Taft-Hartley Act, because courts and legislatures have determined that a disinterested third party should be allowed to carry on his business unmolested by outside labor disputes. It is the theory of these courts that concerted action to force a third party to take a particular course of action, the secondary boycott, is not a justifiable means of obtaining eventual economic benefits. These courts do not forbid, of course, the use of direct ostracism of an unfair employer, commonly known as the primary boycott. It is the exertion of force upon a third party coercing him to take a particular course of action against another that is considered objectionable. However, if the labor union is a fully collective society for the benefit of all

⁹ *Gomez v. United Office and Professional Workers of America, C. I. O., Local 16, et al.*, 73 F. Supp. 679 (D. C. D. C. 1947). In this case the union had peacefully picketed a Washington, D. C. dance studio to bolster its fight against a New York studio of the same name. The restraining order was issued when it appeared that the amount of the studio's loss of trade resulting from the boycott would be difficult to prove and also that the studio would be injured irreparably.

¹⁰ *Dixie Motor Coach Corporation v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, et al.*, 74 F. Supp. 952 (W. D. Ark. 1947). Here the union had called a strike against the Southern Bus Lines, Inc., demanding changes in wages and working conditions. Southern Bus Lines continued to operate their busses while their employees were on strike. In operating their busses, the Southern Bus Lines used the terminal of the plaintiff, Dixie Motor Coach Corporation. The union threatened to picket the plaintiff if he continued to allow the Southern Bus Company to operate their busses from the Dixie Motor Coach Corporation terminal. The plaintiff obtained a permanent injunction against the union forbidding the union to picket the plaintiff's terminal since the picketing was for the purpose of forcing one person, the plaintiff, to discontinue doing business with a third party, the Southern Bus Company.

employees, it is only reasonable to expect that each member of the society will desire to aid his brethren in any feasible manner. It is the role of the courts and legislatures, however, to limit within reasonable bounds those means by which unions effect their mutual benefit. Undoubtedly the freedom of speech, press and assemblage has been curtailed by the outlawing of the secondary boycott. Whether it has been abridged unreasonably; whether the disinterested third party should be insulated from a particular phase of labor-management relations which have had a forceful bearing on labor union effectiveness in the past, must be determined not from a microscopic viewpoint of the particular situation. Rather the legality of boycotts should be considered in reference to the amount of bargaining power a labor union must have to guarantee equality at a collective bargaining table with management. The possibility of ostracism of the bargaining employer by other employers would have a direct bearing on the willingness of said employer to reach an agreement with the labor union. Whether the boycott prerogative is necessary to equalize the bargaining power of labor and management is the question.

The outlawing of labor union jurisdictional disputes appears to be a valid restriction on the scope of union activity. These are problems within the collective employee society itself, the solution of which should not be allowed to interfere with the production or distribution of goods. The just distribution of material goods in relation to the employer is in no manner enhanced by allowing internal labor union problems to disrupt the production of those goods.

However, the broad prohibition which the Taft-Hartley Act places on secondary boycotts appears to be a definite curtailment of possibly necessary incidents of labor union effectiveness.

Section 304 of the Taft-Hartley Act amended section 313 of the Federal Corrupt Practices Act,¹¹ making it unlawful for any labor organization or corporation to make an expenditure in connection with any election at which candidates for a federal office are to be selected or voted for. The penal sanctions of this section extend also to an officer of a labor organization or corporation who consents to such an expenditure by the organization of which he is an officer. The definite purpose of this provision was to prevent labor unions from expressing their views on federal politics by speeches or through publications supported by union funds. The Political Action Committee of the C. I. O. would have been forced to cease operations unless it could have mustered expense funds from sources outside the union.

This provision of the Act was declared unconstitutional on March 15, 1948, in the District Court of the United States for the District of

¹¹ 43 STAT. 1074 (1925), 2 U. S. C. § 251 (1934).

Columbia.¹² District Judge Ben Moore held that the portion of the Act forbidding labor unions to sustain expenses in expressing their political views was an unconstitutional abridgment of freedom of speech, freedom of the press, and freedom of assemblage.

In this case, the government pressed its criminal charges against the C. I. O. and Philip Murray on the basis of section 304 of the Taft-Hartley Act. Mr. Murray, obviously in defiance of this provision, had written an editorial in the *C. I. O. News*, a publication sustained by labor union funds, expressing union views concerning an impending federal congressional election. The government conceded that the Taft-Hartley provision abridged rights of individuals as guaranteed by the First Amendment, but contended that Congress had the power to abridge these rights because of its interest and control of elections and therefore Congress was acting within its constitutional power in enacting section 304. Judge Moore brushed this contention aside by stating that the constitutional rights of free speech and a free press in elections could only be abridged when a grave abuse calculated to create serious public danger existed or was impending. No such situation existed merely because labor unions were expressing their political views through labor union publications. In fact, the public has an important right to hear both sides of a political issue through the presses; a right which the Taft-Hartley Act sought to abridge. Judge Moore explained that the majority of any collective group expresses the ideas of the group, and the fact that a certain minority might hold conflicting views was no sound basis to abuse the constitutional guarantee of free speech, a free press, and the freedom of assemblage. Thus this section of the Taft-Hartley Act, which would have seriously impaired the efficiency of labor unions in attracting public audience for their views, seems to be no longer the law of the land.

Section 305 makes strikes by government employees unlawful and provides penalties of loss of employment and loss of civil service status by the employee so striking. There seems to be no justifiable objection to such a provision under present circumstances. Employment by the government is a privilege for which the government should have the right to designate reasonable conditions of acceptance. The government occupies a different position as employer than does management generally. The distinction between their relative positions is the important differentiating feature. The guarantee of employee rights against management lies in part in the strike. Both the employee and the public can protect their rights against the state by voting in a new government. No such guarantee, obviously, exists for the employee of private management.

¹² United States v. Congress of Industrial Organizations, 16 L. W. 2452 (D. C. D. C. 1948).

It seems reasonable, then, for the government to demand that it be allowed to carry on its delegated sovereign functions devoid of the possibility of a paralyzing strike. This provision of the Act, of course, does not prevent any individual employee acting as an individual to quit his job at his pleasure and seek his material gain in that part of the economic sphere where he is guaranteed the right to strike, or rather, where he should be guaranteed the right to strike. An overwhelming majority of laborers make their livings from private enterprise, and for this reason their right to strike must be protected. For them no alternative exists. This alternative seems conclusive of the reasonableness of section 305.

Since the publication in the *NOTRE DAME LAWYER* of comments on Title I and II of the Taft-Hartley Act, labor-management relations have raised many interesting questions pertaining to those sections of the Act. In this comment we will endeavor to discuss a few of the recent National Labor Relations Board rulings and court decisions applicable thereto.

By a two-to-one decision, a statutory three judge court sitting in the District of Columbia upheld the validity of the filing of the non-communist affidavit as a requirement for Board benefits. In the case¹³ presented to the court, the Maritime Union, among other plaintiffs, sought to enjoin the enforcement of the affidavit requirement provision of the Labor Management Relations Act which would deny the union recognition by the Board. All the judges upheld the validity of the financial statement requirement, but a serious question arose concerning the constitutionality of the requirement of filing a non-communist affidavit as an abridgment of the First Amendment guarantee of the freedom of speech. Both the majority and the dissent agreed that the filing of a non-communist affidavit could be, in the broad requirement of section 9 (h) of the Taft-Hartley Act, an abridgment of the First Amendment. Both agreed that conditions giving rise to a justifiable abridgment of free speech must be of such a nature that to speak or to refrain from speaking would present a menace to the welfare of the nation.

Without referring to the lengthy opinion of the majority, fraught with dicta, nor to the juridical analysis of the problem expressed by the dissent, it seems fair to state that the clash of views between the majority and the dissent arose over a question of the type of evidence which the court required to make a constitutional determination.

The majority took the view that the court could take judicial notice of the "facts of current history" along with the congressional determina-

¹³ *National Maritime Union of America v. Herzog*, 16 L. W. 2502 (D. C. D. C. 1948).

tion that communist activity in labor unions was insidious to the general welfare, and with no evidence offered to the court on that subject whatsoever, decide whether an abridgment of free speech by Congress was justifiable. The dissent did not agree on this point, but felt that a determination of the danger of communistic union activity to the general welfare demanded that the court so determining should be presented with evidence from which a conclusion could be made. The word of Congress was not to be accepted on this point. The dissent felt that, were evidence not required, Congress would be at liberty, by merely making an affirmation of a fact, to flout constitutional rights with impunity. It was the duty of the court, it was said, to make its own separate, independent determination of fact if it were to speak as an independent court. Thus, the dissent argued, since no evidence was offered as to the relative danger of communism to the general welfare, the guarantee of the First Amendment must stand.

In the highly publicized United Mine Workers coal strike the stunning power of the Taft-Hartley Act completely to subjugate unions is conclusively demonstrated. When a pension plan agreement was not carried out by the coal operators, union leader John L. Lewis informed his union members that the contract had been violated and that the miners were free to work or not as they pleased. A general mining stoppage immediately occurred. Acting under the provisions of the Taft-Hartley Act, most probably inserted in the Labor Management Relations Act for this exact situation, the President appointed a board to investigate the stoppage. The board was to determine whether the inactivity would be inimical to the general national welfare.

