June 1979


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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38CG9V

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Hamish R. Sandison†

In 1971, Great Britain enacted a system of laws patterned closely after the American Labor Management Relations Act; after three years of ineffectiveness, the legislation was repealed. The author examines the factors which led to the failure of the British regulations, describing the general background of British labor relations, setting out the provisions and language of the British act that contributed to the problem, and chronicling the events and transactions during 1971-1974 which challenged the act and exposed its weaknesses. He then evaluates the overall experience of Britain in this area and offers his perception of the lesson contained in the swift and complete rejection of the American model.

I
INTRODUCTION

Les Lois Politiques et Civiles de chaque Nation... doivent être telle-ment propres au Peuple pour lequel elles sont faites, que c’est un très-grand hazard si celles d’une Nation peuvent convenir à une autre.1

1. MONTESQUIEU, L’ESPRIT DES LOIS ch. III.

The British Industrial Relations Act of 19712 has been called “a

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1. "The political and civil laws of each Nation... must be so peculiar to the people for whom they are made; it is a very great accident should those of one Nation suit another."

2. PUB. GEN’L ACTS AND MEASURES OF 1971, ch. 72 [hereinafter the BIRA].
highly selective transplant of American labor law."3 Lasting for little more than three years from enactment on August 5, 1971,4 the BIRA, with the important exception of its unfair dismissal provision, has now been replaced in its entirety.5 This article traces the failure of certain provisions of the Act, and, through examination of the antecedent of those provisions in American law, seeks to advance tentative reasons for their rejection. Such a comparative-historical approach has valuable lessons for both the recipient country and the donor.

A quick glance at the 170 sections and nine schedules of the BIRA will indicate the vastness of its scope. An attempt to isolate the “critical issues” out of such vastness is therefore necessary, but also arbitrary, since it is unlikely that observers agree which issues were critical and which were not.6 Three issues which may have been critical and which have occupied the attention of the highest courts in England are: (1) the emergency procedures of Part VIII, considered in the second ASLEF case;7 (2) the question of union responsibility for the unlawful activities of its members, considered in the Heatons case;8 and (3) the closed shop, considered in the Langston case.9 These seem to have been the most important cases between enactment and repeal, having appeared in both law review articles and newspaper headlines. They raised problems that have clear precedent in American law, and they shed more light than other cases on the reasons for the eventual failure of the BIRA. Each of these issues relates to the law of the relationships between employers and trade unions, since it is here that the BIRA owed its greatest debt to American law. Accordingly, the individual employment relationship between employer and worker shall not be discussed, except as it touches upon collective relations.10 These three

4. After receiving the Royal Assent on August 5, 1971, various parts of the BIRA were brought into force by successive Commencement Orders between October 1, 1971, and February 28, 1972.
5. The BIRA was repealed and replaced by the Trade Union and Labour Relations Act, 1974, which received Royal Assent on July 31, 1974, and was brought into force on September 16, 1974.
6. A major area of interest omitted from this study is that of legal recognition of bargaining agencies, provided for in §§ 40-55 of the BIRA. However, these statutory procedures did not assume any practical significance for the great majority of unions that refused to register under the BIRA, since such refusal triggered the § 45(2) withholding of legal recognition. The influence of American law on these sections is discussed at length in O. KAHN-FREUND, LABOUR AND THE LAW 76-90 (1972).
10. On the debt owned to American law in collective relations, see Kahn-Freund, On the
issues shall be considered in the order in which they were litigated, accompanied by the relevant American law.

Before addressing the specifics of the BIRA, it should be noted that no act, whether of Parliament or of Congress, appears spontaneously. Rather, it emerges as a response to the perceived inadequacies of the pre-existing law, so that its present existence is better understood in the light of its absence. Knowledge of the previous law is especially relevant to the BIRA, for two reasons. First, it is important to realize that the BIRA was a startlingly radical departure from the previous law of labor relations in Britain. As noted below, the radicalism of this departure is among the reasons for the failure of the Act.

Secondly, knowledge of the previous law is relevant to the claim by those sponsoring the 1974 Act that it revives with only minor changes the pre-1971 law. Although much political energy has been expended about the precise veracity of this claim, it remains substantially true that any student of post-1974 law must look to the pre-1971 law for his or her sources. For these reasons, then, it is useful to look briefly at the outstanding features of the previous law with the understanding that more detailed reference to that law will be made later in its proper context.

Before 1971, the bedrock of British labor relations law lay in the individual contract of employment, which is legally enforceable as between employer and worker. Above this bedrock, the law of collective labor relations was most remarkable for its scarcity. Labor legislation, in Professor Kahn-Freund’s words, was “a gloss or a footnote to collective bargaining.” Thus the collective agreement between employer and trade union was presumed not to be legally enforceable, except insofar as its terms might be incorporated expressly or implicitly into the individual contract of employment. There was no legal right to organize, no legally recognized bargaining agency, and no resulting le-

*Uses and Misuses of Comparative Law, 37 MODERN L. REV. 1, 24-27 (1974). Professor Kahn-Freund suggests that the law of individual relations contained in the BIRA owes more to European influences. Id. at 23-24.

11. Professor K.W. Wedderburn, for example, has described the 1974 Trade Union and Labour Relations Bill as a “fair and modest modern equivalent of the 1906 [Trade Disputes] Act.” Letter to The Times (London), June 12, 1974.

12. Kahn-Freund, in A. FLANDERS & H.A. CLEGG, THE SYSTEM OF INDUSTRIAL RELATIONS IN GREAT BRITAIN 66 (1954). In 1959, Professor Phelps Brown wrote: “When British industrial relations are compared with those of the other democracies they stand out because they are so little regulated by law.” PHELPS BROWN, THE GROWTH OF BRITISH INDUSTRIAL RELATIONS 355 (1959). Since 1959, the development of an embryonic law of job security in Great Britain has not substantially altered this picture in the sphere of collective labor relations.


gal duty on employer or trade union to bargain collectively.\textsuperscript{15}

Under traditional British law, trade unions are unincorporated associations of rather shadowy legal status;\textsuperscript{16} registration with the Registrar of Friendly Societies is not compulsory, although minor legal advantages flow from it.\textsuperscript{17} Trade unions so registered enjoy complete immunity from criminal or civil conspiracy and other actions in tort, provided that they act "in contemplation or furtherance of a trade dispute."\textsuperscript{18} Individual union officers, however, are not immune, and it is through the medium of individual liability that the labor injunction is used extensively by employers.\textsuperscript{19} Neither trade unions themselves nor their agreements or trusts are subject to the restraint of trade doctrine at common law.\textsuperscript{20} Indeed, many agreements made by trade unions and their members as such are not cognizable by the courts at all.\textsuperscript{21}

There is no individual right to belong to a trade union, nor is there a right not to belong.\textsuperscript{22} Members may not be expelled in breach of union rules or the rules of "natural justice," and they have a legal right of action against the union if they are;\textsuperscript{23} but apart from the requirement of natural justice and the minimal conditions of registration,\textsuperscript{24} the content of the union rule book rests within the exclusive jurisdiction of the union itself.

This unique state of affairs in Britain has been variously described as "legal abstention," "voluntarism," and "industrial autonomy."\textsuperscript{25} Statutory law, to generalize very broadly, has remained largely a stranger to the British system of labor relations, the only significant exceptions being the individual contract of employment and health and safety legislation.\textsuperscript{26} Trade unionists appear to prefer it this way, and the occasional forays of the judiciary into labor relations during the last 30 years have only reinforced their attitude.\textsuperscript{27} "Most workers," as Professor Wedderburn has justly observed, "want nothing more of the law

\textsuperscript{17} C. Grunfeld, supra note 16, at 46-49.
\textsuperscript{18} K.W. Wedderburn, supra note 15, ch. 7 & 8.
\textsuperscript{19} Id. at 379-84.
\textsuperscript{20} Id. at 314-21.
\textsuperscript{21} Id. at 425-29.
\textsuperscript{23} Id., ch. 9.
\textsuperscript{24} Id. at 55-61.
\textsuperscript{26} The scope of these exceptions is discussed in O. Kahn-Freund, supra note 6, at 29-41. Professor Kahn-Freund explains the intervention of Parliament in health and safety by suggesting that the subject matter does not lend itself well to collective bargaining. Id. at 29-30.
\textsuperscript{27} Rookes v. Barnard [1964] A.C. 1129, is a notorious example. The effect of that decision in the context of trade disputes was reversed by Parliament in the Trade Disputes Act of 1965.
than that it should leave them alone."  

Legal abstention, however, does not imply an absence of rules in the actual conduct of collective labor relations. Rather, it means that the rules are determined by the custom and practice of the parties themselves, enforceable, if at all, by voluntary, not legal, means. These rules may be reduced to writing in the collective agreement, but often they are not; the collective agreement is surrounded by a larger penumbra of oral "understandings." The British system is perhaps best characterized in Professor Kahn-Freund's phrase as "collective laissez-faire." It is against this backdrop that the enactment of the BIRA must be examined.

II

NATIONAL EMERGENCY DISPUTES

A. The British Experience

It is undeniable that the state has a legitimate interest in the welfare of its citizens and must intervene to protect them when they are seriously endangered by industrial conflict. But the state also has an equally legitimate interest in the freedom of the individual to withhold his or her labor. Not surprisingly, these two interests tend to conflict, and their resolution, whether by legal or other means, creates a dilemma for every government. When does the first interest outweigh the second? When is the danger serious enough to justify intervention?

The problem is particularly acute in Britain and America, where the national economy as a whole is so dependent upon the uninterrupted operation of its constituent parts, and the connection between a strike in one industry and an injury to the overall welfare of society is so patent. This is especially so when the strike occurs in one of the basic industries of metal, power, or transportation.

There are two possible approaches to this problem, each reflecting quite different evaluations of these conflicting interests. As L.H. Silberman noted in his survey of
proposals to amend the American law, "[s]ome proposals would serve to impose a binding solution on the parties, while others would serve to allay the emergency conditions, leaving the content of the dispute unresolved." The first approach places its emphasis on the welfare of society as a whole, to which it subordinates the individual's freedom to strike; the second preserves the freedom to strike, while taking measures to alleviate its consequences.

Until 1971, British law adopted the second approach in the Emergency Powers Act of 1920, as amended in 1964. That Act provided for the declaration of a "state of emergency" by Royal Proclamation, where it appeared that "events of such a nature as to be calculated . . . to deprive the community, or a substantial portion of the community, of the essentials of life" were imminent. The Proclamation and "the occasion thereof" was to be communicated to Parliament forthwith, or within five days if Parliament was not sitting at the time. So long as the Proclamation was in force, "Her Majesty in Council" (in effect, the government) was empowered to make such regulations as were deemed necessary to preserve the peace "and for other purposes essential to the public safety and the life of the community," including the use of troops.

However, the Act expressly provided that "no such regulation shall make it an offence for any person or persons to take part in a strike, or peacefully persuade any other person or persons to take part in a strike." Of course, a threat to bring in troops is likely to dampen the ardor of all but the most determined striker, and the performance of essential services by troops is bound to lessen the economic impact of the strike. These, however, were the incidental side-effects, not the primary objectives, of the emergency procedures. The fact remains that the strike which gave rise to the emergency could, and usually did, lawfully continue notwithstanding the state of emergency.

The BIRA changed this considerably. Two procedures become available to the Secretary of State for Employment, to deal with an emergency dispute: first, an order for a 60-day "cooling-off" period; then, an order for a ballot of the strikers. The consequence of both is that no strike action was possible as long as the order remained in force. The primary purpose for the procedures was to bring about a

32. Silberman, supra note 31, at 679-80.
33. Id., § 1(1).
34. Id., § 1(2).
35. Id., § 2(1).
36. Id., § 2(1).
37. BIRA § 139.
38. Id., § 142.
39. Id., § 139(4) (cooling-off order); § 143(1) (ballot order).
return to work, thereby eliminating the cause of the emergency. These procedures were to be invoked by an application to the National Industrial Relations Court (NIRC) where it appeared to the Secretary of State that three conditions were satisfied. In the case of the cooling-off order, the conditions were:

(a) that ... industrial action, consisting of a strike, any irregular industrial action short of a strike, or a lockout, has begun or is likely to begin;
(b) [that an “emergency” exists: see below for a definition]; and
(c) that ... it would be conducive to a settlement of it by negotiation, conciliation or arbitration if the industrial action were discontinued or deferred. . . .

If the NIRC was satisfied that condition (b) was fulfilled, it was required to make the order for a period not exceeding 60 days. No subsequent order could be made with respect to the same industrial dispute. Upon expiration of the order, the Secretary of State could apply to the NIRC for a ballot order if it appeared that the same conditions (a) and (b) were satisfied, along with a new condition (c):

(c) that there are reasons for doubting whether the workers who are taking part or are expected to take part in the strike or other industrial action are or would be taking part in it in accordance with their wishes, and whether they have had an adequate opportunity of indicating their wishes in this respect . . . .

Again the NIRC was required to make the order where it was satisfied that condition (b) was fulfilled. The Commission on Industrial Relations (CIR) would then conduct a ballot of the persons specified in the order on the question determined by the NIRC, with results being published. The workers were thereafter free to resume their industrial action.

These emergency procedures were first invoked by the government in the spring of 1972. The interaction of the collective bargaining process, the government, and the courts was dramatic. On February 24, negotiations began between the British Railways Board (BRB) and the three unions representing their employees—the National Union of Railwaymen (NUR), the Associated Society of Locomotive Engineers and Firemen (ASLEF), and the Transport Salaried Staffs Association

40. Id., § 138(1).
41. Id., § 138(1)(a)-(c).
42. Id., § 139.
43. Id., § 140(7).
44. Id., § 142(1)(a)-(c).
45. Id., § 142(1).
46. Id., §§ 144-145.
47. Many of the facts in the text appear in the judgment of Lord Denning, M.R., in the Court of Appeal decision Secretary of State for Employment v. ASLEF (No. 2) [1972] I.C.R. 51-53 (CA). The rest are drawn from contemporary reports in The Times (London).
(TSSA)—on an unquantified claim for substantial wage increases. After a protracted series of offers and rejections, negotiations finally broke down on April 12. The executive committees of all three unions jointly decided to instruct their members to commence a subtle form of British industrial action known as a “work-to-rule.” A work-to-rule occurs where the observance of rules is adhered to beyond reason; the effect was to bring the whole railway system gradually but ineluctably to a halt. After an abortive effort at independent conciliation and an unheeded call by the Secretary of State for a voluntary last-offer ballot, the work-to-rule began on April 17. Two days later, the Secretary of State applied to the NIRC under section 138 for a 21-day cooling-off order. Under section 139, the NIRC granted an order for a period of 14 days to run from the resumption of normal working.48 This order was obeyed by all three unions. Meanwhile, further offers were made by the BRB and rejected by the unions. The Secretary of State again called for a last-offer ballot, and again was ignored. On May 9, the day that the order expired, the executive committees of the three unions decided to resume the work-to-rule as of May 12. On Thursday May 11, the Secretary of State applied to the NIRC under section 141 for a ballot order. After hearing argument for two days, the NIRC gave hurried judgment granting an order for a ballot under section 142.49 All three unions immediately appealed and on Friday May 19, after a week of continuous hearings,50 the court of appeal gave judgment against the unions, upholding the order of the NIRC.51

Work was again resumed in compliance with the order. The CIR then conducted the ballot on the following question: “In the light of the BRB pay offer (about which you are being informed by the BRB) do you wish to take part in further industrial action?” On May 30, the CIR reported the result of the ballot to the NIRC: of 154,189 railway employees eligible to vote, 129,441, or 84 per cent, voted in favor of further industrial action.1

Following a threat of renewed action, the BRB finally settled with the unions on June 12. The agreement granted an increase of 13 per cent on the total wage bill, as against 14 per cent claimed by the unions in the course of negotiations and 9.84 per cent

49. Secretary of State for Employment v. ASLEF (No. 2) [1972] I.C.R. 27.
50. Lord Denning, M.R., complained:

We realize that such pressure is at times inevitable, but we hope that in the future if the Secretary of State intends to apply to the courts he will be able to give more notice to those concerned. It is very difficult for the judicial process to be properly conducted in such haste.