Acting on the board's report, the government obtained a restraining order prohibiting the strike. The stoppage continued; Mr. Lewis claimed that he had called no strike and explained that miners do not work under broken contracts. Later a pension agreement was reached between the operators and Lewis. However Judge Goldsborough, of the United States District Court for the District of Columbia, found that the restraining order had been violated in that the union was guilty of continuing a strike after the issuance of the prohibition.¹⁴ The contention of Lewis that he had called no strike was by-passed when the Judge ruled that any union functioning as a union must be held responsible for mass actions of its members. The Judge declared that Lewis' telegrams to the union locals contained code messages indicating that a strike was called. The heavy penalties, along with an eighty day Taft-Hartley statutory injunction¹⁵ influenced Lewis to urge his miners

¹⁴ *United States v. International Union, United Mine Workers of America*, 16 L. W. 2515 (D. C. D. C. 1948).

¹⁵ The eighty-day injunction is authorized under the National Emergency section of the Taft-Hartley Act, Sec. 206-210.

back to work again. The right to engage in a strategic strike was thus completely abridged as far as the United Mine Workers were concerned. The provisions of the Taft-Hartley Act wound the miners in a web of futility.

Judge Goldsborough, in issuing the statutory injunction, upheld the constitutionality of the applicable provisions of the Taft-Hartley Act. The court pointed out that an injunction to prevent a strike has never been held to be a deprivation of the liberty of speech nor does it constitute involuntary servitude. Presumably, indicated the judge, an inhabitant of an exclusively mining town can choose to work, starve, or move himself and his family to a new locality.

Undoubtedly a peaceful method of preventing national economic emergencies which result from basic industrial strikes must be found. However, to ignore completely the rights of labor in benefiting the public is hardly just. It has been suggested that this problem might be solved by declaring these basic industries public utilities. Some such governmental action appears inevitable if collective bargaining in basic industries proves futile.

Numerous other incidents of the use of the injunction have occurred recently by virtue of the Taft-Hartley Act, preventing labor union activity when the unions have attempted to enforce their demands.¹⁶ The Act entangles the unions in injunctions, court costs, attorney fees, and new National Labor Relations Board requirements. These demands reduce severely the efficiency of labor unions in carrying out their purpose of protecting labor. The Taft-Hartley Act has been congratulated recently by many devotees of big business because of its success in quieting the labor seas, particularly in its rapid termination of the coal strike. Usually these settlements have been brought about by labor unions withdrawing their demands in the face of the tremendous legal power of the Taft-Hartley Act. To continue to press their demands only to reach eventual failure in the courts causes many unions to capitulate immediately. For this quiescence the Taft-Hartley Act has been complimented as being the instrumentality of settling the disputes. We would indicate that there exists an infinite difference in the meaning of the word *settle* and the word *suppress*.

Returning now to our original premise, we see that the primary purpose of an economic system is the production and distribution of wealth. Wealth, however, is not an end, but a means to the end of the happiness of all. Wealth is not held absolutely, but as a steward-

¹⁶ United States News and World Reports, April 16, 1948.

ship for Him Who created the wealth.¹⁷ We noted that before the rise of strong labor unions, this wealth was far from properly distributed. No valid argument can exist that the pro-labor legislation of the thirties did not assist in a more just distribution of this wealth. We are of the opinion that whatever ills, if any, labor unions have brought to this country, one of them was not the change they brought about in the distribution of material goods.

Labor's position under this social legislation bettered its economic position and took from capital much of the unequal strength with which it had previously coerced labor. Management's position under the Wagner Act based on its natural advantage, did not deteriorate as to deprive it of its just share of the fruits of production. If there were ills in the labor-management relation, they did not exist in the field of distribution.

But the Taft-Hartley Act, which was enacted for the avowed purpose of disrupting the bargaining power balance then existent, tends to return management's supremacy at the bargaining table. It so hamstring labor's right to strike, to control its labor union members and to effect efficiently its role as a guarantee of individual rights that the guarantee no longer exists. As was stated in previous comments on the Act in the NOTRE DAME LAWYER, all provisions of the Act, taken together, decrease union efficiency.

We see, particularly, that Title III is constructed in this same manner. Each section removes power from labor unions or burdens them in efficient operation. This cannot but reduce their bargaining power at labor-management discussions. The correction of labor union ills did not require the reduction of union ability to guarantee labor's rights. The return to the natural unbalance with the employer in the position of former advantage cannot help but be inferred from an analysis of the Taft-Hartley Act. Those licenses of *laissez-faire* capitalism allowed to the employer are once again returned in the guise of the protection of employer rights.

To descend to particulars is to quibble over terms. Labor attacks these capitalistic incidents as licenses, management claims them as rights. But the over-all effect as to the production and just distribution of wealth guaranteed under the Wagner Act, threatens to be destroyed with the return of employer supremacy under the Taft-Hartley

¹⁷ POPE LEO XIII, ON THE CONDITION OF LABOR.

¹⁸ In subsequent issues, the NOTRE DAME LAWYER intends to review the Taft-Hartley Act further.

Act. If labor unions possess ills, their bargaining power for justice must not be taken from them to cure these ills lest we revert to the economic slavery of the past.

To pretend to suggest the solution to the labor-management problem would be presumptuous indeed. Amicable and just adjustment of differences by both labor and management is the only real solution to the problem. Be this solution but an empty platitude, it is at least an ideal for which both groups, labor and management, should strive.

Thomas F. Broden

CRIMINAL PROCEDURE — POST-CONVICTION HEARINGS — THE ILLINOIS SITUATION.—Illinois criminal procedure in the matter of post-conviction hearings has recently been labeled by the Supreme Court of the United States as a "procedural labyrinth made up entirely of blind alleys."¹ Composing the labyrinth are the so-called alleys of "writ of error," "habeas corpus" and the "statutory motion in the nature of the common law writ of error coram nobis." These are the Illinois state remedies available when an accused has supposedly been convicted by a state court in deprivation of a right guaranteed by the Constitution. It is the charge of the United States Supreme Court, however, that the remedies are available in theory only. Grounding the charge is the court docket record for the terms 1944, 1945 and 1946 which reveals the disproportionate number of petitions for certiorari to review Illinois' refusals to grant relief, and frequently to grant even a hearing.²

So that this procedural difficulty may be understood, it is well to examine the factual situation which prompted the Supreme Court's admonition. In 1925, petitioner, Tony Marino, was arraigned in open court on charge of murder. At the time he was eighteen years old, had been in this country only two years, and did not understand the English language. He was advised of the meaning of the plea of guilty through interpreters, one of whom was the arresting officer. The common law record recited that petitioner signed a statement waiving jury trial and pleading guilty. The waiver was not in fact signed by him

¹ Mr. Justice Rutledge concurring in *Marino v. Ragen*, U. S., 68 S. Ct. 240, 92 L. Ed. 203 (1947).

² "During the last three terms we have been flooded with petitions from Illinois alleging deprivation of due process and other constitutional rights. Thus in the 1944 term out of a total of 339 petitions filed *in forma pauperis*, almost all by prisoners, 141 came from Illinois; in the 1945 term 175 of 393 were from Illinois; and in the 1946 term, 322 out of 528 came from that state." Mr. Justice Rutledge concurring in *Marino v. Ragen*,U. S....., 68 S. Ct. 240, 242 (1947).

and no plea of guilty was entered at the trial. No attorney was appointed to represent him. He was sentenced to life imprisonment. Petitioner sought a writ of habeas corpus in the circuit court of Winnebago County, Illinois, alleging that his conviction was the result of a denial of his rights under the Federal Constitution. The writ was quashed. In the United States Supreme Court, on petition for a writ of certiorari to the circuit court, the Attorney General of the State of Illinois conceded that habeas corpus is an appropriate remedy in the state court to correct a denial of due process. On this set of facts the Supreme Court vacated the judgment of the circuit court and remanded the cause. It was held that petitioner was denied the due process of law which the Fourteenth amendment requires.³

In order better to realize the Illinois problem it is important to understand the appeal procedure in such a situation. Had not the Illinois Attorney General made a concession of error, the petition for certiorari would have been denied.⁴ The rule is thus stated by the Supreme Court:

We have adhered consistently to the practice of not entertaining such a petition when it seemed to appear that the applicant had not sought the appropriate state remedy. (cases cited). And as a corollary of this practice, we have insisted that the federal courts deny a hearing to an applicant for habeas corpus who has not exhausted his state remedy. (cases cited). This rule requiring exhaustion of state remedies as a condition precedent to federal relief has been firmly established by repeated decisions of this court. Even in extreme situations its application has been justified by sound administrative procedure. (cases cited) ⁵

This law, had not Illinois conceded error, would have denied petitioner Marino certiorari and would have sent him back to the Illinois courts to exhaust state remedies. And in the light of the lower court history in this case and in other cases of like nature, Marino would get exactly nowhere.

In "An Open Letter to the Attorney General of Illinois,"⁶ John P. Wilson, Professor of Law and Dean of the University of Chicago Law

³ *Marino v. Ragen*, U. S., 68 S. Ct. 240, 92 L. Ed. 203 (1947). Noted in 23 NOTRE DAME LAWYER 398.

⁴ "But for the state's confession of error, our usual practice in these cases would lead us to assume that the denial had been on the ground that habeas corpus was not the appropriate state remedy." See footnote 3 to the concurring opinion of Mr. Justice Rutledge in *Marino v. Ragen*, U. S., 68 S. Ct. 240, at page 243 (1947).

⁵ Mr. Justice Rutledge concurring in *Marino v. Ragen*, U. S., 68 S. Ct. 240, 242 (1947).

⁶ See the excellent article by Dean Wilson, *An Open Letter to the Attorney General of Illinois*, 15 U. OF CHI. L. REV. 251 (1948).

School, reviews the record and the position of the State of Illinois by its Attorney General in the Marino case and others of the same type. Dean Wilson wrote:

Mr. Attorney General: . . . In the "confession of error" submitted by you to the United States Supreme Court you admitted (on the merits) that the decision quashing the writ of habeas corpus violated the rule that "due process of law in a capital criminal case requires the appointment of counsel by a trial court where it appears that the accused is ignorant of trial procedure and incapable of understanding the English language before the court can accept a plea of guilty." . . . But was it not misleading, Mr. Attorney General, to say that you have always made this concession when in this very case you signed a return stating, "that if the relator has any recourse it is by the statutory remedy of a motion in the nature of a writ of error *coram nobis*"?

The quote is significant in its showing that even the Attorney General, the law enforcing officer of the state, is lost in the labyrinth. The conclusion must be that Illinois offers no adequate remedy to one in Marino's position. A study of the remedies as they now exist may provide the solution.⁷

Conditions requisite to review by *writ of error* are: 1. That petition for the writ be made within the limitation period of twenty years;⁸ 2. A bill of exceptions must have been filed or the review is limited to matters in the common law record;⁹ and 3. A bill of exceptions must be preserved within fifty days after judgment is entered.¹⁰ Could one in the position of Tony Marino satisfy these requisites? Obviously not! Marino, who was not represented by counsel, had no way of obtaining in fifty days the information that he must file a bill of exceptions. He would thus be required to rely on the common law record alone in such a review. The common law record will seldom show any violation of due process. And since the record cannot be contradicted or amended,¹¹ the conviction would be sustained. Although it would

⁷ 36 ILLINOIS BAR JOURNAL 356 (1947).

⁸ *People v. Murphy*, 296 Ill. 532, 129 N. E. 868 (1921).

⁹ *People v. Foster et al*, 394 Ill. 194, 68 N. E. (2d) 252 (1946). Foster, who was convicted of the crimes of burglary and larceny in 1935 brought error to the Supreme Court of Illinois contending, among other things, that he had been denied due process of law at the trial. The court said: "Nothing appears in the common law record to indicate that Foster did not have the fair trial which the law contemplates. *The cause being here on the common law record, the extent of inquiry is circumscribed by what the record contains.*" (emphasis supplied).

¹⁰ ILL. REV. STAT. c 110, § 259.70A (1947).

¹¹ *People v. Haupris*, 396 Ill. 208, 71 N.E. (2d) 68 (1947). Haupris, who was convicted of murder, brought error. Appended to the common law record was a

not be correct to make the blanket statement that such a remedy would be inadequate in all cases, it is apparent that the stringent requisites would make it impossible for most prisoners, not well acquainted with Illinois criminal procedure, to find relief in a writ of error.

A statutory motion in the nature of a writ of error *coram nobis* would be next available to the prisoner.¹² The effect of this motion is to present factual questions which were not known to the trial court, which do not conflict with the jury findings and which the prisoner failed to raise because of excusable mistake on his part. Additional requisites to the motion are: 1. That the errors relied on were not a matter of record and were not before the court at the time of the trial,¹³ and 2. That the motion is made within the five year limitation period.¹⁴ Here again, one in Marino's position would have little success. A prisoner not represented by counsel could hardly be expected to be aware of the technical requirements. Also, the fact that Marino was not represented by counsel in accordance with what he claims was due process, would be known to the trial court, thus precluding a post-conviction *coram nobis* hearing.

Applications for *habeas corpus* constitute another series of possible remedies. For *habeas corpus* to be proper, it must appear that petitioner is challenging the jurisdiction of the convicting court (a challenge of jurisdiction over the person or subject matter),¹⁵ or it must be shown that events arising subsequent to the trial would nullify the conviction.¹⁶ Marino's allegation that he was denied due process does not fall within either requirement. *Habeas corpus* was thus improper. The contention of the Illinois Attorney General that *habeas corpus* is the appropriate remedy in a case like Marino's is clearly in contradiction to Illinois

letter favorable to the petitioner's case. The court held the letter to be inadmissible saying, "The record itself imports verity and can neither be contradicted nor amended except by other matter or record by or under the authority of the court."

¹² ILL. REV. STAT. c. 110, § 196 (1947).

¹³ *People v. Rave*, 392 Ill. 435, 65 N.E. (2d) 23. (1946). George Rave was convicted of robbery and filed a petition in the nature of a writ of error *coram nobis* seeking to review and set aside the judgment. The petition was denied and Rave brought error. In affirming the judgment the court said: "*The purpose of the writ of coram nobis is to bring before the court rendering the judgment matters of fact not appearing of record which if known at the time the judgment was rendered would have prevented its rendition*". (emphasis supplied).

¹⁴ ILL. REV. STAT. c. 110, § 196 (1947).

¹⁵ *People ex rel Thompson v. Nierstheimer*, 395 Ill. 572, 71 N. E. (2d) 343 (1947). In denying the petition of Nierstheimer the court remarked: "Where petition for leave to file original petition for writ of *habeas corpus* alleged errors that occurred in the trial of the case but failed to set forth any fact showing lack of jurisdiction of either subject matter or of person, leave to file original petition for writ of *habeas corpus* would be denied". (emphasis supplied).

¹⁶ *People ex rel Courtney v. Thompson*, 358 Ill. 81, 192 N.E. 693 (1934).

law. Further evidence of the inadequacy of habeas corpus is the Illinois Supreme Court record which shows that such petitions are uniformly and consistently denied.¹⁷

One question remains: Does a prisoner who is convicted in denial of a constitutional right have any other recourse? As a final move, after petitions for habeas corpus have been denied, the prisoner may petition for certiorari in the United States Supreme Court. But, as has been previously pointed out, such petitions are denied unless, as in the Marino case, the state confesses error. Regardless, the prisoner must make this petition to satisfy the rule on exhaustion of state remedies. After this has been done, federal district courts have power to grant writs of habeas corpus to those confined without due process.¹⁸ This affords a semblance of remedy, but, before it becomes available, the prisoner must wander aimlessly through the passageways of the Illinois "procedural labyrinth."

This brief study of existing remedies is sufficient to show that the State of Illinois has an inadequate criminal procedure in the matter of post-conviction hearings. What is the solution? Of the many which have been suggested, the following stand out: 1. The judiciary could admit that Illinois is without adequate state remedy so that those imprisoned in violation of constitutional rights could apply directly to the federal courts for habeas corpus;¹⁹ 2. To hold that habeas corpus is a proper remedy where there has been a conviction without due process;²⁰ and 3. To expand the remedy of coram nobis to include a review of facts within the knowledge of the convicting court when such facts amount to a deprivation of due process of law. The suggested solutions would no doubt be effective, but legislative action would be desirable. To leave the solution in the hands of the judiciary would not be wise considering the record. Illinois courts, without giving reasons, have, time and time again, denied applications for leave to file petitions for habeas corpus. It is fair to conclude that Illinois courts do not wish to be troubled with such petitions.²¹

The Illinois "procedural labyrinth" must be leveled to the ground. Obstructions must be cleared away. The existing "blind alleys" of

17 "When the Illinois Supreme Court was deluged with applications for leave to file petitions for original habeas corpus writs, it adopted a procedure of denying such leave without requiring an answer, without appointing counsel to represent petitioners and without giving reasons for its action." *A Study of the Illinois Supreme Court*, 15 U. OF CHI. L. REV. 107, 120 (1947).

18 *Ex Parte Hawk*, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944).

19 36 ILLINOIS BAR JOURNAL at 356, (1947).

20 *A Study of the Illinois Supreme Court*, *op. cit. supra*, note 17; Comment 42 ILL. L. REV. 329 (1947).

21 *Op. cit. supra*, note 17.

"writ of error", "coram nobis", and "habeas corpus" must be reconstructed to permit straightforward passage. If this work of reconstruction fails to assure an adequate post-conviction hearing to one deprived of his liberty without due process of law, then the Illinois State Legislature must construct a fourth passageway specially designed for "Tony Marinos."

James A. Cassidy

CONSTITUTIONAL LAW—COMMUNISM'S CRIMINALITY.—Man's incessant struggle against the dominance of the state continues unabated, just as does the correlated struggle of law against anarchy. The political school of communism, today's foremost advocate of the superiority of the state, has undertaken the propagation and application of its doctrine, by whatever means are most expedient, with an ambition unprecedented in the history of civilization. In the United States this doctrine is represented and advanced by the Communist Party. International and domestic developments of the past year have necessitated a re-examination of the relation of the Communist Party to the law of the land. The urgency of the task is great.

The foreign policy known as the Truman Doctrine has met with appreciable success in, at least temporarily, slowing the westward political advance of the U. S. S. R. There has been no parallel success by our domestic policy and law against the threats of the local Communist Party. The problem presses for a solution not because the communists in America are of any great number¹ nor because there is any immediate chance of their gaining political ascendancy by election; it is rather because the Communist Party is attempting so to operate that, should the U. S. S. R. decide it was safe to attack the United States and/or should revolution within the United States be advisable, the party would be an available tactical politico-military force well within the vitals of the U. S. and at the command of the General Staff of the Russian Army. In the causes of the spread of this diabolical doctrine² lies the only key to its defeat. Only a positive social program as commanded by the law of nature can finally uproot this poisonous vine. As an incidental move, however, in the current struggle, stronger legislative action has been deemed advisable.

The Subcommittee on Legislation, under chairmanship of Rep. Richard M. Nixon, of the House Committee on Un-American Activities, re-

¹ 34 A. B. A. JOURN. 30 (Jan. 1948) quotes The Associated Press as saying that, according to Army "orientation" information, there are 74,000 Communist Party members in the United States.