51. Id.
52. The complete results of the ballot are reported in The Times (London), June 1, 1972.
originally offered by the Railways.\textsuperscript{53}

The outcome of these events, as might be expected, invited serious public derision and legal criticism of the emergency procedures of the BIRA.\textsuperscript{54} The emergency provisions were never invoked again, despite several instances of grave industrial conflict which arguably justified their use. The provisions remained for all practical purposes a dead letter throughout the subsequent life of the BIRA. This atrophy can be seen in retrospect as the first serious blow to the BIRA.

\textbf{B. The American Model}

A comparison with the American law reveals the extent of its adoption in the BIRA. There are two separate and exclusive regimes for the regulation of emergency disputes in American law: industries engaged in interstate and foreign commerce are covered by Title II of the Labor-Management Relations Act of 1947 (also known as the Taft-Hartley Act),\textsuperscript{55} while railroads and carriers by air engaged in interstate and foreign commerce are covered by Titles I and II of the Railway Labor Act of 1926.\textsuperscript{56} The provisions of the LMRA may be invoked "[w]henever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof . . . will, if permitted to occur or to continue, imperil the national health or safety . . . ."\textsuperscript{57} When the President is of this opinion, he may appoint a board of inquiry "to inquire into the issues involved in the dispute . . . ."\textsuperscript{58} The board must make a written report within a time prescribed by the President, setting out a statement of the facts and of each party's position, but not including any recommendations of its own.\textsuperscript{59} A copy of this report is filed with the Federal Mediation and Conciliation Service (FMCS) and its contents are made available to the public.\textsuperscript{60} The President may then direct the Attorney General to petition the appropriate district court to enjoin the strike or lock-out.\textsuperscript{61}

If the courts find that the threatened or actual strike or lock-out 
"(i) affects an entire industry or substantial part thereof . . . and (ii) if permitted to occur or continue, will imperil the national health or
safety, . . .” the court “shall have jurisdiction” to enjoin it.\textsuperscript{62} Once enjoined, the strikers must return to work, and the parties are required to “make every effort to adjust and settle their differences” with the assistance of the FMCS.\textsuperscript{63} At the end of 60 days, the board of inquiry makes another report to the President.\textsuperscript{64} Then, within the next 15 days, the National Labor Relations Board (NLRB) conducts a secret ballot of the employees on the question “whether they wish to accept the final offer of settlement made by their employer as stated by him . . .,”\textsuperscript{65} and the results of the ballot are then certified to the Attorney General within five days.\textsuperscript{66} At this point, 80 days after the original petition, the Attorney General applies to the court to discharge the injunction, and this motion must be granted.\textsuperscript{67} The parties are free thereafter to resume their action. Finally, the President makes a report to Congress on the dispute, together with recommendations “for consideration and appropriate action.”\textsuperscript{68}

The emergency procedures of the Railway Labor Act are similar though not identical; their use is more closely allied to the normal collective bargaining process. If a dispute concerning changes in rates of pay, rules or working conditions, known as a “major dispute,” is not adjusted by the parties themselves or by the National Mediation Board, and if the dispute “should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service . . . .” the Board must notify the President.\textsuperscript{69} The President may create an emergency board “to investigate and report respecting such dispute.”\textsuperscript{70} The report must be made within 30 days, and may include recommendations.\textsuperscript{71} For the period of the Board’s investigation and for 30 days following its report, the Act stipulates that “no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.”\textsuperscript{72} This has been generally agreed to mean that no form of industrial action is possible until the end of the 60-day period.

Placed side by side, the British law of emergency disputes in the BIRA and the American law, especially in LMRA, show obvious simi-
larities of procedure. More importantly, however, they both share the same underlying evaluation of the conflicting interests referred to at the outset of this section. Both statutes align themselves with the first approach; the freedom to strike is sacrificed so as to abate the emergency. This coincidence of form and philosophy provides a fertile ground for comparative analysis, since it provokes several questions of equal concern to both countries. First, what is an "emergency?" Is it meaningful, for example, to speak of a "national emergency" when only one plant is on strike? Secondly, who should decide? Is it appropriate for a court to decide whether an emergency exists? Finally, if legal methods are used to resolve emergency disputes, how do they fit into the process of voluntary collective bargaining? Are they a help or a hindrance?

C. What is an Emergency?

At first blush, the definition of an emergency in the BIRA appears vastly broader than the corresponding definition in the LMRA. In the case of a cooling-off order, the BIRA referred to:

an interruption in the supply of goods or in the provision of services of such a nature, or on such a scale, as to be likely—

(a) to be gravely injurious to the national economy, to imperil national security or to create a serious risk of public disorder, or

(b) to endanger the lives of a substantial number of persons, or to expose a substantial number of persons to serious risk of disease or personal injury.73

In the case of a ballot order, one alternative condition was added, that "the effects of the industrial action in question on a particular industry are, or are likely to be, such as to be seriously injurious to the livelihood of a substantial number of workers employed in that industry."74

Like Professor Kahn-Freund, "one wonders how many strikes of any importance are outside that definition."75

Peril to the "national health or safety," on the other hand, seems modest enough. As applied by the courts, however, this LMRA standard is broader than it appears, especially in the context of strikes affecting national defense. The court of appeals for the Second Circuit has stated that "the test of applicability is not merely the extent of the strike within one industry but the extent of the effect of a strike upon an industry and the national health or safety."76

Applying this test, the court of appeals enjoined the strike in a single plant of the American Locomotive Company on a finding that it made specialized articles "es-

73. BIRA § 138(2).
74. Id., § 141(2).
75. O. KAHN-FREUND, supra note 6, at 240.
sential" for the atomic weapons program. This was followed by the landmark Steelworkers case of 1959, in which the Supreme Court upheld an injunction issued to restrain a strike which had closed 85 percent of the country's steel mills on the single ground that the strike was adversely affecting "top priority missile programs"—despite evidence that the steel required for all national defense needs amounted to less than one per cent of total production in the previous 18 months.

Thus, the "safety" limb of the American definition has been approximated by judicial interpretation to the "national security" condition of the BIRA. Nonetheless, the definition remains significantly narrower, in that peril to "health" has never been taken to include mere economic injury in the absence of some national defense connotation. The RLA seems broader still, requiring only a dispute which threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service."

The definition of an emergency is not just a matter of semantics; it has important practical and political implications. The practical implication is that the width of the definition determines the possible frequency with which the emergency procedures can be used. As one commentator has pointed out, "the broader the definition of emergency, the greater the call for governmental intervention."

This view seems to be supported by empirical data. Under the modest definition of the LMRA, the emergency procedures have been invoked twenty-nine times between 1947 and 1968, or more than one per year. Under the broader definition of the RLA, 175 emergency boards have been appointed between 1936 and 1969, more than five

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77. Id. at 134.
79. Id. at 42.
80. Id. at 69.
81. United States v. ILA Local 418, 335 F. Supp. 501 (N.D. Ill. 1971). Judge Morovitz stated:

Given the complete absence of any decision that has granted an injunction based solely on national economic interest without considerations of national defense of physical health, we cannot permit an interpretation of § 178 that would include economic injury as a controlling part of the "national health or safety."

Id. at 507. This statement was disapproved in United States v. ILA Local 861, 336 F. Supp. 504 (S.D. Me. 1971), by Judge Coffin: "[T]his court does not believe that the phrase 'health or safety' was intended to be given a strict, narrow construction." Id. at 505. But the court accepted government affidavits showing that the strike was jeopardizing United States military commitments in Europe, Southeast Asia, and elsewhere. Id. at 506. The court cited United States v. ILA, 293 F. Supp. 97 (S.D.N.Y. 1968), in support of its wider interpretation. Id. at 505. But in that case also, the government affidavits disclosed the "disastrous effect which a continued strike would have on the national health and safety in all aspects of its economic and military activities . . . ." 293 F. Supp. at 103; see also the Findings of Fact, 293 F. Supp. at 99-101.
83. Silberman, supra note 31, at 678.
84. Id. at 674.
times per year.\textsuperscript{85} The high frequency with which the emergency provisions are invoked is notably at odds with the crises situation brought to mind by the term “national emergency,” and consequently reduces the credibility of the government’s action. One scholar reviewing the twenty-nine “national emergencies” has flatly stated that “the very term is dishonest.”\textsuperscript{86} It is argued that “[t]oo frequent resort to the scare and crisis terms of ‘imperiling the national health or safety’ will . . . likely compromise the confidence of the public in such a law or in the officials who administer it.”\textsuperscript{87} Moreover, frequent use of the emergency provisions tends to anesthetize those who dispense the power. The union lawyers of the Labor Section of the American Bar Association have drawn an apt analogy:

Emergency procedures are like narcotics. They may be used initially only in the gravest emergency but they can, and often do, create an addiction which, in the long run, may be far more serious than the disease for which the drug was originally prescribed.\textsuperscript{88}

All these criticisms apply \textit{a fortiori} to the BIRA.

The definition of emergency also has important political implications. The definition confers political power on those who may invoke it, since discretion, in political terms, implies power. Thus, the width of the definition determines the extent of the power. When the definition is as wide as that of the BIRA, there are so many disputes potentially within its ambit that the discretion to invoke the emergency procedures can only be exercised according to political rather than strictly factual or legal criteria. As Professor Aaron has noted, speaking of the LMRA: “[T]he decision to declare or not to declare an emergency is essentially political, and is as much a reflection of the incumbent President’s temperament and style as of the actual or potential economic impact of the dispute.”\textsuperscript{89}

The significance, therefore, of a wide definition is that it places in the hands of the government a potential weapon as powerful as any labor injunction available to a private employer. In his dissenting opinion in the \textit{Steelworkers} case, Justice Douglas likened the emergency injunction to “the old labor injunction that brought so much discredit to the federal judiciary. . . .”\textsuperscript{90} The danger to which he alluded is that the government may be tempted to upset the balance of interests

\textsuperscript{85} Id. at 768.
\textsuperscript{86} Jones, \textit{Toward a Definition of “National Emergency Dispute,”} 1971 \textit{Wisc. L. Rev.} 700, 737.
\textsuperscript{87} Id. at 737.
\textsuperscript{88} ABA LABOR LAW SECTION, \textit{FINAL REPORT OF THE AD HOC COMMITTEE TO STUDY NATIONAL EMERGENCY DISPUTES} 332 (1966).
between employer and trade union by legal intervention in favor of the employer, under the pretext that it is protecting the public welfare from injury in an "emergency dispute." While potential abuse is not necessarily a reason to deny the power, it serves to explain the political difficulties of its use in the face of popular skepticism about an alleged "emergency." The likelihood of skepticism increases in direct proportion to the width of the definition; suspicion of abuse—or indeed actual abuse—can only be avoided by removing the opportunity. One way to do that is to cut down the definition.

One final and important point remains to be made about the definition. The analogy that can be drawn with the historic labor injunction brings one back to the fundamental but conflicting interests which emergency procedures are designed to resolve: the public welfare on the one hand and the individual's freedom to strike on the other. Just as the old labor injunction inhibited the freedom to strike in order to serve the employer's personal interest, so the modern emergency injunction—pretexts apart—inhibits that freedom in the interest of what the government perceives to be the public welfare. If the definition of an emergency, as argued above, determines the frequency and scope of government intervention, it also determines the extent of the individual's freedom to strike, since the striker's freedom ends where the "emergency" begins. Put figuratively, there is a linear continuum between the freedom to strike at one end and the definition of emergency at the other; as the definition is expanded, the freedom to strike is reduced. In this way, the definition reflects the relative values that are given to the two conflicting interests. If an emergency is narrowly defined in terms of actual danger to life, it reflects the high value placed on the freedom to strike; if it is widely defined in terms of injury to the national economy, it reflects the high value placed on the public welfare, to which the freedom to strike is correspondingly subordinated. Without favoring one or the other of these interests, it must be noted that legislators (and voters) should be aware that the definition of an emergency is not merely a matter of convenience, but implicitly expresses a political evaluation of the two interests.

As suggested, one way to avoid the practical and political dangers of a wide definition is simply to reduce its scope. The question becomes, to what extent? One commentator has gone so far as to suggest

91. The management lawyers of the ABA Labor Section were alive to this danger. Commenting on a proposal to widen the definition still further, they wrote: "Thus the temptation on the part of the executive branch of the government to intervene would be substantially greater. This in turn would weaken the incentive of the parties to settle unresolved issues between themselves." ABA LABOR LAW SECTION, supra note 88, at 327. The proposal was contained among the recommendations in Report of President Kennedy's Advisory Committee on Labor Management Policy, Free and Collective Bargaining and Industrial Peace (1962).
“the impossibility of any clear anterior definition.” An alternative safeguard against abuse is to require that the decision as to emergency status be taken out of government hands altogether and given to the courts. This leads to a second question for comparative analysis.

**D. Who Should Decide?**

This question arises in the context of certain *a priori* principles which are shared by both the United States and Great Britain: first, that the judicial function and the executive function should be kept separate; second, that the former is exercised by the courts and the latter by the government; and finally, that “legal” questions belong to the former and “political” questions to the latter. In the United States, these principles are given legal effect in the constitutional doctrine of the separation of powers, whereas in Britain they are expressed in a constitutional convention having political rather than legal status. In this context, the emergency procedures in the American and British legislation, with the exception of the RLA, have been allocated to the judiciary. Under the BIRA, it was the NIRC that issued the cooling-off order or the ballot order pursuant to an application by the Secretary of State for Employment. Under the LMRA, it is the appropriate district court that issues the injunction pursuant to a petition by the Attorney General, and the ballot follows automatically thereafter. In both countries, this distribution of the executive and the judicial functions has provoked much controversy, legal as well as political.