² ENCYCL. ATHEISTIC COMMUNISM (*Divini Redemptoris*), 1937. PIUS XI.

cently completed two months of hearings and study, which were begun only after exhaustive investigations, relative to proposals which would outlaw or in some other way curb the Communist Party in the United States.³ Of the two bills most seriously considered one (H.R. 4581) provided for the outlawing of the Communist Party and the other (H.R. 4422) provided for the exposure of its propaganda activities. The former bill⁴ noted that communism is

. . . not a political party, but is an international conspiracy and an anti-religious ideology which advocates and practices deceit, confusion, subversion, revolution, and the subordination of man to the state, and which has for its purposes and intentions the overthrow of any democratic or other form of government by force and violence, if necessary; . . .

The second bill⁵ provided for the registration of the Communist Party and "Communist-front organizations" as agents of a foreign principle and for a labeling of their propaganda releases. As an outgrowth of the hearings a bill⁶ was drawn up by the Subcommittee which included the major provisions of the latter aforementioned proposal. One of the main difficulties is the definition of a "front" organization—and it is essential to prevent the subjects from avoiding the operation of the law by the simple device of abandoning the name "Communist Party". The bill (H.R. 5852), likely to succeed in passage, defines a "front organization" as one, among others, acting with intent to the ". . . bringing about replacement of free private enterprise in the United States with a Communist economic system, . . ." This clause, leaving so much interpretative discretion to the judiciary as to just was is "a Communist economic system", unless the legislative history is clear on the matter, represents the difficulty faced by all legislation of this type. (There is nothing to be found in the Constitution which guarantees the continuance of a "free private enterprise.") Unfortunately there are those in this country who would readily define even public utilities as "communist". The necessities of the situation must not be allowed to minimize the danger to civil rights which is possible in any adequate legislation.⁷ Neither, however, must one assume that this presents insuperable obstacles to the erection of safeguards against the immediate dangers threatening. If, for example, such a bill is to become law, then

³ *Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities*, House of Representatives, 80th Cong. 2d Sess. (1948), Hereafter called *Hearings*.

⁴ H. R. 4581, 80th Cong., 1st Sess. (1947).

⁵ H. R. 4422, 80th Cong., 1st Sess. (1947).

⁶ H. R. 5852, 80th Cong., 2d Sess. (1948).

⁷ Statement of John Foster Dulles to the Subcommittee On Legislation (hereinafter referred to as the Subcommittee), *Hearings*, pp. 492, 493.

the enacting Congress must make fully clear that all "leftist" organizations are not included. This step is necessary in view of the vernacular connotation of "left" and "right" and the fact that communism is designated as "leftist". It is apparent to all observers that the "left" is providing the most effective of the communists' opposition. But the danger to liberal groups, while real, is not unavoidable. Sound statutory draftsmanship must provide the necessary safeguards for the liberal factions.

The history of the United States' dealings with the "domestic" Communist Party offers few guides to the solution of so unique a problem. A free press and speech have overcome the political appeal of communism, freedom of religion has overcome any ideological appeal it might have had and, with all its glaring defects, our economic system has (with the help of the people through their government) been sufficiently vigorous to overcome the economic appeal of communism. These institutions have been so effective that the power of the communists for any legitimate action is virtually nil. The problem today is to overcome the "fifth column" and/or revolutionary potential of the Communist Party within the limits of the Constitution and without the impairment of any man's natural rights.

Mediocre success met the legislative efforts of the various states of the Union to control criminal syndicalism. These efforts offer little aid, primarily because that problem is not the present one. That issue is of interest only as the first domestic question in which the communists took part. Currently the communists are outlawed, as a political party, in some nine states⁸ (Ala., Ark., Ill., Kan., Ohio, Okla., Ore., Tenn., and Wis.). Some states⁹ apparently deny the Communist Party a place on the ballot even though it is not an illegal organization. Four¹⁰ states require the "Party" to file affidavits to the effect that it does not advocate the overthrow of the government by force or violence, before being permitted to register on the ballot. Bills are pending at this writing in three state legislatures¹¹ which would bar communists from public office. Criminal syndicalism statutes remain on at least five of the state statute books.¹² Many states have no statutes capable of exercising any real control of the communists. The unreasonableness of relying on the inadequacy of such patch-quilt action is clear, particularly since the power to "... guarantee to every state in this Union a re-

⁸ Report on the status of the C. P. in various states by Robert B. Gaston, Staff of Committee on Un-American Activities, *Hearings*, p. 455.

⁹ See testimony of Raymond Moley, *Hearings*, p. 297.

¹⁰ Note 9 *supra*, re Delaware, Indiana, Ohio and Tennessee.

¹¹ Note 9 *supra*, re. Mississippi, Missouri, and Wyoming.

¹² Note 9 *supra*, re. Alabama, Montana, North Carolina, Rhode Island, Oregon and, also, T. Alaska.

publican form of government, . . ." is so explicitly granted the federal government.¹³

Federal action, to date, has consisted primarily of more or less abortive attempts, by statute, to control the immigration of communists, the search for any "conspiracy", and the dismissal of disloyal employees of the federal government. Although the House Subcommittee recommended ". . . a number of stiffening changes in existing laws covering immigration, naturalization, and passport travel . . ." ¹⁴ The real emphasis is on the danger from native communists. One of the more meaningful of the present federal statutes is that which provides criminal penalty for anyone, other than diplomats and consuls, who acts in the U. S. as an agent of a foreign power, unless he has given notice of the fact to the Secretary of State.¹⁵ Vigorous enforcement of the letter and spirit of this congressional mandate could do much to alleviate the prevailing danger.

Although subject to much deserved criticism, the dismissal of "disloyal governmental employees has undoubtedly increased the functioning security of the government. At this writing the decision of the Attorney General as to the subversiveness of good faith of an organization is final. If the decision is against an organization its members are presumed un-American. Legislation providing for an appeal of this decision to the courts is now under consideration. Regarding the right to privacy, as involved in questioning of governmental employees and those in key communication media, by both congressional committees and the Executive, there has been much constructive comment.¹⁶ One very meaningful observation with regard to the questioning of cinema writers is worthy of note: ¹⁷

It has been argued, with a curious disregard of moral principles, that Communist writers have a constitutional right to conceal their opinions because, if their communism were known, they would lose their highly paid employments. This is a brazen claim that a man has a constitutional right to obtain and to hold a job by fraud—by concealing his disqualifications from his employer.

In the U. S. Code there is to be found another act which might be of use in the present situation. Conspiracy statutes, essentially the

¹³ U. S. CONST. ART. IV, § 4.

¹⁴ N. Y. Times, April 6, 1948, p. 1.

¹⁵ 54 STAT. 80 (1940), 22 U. S. C. 601 (1947 Supp).

¹⁶ Note, 23 NOTRE DAME LAWYER 353 (1948).

¹⁷ Donald R. Richberg, Washington Sunday Star, Dec. 7, 1947, pp. 1-3, reprinted in *Hearings* 59.

same as the present one have been in force since 1867.¹⁸ The present statute reads, in part: ¹⁹

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

In view of its terms, which have a known common law meaning, and its definition of the offenses prohibited, there is sufficient certainty in the Act. Its validity is established,²⁰ although it must be strictly construed.²¹ It has been judicially declared ²² that the statute is sufficiently broad to include conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any governmental department. Regarding the Communist Party, it is objected that the difficulty of proof is prohibitive. But if, upon sufficient evidence, the jury is satisfied that two or more persons agreed to do an unlawful act or design and committed some act to further it—conspiracy is proven.²³ At common law not even proof of an overt act was necessary for a conspiracy conviction,²⁴ and there are indications of like result under the statute,²⁵ but proof of the conspiracy has to be clear. But it is still not required that more than one of the conspirators take part in the overt act.²⁶ Thus it would seem that, if the members of the Communist Party subscribe to the Manifesto, as they claim, only a judicial misconstruction of the statute could exempt them from conviction, once any act in furtherance of their program was committed. It is not even necessary that there be any formal agreement between the parties to a conspiracy, if they work together understandingly, by common plan, to a mutual goal.²⁷ If the communists' contention be that they plan no crime against declared law, it is well to recall that the act conspired for commission need not be one against a statute.²⁸ But in any case the argument is of small weight in view of related, pertinent legislation on

¹⁸ REV. STAT. § 5440 (1875).

¹⁹ 52 STAT. 197 (1938), 18 U. S. C. A. § 80 (1947 Supp.).

²⁰ *Crawford v. United States*, 212 U. S. 183, 29 S. Ct. 260, 53 L. Ed. 183 (1907).

²¹ *United States v. Robbins*, 157 Fed. 999 (D. C. Utah 1907).

²² *Hass v. Henkel*, 216 U. S. 462, 30 S. Ct. 249, 54 L. Ed. 569 17 Ann. Cas. (1910).

²³ *United States v. Barrett*, 65 Fed. 62 (C. C. S. C. 1894).

²⁴ *Robinson v. United States*, 172 Fed. 105 (C. C. A. 8th 1909).

²⁵ *Orear v. United States*, 261 Fed. 257 (C. C. A. 5th 1919).

²⁶ *Williams v. United States*, 3 F. (2d) 933 (C. C. A. 6th 1925).

²⁷ *Fowler v. United States*, 273 Fed. 15 (C. C. A. 9th 1921).

²⁸ *United States v. Raley*, 173 Fed. 159 (D. C. Or. 1909).

the subject of conspiracies to overthrow the federal government by force and violence. These ²⁹ forbid anyone to "... abet, advise or teach ..." these actions, orally or "... by written or printed matter ..." It is declared illegal:

To organize or help organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliated with, any such group, society, or assembly of persons, knowing the purpose thereof.