Two separate but related questions arise. First, what is the scope of the judicial function in emergency procedures? Do the courts make an objective determination of the factual and legal requirements before issuing an emergency order, or are they bound to accept the subjective assertions of fact and law contained in the government’s application? Secondly, is it appropriate for the courts to decide whether an emergency exists, or should this be an executive function? These two questions were at the heart of the controversy in both the *ASLEF (No. 2)* and the *Steelworkers* cases.

In *ASLEF (No. 2)*, all three unions conceded to the Court of Appeal that there was an emergency as defined by section 141(1)(b) of

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93. “The nonjusticiability of a political question is primarily a function of the separation of powers.” Baker v. Carr, 369 U.S. 186, 210 (1962). This is the leading case on the jurisdiction and justiciability of “political questions.”
95. BIRA §§ 139(4) and 143(1).
97. Secretary of State for Employment v. ASLEF (No. 2) [1972] I.R.C. 19 (CA).
the BIRA. They argued, however, that there was no objective evidence to satisfy conditions (a) and (c); that in the absence of objective evidence, the NIRC was not bound by the subjective assertions of the Secretary of State that these conditions were satisfied; and that the NIRC had therefore erred in granting a ballot order and should be reversed. The Court of Appeal rejected their argument on two grounds. First, it found evidence that there were breaches of contract that satisfied condition (a) and that there were reasons for doubting whether the strike was in accordance with the workers' wishes, thus satisfying condition (c). Secondly, the Court of Appeal held that in any case it was enough that the Secretary of State was satisfied—at least in the absence of mala fides or palpable misdirection. According to Lord Denning, Master of the Rolls (M.R.): "All that the statute requires is that it should 'appear' to the Secretary of State to be so." According to Lord Justice (L.J.) Buckley, "the court can accept the Secretary of State's view as to conditions (a) and (c) without investigation in any case where his view is not assailed." The Solicitor General, appearing for the Secretary of State, put it even more bluntly in argument: "The words, 'where is appears to' in section 141(1) plainly gave an unlimited discretion . . . ." Since the Secretary of State was satisfied that conditions (a) and (c) were fulfilled, and since the NIRC was satisfied that condition (b) was fulfilled, the NIRC was bound to make the ballot order, and the Court of Appeal duly upheld it.

In the Steelworkers case, the union's argument before the U.S. Supreme Court, for reversal of the district court's issuance of an emer-

99. *Id.* at 56, 58.
100. *Id.* at 56, 58.
101. *Id.* at 56.
102. *Id.* at 60.
104. An order under § 142 is mandatory:

Where an application is made to the Industrial Court under section 141 of this Act, the Court subject to its being satisfied that there are sufficient grounds for believing that [condition (b) is fulfilled] shall order a ballot to be taken.

(Emphasis supplied). The reasons for differentiating the subjective requirement of conditions (a) and (c) from the objective requirement of condition (b) are obscure. A contemporary editorial in The Times (London), *supra* note 54, commented:

So the Act gives rise to the paradoxical situation that decisions on questions which are properly questions of law and fact (are there breaches of contract of employment, have the men had a chance to make their wishes felt in the matter of industrial action?) are to an extent withdrawn from the purview of the court; while the question whether grave injury to the national economy is likely, which is a political question if there was one, is left for the court to decide.

105. Their interpretation seems to be equally applicable to the procedures for a cooling-off order under §§ 138 and 139, though the court expressed no opinion on those procedures. The NIRC took this view in the first ASLEF case.
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ergency order, proceeded along parallel lines. First, it argued that there was no evidence of an emergency as defined by section 206. Second, it argued that even if there were such an emergency the district court failed to exercise its equitable jurisdiction under section 208, in that the court had not considered its power to withhold injunction. The Supreme Court rejected the first argument on the evidence, and the second argument as a matter of law. Justices Frankfurter and Harlan, in a concurring opinion, stated:

The purpose of Congress expressed by the scheme of this statute precludes ordinary equitable discretion. . . . Such a decision by the President to invoke the court's jurisdiction to enjoin, involving, as it does, elements not susceptible of ordinary judicial proof nor within the general range of judicial experience, is not within the competent scope of the exercise of equitable jurisdiction.

This means that under section 208 of the LMRA, as under section 142 of the BIRA, the court is bound to issue an emergency order if it is satisfied that an emergency exists, with due deference given to the findings of the executive branch.

Both these cases share a novel concept of the judicial function. Under the BIRA, the court was precluded from determining the existence of two out of the three necessary conditions before issuing an order, since the Secretary of State's opinion could be accepted "without investigation." Under the LMRA, the court may not exercise its ordinary equitable jurisdiction before issuing an injunction, since the President's decision involves elements not "within the general range of judicial experience." Under both acts, the courts are given the power to issue an order if they find that an emergency exists, but they are denied the power not to issue an order in such a situation.

Not surprisingly, the application of these Acts has embarrassed judges and provoked criticism outside the courts. In 1959, Justice Douglas argued: "We cannot lightly assume that Congress intended to make the federal judiciary a rubber stamp for the President. . . . If the federal court is to be merely an automaton stamping the papers an Attorney General presents, the judicial function rises to no higher level

106. The union's argument is summarized in 361 U.S. at 46.
107. Id. at 42.
108. Id. at 43.
109. Id. at 56, 58. Justices Frankfurter and Harlan likened the role of the district court under § 208 to "the role of the Courts of Appeals under provisions for review by them of the orders of various administrative agencies, such as the NLRB." Id. at 56. But the power of courts of appeals under § 10(e) of the National Labor Relations Act of 1935 as amended in 1947, 29 U.S.C. § 160(f) (1976), to which they referred, is significantly wider:

[T]he court . . . shall have . . . jurisdiction to grant . . . such temporary relief or restraining order as it deems just and proper, and . . . to make and enter a decree enforcing, modifying, and enforcing as modified, or setting aside in whole or in part the order of the Board . . . .
than an IBM machine." Thirteen years later, Lord Denning, M.R. asserted with equal vehemence: "It has been suggested that the role of the Secretary of State is so vast that the courts are in danger of becoming a rubber stamp to carry out his decision. This suggestion must be emphatically rejected." Outside the courts, a contemporary editorial in The Times commented on ASLEF (No. 2) that "the law in this matter goes some way—and that some way is too far—towards converting the courts that administer it into executors of ministerial policy." In a similar vein, the union lawyers of the ABA Labor Section wrote in 1966: "In fact . . . the hearing before the district court is a sham, the finding is predetermined, and the judicial process is utilized to case a cloak of legality over a finding which is in fact made ex parte by the President." Between 1947 and the present, only one government application has been refused under section 208, while 34 have been granted.

In essence, these critics conclude that the emergency procedures offend the principle of separate functions, in that they are neither wholly judicial nor wholly executive. Their conclusion implicitly undermines the suggestion that the judicial function might operate as a safeguard against potential abuse by the government, since that suggestion depends for its efficacy on the premise of separate and independent functions. An emasculated judicial function that serves only to disguise a prior political decision is unlikely to deter abuse.

Yet while these critics share the same conclusion, they appear to reach it from diametrically opposite starting points. Justice Douglas, assuming that the decision is essentially legal, infers that it should be subject to the full scope of judicial discretion, lest the courts become a "rubber stamp." The union lawyers, assuming that the decision is essentially political, infer that it should be made by the President alone, not foisted on the courts merely to invest it with a "cloak of legality." These conflicting assumptions raise the second question of whether the emergency order process is "legal" or "political."

In the Steelworkers case, the union pursued this question in its

110. United Steelworkers v. United States, 361 U.S. at 70-71 (dissenting opinion).
112. The Times (London), Ministers and Judges, May 20, 1972 (editorial).
113. ABA LABOR LAW SECTION, supra note 88, at 335.
114. U.S. v. ILA Local 418, 335 F. Supp. 501 (N.D. Ill. 1971). The application was refused because the court found insufficient evidence of a national emergency. The court expressly did not deviate from the holding of Steelworkers that a court must issue an injunction if it is satisfied that an emergency exists. Id. at 511.
115. Since Silberman's survey, supra note 31, there have been six more emergency disputes, making a total of 35 since 1947. San Francisco Chronicle, March 7, 1978, at 1. The coal miners' strike of Spring 1978 is the latest example; it appears to have added very little to the experience of previous disputes.
third argument before the Supreme Court.116 Accepting arguendo that the emergency injunction was otherwise properly issued, the union claimed that the grant of jurisdiction under section 208 was itself unconstitutional, in that it purported to confer on the district court a power that is outside the scope of judicial power within the meaning of article III, section 2 of the U.S. Constitution. In other words, the decision to issue or not to issue an emergency injunction is not an appropriate exercise of the judicial power because it is a political rather than a legal decision. The Supreme Court again rejected the union's argument: "[T]he provision in question as applied here is not violative of the constitutional limitation prohibiting courts from exercising powers of a legislative or executive nature . . ."117 In ASLEF (No. 2) a similar constitutional argument was of course not available to the unions; however, the political argument outside the courts that followed the decision took similar lines. The Times stated:

This consequence of the Act . . . is unfortunate because it blurs the sharp line that ought to be kept between the powers and functions of ministers and the powers and functions of courts . . . These orders, when they are necessary, should come on the authority of the Secretary of State, and the statute should be amended to that effect.118

The discussion so far does not support the Supreme Court's view that the emergency procedures are judicial in nature. As noted above, the definition of an emergency is subject to politics. Professor Aaron has suggested that the decision to invoke the emergency procedures is "essentially political."119 In the absence of compelling reasons to abandon the principle of separate functions, it necessarily follows that the decision to issue an emergency order should be made by the executive branch, not by the courts. This is the view implicit in the Emergency Powers Act of 1920, where the decision to declare a state of emergency is made by the government subject only to approval by Parliament. It is also the view implicit in the RLA, where the decision to appoint an emergency board is made by the President without involvement by the courts. These statutes adopt the only procedure that is consistent with the political character of the decision. By contrast, the emergency procedures of the BIRA and the LMRA offend the principle of separate functions by entrusting to the courts a decision which belongs properly to the executive.

A practical consideration is also relevant. ASLEF (No. 2) and the Steelworkers case illustrate the obvious limits on the speed of the judicial process. In the former, there was a hiatus of eight days between

116. 361 U.S. at 46.
117. Id. at 43.
118. The Times (London), Ministers and Judges, May 20, 1972 (editorial).
119. Aaron, supra note 89, at 141.
application and ballot order; in the latter, there was a gap of no less than 18 days. In the meantime, if the governments are to be believed, both countries were rushing headlong towards Armageddon. The judicial process is not by its nature adept at quick deliberation; if the process is to run its normal course from application through possible appeal to decision, the country is likely to suffer. Unless the emergency is to continue unabated, the judicial process must be cut short—leaving the courts stranded in the same no man’s land that has been the object of so much criticism. These practical difficulties, in addition to the principle of separate functions, all argue for the use of executive rather than judicial machinery in emergency situations.

E. Emergency Procedures and Collective Bargaining

The involvement of courts in emergency disputes raises a third and final issue: how do the emergency procedures fit in with the process of voluntary collective bargaining? Collective bargaining is the central pivot of the British and American systems of labor relations, a fact recognized by the law of both countries. Collective bargaining is the process by which management and labor seek to give effect to their conflicting expectations: management’s expectation of making a profitable return on its investment, and labor’s expectation of securing higher wages and improved working conditions. The end product of this process, the collective bargaining agreement, expresses the balance between these conflicting expectations—a balance reached by measuring the relative power of the two parties. Such an evaluation is thus the crucial function of the collective bargaining process; unless this balance is reached, there can be no agreement.

It is only when this process fails to function, when a balance of expectations is not reached, that the possibility of an emergency dispute can arise. The paramount concern of every government is to ensure that the collective bargaining process does function successfully so as to prevent at the outset any potential threat to the public welfare. This aim is acknowledged in the emergency procedures of both countries, professing designed to encourage settlement of the dispute by means of collective bargaining. The cooling-off order under the BIRA was

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120. In the ASLEF case, the period was from May 11 to May 19, 1972; in the Steelworkers case, it was from October 20 to November 7, 1959.

121. Among four “general principles,” the BIRA embraced “the principle of collective bargaining freely conducted on behalf of workers and employers.” BIRA § 1(1)(a). The NLRA states: “It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . .” 29 U.S.C. § 151 (1976). This declaration is supported by the right to bargain collectively under 29 U.S.C. § 157 (1976).

122. This analysis assumes the absence of third-party intervention, whether by compulsory arbitration or statutory wages policy.
only available, as noted above, where it appeared to the Secretary of State for Employment that "having regard to all the circumstances of the industrial dispute, it would be conducive to a settlement of it by negotiation, conciliation or arbitration if the industrial action were discontinued or deferred . . . ."123 While the order was in force, there was a presumption that "all appropriate action would be taken to effect a settlement,"124 though this presumption did not translate into a legal duty. Similarly, it is declared by the LMRA to be the policy of the United States that:

the advancement of the general welfare, health and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of employees. . . .125

In furtherance of this policy, a legal duty is imposed upon the parties as long as the emergency injunction is in force "to make every effort to adjust and settle their differences," with the assistance of the Federal Mediation and Conciliation Service.126

In both countries, the ballot order has been motivated by the same paramount concern. It is predicated on the hope that a majority of workers will vote to discontinue their industrial action and thereby hasten a settlement (as under the BIRA), or on the hope that a majority will vote to accept the employer's last offer (as under the LMRA). The emergency procedures of the RLA, though not involving a duty to adjust the differences or a last-offer ballot, are likewise directed at promoting the collective bargaining process of which they are but an extension. Either party may invoke the services of the National Mediation Board with a view toward settling a "major dispute," and the Board itself may take the initiative to offer its services in the event of an imminent emergency.127 Only when these efforts have been exhausted may the Board notify the President of a threatened emergency and thus set in motion the appointment of an emergency board.128

One way to judge the success or failure of the emergency procedures is to ask whether the emergency orders succeed in securing a return to work. On this test, it must be admitted that the record in both countries is good. In the ASLEF cases, the orders were obeyed by all

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123. BIRA § 138(1)(c). This condition is not required in an application for a ballot order under § 141, but the Secretary of State must, "so far as appears to him to be practicable in the circumstances," consult every party to the dispute. Id., § 141(4).

124. INDUSTRIAL RELATIONS BILL CONSULTATIVE DOCUMENT ¶ 170 (1970) [hereinafter CONSULTATIVE DOCUMENT].


three railway unions. In America, all but three emergency injunctions issued under the LMRA have been complied with,\textsuperscript{129} while the appointment of an emergency board under the RLA has usually resulted in the restoration of the \textit{status quo ante}.\textsuperscript{130} Yet if the paramount concern of the emergency procedures is to encourage a settlement of the dispute by means of collective bargaining, it would seem more pertinent to ask another question: did the emergency order promote a settlement of the dispute through the collective bargaining process? On this test, a very different judgment emerges.