It is difficult to envision any defense by the communists to prosecution under these statutes, *if* prosecutions were made. Since, however, even in view of these enactments the Communist Party carries forward its mission practically unrestrained, the Subcommittee is submitting to the Committee the bill aforementioned. The registration provisions are undoubtedly constitutional. A New York statute requiring registration of the Ku Klux Klan with the State Attorney General was held ³⁰ not to be discriminatory within the federal constitutional definition, nor violative of the civil rights of the members. The legitimate goal of the present Bill (H.R. 5852) is indicated by the reason it gives for the necessity:

... it is a matter of common knowledge that the subversive forces of communism are endeavoring in the United States as well as elsewhere, by devious and unscrupulous methods, to undermine democratic governments and institutions.

Perhaps, if the Bill becomes law, it will restrict the activities of the Communist Party, but it cannot solve the basic problem, for it is not so aimed.

This then is the law of the states and nation covering this vital matter. There has arisen, in the past year, the question of the advisability and constitutionality of a legislative declaration of the illegality of the Communist Party and its activities. The expediency of such a move, in view of all the noted circumstances, is chiefly a problem of political science but the legality of the step is a problem of constitutional law.

Any legislation outlawing the Communist Party must be exceedingly cautious that it infringes none of man's fundamental freedoms. True, the organization is in no Anglo-American sense a political party—even the dictionary ³¹ defines it as only a "semipolitical party"—but, if due process of law is to be retained, in both its substantive and pro-

²⁹ 54 Stat. 671 (1940), 18 U. S. C. § 10 (Supp. 1947).

³⁰ *Bryant v. Zimmerman*, 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184 (1928).

³¹ WEBSTER'S COLLEGIATE DICTIONARY, 5th Ed. (1946).

cedural aspects, the safeguards must be adequate. Many learned members of the bar question the constitutionality of any outlawing act. They base their dissent on the firm ground of civil liberties.

If any such statute is to escape the lethal brand of repugnance it must first of all meet the test of bill of attainder,³² or legislative trial. The Supreme Court of the United States has recently held³³ that a statute attempting to punish a group or its members, without judicial trial, is within the constitutional ban on bills of attainder. The national legislators must keep in mind that they may say what is illegal and decree its sanction but they can not apply that law to any man or punish the breach.³⁴

A decision of the Federal Supreme Court, rendered in the war year of 1943, on the case of *Schneiderman v. United States*,³⁵ while important to the suggested outlawing statute, does not predetermine its constitutionality. The case involved a governmental attempt to revoke and cancel the citizenship of one who had been naturalized, on the grounds that he was a member of the Communist Party. Upon naturalization, he had taken the oath of allegiance to the United States and the Constitution. The Court found for the defendant holding:

... we do not think that the Government has carried its burden of proving by evidence which does not leave the issue in doubt that petitioner was not in fact attached to the principles of the Constitution and well disposed to the good order and happiness of the United States when he was naturalized in 1927.

There is no holding in the case that the Communist Party does not advocate unlawful means of social change but merely that on the facts and statutory law available there would be no judicial notice of the facts. This position of the Supreme Court is not at all typical of the (then and now) occupants of that bench. In fact, the incumbent jurists have been widely acclaimed for their solicitude for human rights and human dignity. The history of the Communist Party belies the necessity for proof of its intentions. As the late Chief Justice Stone pointed out, in his dissenting opinion "... the end contemplated was the overthrow of governments and the measures advocated were force and violence." The holding in the *Schneiderman* case has met with severe and ma-

³² Or, technically, a "bill of pains and penalties", since no question of capital punishment is involved, BLACK'S LAW DICTIONARY, 3rd. Ed. (1933) at p. 164.

³³ *United States v. Lovett*, 328 U. S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946).

³⁴ *Cummings v. Missouri*, 4 Wall. 277, 71 U. S. 356 (1867); *Ex Parte Garland*, 4 Wall. 333, 71 U. S. 366 (1867); *Duncan v. Kahanamokv*, 327 U. S. 304, 66 S. Ct. 606, 90 L. Ed. 688 (1945).

³⁵ 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943).

terial criticism and it is to be hoped that it is not long for this world. One critic ³⁶ suggested that the case hung on the paradox of American citizenship and communism, observing that,

. . . as long as the principle of contradiction remains axiomatic in reasoning, and the doctrine that the end justifies any means anathematized in law as well as morality, it seems competent to question the sincerity of the petitioner in professing attachment to the Constitution without renouncing his affiliation with an organization which is . . . opposed to our charter of political philosophy.

Another, more recent, comment ³⁷ was, ". . . I think that the Supreme Court of the United States would be amply justified by investigations and proof which have come forward since the determination of the *Schneiderman* case in reversing all the holdings of the *Schneiderman* case . . ." as they regard Communism.

Assuming arguendo, that a legislative declaration of the illegality of the Communist Party would abridge certain of the constitutionally protected rights of its members—the question is presented under what circumstances such an abridgment is allowable. In *Schenk v. United States*,³⁸ a conviction for printing and distributing handbills advocating resistance to the draft was upheld, the Court holding that such acts in time of war constituted such a "clear and present danger" to the security of the nation that the abridgment of constitutional rights was justified. Thus was established the "clear and present danger" rule. It would seem, as was pointed out by one of the legal scholars ³⁹ testifying recently before the Subcommittee, that in forming legislation to disarm the Communist Party ". . . we will be working against a clear and present danger . . ." The "clear and present" danger phrase is reasonably but not broadly construed. The Supreme Court of the United States⁴⁰ has denied that freedom of speech protects those who advocate the destruction of our parliamentary system by methods of force and violence, reiterating a basic rule of political civilization: "A State may punish utterances endangering the foundations of organized gov-

³⁶ Note, 32 GEO. L. J. 405 (1944), reprinted in *Hearings*, p. 458.

³⁷ Statement of Donald R. Richberg, *Hearings*, 77.

³⁸ 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919). See also *Bridges v. California*, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941); *Carlson v. California*, 310 U. S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940); *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); See dissent of Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927).

³⁹ Testimony of Dr. Charles S. Collier, *Hearings*, 184, 187.

⁴⁰ *Gitlow v. State of New York*, 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925); see also *State v. Moilen*, 140 Minn. 112, 167 N. W. 345, 1 A. L. R. 331, 336 (1918); *State v. Diamond*, 27 N. M. 477, 202 Pac. 988, 20 A. L. R. 1527, 1535 (1921).

ernment and threatening its overthrow by unlawful means." The right of law whether state or national to "... prevent the overthrow of the Government by force and that it may, as a means to these ends, punish utterances which have a tendency to and are intended to produce the forbidden results is not open to question."⁴¹ In *Stromberg v. California*,⁴² the Supreme Court, speaking through Mr. Chief Justice Hughes, held that the displaying of a red flag as a symbol of opposition, by legal and peaceful means, to organized government, is protected as free speech. Thus *the belief in force is a prerequisite to illegality*. This important distinction must always remain.

In sum then the preliminary constitutional considerations make it clear that the "due-process" clause forbids a conclusive presumption by legislation of an arbitrary state of facts;⁴³ and ⁴⁴ "... freedom of speech and of press . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."

Thus if a legislative presumption of the criminality of membership is to be created it must be based on sound, apparent fact, clearly stated. That, if so stated, the freedom of speech enjoyed under the Constitution will not be found to include the right to advise or solicit crime,⁴⁵ seems probable. Hence the crux of the problem is the nature of the Communist Party in the United States. Is it by its very nature inherently illegal or so dangerous to the Anglo-American system of evolutionary democracy as to be susceptible of such designation? It is advisable, in answer, to note briefly what has been said of communism and the Communist Party, (a) by competent students of the doctrine, (b) by the communists themselves, and (c) by the courts. If the consensus be that it is truly a revolutionary organization there is little doubt of the constitutionality of an outlawing statute.

What have the students of the matter concluded as to the nature of the Communist Party? The investigating congressional subcommittee, in its report,⁴⁶ states:

⁴¹ *Dunne v. United States*, 138 F. (2d) 137 (C. C. A. 8th 1943); See also *Near v. Minnesota*, 283 U. S. 697, 51 St. Ct. 625, 75 L. Ed. 1357 (1931).

⁴² 283 U. S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A. L. R. 1484, 1494 (1931).

⁴³ *Manley v. State of Georgia*, 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. 575 (1929).

⁴⁴ *West. Va. Board of Education v. Barnette*, 319 U. S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1942).

⁴⁵ *Frohwerk v. United States*, 249 U. S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919).

⁴⁶ Report of the Subcommittee on Legislation of the Committee on Un-American Activities on Proposed Legislation to Control Subversive Communist Activities in the United States 1, 80th Cong., 2nd Sess. (1948).

It has been clearly established that the Communist Party of the United States is not an American political party, but is actually a disciplined and organic part of the world Communist movement, which has sections in every nation in the world, all under the direction and control of . . . the Politburo in Moscow.

A Canadian commentator⁴⁷ pointed out that, "The so-called Communist party is no more a political party in our sense of the term, than were Catiline's conspirators, . . . Coxey's Army or Al Capone's gang." As early as two years before the writing of the Manifesto the Pope⁴⁸ styled it ". . . that infamous doctrine . . . absolutely contrary to the natural law itself . . ." The accuracy of this conclusion has become increasingly clear through the one hundred years of the doctrine's formal existence.