In the British railway dispute of 1972, the collective bargaining process broke down on April 12. No settlement was reached while the cooling-off order was in force, and the ballot order resulted in a massive vote for further industrial action; serious collective bargaining was only resumed after a threat to renew the work-to-rule. Agreement was reached on June 12, thirteen days after the ballot order had expired. This pattern is reflected in the American experience under the LMRA between 1947 and 1968. Of twenty-nine emergency disputes, twelve were not settled during the 80-day injunction, and every last-offer ballot was rejected; of the twelve disputes, seven were later settled after strike action and five were resolved without strikes.\textsuperscript{131} Under the RLA between 1947 and 1967, at least thirty-four strikes occurred, during or after the 60-day emergency period, before a settlement was reached.\textsuperscript{132}

Of these procedures, those of the RLA have been the most criticized when judged by their effect on the collective bargaining process. The ABA Labor Section, in the 1966 report cited above, unanimously concluded that "the efficacy of the emergency provisions of the Railway Labor Act has diminished almost to the vanishing point."\textsuperscript{133} The procedures have been invoked so frequently—a consequence, as noted, of an expansive definition of "emergency"—that their predictability has been likened by Professor Aaron to "the courtship dance of the greater crested grebe,"\textsuperscript{134} and by Professor Dunlop to the performance of a "kabuki theatre."\textsuperscript{135} This predictability has paralyzed, rather than stimulated, the collective bargaining process during the 60-day period. An Emergency Board reported in 1967 that "experience shows that the parties begin to negotiate only after an Emergency Board has been appointed, and often only after a report has been submitted to the Presi-

\textsuperscript{129} The three exceptions were strikes in the bituminous coal-mining industry, two of which occurred in the early days of the Taft-Hartley Act and one of which occurred 31 years later. Silberman, \textit{supra} note 31, at 693-95; the New York Times, March 14, 1978, at 1, col. 1.
\textsuperscript{130} Silberman, \textit{supra} note 31, at 678.
\textsuperscript{131} \textit{Id.} at 674.
\textsuperscript{132} \textit{Id.} at 678.
\textsuperscript{133} ABA LABOR LAW SECTION, \textit{supra} note 88, at 338.
\textsuperscript{134} \textit{Quoted by} Silberman, \textit{supra} note 31, at 680.
\textsuperscript{135} \textit{Quoted by} Wedderburn, \textit{supra} note 92, at 354.
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While in the short term the procedures serve merely to postpone collective bargaining for 60 days, the long-term effect of legal intervention is more serious. As the union lawyers of the ABA Labor Section put it: "The railroad industry provides a classic example of the destructive effects upon collective bargaining resulting from constant, indiscriminate, predictable government intervention." It seems that neither management nor labor is likely to develop the continuing momentum necessary for autonomous collective bargaining when both can rely upon the intervention of a third party to absolve them of further responsibility. Habitual emergency boards, like habitual miracles, weaken the incentive for self-help.

Similar criticisms are applicable to the emergency procedures of the LMRA, particularly in their effect on those industries, such as the longshore industry, where their use has been most frequent. In nearly half of the twenty-nine emergency disputes, it is apparent that the 80-day injunction accomplished nothing more than an automatic extension of the agreement, during which time no serious collective bargaining took place. The balloting, far from resulting in acceptance of the employer's last offer, appears to have been, in Professor Kahn-Freund's words, "a rather futile ceremony."

The British railway dispute, while not a very useful statistical sample, exhibits the same characteristics: paralysis of collective bargaining throughout the cooling-off period and rejection of a settlement through the ballot vote. In addition, the first use of these novel procedures inspired a solidarity among the railway workers that was presumably the very opposite of the government's intention. Mr. Peter Pain, counsel for the NUR, later observed that "the effect of ordering a ballot was to rally the members to their leaders; once the men had supported their leaders so demonstrably, further concessions became inevitable."

137. ABA LABOR LAW SECTION, supra note 88, at 343-44.
139. The union lawyers were of the opinion that:

in other situations, and particularly in the longshore industry, the use of the 80-day injunction is so predictable that it amounts to an automatic extension of the agreement, with the inevitable result that the pressure necessary to bring about a settlement is not generated until the injunction has run its course.

ABA LABOR LAW SECTION, supra note 88, at 322.
140. O. KAHN-FREUND, supra note 6, at 242.
141. The reaction of the railway workers, if less dramatic, is yet reminiscent of the coal mining strikes of 1948 and 1949-50, when the United Mine Workers flatly refused to obey the emergency injunction. See the material cited at note 192 supra.
the government had hoped to induce a settlement close to the nine percent originally offered by the BRB, it was sadly betrayed by a ballot vote that helped to wring out a concession of 13 per cent.

To generalize broadly, it would appear that the effect of the emergency procedures in both countries has been at best irrelevant, and at worst a positive hindrance, to the collective bargaining process. This result is not surprising when the function of collective bargaining is recalled. The collective bargaining agreement, as suggested earlier, represents a balance between the industrial power of management and labor. The freedom to strike is obviously a prime component of labor's industrial power. The temporary suspension of that freedom has two mutually dependent consequences. On the management side, it takes away the most persuasive inducement to serious collective bargaining. As Professor Morris has written: "Collective bargaining evidently works as a method of fixing terms and conditions of employment only because the risk of loss is so great that compromise is cheaper than economic strife." On labor's side, the emergency order denudes the workers of their most powerful weapon. So long as their dispossession is only temporary, there is no reason to settle early on terms inevitably lower than those obtainable when their weapon is later restored. On both sides, therefore, the effect of the emergency order is to render impotent the prime motivation for collective bargaining.

A more fundamental point concerns society's legitimate interest in the freedom of the individual to withhold his or her labor. This interest can be described in libertarian terms: no person should be compelled to sell his or her labor. But there is also a function rationale. The freedom to strike—whether threatened or actually used—is the principal yardstick in the measuring process of collective bargaining by which the balance of conflicting expectations is reached. This axiom has been recognized by the highest judicial authority in both countries. Lord Wright stated in the House of Lords in 1942: "Where the rights of la-

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143. It is difficult to determine the effect, if any, of the emergency procedures on the four disputes from 1947 to 1970 that were settled before the emergency injunction had even been issued; an additional thirteen were settled at some time during the 80-day period. Silberman, supra note 29, at 674. The union lawyers of the ABA Labor Law Section admit that "in a few instances the 80-day injunction has afforded the parties needed additional time in which to reach an agreement . . . ." ABA LABOR LAW SECTION, supra note 88, at 322. But of course it is impossible to prove or disprove the negative, i.e., that a settlement would not have been reached in the absence of an emergency injunction. The management lawyers, when assessing a return to work, were forced to admit that the result of the Act had been accomplished "either by accident or by its own intrinsic merit." Id. This same uncertainty of causation applies a fortiori when the question is asked whether the injunction has helped to promote a settlement of the dispute.


145. In the British railway dispute, for example, we have seen that settlement followed a threat to resume the work-to-rule. Seven of the Taft-Hartley disputes were settled after strikes. Silberman, supra note 31, at 674.
bour are concerned, the rights of the employer are conditioned by the rights of the men to give or withhold their services. The right to strike is an essential element in the principle of collective bargaining. Justice Brennan stated for the Supreme Court in 1960:

The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

If the freedom to strike is recognized as a *sine qua non* of collective bargaining, the contradiction inherent in the emergency procedures is readily apparent. It is flatly contradictory to declare the aim of promoting collective bargaining while in the same breath denying the freedom to strike that is a necessary condition of it; the American experience teaches that this contradiction is not easily reconciled. As long as strike action is excluded from the balance of collective bargaining, there is no middle course between pure reason and compulsory arbitration to resolve the conflicting expectations of management and labor.

This is not, of course, to deny society's legitimate interest in the public welfare. Rather, it suggests that a better way to protect that interest is to encourage the voluntary settlement of conflicting expectations through the collective bargaining process—a process necessarily including the freedom to strike. This was the British approach before 1971, underpinned by the safety net of emergency powers; it is now the approach to be followed after 1974.

Most of the reasons for the "atrophy" of the BIRA emergency provisions are no more than particular instances of certain general principles of what Professor Kahn-Freund has called comparative law reform, or rather, the use of comparative law "as a tool of law reform." The atrophy of the ballot order is perhaps easiest to explain. The ballot failed in Britain for the very same reason that it failed in America—because its success depends upon the mistaken prediction that union members will vote to accept an offer which has been rejected by their leaders. This prediction is derived from a fallacious premise about the nature of union leadership. The premise is that hot-headed union leaders, like Sirens, are likely to seduce their reluctant members onto the rocky shores of industrial conflict. From this premise, the BIRA expressly implied—and this is also implied by the LMRA—

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149. BIRA § 141(1)(c).
that the union's members are not taking industrial action "in accordance with their wishes." Hence there follows the prediction that a majority, free to express its wishes through secret ballot, will vote to accept what its leaders have rejected. Yet as we have seen, there is not one American case in which this hot-headed leadership theory has been vindicated by a vote to accept the employer's final offer. In Britain, as might be expected, neither the premise nor the prediction fared any better. The failure of the ballot order of the BIRA illustrates what is surely the first and most elementary lesson of comparative law reform: do not attempt to transplant a device which has failed to function in the original system—at least in the absence of compelling reasons to indicate that transplantation may cure its malfunction.

Several other factors equally pertinent to the ballot order and the cooling-off order are relevant here. One factor is that the government was suspected of an ulterior motive. Workers perceived the emergency orders as the modern equivalent of the old labor injunction, to be wielded as a club by the government in the place of the private employer; that this particular club was labeled "emergency order" only reinforced their suspicion. Three facts added weight to this interpretation. First, the comparison between the government and the private employer was more than rhetorical in the case of nationalized industries such as British Rail, coal, gas, electricity or steel. The nexus of government and management in these industries is so close that the relation of the workers and the government is approximate in fact, if not quite in law, to an employment relationship. In the railway dispute of 1972, for example, this nexus found expression in a direct government interest in limiting the size of the settlement conceded by the BRB—quite apart from the government's general interest in wage restraint at a time of accelerating inflation.

150. There seems to be no responsible opinion that the last-offer ballot is useful. The implicit assumption of the 'last-offer' ballot that there is a substantial chance that the membership will accept what the leadership has rejected has turned out, in fact, to be totally unwarranted. It simply has not happened.

ABA LABOR LAW SECTION, supra note 88, at 337.

151. Lord Denning, M.R., has accepted it as "arguable" that a one-day strike called by the Amalgamated Union of Engineering Workers (AUEW) on May 1, 1973, in protest against the government's counter-inflation policy is "a dispute between workers in the employ of the government on the one hand and the government as employer on the other hand" such as to constitute an industrial dispute within § 167(1) of the BIRA, even though only some AUEW members were actually employed by the government. Sherard v. AUEW [1973] I.C.R. 421, 433. Extending Lord Denning's dictum by analogy, it is arguable that a dispute between workers and management in a nationalized industry is an "industrial dispute" between those workers and the government as employer.

152. A voluntary ceiling on price increases of five percent was then being operated by members of the Confederation of British Industry (the employers' equivalent of the TUC), aided and abetted by government persuasion. As the labor correspondent of The Times observed: "An inflationary settlement on the railways would make it more difficult for public and private industry to
Powers Act of 1920 was still on the statute books. If the provisions of that Act had been thought adequate for the previous 51 years, there seemed to be no need to give the government additional powers in order to cope with emergencies as such. Finally, the definition of an emergency dispute was clearly wide enough to encompass disputes which could not by any stretch of the imagination be regarded as emergencies. In light of these facts it is easier to comprehend the suspicion that the government's primary purpose in the enactment and exercise of the emergency provisions was to curb the power of the unions rather than to protect the public welfare.

Another factor was the widespread criticism engendered by the choice of the judiciary to implement emergency orders. Violation of the principle of separate judicial and executive functions offended many who were otherwise sympathetic, or at least neutral, toward the objectives of the provisions. A side-effect of this choice was that political debate both inside Parliament and in the press was foreclosed throughout the duration of judicial proceedings. The government's difficulties were thus doubled; not only was it denied the opportunity to defend its political decision to invoke the emergency procedures, the incidental limitation on political debate only exacerbated suspicion that the government was harboring an ulterior motive. In this way, the choice of judicial proceedings obliged the government to conduct its political campaign with one hand tied inextricably behind its back.

One final and important factor to be noted is that the use of legal methods to resolve the causes, as opposed to the symptoms, of emergency disputes was alien to the history of voluntarism in British labor relations. As discussed above, emergency procedures, insofar as they prohibit the freedom to strike, contribute very little to, and may even hinder, the process of voluntary collective bargaining in Britain or America. In Britain, however, they have an additional implication: they amount to a slap in the face for employers and workers, who share a long tradition of voluntary cooperation in the provision of emergency services during industrial action. It was in the light of this tradition that the Royal Commission of Trade Unions and Employers' Associations, also known as the Donovan Commission, after canvassing the views of government, unions and employers, rejected in 1968 a propo-

153. In proposing the bill, the government argued that the Emergency Powers Act of 1920 is inadequate because it "cannot be invoked solely on the ground that the national economy is endangered." CONSULTATIVE DOCUMENT, supra note 124, ¶ 165. This argument is questionable; there are unlikely to be many strikes in which the national economy is "endangered" that do not also "deprive the community, or a substantial portion of the community, of the essentials of life." Emergency Powers Act of 1920, ¶ 1(1).
sal to enact emergency procedures on the Taft-Hartley model.\textsuperscript{154}

Taken together, these factors help to explain the atrophy of these BIRA provisions after the \textit{ASLEF (No. 2)} decision was issued in 1972. The ballot order had failed; emergency orders severally were viewed with hostile suspicion by the workers; sympathetic or neutral opinion found the role of the NIRC obnoxious; and employers feared that the spirit of voluntary cooperation with their workers was being upset by legal intervention. It is idle to speculate which of these or other factors were decisive in persuading the government to abstain from using the emergency procedures again; it is not even clear that the conscious decision was ever made. Nonetheless, such considerations rendered even a \textit{bona fide} use of the emergency procedures at best hazardous and at worst self-defeating, in cumulative effect relegating them to the scrap heap of abandoned law. The fate of the emergency procedures of the BIRA represents the first rejection of the American transplant.

III

UNION RESPONSIBILITY

\textbf{A. Generally}

A union, like a corporation, can only act through human agents. The acts of its agents become, in law, the acts of the union, so that their lawful acts can accrue to its benefit and their unlawful acts can render it liable to penalties. It is therefore vital to know who are the union's agents and what are the acts for which a union can be made responsible. In Britain and America, this question is decided according to principles of the law of agency—better known in Britain as the law of vicarious responsibility. Generally speaking, a union is responsible for the unlawful acts of its agents committed while acting within the scope of their authority on behalf of the union. It is in this sense, rather than any moral sense, that reference here is made to “union responsibility.”

The question of union responsibility was at the forefront of a growing disenchantment with the British system of industrial relations during the early 1960's. Questions were raised about the obligation of national unions to reduce the growing incidence of local strikes, and particularly about the proper role of law to enforce that obligation. In 1965, the Labor government appointed a Royal Commission (the Donovan Commission) to study the British system. Reporting in 1968, the Commission found that Britain had two systems of industrial relations: the “formal” system of industry-wide bargaining, and the “informal”

system of factory-wide bargaining.\footnote{155} Industry-wide bargaining between employers and employers’ associations and national unions or federations of national unions was aimed at reaching written agreements on “a narrow range of issues”;\footnote{156} factory-wide bargaining between individual employers and local work groups, though “far wider” in range, consisted largely of “tacit arrangements and understandings,” and in “custom and practice.”\footnote{157} These two systems of bargaining were found to be in conflict.\footnote{158} There had been “a shift in authority from the industry to the factory,”\footnote{159} accompanied by an increasing gap between wage rates agreed at industry level and actual earnings at factory level—a phenomenon known as “wage drift.”\footnote{160} Factory-wide bargaining, the new locus of power, was founded to be “largely informal, largely fragmented and largely autonomous.”\footnote{161} This fragmentation was identified by the Commission as the central defect of the British system.\footnote{162}

The “decentralisation of collective bargaining”\footnote{163} was also thought to explain the peculiar pattern of strikes in Britain.\footnote{164} The Donovan Commission estimated that 95 percent of all work stoppages were due to “unofficial” strikes (those not approved by the appropriate union authority) and “unconstitutional” strikes (those in breach of agreed disputes procedure), most of which occurred at workshop or factory level.\footnote{165} The widely quoted figures of 95 percent has been seriously challenged by a later study.\footnote{166} In the political debate that followed publication of the Report, however, the “special problem” of unofficial and unconstitutional strikes became an idée fixe, and the magical figure of 95 percent was cited by both major parties in support of their own favored nostrums. The majority of the Donovan Commission, supported by the trade unions and eventually by the Labor government,

\begin{itemize}
  \item 155. \textit{Id.} at ¶¶ 46, 143-54.
  \item 156. \textit{Id.} at ¶¶ 145, 147.
  \item 157. \textit{Id.} at ¶ 147.
  \item 158. \textit{Id.} at ¶ 149.
  \item 159. \textit{Id.} at ¶ 65.
  \item 160. \textit{Id.} at ¶ 57.
  \item 161. \textit{Id.} at ¶ 65, \textit{quoting} Allan Flanders.
  \item 162. \textit{Id.} at ¶ 162.
  \item 163. Discussed in \textit{id.} at ¶ 74.
  \item 164. \textit{Id.} at ¶¶ 70, 360-457.
  \item 165. \textit{Id.} at ¶¶ 367-68. The Donovan Report did not provide separate figures for “unofficial” and “unconstitutional” strikes, although it did surmise that “[u]nofficial strikes are also in practice usually, though not always, ‘unconstitutional’ in the sense that they take place in disregard of an existing agreement laying down a procedure for the attempted settlement of a dispute before strike action is taken.” \textit{Id.} at ¶ 367. For the sake of argument, it is hereinafter presumed that unofficial strikes are also unconstitutional.
  \item 166. Silver, \textit{Recent British Strike Trends: A Factual Analysis}, 11 \textit{BRIT. J. INDUS. REL.} 66, 90 (1973). The author suggests that “an estimate of between 75 and 85 per cent . . . is as at least as worthy of consideration as Donovan’s 95 per cent.” \textit{Id.} at 91.
\end{itemize}
argued that the best way to reduce the figure was by voluntary reform of the institutions of collective bargaining, particularly that of factory-wide bargaining.\textsuperscript{167} The Conservative Party, then in opposition, argued that the only cure was to enact legal measures aimed at “strengthening the hands of employers, trade unions and individuals who resist irresponsible, subversive or unconstitutional action.”\textsuperscript{168}

It was the latter view that prevailed in the BIRA. The Conservative government, newly elected in 1970, declared that it had “a responsibility to make clear the standards to which, on behalf of the country as a whole, it expects the conduct of industrial relations to conform.”\textsuperscript{169} These standards were laid down by way of legislation—the BIRA—which was conceived as “the main instrument” of reform.\textsuperscript{170} The BIRA established a complex machinery to enforce the standards: industrial activities contrary to the standards of conduct constituted “unfair industrial practices,” akin to statutory torts;\textsuperscript{171} jurisdiction over unfair industrial practices was vested in the National Industrial Relations Court;\textsuperscript{172} and the range of legal sanctions included declaratory orders, compensation, and injunctions.\textsuperscript{173} Nonetheless, litigation against unofficial or unconstitutional strikers to enforce the standards was only foreseen as “a last resort.”\textsuperscript{174} Instead, a primary role of preventive enforcement was cast upon unions themselves. As one commentator has written: “An essential part of the philosophy behind the Act . . . is that unions should be induced to exercise greater discipline over those members who break rules of procedure or step outside the imposed framework of industrial ‘order.’”\textsuperscript{175} This philosophy is implicit in the third “general principle” of section 1, which calls for “representative, responsible, and effective” trade unions.\textsuperscript{176} The prophylactic function of the BIRA was thus conditioned upon control by national unions over local industrial practices, and the legal inducement for the exercise of that control was the law of vicarious responsibility.

Suprisingly enough, however, neither the BIRA nor the LMRA states a general principle of union responsibility for the unfair practices of its members.\textsuperscript{177} This section considers the extent union responsibil-

\begin{itemize}
\item \textsuperscript{167} Donovan Report, \textit{supra} note 154, \textsection{} 155-211.
\item \textsuperscript{168} \textit{FAIR DEAL AT WORK} 29 (1968).
\item \textsuperscript{169} \textit{CONSULTATIVE DOCUMENT}, supra note 124, at \textsection{} 8.
\item \textsuperscript{170} \textit{Id}.
\item \textsuperscript{171} \textit{Id} at \textsection{} 22; BIRA part V.
\item \textsuperscript{172} \textit{CONSULTATIVE DOCUMENT}, supra note 124, at \textsection{} 21; BIRA parts VI-VII.
\item \textsuperscript{173} \textit{CONSULTATIVE DOCUMENT}, supra note 124, at \textsection{} 30-33; BIRA \textsection{} 101.
\item \textsuperscript{174} \textit{CONSULTATIVE DOCUMENT}, supra note 124, at \textsection{} 9.
\item \textsuperscript{175} Hepple, \textit{Union Responsibility for Shop Stewards}, \textit{I INDUS. L.J.} 197 (1972).
\item \textsuperscript{176} BIRA \textsection{} 1(1)(c).
\item \textsuperscript{177} But see the discussion of \textsection{} 36 of the BIRA at notes 182-213 \textit{infra}.
\end{itemize}
ity can be inferred from the British or American statutes and the extent to which it has been established by the courts. Three types of unlawful activity which may give rise to union responsibility are considered: (1) disobedience of emergency orders or injunctions; (2) breach of collective bargaining agreements; (3) inducement of breach of contract (Britain) and unfair labor practices (United States). This discussion shall also consider the extent of individual liability for the same unlawful activities—whether union responsibility is inclusive of, or exclusive of, individual liability.

B. The British Law

1. Emergency Orders

The binding effect of the cooling-off and ballot orders under the BIRA was specifically limited to "the persons... appearing to the Secretary of State to be responsible for calling, organising, procuring or financing the strike or other action in question..." Although the term "persons" included trade unions as corporate entities, it did not include:

any person who in the opinion of the Industrial Court...

(a) has... no responsibility for the strike or other action in question beyond that of being included among the persons taking part in it, or

(b) has no responsibility... except in his capacity as an official of a trade union acting within the scope of his authority on behalf of the trade union.

This second exemption was limited to the officials of registered trade unions. The BIRA thus contemplated proceedings against unions, and perhaps against the leaders of unregistered unions, but not against members acting as individuals. This, in fact, was the procedure adopted in the ASLEF cases, where the only defendants were the three unions involved in the dispute.

The BIRA was silent, however, on the question of union responsibility for disobedience of an emergency order. This question did not arise during the brief history of the BIRA, and the ASLEF cases offer no guidance. Professor Kahn-Freund suggested that union leaders who did not obey the order would make themselves liable to the penalties of contempt. This seems doubtful upon closer examination. Union officers, unpaid officials, and even shop stewards, acting within the scope of their authority, could clearly render the union vicariously responsible by their own disobedience; but it is unlikely that the leaders themselves would have been liable individually for disobedience of an order

178. BIRA § 138(3)(a).
179. Id.; § 139(3).
180. Id.; § 61(3). See text accompanying note 213 infra.
181. O. KAHN-FREUND, supra note 6, at 242.
in which they are not named, although the officials of an unregistered union, if named in the order, might be liable. These questions illustrate the yawning gaps in the BIRA on the extent of vicarious responsibility.

2. Breach of Collective Agreement

Before 1971, the collective agreement between employer and union was presumed not to be legally enforceable. This, as noted, was one of the foundations of "legal abstention" in Britain. The BIRA took a 180-degree turn. "There is no reason," the government said, "why a collective agreement, like any other valid contract, cannot be made legally binding." Legal enforceability was purportedly secured by sections 34 and 35.

A legally enforceable collective agreement, made after the commencement of the BIRA, was to bind the parties in accordance with ordinary contractual principles. In practice, this meant the signatories and the organizations for whom they sign; persons other than the contracting parties, such as union members, were not individually bound. Enforcement of the agreement lay within the exclusive jurisdiction of the NIRC, though the action and the remedy provided are analogous to those for breach of contract a common law. Section 36(1) made it unfair industrial practice for any party to break the collective agreement. Proof of breach attracts the statutory remedies of declaratory order, compensation and injunction, although there are certain exemptions for the officials of registered trade unions.

At this point, however, the analogy with the law of contract disintegrates. Section 36(2) made it an unfair industrial practice for any party to the agreement not to take all such steps as are reasonably practicable for the purposes—

(a) of preventing persons acting or purporting to act on behalf of that party from taking any action contrary to an undertaking given by that party and contained in the collective agreement . . . ;
(b) where the party in question is an organisation, of preventing members of the organisation from taking any such action; and
(c) where any action has been taken as mentioned in paragraph (a) or paragraph (b) of this subsection, of securing that the action is not continued and that further action as mentioned in those paragraphs does not occur.

Furthermore, “action contrary to an undertaking given by” the contracting party was defined by section 36(3) as

(a) action which, if taken by the contracting party, would have been a breach of the undertaking by the contracting party [or]
(b) [action which] consists in doing that which, in accordance with the undertaking, was not to be done, or in not doing that which, in accordance with the undertaking, was to be done.

These subsections are a startling departure from common law notions such as privity and consensual obligation. Not only does subsection (2) rewrite the collective agreement without consent of the parties to include an affirmative duty of enforcement, but subsection (3) ascribes to the contracting parties the delinquencies of a non-contracting third person.

The wider theoretical significance of section 36 is twofold. First, it was the only explicit statement of a principle of vicarious responsibility in the whole of the BIRA. To that extent, it points to the proper interpretation of the great silences in the rest of the statute. The principle, as applied to a national union, appears to be that the contracting union was responsible for the acts of its members—whether agents in law or not, whether signatories to the contract or not—so long as their acts were contrary to an undertaking contained in the contract. Liability for breach of contract could only be escaped by taking “all such steps as are reasonably practicable”—which were nowhere defined—to avert or restrain the unlawful acts. It is hard to imagine a clearer expression of a “police” philosophy of union leadership. Secondly, section 36 was significant in choosing the duty to observe the collective agreement as one of the legislative “standards of conduct.” The consequence of this choice was to render unlawful, at a stroke, the great majority of all stoppages—95 percent if one believes the Donovan Commission—which are by definition in breach of a collective agreement. Whether such a blanket prohibition is desirable can be debated elsewhere; it is enough to point out here that the principle of pacta sunt servanda as a norm of industrial relations is quite incompatible with any legally recognized freedom to strike. Yet the sanctity of contract, both collective and individual, as a yardstick of legitimate strike action was a recurrent theme of the BIRA.

In practice, however, section 36 proved still-born. From the inception of the BIRA, the member unions of the Trade Unions Congress
(TUC) united in demanding that every collective agreement should contain a clause excluding legal enforceability. The words "This Is Not A Legally Enforceable Agreement" joined the argot of every union negotiator. Nor was there any resistance by major employers to the exclusionary clause; Professor Kahn-Freund's prediction, delivered in the early days of the BIRA, that "unions may have to make concessions in order to induce management to consent to the [non-enforceability] clause" was not fulfilled. The CIR, in its Annual Report for 1972, found no evidence that the question of legal enforceability had become "a significant bargaining issue;" this removed the vast majority of collective agreements from the purview of the NIRC, since the unfair industrial practices of section 36 were limited to those agreements that are "legally enforceable contracts," and no action was ever brought under that section.

Section 36, augmented by sections 34 and 35, was one of the key elements in the government's strategy against the unofficial and unconstitutional striker. It portended a continuing regime of private law, of "standards of conduct" written by the contracting parties and enforced by the national union. Its intended role in the reform of industrial relations was far more important than occasional ad hoc litigation under section 96—from which the registered trade union and its officials were immune in any case. The premature demise of section 36 was certainly less dramatic than the confrontations in the docks industry over section 96, or in the railway industry under the emergency provisions, and consequently, its disappearance was largely unnoticed. Still, that should not disguise the fact that section 36 was one of the most egregious failures of the BIRA.

3. Inducement of Breach of Contract

Section 96 of the BIRA created another unfair industrial practice, analogous to various torts of economic interference at common law. It provided that "[i]t shall be an unfair industrial practice for any person, in contemplation or furtherance of an industrial dispute, knowingly to induce or threaten to induce another person to break a contract to which that other person is a party..." Exclusive jurisdiction lay in the NIRC. There was no concurrent liability for the common

189. The TUC is the national federation of British trade unions, analogous to the AFL-CIO in America.
190. O. KAHN-FREUND, supra note 6, at 138.
193. BIRA § 96(1).
194. Id., § 101(1).
law torts, and the usual statutory remedies were available.

On its face, section 96 applied to "any person"—whether corporate or individual—who engaged in the proscribed action. However, two classes of "persons" were expressly exempted from liability: (a) "a trade union or an employers' association" and (b) an individual who acted "within the scope of his authority on behalf of a trade union or an employers' association." These exemptions were limited to registered trade unions and their officials, since a "trade union" was defined by section 61(3) as "an organisation of workers which is for the time being registered under" part IV of the BIRA; registration, then, was clearly a precondition of the immunity.

The purpose of these exemptions is apparent. The target of section 96 was not the official strike conducted by a registered trade union through its authorized agents; such organizations and individuals retained the immunity that they enjoyed before 1971 and received an added immunity with respect to breaches of non-employment contracts. Its targets were rather "sudden unofficial strikes" perpetrated by an unregistered organization of workers "that had not yet accepted such obligations [of registration]." The echo of the Donovan Commission is unmistakable.

As it turned out, the government's scheme of immunity through voluntary registration misfired. Despite the overwhelming benefits of registration and the punitive disadvantages of non-registration, the great majority of unions affiliated with the TUC refused to register, thereby exposing themselves and their officials to unlimited liability under section 96. By reason of non-registration alone, the size of the exempted class shrank to almost nil, while the range of potential targets extended from the smallest local work group to the largest national union. Section 96, as Professor Gould rightly observes, was unexpectedly translated into "the Act's most formidable weapon."