It is well at this point to recall that virtually since the founding of the Third Communist International, by the Soviet Union Communist Party, in Moscow, on March 2, 1919, (allegedly dissolved on May 30, 1943) the Communist Party of the United States was openly affiliated with it. When, on November 16, 1940 the Party "dissolved" its bond to the International its sole purpose was the avoidance of the Voorhis Act.⁴⁹ On the same day that relations with the International were "broken", the Communist Party of the United States adopted a resolution⁵⁰ reiterating the ". . . unshakeable adherence of our party to the principles of prolaterion internationalism in the spirit of its greatest leaders and teachers, Marx, Engels, Lenin, and Stalin."

It is enlightening to observe just what the "spirit of its greatest leaders" is. Do the communists deny the charges before noted that they seek world revolution? Is there any factual basis for a legislative presumption of the illegality of the Communist Party, per se? If there is a basis it must be that this "party" subscribes to the violent overthrow of the government. What do the communists themselves say?

In their Manifesto Marx and Engels state frankly: ". . . the Communists everywhere support every revolutionary movement against the existing social and political order of things." They boast that, "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only *by the forceful overthrow of all existing social conditions.*" (emphasis supplied). To American visitors Stalin explained:

⁴⁷ 17 THE FORTNIGHTLY LAW JOURNAL 90 (1947).

⁴⁸ PIUS IX. ENCYCL. QUI PLURIBUS (1846).

⁴⁹ 56 STAT. 251 (1942), 22 U. S. C. A. §§ 611-622 (1947 Supp.).

⁵⁰ *Hearings*, p. 6.

I think the moment is not far off when a revolutionary crisis will develop in America . . . It is essential that the American Communist Party should be capable of meeting that historical moment fully prepared and of assuming the leadership of the impending class struggle in America. *Every effort and every means must be employed in preparing for that*, comrades.

(emphasis supplied).⁵¹ Stalin was following well the belief of his master, Lenin who had taught ⁵² that, ". . . it is absolutely necessary for every Communist Party systematically to combine legal with illegal works, legal with illegal organizations." This then is the "spirit of its greatest leaders" to which the Communist Party subscribes. That the American Communist Party is fully cognizant of its goal was testified by William Z. Foster while its national chairman.⁵³ He was asked: "Do the Communists in this country advocate world revolution?" He answered: "Yes." On another occasion ⁵⁴ the same man admitted that, "The attitude of the Communists is the abolishing of the American form of government." Thus the communists admit they are working by every available means, in complete disregard of justice and law, for the destruction of this country's political structure.

In the ultimate analysis it will be the courts which will make the final decision as to the nature of the Communist Party. A glance, therefore, at some of the judicial determinations in this regard is not without merit. For liability of deportation of dangerous aliens, a member of the Communist Party is bound by declaration of purposes and programs of the Communist International (now called "Cominform"), the Manifesto and the constitution of the Communist Party of America.⁵⁵ However, it seems, that if a member, alien, believes that violence is not now desirable, his membership will not bind him.⁵⁶ There has been dictum from the federal judiciary to the effect that implementation of Communist Party policies by orderly amendment is not feasible and that ". . . their consummation is impossible short of revolution."⁵⁷ Among the lower federal courts it has long been well established that communism teaches and advocates principles basically opposed to our Constitution ⁵⁸ and proposes their application by violent overthrow of

⁵¹ Stalin at interview with the First American Labor Delegation, Sept. 9, 1927, printed, *Hearings*, p. 439.

⁵² SELECTED WORKS OF LENIN, Vol. X. 172, International Publishers Co., Inc., (1943).

⁵³ Testimony before House, Investigating Committee, 1930, reprinted, *Hearings*, p. 369.

⁵⁴ William Z. Foster quoted by Rep. McDonough, *Hearings*, 44.

⁵⁵ Skeffington v. Katzeff, 277 Fed. 129 (C. C. A. 1st 1922). See also Antolish v. Paul, 283 Fed. 957 (C. C. A. 7th 1922).

⁵⁶ Strecker v. Kessler 95 F. (2d) 976 (C. C. A. 5th 1938).

⁵⁷ In Re Saralief, 59 F. (2d) 436 (E. D. Mo. 1932).

⁵⁸ United States v. Tapolesanm, 40 F. (2d) 255 (C. C. A. 3rd 1930).

the Federal Government.⁵⁹ Membership in the "party" makes one liable to certain governmental controls, even though the member had no knowledge of the character of the Communist Party and did not actually participate in its proceedings.⁶⁰ The adjudications of the state courts present no such uniformity, although, here too the opinion is largely in agreement. California has specifically held⁶¹ that it does not take judicial notice of the Communist Party's program for violent overthrow of the governments. The Pennsylvania Supreme Court, on the other hand, wrote:⁶² "What the policy of the Communist Party is does not appear from the evidence but courts have long recognized and have taken judicial notice that communism, as a political movement, is dedicated to the overthrow of the Government of the United States" . . . (and of the states) by force and violence." Most of the decided state cases are essentially in agreement with the view that "Marxian Principles", as applied, are such as to make their propagation a criminal act.⁶³ What, in the light of current events, could logically be considered the beginning of a trend in judicial notice appeared in the very late (1948) federal decision, *National Maritime Union v. Herzog*.⁶⁴ It was there held that communist activity in labor unions is such a danger to the nation that Congress may withhold from a union the privilege of becoming the exclusive bargaining agent in an industry unless each officer of said union fulfills the non-communist affidavit⁶⁵ requirement of the Taft-Hartley Act. Obiter, the Court noticed, without the introduction of evidence:

The Communist Party is known to be organized for the purpose of promoting throughout the world a program to spread communism . . . The pattern followed . . . is to create economic unrest . . . Evidence in a judicial proceeding is not needed to establish these as primary objectives.

This is judicial notice of the most obvious facts.

Lastly the total problem of outlawing or otherwise controlling the Communist Party must be broached in view of the novelty of the situa-

⁵⁹ *Uncar v. Seaman* 4 F. (2d) 80 (C. C. A. 8th 1924). See also cases cited in 32 GEO. L. J. 405 (1943).

⁶⁰ *Ex Parte Bridges*, 49 F. Supp. 292 (N. D. Cal. 1943).

⁶¹ *Communist Party v. Peek*, 20 Cal. (2d) 536, 127 P. (2d) 889 (1942).

⁶² *Pawell v. Unemployment Compensation Board of Review*, 146 Pa. Sup. Rep. 147, 22 Atl. (2d) 43 (1941). See also *United States v. Wallis*, 268 Fed. 413 (S. D. N. Y. 1920), *Field v. Hall*, 77 Ark. 143, 143 S. W. (2d) 567 (1940).

⁶³ *In re Lithuanian Workers' Literature Society*, 187 N. Y. S. 612 (1921).

⁶⁴ 16 L. W. 2501 (D. D. C. 1948).

⁶⁵ For a discussion of this statutory requirement see Note, 23 NOTRE DAME LAWYER 238, 248 (1948).

tion it presents. Communism, like the Ku Klux Klan, is in a state of perpetual war with our governmental system. However, the Klan, which is composed primarily of the neurotic dregs of this country, acts with a domestic scope, while the Communist Party, composed of the world's most unscrupulous human elements, acts with a world-wide scope. That which makes the Communist Party more threatening than the other subversive organizations is its connection, as a tactical unit, with the U. S. S. R. Thus the problem of the governments, state and national is unique.

As has been seen, an organization engaging in conspiratorial activity tending toward the overthrow of the government by force and violence, particularly when it is the agent of a foreign power, is one against which government must protect itself. A clear and present danger to society from such an organization permits the abridgment of what would otherwise be the rights of the members of the subject organization. By the observation of reasonable men, by the determination of American courts of justice and by the assertions of the communists themselves, the Communist Party in the United States fits completely this pattern for constitutional illegality. A federal statute declaring the Communist Party an illegal organization and membership therein criminal, per se, would be perfectly in accord with the letter and the spirit of the Constitution.⁶⁶ It may, in fact, be cogently argued that the Constitution commands such action.

However, in view of the difficulty of the legislative problem involved and the doubts as to constitutionality, all attempts at outlawing the Party, per se, were abandoned by the Subcommittee. A report was made by the Subcommittee on legislation, to the full Committee, on the legislation which they proposed. The report pointed out that the Communist Party in the United States "... constitutes a clear and present danger to our national security . . ." The report criticised the Department of Justice's "... failure to proceed under existing laws. . . ." It is suggested that the states be encouraged to take their own protective measures—in addition to those of the Federal Government. The report suggests the provision—in view of the current communist statements denying advocacy of force and violence—that it be necessary only to prove willful participation in a conspiracy to subvert the welfare of this country to that of a "foreign Communist power". Suggested legislation is primarily an extension of the existing statutes. Early in May, 1948, a bill was recommended to Congress by the full Committee,

⁶⁶ In support of this contention see *Whitney v. California*, 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927).

which embodied these changes.⁶⁷ The draftmanship of the bill finally enacted may do much to determine both its constitutionality and efficiency. It may be hoped therefore that this task will be adequately completed.

There is little serious doubt that the proposed legislation, if drafted prudently, will be constitutional. Could not a statute declaring the *per se* criminality of the Communist Party be founded upon the sound constitutional premises that support statutes "controlling" the Communist Party?