The size of the potential target raises the question of the definition of vicarious responsibility under section 96: in what circumstances would an individual officer, official, shop steward or other member render a union liable by inducing or threatening to induce another person to break a contract? Section 96 provided no answer. In the case of registered trade unions, as one commentator has pointed out, it

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195. Id., § 131.
196. Id., § 101(3).
197. Id., § 96(1)(a)-(b).
201. Hepple, supra note 175, at 198.
seems to have been intended that this omission of the statute would be filled by the union rule book. Schedule 4, paragraph 10, of the BIRA required that the rules of a registered trade union “specify any body by which, and any official by whom, instructions may be given to members of the organisation on its behalf for any kind of industrial action, and the circumstances in which any such instructions may be so given.” Such a rule would presumably answer the relevant questions about agents and prohibited acts, thus fixing the extent of vicarious responsibility for unfair industrial practices. In the case of unregistered unions, however, which needed not comply with Schedule 4, it was left to the courts to supply the answers.

The question of vicarious responsibility first arose in March 1972, less than a month after commencement of the BIRA, in a dispute over “containerization” in the docks industry. The complainants were road haulage firms, operating container vehicles into and out of the docks in Liverpool and Hull. They alleged that shop stewards belonging to the Transport and General Workers’ Union (TGWU) were “blacking” (marking with paint) the firm’s vehicles, and that this was an unfair industrial practice under section 96 for which the national union was vicariously responsible. It took the courts more than four months—from the first complaint before the NIRC on March 21 to the final decision of the House of Lords in *Heatons Transport (St. Helens) Ltd. v. TGWU* 202 on July 26—to rule that the TGWU was responsible for the unfair industrial practices of these shop stewards.

During the same period, in early June, the question of individual liability under section 96 was raised in a similar dispute in the London docks. The complainant there was a cold storage firm, owning a cold storage depot just outside the docks, which alleged that shop stewards belonging to the TGWU were individually liable for picketing its depot and “blacking” its customers’ vehicles. On July 26, barely three hours after the *Heatons* decision, the NIRC in *Midland Cold Storage v. Turner* 203 reached the conclusion that these shop stewards were not individually liable, irrespective of their union’s liability.

The *Heatons* decision, together with *Midland Cold Storage*, is a landmark of British labor law, equivalent in stature perhaps to the *Steelworkers* trilogy 204 in American law. But the analysis there of vicarious responsibility was only the legal pivot for a wider conflict of industrial, technological and political forces. At stake was not merely the TGWU’s bank balance, nor the personal freedom of five London dock-

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ers; the capacity of the British docks industry to cope with a technologi-
cal revolution, and, more than that, the future effectiveness of the
BIRA as a whole, was in the balance. It is impossible to grasp the
impact of the Heatons decision in isolation from these wider issues.

The origins of the Heatons case lie in a new technology of trans-
portation in the docks industry—“containerization.” Until the early
1960's, goods for export were transported in the time-honored man-
ner—first loaded at the point of departure; then carried by truck or by
train to the docks; then unloaded and re-loaded, piece by piece, by
hand and by crane, onto the ship. Goods for import were transported
in the same manner. With containerization, individual receptacles are
“stuffed” (packed) and “stripped” (unpacked) only once; then carried
to and from the docks and lifted mechanically, all of a piece, onto and
off the ship. This new technology poses a critical question for every
docker: who is to do the stuffing and stripping? Sometimes it is done
by the dockers themselves within the docks area; more often it is done
by the shipper at the point of departure or arrival. Increasingly, it is done
at “group container bases” by warehouse or road haulage contractors
who specialize in the business of handling containers. The advantage
for these group container firms lies in the fact that their bases are situ-
atuated outside the “docks area” as defined by the National Docks Labour
Board, so that they need not employ registered dockers whose higher
wages and greater job security are guaranteed by the National Docks
Labour Scheme. The consequence of this technological revolution is
predictable: the number of registered jobs for dockers declined from
60,000 in 1967 to 40,000 in 1972.

The official response of the TGWU, to which most dockers belong,
was formulated in the middle of 1971 at a national delegate conference
of the union’s dock workers known as the Docks Group. The union
did not object to “door-to-door” transportation of containers, where
the stuffing and stripping is done at the shipper’s place of business, but
it maintained that group container work, both inside and outside the
docks area, should be done by registered dockers. In support of this
policy, the union requested all group container firms to employ only
registered dockers, and it asked road haulage firms to avoid those firms
that refused to comply with its request. The reaction of employers dif-

205. The facts stated in this and the following three paragraphs are drawn from the judgment
of containerization in Britain, see C.F. Wilson, Dockers: The Impact of Industrial Change
(1972); on the social impact, see Connolly, Social Repercussions of New Cargo Handling
Methods in the Port of London, 105 Int’l Labour Rev. 543 (1972). On containerization in America,
see Ross, Waterfront Labor Response to Technological Change: A Tale of Two Unions, 21 Lab.

ferred in relation to their interests at stake. The major shippers, who operated door-to-door, readily acceded, as did most road haulage firms, who could afford to pass on higher labor costs to their customers. But the group container firms and some road haulage firms refused to comply, since their competitive edge depended precisely upon the employment of cheaper labor outside the docks area. For several months, this second group of employers—including the complainants in the *Heatons* and *Midland Cold Storage* cases—refused to budge. By February 28, 1972, when the BIRA came into force, an impasse had been reached.

Although the official policy of the TGWU remained unchanged, its leaders were not willing to pursue it to the point of industrial action. Apart from any considerations of potential liability under the BIRA, they could scarcely ignore the conflicting interest of their membership in the Road Transport Group; industrial action by TGWU dockers against group container and road haulage firms would jeopardize jobs belonging to TGWU truck drivers. But this posture of passive support from the top did not satisfy the rank-and-file dockers at the bottom. Dockers in London, Liverpool, and Hull, led by TGWU stewards, initiated an unofficial campaign to picket the group container bases and to “black” the vehicles that used them. This campaign proved highly successful, with the result that more—but not all—employers fell in with the TGWU policy. The Docks Group, however, did not officially authorize or approve the industrial action, and advised its members to desist. This advice was not taken.

On March 21, the first employer went to court.\textsuperscript{207} *Heatons Transport* (St. Helens) Ltd., a road haulage firm operating around Liverpool, complained to the NIRC under section 101(1) of the BIRA. It alleged that the TGWU, acting through its stewards, was guilty of an unfair industrial practice under section 96 by blacking its container vehicles. On March 23, the NIRC concluded that there was *prima facie* evidence of an unfair industrial practice, and issued an interim order under section 101(3)(c) to restrain the TGWU, its officers, servants or agents from further blacking. The blacking nonetheless continued. On April 14, Craddocks Brothers, another road haulage firm from Liverpool, complained to the NIRC, alleging that the TGWU was guilty of an unfair industrial practice under section 96. Three days later, the NIRC issued another interim order to restrain the union, its officers, servants or agents; the order was ignored. On May 9, Panalpina Services Ltd., a road haulage firm from Hull, made the same complaint against the TGWU and also against an individual shop steward; two

\textsuperscript{207} The chronology of events in this and the following paragraphs appears as an appendix to the judgment of the House of Lords in the *Heatons* case, [1972] I.C.R. at 406-08.
days later, the NIRC issued a third interim order to restrain both the TGWU and the steward, to no avail.

Meanwhile, on March 27, Heatons reappeared before the NIRC, alleging that the TGWU had disobeyed the March 23 interim order. The NIRC found the union to be in contempt of court, and imposed a fine of £5,000. The blacking continued—despite letters from the TGWU Secretary-General and from TGWU regional and district officers advising members of the Docks Group to observe the court order. On April 17, Heatons appeared before the NIRC to allege disobedience for the second time. On April 21, the NIRC imposed an additional fine of £50,000; it also found the union guilty of contempt of court for disobedience of the interim order in the Craddocks case, and ordered it to pay Craddocks’ costs. The blacking still continued.

At this point, the official policy of the TGWU hardened. At a national delegate conference of the Docks Group on May 4, the membership voted to give the legally required notice (one month) for an official nationwide docks strike. At the same time, the TGWU leadership modified its former policy of refusing to appear before the NIRC, and applied for review of the contempt of court orders in the Heatons and Craddocks cases. Both applications were denied by the NIRC on May 12.208 The TGWU then decided to appeal against the section 96 orders in the Heatons, Craddocks and Panalpina cases (which had subsequently been made final), as well as the contempt orders in the Heatons and Craddocks cases and the refusals to review the same. Consolidated hearings began in the Court of Appeal on May 30, 1972.

Legal events in the London docks took a different and dramatic turn. The first complainants there were employees, and the respondents were individual dockers; all were members of the same union—the TGWU. The complainants alleged that three dockers were individually liable under section 96 for picketing the group container depot at Chobham Farm where they worked and for blacking the vehicles that used it. On Monday June 12, the NIRC issued an interim order to restrain the three men from further picketing or blacking.209 The order was ignored, and on Wednesday the NIRC found the men to be in contempt of court; the court then ordered their imprisonment, though it suspended action until 2 p.m. on Friday to allow them time to explain their conduct or to appeal.210 The men were not represented by counsel, they did not appear, and they did not appeal. The reaction in the docks to their threatened imprisonment was instant and predictable:

35,000 dockers struck. On Friday morning, a little-known legal character called the Official Solicitor made his first appearance. Acting without orders from the respondents, he instructed counsel to appeal to the Court of Appeal against the NIRC’s imprisonment order. On Friday afternoon, the Court of Appeal found that the evidence was “quite insufficient” to justify imprisonment and set aside the NIRC order. The imprisonment was not carried out, and the unofficial dock strike ended the following day.

The miraculous intervention of the Official Solicitor served to avert the imminent martyrdom of the three dockers and to secure a return to work in the docks. Indeed, it seemed so miraculous that there was widespread disbelief about the government’s neutrality in the proceedings. Lord Denning, M.R., went so far as to make a statement in the Court of Appeal on the following Tuesday in order to dispel “the speculation which has been going on in some quarters as to how an application came to be made to us on Friday afternoon.” But the miracle—whatever its source—was shortlived, for the NIRC’s interim order against the three dockers was still in force, and they showed no signs of complying with it.

On June 13 of the same week, the Court of Appeal gave judgment in the Heatons case. It reversed the final orders of the NIRC, holding that the TGWU was not vicariously responsible for the unfair industrial practices of its shop stewards in Liverpool and Hull. It found that these shop stewards had not committed the unlawful acts within the scope of their authority—express or implied—so as to render the union liable. The court applied a two-tiered test to determine the responsibility of the union for the acts of its shop stewards: “(1) Is a shop steward an agent of the union? (2) And if so, what is the scope of his or her authority?” With regard to (1), the court gave great weight to “the long-established distinction between the liability for the acts of a servant and the liability for the acts of an agent.” It found that these shop stewards were not “servants” but merely “agents” of the union. Under the second part of the test, the court emphasized the “duality” of the shop steward’s role—on the one hand, a representative of the national union; on the other, a representative of the workforce. It found no evidence of any express or implied authority in these shop

211. The Times (London), June 15, 1972, at 1.
213. The Times (London), June 20, 1972.
215. Id.
216. Id. at 366. See also text accompanying notes 292-293.
217. Id. at 347.
218. Id. at 339-41.
stewards to take industrial action on behalf of the national union and concluded that they were "acting on behalf of their own work groups and not on behalf of the union." As a result, the TGWU was not vicariously responsible for the stewards' activities. Consequently the court also set aside the fines for contempt. The decision caused anguish to many Conservative Party members, who claimed that the Court of Appeal had driven a coach and horses through the BIRA. As the Times more sedately put it, the "expectations entertained by some of those with high hopes of the Act are bruised by the judgment of the Court of Appeal." If Britain's largest and most powerful union could escape responsibility for the unfair industrial practices of its shop stewards, the BIRA had no possible means to secure effective enforcement.

Although leave was given to appeal to the House of Lords, the focus of attention again returned to individual liability under section 96. On July 7, the NIRC issued an interim order against seven more dockers in London—two of whom had been respondents in the Chobham Farm case. The complainant this time was Midland Cold Storage Ltd., whose cold storage depot outside the London docks was being picketed and blacked. On July 18, Midland Cold Storage returned to the NIRC alleging disobedience of the interim order; the NIRC subsequently ordered five of the dockers to be imprisoned for contempt of court. On this occasion, however, the submissions of the Official Solicitor concerning the sufficiency of the evidence were considered but rejected, and the five men were removed to Pentonville Prison forthwith.

The docks were almost immediately paralyzed by a nationwide unofficial strike; there was an almost continuous demonstration of dockers outside Pentonville Prison over the weekend; and on Monday the TUC called a one-day general strike to take place on Thursday, July 27. The unions and the courts were headed for a collision, and the government appeared powerless to prevent it. Then, on Wednesday morning, the House of Lords unexpectedly issued its decision in the Heatons case. Unanimously reversing the unanimous Court of Ap-

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219. *Id.* at 341.
220. *Id.* at 344.
221. The Times (London), June 14, 1972 (editorial).
peal, it held that the TGWU was vicariously responsible for the unfair industrial practices of its shop stewards in Liverpool and Hull inasmuch as they had acted within the scope of their implied authority on behalf of the union. The House of Lords dismissed the lower court’s careful distinction between servants and agents, repudiated the concept of “duality” in the shop steward’s role, and applied only a single test of vicarious responsibility: “In each case the test to be applied is the same: was the servant or agent acting on behalf of, and within the scope of the authority conferred by, the master or principal?”

The court identified four potential sources of authority:

The authority may be conferred (1) by the rules expressly or by implication (2) under the rules, presumably by express or implied delegation (3) by virtue of the office held—in this case the office of shop steward (4) ‘or otherwise’ which must include custom and practice.

On the facts of the case, however, the court could find no express authority in the TGWU rulebook; indeed, the rules conferred authority to take industrial action only on the general executive committee, subject, in certain circumstances, to approval by a reconvened biennial delegate conference. Nor was there any express or implied delegation of authority, since the blacking and picketing had been explicitly disavowed by the national union. Nor, finally, was the office of shop steward per se the source of such authority. Instead, the court relied on the evidence of “custom and practice” to infer a “general implied authority” in the shop stewards “to act in the interest of the members they represent.” This authority was conferred not by express delegation from “the top,” but from “the bottom i.e. the membership of the union.”