This is the specific legal action which might be taken against the domestic operation of international Communism. In a discussion of such a specific question there is the constant danger that the student of the total problem will lose the broad perspective requisite to an understanding of the roots of the present conflict. The long range success of any country in combatting the idea of communism, which is a potent negative force, will be determined by that country's ability or will to fill the vacuums wherein there is no justice to its citizens. Constructive social law and policy, which is a potent positive force, is the only means to accomplish this result. Speaking of that just social philosophy obligatory as "the doctrine of the Church,"⁶⁸ the Pope observed that "... this doctrine must be consistently reduced to practice in everyday life. . . ." The Catholic Church has, from the beginning, taught the immorality of those economic practices of our free enterprise system which create the justice vacuum in which communism so willingly thrives. These are such axiomatic wrongs as the unfair labor practices of child labor, substandard working conditions, inadequate compensation to workmen, denial of the workers' right to organize, et cetera; they include the flagrant immorality of "Jim Crowism" and Anti-Semitism. The true love of the communist is his role as champion of the oppressed, yet "... it was Christianity that first affirmed the real and universal brotherhood of all men of whatever race or condition."⁶⁹ Those justifiably dissatisfied with social conditions would do well to test the sincerity of the communists by the statement of Stalin, that:⁷⁰

... the revolutionist will accept a reform in order to use it as a means wherewith to link legal work with illegal work, in order to use it as a screen behind which his illegal activities . . . may be intensified."

⁶⁷ A copy of the bill was not yet available at this writing.

⁶⁸ ENCYCL. ATHEISTIC COMMUNISM (*Divini Redemptoris*) (1937) PIUS XI, speaking of the encyclicals RERUM NOVARUM and QUADRAGESIMO ANNO.

⁶⁹ See Note 66 *supra*.

⁷⁰ Quoted by James Burnham in his *Struggle For The World*, p. 61, noted in 17 Fortnightly Law Journal 90 (1947).

A program of morality implemented by positive law will help overcome any threat of communism's "ideals", while a program of adequate governmental action, not capable of use for fascist excesses, will help overcome the threat of communism's violence. There is neither reason nor excuse for the delay of such a program, if we would make secure the democracy so well defined by a poet as:

Ancient Right unnoticed as the breath
we draw—

Leave to live by no man's leave,
underneath the Law.

John E. Cosgrove

CIVIL RIGHTS—CONSTITUTIONALITY OF FEDERAL ANTILYNCHING LEGISLATION—On March 23, 1948, the Judiciary Committee of the House of Representatives reported to the House¹ that H.R. 5673 was a clean bill and recommended its prompt passage. This was the proposed federal antilynching bill which had been introduced in the House by Representative Case of New Jersey² and which had been referred to the Judiciary Committee for its consideration. In the committee itself, the question of a federal antilynching bill was already being considered. Since February 4, Subcommittee No. 4 had been conducting hearings on fourteen other bills³ similar to H.R. 5673, and differing only in certain minor features.⁴ It was, then, as a result of carefully considering all these bills that Mr. Case's bill was finally given the favorable report previously referred to. Though the report was favorable, it was by no means unanimous. On legal and other grounds, the question was hotly contested in the subcommittee hearings, and attached to the committee report was a strong minority report, signed by eight members of the Judiciary Committee.

The desirability and constitutionality of federal antilynching legislation has, as a matter of fact, long been a question of much specula-

¹ H. R. REP. No. 1597, 80th Cong., 2nd Sess. (1948).

² "A bill for the better assurance of the protection of citizens of the United States and other persons within the several States from mob violence and lynching, and for other purposes." Popularly known as "Federal Antilynching Act."

³ H. R. 41, introduced by Mr. Celler; H. R. 57, by Mr. Clason; H. R. 77, by Mr. Dirkson; H. R. 223, by Mr. Canfield; H. R. 228, by Mr. Dawson; H. R. 278 by Mr. Powell; H. R. 800, by Mrs. Douglas; H. R. 3850, by Mr. Bender; H. R. 4155, by Mr. Bradley; H. R. 4528, by Mr. Keating; and H. R. 4577 by Mr. Twyman.

⁴ See Statement of Joseph B. Robinson, American Jewish Congress, on H. R. 3488 and Other Bills to Curb Lynching, as found in *Hearing Before Subcommittee No. 4 of the Judiciary House of Representatives*, 80th Cong., 2nd Sess. 118 (1948).

tion. Since 1900, when Representative White introduced H.R. 6963 in the fifty-sixth Congress, more than 150 bills have been introduced into Congress.⁵ The first really sustained drive for such a bill, however, did not come until April 11, 1921 when Representative Dyer of St. Louis, Missouri, introduced H.R. 13, the Dyer antilynching bill.⁶ It passed the House in January, 1922, by a vote of 230 to 119, but was filibustered to death in the Republican Senate. It was reintroduced in succeeding years by Representative Dyer, but it was never again acted upon.

In 1933 the National Association for the Advancement of Colored People began mobilizing organizations and individuals in support of the Wagner-Costigan antilynching bill, sponsored by Senator Robert F. Wagner (D., N. Y.) and Senator Edward P. Costigan (D., Col.). Hearings were held before the Senate Judiciary Committee in February 1934 and broadcast was made over a nation-wide radio network. But it too was filibustered to death by southern senators and had to be laid aside. Since that time many other bills have been introduced, only to meet this or a similar fate.

During the past year, interest in this and other types of civil rights legislation has received great impetus from the publication of the book, *To Secure These Rights*. Both in⁷ and out⁸ of Congress support for a federal antilynching bill has grown to such proportions that the prospects for its passage seem brighter than ever.

That lynching does go on in the United States and is a real problem in this country is too obvious to warrant a thorough discussion. Nor is it necessary to show in detail that the civil rights of many of our citizens, primarily the rights of citizens who are in minority groups, are frequently violated. The question is whether these problems should be dealt with on the federal level or left to the states. Due to factors such as the above report and the efforts of such groups as the NAACP, the conviction is now stronger than ever that it can and should be done on the federal level. As a result, passage of a federal antilynching bill seems more likely than ever before, despite the opposition of many who, for various reasons, still share the conviction that the States should be left alone to work these problems out for themselves. The

⁵ The Library of Congress, Legislative Reference Service, Federal Law Section, June 13, 1947.

⁶ The following two paragraphs are based on excerpts from *A GENERATION OF LYNCHING IN THE UNITED STATES, 1921-46*, a supplement to *THIRTY YEARS OF LYNCHING IN THE UNITED STATES, 1889-1918*, by the National Association for the Advancement of Colored People, New York 18, New York.

⁷ For example, see the senatorial support being mustered for such a bill as reported in *N. Y. Times*, April 10, 1948.

⁸ For example, see *N. Y. Times*, "Letters to the Times", April 7, 1948.

opinion of those who share the federal viewpoint is summed up to some extent in the following excerpt from the message to Congress by the President in which he transmitted his recommendations for a civil rights program:⁹

A specific Federal measure is needed to deal with the crime of lynching—against which I cannot speak too strongly. It is a principle of our democracy written into the Constitution, that every person accused of an offense against the law shall have a fair, orderly trial in an impartial court. We have made great progress toward this end, but I regret to say that lynching has not yet finally disappeared from our land. So long as one person walks in fear of lynching, we shall not have achieved equal justice under law. I call upon Congress to take decisive action against this crime.

The decline in lynchings, referred to in the above quotation, is also brought out in the statement made by Mrs. Douglas to the subcommittee.¹⁰ In it, she points out that of the 4,717 known lynchings since 1882 and the 1,967 since 1900, there was only one in 1947. This fact has been seized upon by opponents of federal antilynching legislation as proof for their contention that it can be solved without what they term "federal interference in state affairs." But proponents of federal legislation point out that there were thirty-one attempted lynchings that year, and they contend that fear of just such federal legislation has tended to produce better enforcement by state and local officials of state antilynching laws.

Throughout this struggle it should be noted that even among those farthest removed from prejudice, and also among liberal groups in the South and elsewhere, there is opposition to such a federal program. For, in addition to emotional factors, there are other considerations involved in such opposition, one of the strongest of which is the idea in the South that enactment of such legislation tends to bring on the reconstruction era all over again. The Honorable Eugene Cook, Attorney General of Georgia, in a speech before the Lamar School of Law of Emory University, delivered March 4, 1948, put it this way:

One characteristic of Southerners is their reluctance to be forced into anything, even for their own good. It was a common saying after the War Between the States, when federal statutes attempted to force repugnant practices on our State, that "I can be restored to the Union, but I can't be reconstructed into it." Someone ought to tell Congress that reconstruction has been tried and abandoned.

⁹ H. R. Doc. No. 516, 80th Cong., 1st Sess. (1947).

¹⁰ *Hearings Before Subcommittee No. 4, 80th Cong., 2nd Sess., 39 (1948), supra* note 4.

But regardless of all the arguments pro and con,¹¹ it is generally recognized that, as Mr. Cook stated in the same speech, "Lynching may be a problem arising from emotions; but antilynching control is a *legal* proposition." (*Italics supplied.*) Hence the biggest controversy raging at the present time is whether or not a federal antilynching law is constitutional.

In support of its constitutionality, its proponents rely chiefly on the Fourteenth Amendment, as section one of H.R. 5673 states,¹² although not in such a way as to intend to exclude other constitutional bases which may also exist for such action. For example, Section One of the Fourteenth Amendment provides in part: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is contended that this provision is violated by state inaction and acquiescence in lynch law and mob violence. It is pointed out that inaction is just as much a violation of this amendment as affirmative action. It is insisted that *United States v. Cruikshank*,¹³ and *United States v. Harris*,¹⁴ two cases often cited by opponents of federal control, are not applicable because they merely hold that the various attempts by Congress to prevent the deprivation of civil rights by private individuals alone without state sanction or authority are unconstitutional.