As Lord Wilberforce put it: “It is hardly conceivable that a dock worker joining the TGWU would be content to be represented in an industrial dispute by someone who was not in a position to call for industrial action by him and his workmates in support of their claim.” Further evidence of “custom and practice” was adduced by His Lordship from the TGWU “Shop Stewards Handbook” and from the union newspaper. Finding that the shop stewards in Liverpool and Hull had acted within the scope of this “general implied authority,” the House of Lords necessarily concluded that the TGWU was vicariously responsible for the unfair industrial practices under section

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227. Id. at 393, citing § 167(a) of the BIRA.
228. Id. at 393-95.
229. Id. at 395.
230. Id. at 396.
231. Id. at 405.
232. Id. at 395.
233. Id. at 397.
234. Id. at 396.
This reasoning bore fruit some months later in the Howitt case.\(^{236}\) In holding the TGWU vicariously responsible under section 96 for blacking the complainant’s vehicles, the NIRC enunciated the following test of responsibility:

In the TGWU, with its emphasis upon . . . “grass roots” authority, industrial action can be divided into three categories, namely, (i) “official union action”, that is to say, action approved by the General Executive Council or, as the case may be, a delegate conference, (ii) “unofficial union action,” namely, action not so approved, but authorised and carried on by a group of members of the union acting as such, and (iii) “unauthorised non-union” action, that is to say, action by members of the union as individuals and not as members of the union.\(^{237}\)

Both (i) and (ii) may be regarded as “union activities, carried on with the authority of the union derived from the bottom.”\(^{238}\) On the facts, the court found that the blacking—although not sanctioned by the national union—was nonetheless “unofficial union action” which rendered the national union liable.\(^{239}\)

It was such reasoning which had allowed the House of Lords in the Heatons case to re-impose the fines for contempt of court. The significance of the decision for the jailed dockers, who were not, of course, parties to the Heatons litigation, lay in a single sentence of Lord Wilberforce’s judgment, where he stated that “[t]he primary method [of enforcement] contemplated by the [Industrial Relations] Act [is against the funds of organisations] rather than . . . against individuals.”\(^{240}\)

Pursuant to an application by the Official Solicitor, the NIRC ordered the release of the five dockers in the Midland Cold Storage case on the
ground that "the House of Lords in Heatons has made clear that the primary method of enforcement contemplated by the Industrial Relations Act is against the funds of organisations rather than against individuals." 241 Midland Cold Storage settled the question of individual liability; 242 the NIRC would no longer enforce orders in respect of unfair industrial practices under section 96 against individuals, nor would it impose criminal penalties on any individual for contempt of court.

The release of "the Pentonville Five," as they became known, prompted the TUC to call off its threatened general strike. For the second time in less than two months, the government was let off the hook by a legal miracle. The part played by the government in the judicial process remains ambiguous; yet the hasty judgment of the House of Lords—several weeks before it was expected—and the gratuitous appearance of the key dictum on individual liability were suggestive of more than mere coincidence. The TUC made an official complaint to the Lord Chancellor about the manner and the substance of the Heatons decision, 243 but the general public relief at the fortunate outcome of events took the force out of their attack. The Lord Chancellor, as expected, rejected their complaint.

While the Heatons decision resolved, for the time being, the legal issue of vicarious responsibility under section 96, it did nothing to settle the industrial dispute over containerization. That was left to the two sides of industry, with a considerable push from the government. On June 1, shortly before expiration of the one-month official strike notice, the TGWU Secretary-General met with the Chairman of the National Port Authority. After several weeks of negotiation, the two sides emerged with a settlement scheme which would reduce the total workforce by offering substantial severance payments for voluntary retirement, thereby avoiding compulsory loss of jobs due to containerization. The scheme, however, was rejected by the Docks Group membership; on July 27, the day after the Heatons decision, the nationwide official docks strike began. Three weeks later, the two sides presented a second scheme to the TGWU Docks Group, which offered larger severance payments and included a promise from the government to set up an official inquiry into the wider problems facing the

242. Id. Sir John Donaldson, in Howitt Transport Ltd. v. TGWU [1973] I.C.R. 1 (NIRC), spoke to the question of individual liability:
   In relation to organisations, we wish to make it abundantly clear that the penalties will in all foreseeable circumstances be financial, however onerous they may be; that they could range up to total sequestration of assets, but that the liberty of the subject will not be involved.
docks industry. Contrary to the advice of the shop stewards, the second scheme was accepted by a substantial majority of dockers. Work was resumed on August 19, and the unofficial blacking and picketing came to an end.

Almost five months elapsed between the first complaint in the *Heatons* case and the resumption of normal working in the docks. It seems that section 96 did nothing to resolve the containerization dispute. The imposition of vicarious responsibility on the national union, and the fines on its treasury, did not help the TGWU leadership restrain the unofficial strikers in Liverpool or Hull. Indeed, the decision of the House of Lords to uphold the £55,000 fine was immediately followed by official strike action. Nor did the imposition of individual liability on the London dockers, or even their physical imprisonment, bring the unofficial action to an end. Instead, it very nearly caused a general strike for the first time in almost 50 years. Far from promoting a resolution of the containerization dispute, section 96 directly contributed to massive industrial unrest in the docks industry and to a snowballing political crisis between the labor movement and the courts.

The disastrous failure of section 96 was also the cause of widespread disillusionment with the rest of the BIRA and its institutions. Nor was the disillusionment confined to trade unionists: there were renewed calls for amendment from *The Times*, from employers, and, later, from the government itself. More significantly, the major employers continued to shun the NIRC. As Peter Pain, a leading labor law practitioner, observed two years later:

> The Court was fairly busy for about 5 months dealing with a comparatively small number of labour dispute cases. Thereafter there was a most extraordinary lull, which with a few exceptions has continued until the present day and which shows that employers simply will not use the court.

The lesson of the first five months was clear: fines and imprisonment are not conducive to good industrial relations. The *Heatons* and *Midland Cold Storage* cases killed section 96, just as the *ASLEF* cases gutted the emergency provisions. In retrospect, they may be viewed as the second—and most serious—blow to the BIRA as a whole.

**B. The American Law of Vicarious Responsibility**

The American law of vicarious responsibility and individual liability may be classified into three types of unlawful activity as noted

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above: (1) disobedience of a national emergency injunction; (2) breach of a collective bargaining agreement; and (3) unfair labor practices.

1. National Emergency Injunctions

As already noted, the President has the power, acting through the Attorney General, to petition a district court under section 208 of the LMRA to enjoin a threatened or actual strike which might "imperil the national health or safety." The LMRA does not, however, state who shall be bound by the injunction, nor does it specify who shall be responsible for disobedience of the injunction. Although disobedience of national emergency injunctions has been infrequent, there was one case during the early years of the Taft-Hartley Act which is instructive on the question of vicarious responsibility and individual liability under section 208.

During the coal mining strike of 1948, an emergency injunction was issued under section 208 against the United Mine Workers (UMW) and its officers. The strike continued, and the Attorney General brought an action for civil and criminal contempt against the international union and against its president, John L. Lewis. In *United States v. UMW*, 246 the district court for the District of Columbia found the union and its president to be in contempt, and fined them $1,400,000 and $20,000 respectively. It shopped short, however, of sending Lewis to prison, as it had done two years earlier.

In its defense, the union argued that it was not responsible for unlawful acts committed by its members as individuals. The court rejected this argument on two grounds. First, it found that the union had through its officers in fact authorized the strike, albeit surreptitiously. As District Judge Goldsborough stated: "If a nod or a wink or a code was used in place of the word 'strike,' there was just as much a strike called as if the word 'strike' had been used." 247 Secondly, and more significantly for present purposes, the court attempted to state a general principle of vicarious responsibility, observing that "so long as a union is functioning as a union it must be held responsible for the mass action of its members." 248 Under this principle, the union was vicariously responsible for the "mass action" of its striking members even in the absence of any express or implied authorization.

The mass action principle is a recurrent theme of the American law, and is worth comparing with Sir John Donaldson's formulation in the *Howitt* case of "'unofficial union action' . . . carried on by a group

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247. *Id.* at 566.
248. *Id.*
of members of the union acting as such." Whether conscious or not, the parallel is remarkable.

2. Breach of Collective Bargaining Agreement

Under section 301(a) of the LMRA, "suits for violation of contracts between an employer and a labor organization" may be brought by either party in any district court having proper jurisdiction. The usual remedies for such breach include damages and injunctions. This provision is closely parallel to section 36(1) of the BIRA, except that jurisdiction lies in the federal courts rather than (by analogy) in the NLRB.

Section 301(b) specifically provides that any union and any employer shall be bound by the acts of its "agents," and section 301(e) adds:

For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

As with the BIRA, however, nowhere does the American statute define the meaning of "agents," and it is left to the courts to decide which persons and what acts are capable of making the union vicariously responsible.

An early interpretation of sections 301(b) and (e) is contained in United Construction Workers v. Haislip. The court of appeals for the Fourth Circuit stated that "the purpose of these provisions was merely to apply the ordinary rules of the law of agency to labor organizations notwithstanding resolutions on their part disclaiming responsibility for the action of persons who, in reality, are acting on their behalf." Applying the "ordinary rules of the law of agency," the court found that the national union was not responsible under section 301 for breach of contract by its members, since there was insufficient evidence to show that its agents had "adopted, encouraged, or prolonged the continuance of the strike." Moreover, the court thought it "hardly conceivable" that authority to adopt wildcat strikes which are "clearly inimical to the interests of the union" should be vested in these agents.

This test of actual participation by the agent falls far short of the "guarantee obligation" that we have seen in section 36(2) of the BIRA, and it has not gone unchallenged in the American courts. More re-

250. 223 F.2d 872 (4th Cir. 1955).
251. Id. at 878.
252. Id. at 877-78.
253. Id. at 878.
recently, in *Eazor Express v. International Brotherhood of Teamsters*, the court of appeals for the Third Circuit affirmed that an international union cannot escape responsibility merely by refraining from participation in the unlawful activities of its members, but must affirmatively "take steps to frustrate its members from doing that which it is contractually prohibited from doing." In that case, the employer brought suit under section 301 against the international union for breach of a no-strike clause in a collective bargaining agreement which expressly exempted the international union from liability for unauthorized strike action by its members. The court held that the no-strike clause imposed an implied obligation on the international union to take "any and all such reasonable means at their command as might be needed" to terminate the strike, including fines, suspension or expulsion of individual members and imposing trusteeship on the local union. Thus the union was found liable for breach of its own implied obligation, notwithstanding that it was expressly exempted by contract from responsibility for breach of contract by its members. This application of liability by inaction appears to go as far, and perhaps further, than the active duty of enforcement imposed by section 36(2) of the BIRA. The difference, of course, is that section 36(2) was enacted by the legislature, while the *Eazor* principle was judicially inferred by a somewhat imaginative court.

The *Haislip* test of vicarious responsibility has also been overtaken by borrowing of the "mass action" principle from *United States v. UMW*. In *Colt's Inc. v. UAW Local 376* for example, the federal district court of Connecticut, citing *United Mine Workers*, found the local union responsible for breach of a collective bargaining agreement by its members acting *en masse*. The district court declared that "[p]ublic policy requires that unions be held responsible for the actions of employees whom they represent; otherwise, a no-strike clause express or implied, would be meaningless, with resulting detriment to the national interest in stabilizing industrial relations." Similarly in *United Textile Workers v. Newberry Mills*, another district court, citing *United Mine Workers*, stated:

As long as the union is *functioning as a union* it must be held responsi-
ble for the mass action of its members. It is perfectly obvious not only in objective reasoning but because of experience that men don’t act collectively without leadership. The idea that the number of people who went on strike would all get the same idea at once, independently of leadership, and walk out of the defendants’ mill, “is of course simply ridiculous.”

The courts have come a long way from “the ordinary rules of the law of agency” which Senator Taft had in mind in 1947.

In the sphere of individual liability under section 301, there has also been evidence of judicial inventiveness. Where the union itself is found liable in damages, section 301(b) makes clear that “any money judgment . . . shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.” Moreover, the Supreme Court has affirmed that the interdiction of individual liability is required by the “national labor policy.” This corresponds exactly to the policy declared by the NIRC in the Midland Cold Storage case.

Where the union is not found responsible, however, the LMRA is silent. The court of appeals for the Seventh Circuit, in Sinclair Oil Corp. v. Oil Workers’ Union, has taken the view that section 301 does not permit the enforcement of damages against individual strikers, whether or not the union is found liable, but it expressly left open the possibility of an injunction against such individuals. At least one state’s highest court, the Kentucky Court of Appeals, has held that an injunction is available under section 301 against individual strikers. It has not, however, been demonstrated why an injunction comports with the “national labor policy” while the enforcement of damages does not.

3. Unfair labor practices

In the Taft-Hartley amendments of 1947 Congress created a number of union unfair labor practices to match the employer unfair labor practices of the Wagner Act of 1935. Section 8(b) provides that “it shall be an unfair labor practice for a labor organization or its

263. Id. at 373.
264. 93 Cong. Rec. 7001 (1947) (remarks of Senator Taft on § 301(3) of the Taft-Hartley Bill).
266. See note 241 supra.
267. 452 F.2d 49 (7th Cir. 1971).
268. Id. at 54 n.10.
agents" to commit any of the proscribed activities. The LMRA does not define "agents," but section 2(13)—like section 301(e)—states that "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Shortly after enactment of the 1947 amendments, the National Labor Relations Board in Sunset Line & Twine Co. gave an authoritative analysis of vicarious responsibility for unfair labor practices under section 8(b). The Board declared: "In determining whether or not the evidence does afford a basis for holding the Unions responsible for the episodes in question, the Board has a clear statutory mandate to apply the 'ordinary law of agency.'" It noted three "fundamental rules of the law of agency" to be considered:

1. The burden of proof is on the party asserting an agency relationship, both as to the existence of the relationship and as to the nature and extent of the agent's authority . . . .
2. Agency is a contractual relationship, deriving from the mutual consent of principal and agent that the agent shall act for the principal. But the principal's consent, technically called authorization or ratification, may be manifested by conduct, sometimes even passive acquiescence as well as by words. Authority to act as an agent in a given manner will be implied whenever the conduct of the principal is such as to show that he actually intended to confer that authority.
3. A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a servant, even though the principal has not specifically authorized or indeed may have specifically forbidden the act in question. It is enough if the principal actually empowered the agent to represent him in the general area within which the agent acted.

This analysis, as seen above, was substantially followed by the Fourth Circuit in United Construction Workers v. Haislip in the context of section 301 suits. Yet like Haislip, Sunset Line & Twine Co. has been unevenly applied in practice.

In the 1954 case of UMW v. Patton, the Fourth Circuit ruled that both the international and the district unions were bound by the acts of a field representative employed by the district union. The court of appeals stated: "It is clear that in carrying on organizational work the field representative is engaged in the business of both the international union and the district and that both are responsible for acts done

272. 79 N.L.R.B. 1487 (1948).
273. Id. at 1507, quoting Senator Robert Taft.
274. Id. at 1508-09 (emphasis in original).
275. 223 F.2d 872 (4th Cir. 1955).
276. 211 F.2d 742 (4th Cir. 1954).
by him within the scope and course of his employment.” Judgment against the unions was reversed on other grounds. Two years later, in *NLRB v. P.R. Mallory & Co.*, the Seventh Circuit refused to attach union responsibility to the acts of shop stewards not employed by the union. The court of appeals stated:

With no obligation on the part of the union to compensate, with no right to appoint or discharge, and with very limited authority or control, we discern no basis for a ruling under the general law of agency that the stewards were agents of the union.