In the *Cruikshank* case, the defendants were jointly indicted under an act¹⁵ which made it a felony for two or more persons to conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." The Court held that the right to equal protection of the laws under the Fourteenth Amendment does not "add anything to the rights which one citizen has under the Constitution against another," and that the duty to protect all citizens was one originally assumed by the several states and remains there, the only obligation on the United States being that of seeing that the states do not deny

¹¹ A good summary of the arguments in addition to the legal aspects against federal antilynching legislation can be found in H. R. REP. No. 1597, 80th Cong. 2nd Sess., 9-20 (1948) (Minority Views).

¹² ". . . the provisions of this Act are enacted in exercise of the power of Congress to enforce, by appropriate legislation, the provisions of the fourteenth amendment to the Constitution of the United States under said amendment equal protection and due process of law to all persons charged with or suspected or convicted of any offense within their jurisdiction."

¹³ 92 U. S. 542, 23 L. Ed. 588 (1875).

¹⁴ 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290 (1883).

¹⁵ § 6, Enforcement Act of May 30, 1870. For substance of this Act see 18 U. S. C. 51.

that right. The *Harris* case declared a federal statute of a similar nature unconstitutional because it dealt with individual rather than state action. Thus these two cases clearly do not apply, for the argument is that the states are the violators of this amendment by their inaction. In *Truax v. Corrigan*,¹⁶ for example, the Supreme Court held invalid, under both the "due process" and "equal protection" clauses of the Fourteenth Amendment, the attempted withdrawal by the Arizona Legislature of the weapon of injunction in labor dispute cases.

When such a violation of the Fourteenth Amendment by a state does take place, it may be remedied by Congress without specific constitutional authorization for the particular method chosen. In support of this important proposition, three cases provide good authority: *Texas v. White*,¹⁷ *Ex parte Yarbrough*,¹⁸ and *Strauder v. West Virginia*.¹⁹ In the first case, the Court speaks of the powers of Congress and says, "In the exercise of the powers conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in the choice of means is necessarily allowed."²⁰ In the *Yarbrough* case, the Court denied a writ of *habeas corpus* to eight defendants who had been imprisoned following conviction of the charge of conspiracy to prevent a Negro from voting. They alleged that the trial was null and void for want of jurisdiction, and that Congress did not have the right to punish private citizens for interfering with a federal election. The Court, in denying the writ, stated that although no express power has been given to Congress by the Constitution to provide for the prevention of violence exercised against the voter to control his vote at an election, it does not follow that no such law can be enacted. In construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed. Very similar to this is the *Strauder* case in which the Supreme Court held a state statute unconstitutional as a violation of the Fourteenth Amendment. *Strauder*, a Negro, was convicted of murder by a jury composed entirely of white men under this state law which limited jury service to white, male citizens. He claimed this law denied him the equal protection of the law required by the Fourteenth Amendment. In upholding his contention, the Court said:

It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race that protection of the General Government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State

¹⁶ 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375 (1921).

the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation . . .

. . . The fourteenth amendment makes no attempt to enumerate the rights designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies that existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or prosperity. Any State action that denies this immunity to a colored man is in conflict with the Constitution.

It is important to note at this point that the discretionary power of Congress need not be relied on wholly in showing authority to act under the Fourteenth Amendment to prevent state violation of civil rights. The leading case of *Screws v. United States*,²¹ is direct authority for the constitutionality of federal legislation as applied to state officials. In this case the petitioner, a sheriff of Baker County, Georgia, and two others who had assisted him in arresting a young Negro had been indicted and convicted under two sections of the Criminal Code.²² The case was reversed on other grounds, but in the course of their arguments it was made clear that Congress was acting within the authority conferred upon it by the Fourteenth Amendment in enacting those sections of the Criminal Code.

Two years later, this case was followed in affirming the conviction of a local official for depriving a citizen of his civil rights.²³ The officer had arrested a Negro who "looked drunk", had severely beaten him with a bull whip, and had forced him to jump into a river resulting in his death. On the authority of the *Screws* case, the conviction under the Criminal Code was upheld.

One argument often used by advocates of federal antilynching legislation seems rather farfetched. It is said that lynching substitutes a private, arbitrary, mob rule type of government for the republican form of government guaranteed by the Constitution. And since Article Four,

¹⁷ 7 Wall 700 (U. S. 1869), 19 L. Ed. 227.

¹⁸ 110 U. S. 651, 4 S. Ct. 152, 28 L. Ed. 274 (1883).

¹⁹ 100 U. S. 303, 25 L. Ed. 664 (1879).

²⁰ *Texas v. White*, 110 U. S. 651, 729, 4 S. Ct. 152, 28 L. Ed. 274 (1883).

²¹ 325 U. S. 91, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330 (1945).

²² 18 U. S. C. 52, section 20, and 18 U. S. C. 88, section 37. 18 U. S. C. 52 reads in part: ". . . Whoever under color of any law . . . subjects, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution . . . or by reason of his color, or race . . . shall be fined not more than \$1000 or imprisoned not more than one year or both."

²³ *Crews v. United States*, 160 F. (2d) 746 (C. C. A. 5th 1947).

Section Four of the Constitution provides that "the United States shall guarantee to every State in this union, a republican form of government," it is contended that congress must pass such legislation in accordance with this obligation. For example, in reference to the setting up of a military government in Rhode Island at the time its state constitution went into effect, the Supreme Court said,²⁴ "... unquestionably a military government, established as the permanent government of the State, would not be a republican form of government, and it would be the duty of Congress to overthrow it." The same thing is said to apply to a lynch mob, and that Congress must therefore enact such legislation. Incidentally, this same case finally ended the belief once held that it was the courts, rather than Congress, who are charged with this duty.

The treaty-making power of the United States is also relied upon to sustain the validity of such a federal statute. By Article Six of the Constitution such treaties are the supreme law of the land, while Article One, Section Eight, Clause Ten empowers Congress "to define and punish . . . offenses against the law of nations." Under these two sections, it has long been recognized that Congress has broad powers to legislate as to matters important to our international affairs. Consequently, powers that are not specifically provided for in the Constitution are inherent in this treaty-making power. For example, in *Missouri v. Holland*,²⁵ the state of Missouri brought a bill in equity to prevent the United States from enforcing the Migratory Bird Treaty Act of July 3, 1918,²⁶ which sought to effectuate a treaty between the United States and Great Britain. The Court upheld the validity of the Act under this treaty power.

The point of this argument is that in a similar manner Congress has acquired power to legislate against lynching. The United Nations Charter, which was ratified as a treaty of the United States,²⁷ provides in article fifty-five that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Protection of racial minorities was also involved in the peace treaties with Italy, Romania, Bulgaria, and Hungary.²⁸

However, the argument does not seem too sound. It does not answer the objection that might be raised; namely, that, granted the treaty power would give Congress power to deal with lynching if it

²⁴ *Luther v. Borden*, 7 How. 1 (U. S. 1849), 12 L. Ed. 581.

²⁵ 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984 (1920).

²⁶ 40 STAT. 755, 16 U. S. C. §§ 703-711.

²⁷ 59 STAT. 1031.

²⁸ 93 Cong. Rec. 6307 (June 2, 1947), 93 Cong. Rec. 6567-6584 (June 5, 1947).

could not otherwise be inferred, would it give Congress this power if such power were considered forbidden by the Constitution? Missouri raised this question²⁹ when it alleged that the Migratory Bird Act unconstitutionally interfered with rights reserved to the states by the Tenth Amendment. Specifically, it was argued that a treaty could not be valid if it infringed on the Constitution; that there are therefore limits to the treaty-making power—one such limit being that a treaty could not do that which could not be done by an act of Congress unaided. This is perhaps an overstatement of the objection, but it still stands as an important consideration since the Court side-stepped it by holding that the act in no way infringed on the Tenth Amendment. Thus, no matter how much emotional or popular appeal such an argument might have, it does not have too firm a legal foundation. Whether or not a federal antilynching law would be constitutional or not clearly depends on the construction of the Fourteenth Amendment to the Constitution.

The only other portion of the Constitution that has been relied upon to any extent is the Thirteenth Amendment, but it appears quite definitely settled that this will not support the federal view. Indeed, the Supreme Court once held³⁰ that there is no authority unless it be in the Fourteenth Amendment. Not only has it been definitely settled by inference that the Thirteenth Amendment does not apply, but in dealing with a federal statute on civil rights,³¹ the Supreme Court once specifically held that:³²

Congress was not empowered by the Thirteenth Amendment to make lynching an offense against the United States cognizable in the Federal courts . . . but the remedy must be sought through state action in state tribunals, subject to supervision by the Supreme Court by writ of error in proper cases.

As a result of this case, an Alabama Judge was forced to reverse his position. In a very similar case,³³ he had upheld the conviction of the appellant who had been tried and convicted under this Act for lynching. In the companion case,³⁴ this same jurist, Judge Jones, on the strength of the Supreme Court's holding in the case just quoted,

²⁹ *Missouri v. Holland*, 252 U. S. 416, 40 S. Ct. 382, 64 L. Ed. 641, 11 A. L. R. 984 (1920).

³⁰ *Slaughter-House Cases*, 16 Wall 36 (U. S. 1873), 21 L. Ed. 394.

³¹ 14 STAT. 27 (1886).

³² *Hodges v. United States*, 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65 (1906).

³³ *Ex parte Riggins*, 134 Fed. 404 (C. C. N. D. Ala. 1904), *Reversed*, 199 U. S. 547, 26 S. Ct. 147, 50 L. Ed. 303 (1905).

³⁴ *United States v. Powell*, 151 Fed. 648 (C. C. N. D. Ala. 1907), *Aff'd Mem.*, 212 U. S. 564, 29 S. Ct. 690, 53 L. Ed. 653 (1908).