The court distinguished *Patton* on the ground that the field representative in that case was a servant of the union, while the stewards in *Mallory* were not. In 1959, however, the same court in *NLRB v. Teamsters Local 135* was willing to find the union responsible for the unlawful acts of its shop stewards although they were not servants of the union. The court distinguished *Mallory* on the ground that those stewards were “acting contrary to Union policy and to the express directions which they had received from the union.” In *Teamsters Local 135*, by contrast, the stewards were found to be acting “in conformity with the policy fixed and established by the Union.” The relevancy of compensation, of the right to appoint or discharge, was not considered.

The “mass action” principle of *United States v. UMW* has also found a home in unfair labor practice litigation in some circuits. In *Vulcan Materials Co. v. United Steelworkers*, the Fifth Circuit found the international and local unions to be responsible for violation of section 8(b) by their members, notwithstanding the evidence of signed affidavits which stated that the members were “acting on their own and were not doing so on the advice of their Local or International Union.” The court of appeals, dismissing these affidavits, declared: “It is well established that as long as a union is functioning as a union it must be held liable for the mass action of its members.” Furthermore, the court found that the international and local unions had in fact “induced and encouraged” the violations through the participation of their agents—a representative of the international and the president

277. *Id.* at 746.
278. 237 F.2d 437 (7th Cir. 1956).
279. *Id.* at 442.
280. 237 F.2d at 442.
281. 267 F.2d 870 (7th Cir. 1959), *cert. denied*, 361 U.S. 914 (1959).
282. *Id.* at 873.
283. *Id.*
286. *Id.* at 455.
287. *Id.*
of the local—in the unlawful activities.\textsuperscript{288}

The question of individual liability for unfair labor practices was also settled by \textit{Sunset Line & Twine Co.}\textsuperscript{289} The NLRB stated that the LMRA “does not regulate the conduct of individuals acting in a private capacity; only employers or labor organizations or their agents can commit unfair labor practices.”\textsuperscript{290} This means that:

Under Section 8(b) of the Act, individuals acting in the capacity of ‘agents’ of a labor organization can be held personally accountable for unfair labor practices in which they engage, just as an employer’s ‘agent’ may be held personally accountable for conduct violative of Section 8(a).\textsuperscript{291}

4. \textit{In General}

At the beginning of this section, the law of vicarious responsibility was referred to as a means of inducing compliance with national standards of industrial conduct. The “deterrent” theory of vicarious responsibility was incorporated into the BIRA in sections 36, 96, and others, which created certain national standards of industrial conduct. The threat of vicarious responsibility for non-compliance with these standards was intended to induce the leaders of national unions to exercise preventive discipline over their local membership, thus transforming union leaders into the police force of a new industrial order and eliminating the need for litigation to enforce the standards. As noted, however, the standards of conduct were not enforced between 1971 and 1974 either by the leaders of unions or by the courts. In a wider sense, therefore, the failure of section 96 represents the failure of vicarious responsibility as a tool of industrial order.

Still, the deterrent theory of vicarious responsibility has ample precedent in the American law of agency. Why was the precedent rejected? Three separate but sequential questions must be considered. First, is the law of vicarious responsibility a viable means of industrial control—in other words, is it possible to secure compliance with national standards by means of vicarious responsibility? Second, is it a desirable means of control? Lastly, what are the proper standards of conduct to be applied?

The theory of vicarius responsibility rests upon the fact of control; the acts of an agent are imputed to a principal on the ground that the principal has control over the agent’s conduct. The classic example is the responsibility of a master for the acts of a servant, as the \textit{Restatement of Agency} explains:

\begin{itemize}
\item \textsuperscript{288} \textit{Id.} at 456.
\item \textsuperscript{289} 79 N.L.R.B. 1487 (1948).
\item \textsuperscript{290} \textit{Id.} at 1507 n.37.
\item \textsuperscript{291} \textit{Id.} at 1507 n.36.
\end{itemize}
The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally.  

The degree of control is significant because it measures the extent of responsibility; the greater the principal's power to control the agent's conduct, the greater is the principal's responsibility for the agent's acts. This equation of power and responsibility is illustrated by the historical distinction between servants (employees) and other agents. The master (employer) is responsible for all acts committed by the servant within the scope of employment, even for those acts which are expressly forbidden; the principal's responsibility for a mere agent, on the other hand, is more limited.

The degree of control is also essential to the deterrent value of vicarious responsibility. There is clearly no point in imposing responsibility upon a principal for the acts of an agent over whom the principal cannot exercise effective control. As one commentator has observed: "Any deterrent theory for imposing liability on one person for the acts of another is based on the premise that only those who are in a position of control should be held liable for the unlawful conduct of others." In order, therefore, to assess whether the American law of agency is an appropriate vehicle to secure compliance with any standards of conduct in Britain, it is first necessary to compare the powers of a national union in both countries. Are the leaders of a national union able to control the activities of their local membership? If not, the deterrent theory will amount to an empty threat.

In the American industrial context, the powers of a national union are considerable. In general, a national union enjoys and exercises the power to fine, suspend, and expel an individual member. It is also empowered to impose trusteeship and receivership upon a local union, and thereby effectively to terminate its autonomy. Moreover, unions play a central role in the legally enforceable grievance-arbitration process, and by virtue of majority recognition under section 9(a) of the NLRA, their role in representing the workforce for purposes of collective bargaining is exclusive. In addition to these legal powers, a few

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292. Restatement (Second) of Agency § 219(1), comment a (1958).
293. Id.
296. § 9(a) states in pertinent part:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.
unions have utilized various more or less illegal methods of control, ranging from bribery to intimidation, coercion, and worse.\textsuperscript{297} Finally, the powers of a national union have become institutionalized in a national bureaucracy of hierarchical decisionmaking, underpinned by large financial resources.

The British system of trade union government presents a very different picture.\textsuperscript{298} First, a national union enjoys fewer \textit{de jure} powers of control. Although it may fine, suspend or expel an individual member, a national union is rarely, if ever, empowered to impose trusteeship or receivership upon a local branch. In contrast to American law, there is no grievance-arbitration process at the local level; nor are British unions able to obtain legal recognition of exclusive bargaining rights.\textsuperscript{299} Second, and more important, the \textit{de facto} locus of power resides in local branches and factory-wide work groups, not in national headquarters. The power to discipline an individual member, for example, is usually exercised at the local level. There has been, in the words of the Donovan Commission, a “shift in authority” from the national union to the local work group.\textsuperscript{300} This shift corresponds to the “shift in authority from the industry to the factory” which the Commission observed throughout the British system of industrial relations as a whole, and which was noted at the beginning of this section.\textsuperscript{301}

Within the TGWU in particular, a number of additional factors have carried the shift in authority still further; these factors were critical to the decision of the House of Lords in the \textit{Heatons} case. First, the industrial action in Liverpool and Hull, as well as in London, was instigated not by paid union officials answerable to national headquarters but by unpaid shop stewards elected by, and hence answerable to, the local docks membership. Second, the authority of these shop stewards to act on behalf of their local constituency was implicitly if not explicitly condoned by the TGWU’s policy of “grass roots” democracy. This policy emerged during the late 1960’s as a deliberate reaction in the unions against the autocratic leadership of Ernest Bevin during the 1930’s and 40’s and of Arthur Deakin during the 1950’s. The \textit{Shop Steward’s Handbook}, an official TGWU educational publication, went

\begin{footnotesize}
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\item in respect to rates of pay, wages, hours of employment, or other conditions of employment.
\item 29 U.S.C. § 159(a) (1976).
\item 297. San Francisco Chronicle, May 28, 1976, at 1, col. 5.
\item 298. \textit{See generally} Hughes, \textit{Trade Union Structure and Government}, \textit{Royal Commission on Trade Unions and Employers’ Associations 1956-68} (Research Paper No. 5).
\item 299. The BIRA did provide for legally enforceable collective bargaining agreements (§§ 34-36) and for legal recognition of “sole bargaining agents” (§§ 44-53). But as noted above, the provisions allowing bargaining agreements were never utilized, and only the few registered trade unions were eligible for legal recognition as sole bargaining agents.
\item 300. Donovan Report, \textit{supra} note 154, at § 111.
\item 301. \textit{Id.} at § 65.
\end{itemize}
\end{footnotesize}
so far as to tell shop stewards that "You are the union." These factors were either overlooked or misunderstood by the House of Lords, with the inevitable result that it overestimated the power of the national leadership to control the activities of its shop stewards. First, it ignored the Court of Appeal's distinction between servants and other agents, and applied the same unitary test of vicarious responsibility to unpaid shop stewards as to paid officials. Second, it made clear to the TGWU Secretary-General that the only way to avoid vicarious responsibility was by exercising the kind of authoritarian discipline of a Bevin or a Deakin that he had carefully avoided.

This cursory examination of the British and American systems of trade union government reveals a measurable difference in the powers and status of their national unions, and this differentiation is even greater in the particular circumstances of the Heatons case. The consequence of transplanting the American law of agency into the British industrial relations system was therefore quite predictable: the transplant was rejected. The reason is that representational status and the power of centralized control that is essential to the deterrent theory of vicarious responsibility is altogether lacking in the decentralized British system. The equation of American responsibility with British power is hopelessly imbalanced, and the imposition of responsibility without power was therefore a futile exercise. Of course it can be argued that the threat of vicarious responsibility was intended to serve as both a stick and a carrot, offering hitherto decentralized unions a strong incentive to exercise the necessary degree of central control in the future. Whether or not the British unions would have swallowed the carrot is a question foreclosed by repeal of the BIRA, but the argument does raise a second question: is the law of vicarious responsibility a desirable tool of industrial order?

The law of vicarious responsibility is calculated to promote at least three major objectives, none of which seems desirable, even supposing that a national union were capable of exercising a sufficient degree of control over the activities of its members. The first objective is to serve the narrow interest of a plaintiff employer in recovering money damages from a national union because of local activities which do injury to its business. This interest is perhaps more apparent than real, for in the longer term, the employer's interest lies in good industrial relations, not in accounting for every penny lost through industrial action. A law

303. The Heatons court stated:

As soon as the orders of [the NIRC] were issued . . . , the union became responsible for taking all possible steps to stop the blacking, including the non-equivocal withdrawal of the shop stewards' authority and, if necessary, disciplinary action.

Id. at 406.
suit by an employer against the union to which its employees belong is not very likely to promote good industrial relations after the resumption of work. It is scarcely surprising, then, that the Donovan Commission reported that "hardly any employer" is willing to take legal action against a union after the end of a strike.\footnote{Donovan Report, supra note 154, at \S 463.} Moreover, the availability of legal sanctions to the small minority of employers willing to use them is apt to jeopardize the wider industrial peace. This led the Donovan Commission to specifically recommend against allowing such legal action.\footnote{Id. at \S 506.}

Second, the law of vicarious responsibility arguably furthers an interest in centralized decision-making for its own sake. Yet it is worth noting that this interest was expressly disavowed by the last authoritative report on industrial relations in the British docks industry. The Devlin Committee recommended in 1965 that the TGWU should re-establish control over its disaffected militants by incorporating them into the shop steward system rather than by disciplining or even expelling them, adhering to the view that "a trade union leader is not a policeman who can be called in by employers to enforce the law."\footnote{FINAL REPORT OF THE DEVLIN COMMITTEE ON THE PORT TRANSPORT INDUSTRY, at \S 52 (1965), reprinted in 21 BRITISH PARLIAMENTARY PAPERS 1964-65, at 827.} The interest in centralism is also at odds with two other parts of the BIRA itself: the ballot order provisions already examined, and, as discussed below, the individual's right under section 5(1)(b) not to belong to a union. The rationale of the ballot order is that the local membership should be encouraged to exercise its own decision to strike or not to strike, heedless of the exhortations of a hot-headed leadership at national headquarters; similarly, the right not to belong is subversive of the national union's most potent weapon—the power to expel a dissident member. Thus the BIRA by its own terms undermined the authoritarian centralism that provides the basis of the deterrent theory of vicarious responsibility.

Third, and most obvious, is the asserted interest in requiring union leaders to secure compliance with certain national standards of industrial conduct, which leads us finally to consider the standards themselves. The BIRA set forth a number of standards of industrial conduct, the most recurrent of which is \textit{pacta sunt servanda}, or sanctity of contract. As already noted, this was the standard required by section 36(1) and by section 96, though the latter was far wider in scope, encompassing all contracts and not merely collective bargaining agreements. This standard seems both irrelevant and alien to the British system of industrial relations, for a number of reasons.
Sanctity of contract is irrelevant because it fails to come to grips with what the Donovan Commission identified as the central defect of the British system—the fragmentation of factory-wide collective bargaining.\(^{307}\) How can one promote reform of the institutions of collective bargaining by labelling all unofficial and unconstitutional strikes illegal? It is also irrelevant, of course, to the technological problems raised by the *Heatons* case. How can one prevent technological unemployment by outlawing industrial action by workers who fear the loss of their jobs?

Sanctity of contract is alien to the British system of industrial relations because it has not been seen or heard of for 70 years. The Trade Disputes Act of 1906\(^{308}\) provided that “an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment.” Notwithstanding certain judicial incursions,\(^{309}\) the Act of 1906 has largely shielded the field of industrial relations from actions for inducement of breach of a contract of employment. The Donovan Commission went one step further and recommended that the immunity be extended to all contracts.\(^{310}\) Their recommendation reflects the prevalent British view that sanctity of contract is not a useful or workable norm of industrial relations, and it corresponds to the reluctance of employers to sue their own employees for breach of their contracts of employment. That sanctity of contract can be viewed as just a foreign legalism is, of course, only another facet of the prevailing ideology of “legal abstention” shared by workers and employers alike.

In conclusion, the reasons for rejection of the American law of agency—the police philosophy of union leadership—may be summarized as follows. First, the leaders of British unions are not capable of exercising the degree of control necessary to secure compliance with national standards of conduct, nor would it be desirable if they were. Second, the standards of conduct, even if they were to be enforced, are totally inapplicable to the British system of industrial relations. The rejection of the American transplant in this context suggests a further lesson of comparative law reform: any theory of law such as union responsibility, which depends for its efficacy upon some balance of social power which does not exist in the adopting country, will crumble under challenge—as is to be expected of a structure without foundation.

\(^{307}\) Donovan Report, *supra* note 154, at ¶ 162.
\(^{308}\) Trade Disputes Act of 1906, 6 Edw. 7, ch. 47.
\(^{309}\) These cases are discussed by K.W. Wedderburn, *supra* note 15, at 350-71.
\(^{310}\) Donovan Report, *supra* note 159, at ¶ 893.
IV

THE CLOSED SHOP

The closed shop, better known in America under the less invidious euphemism of "union security," is an article of faith in the pantheon of trade unionism: "The right to belong." Yet whatever the persuasions of the speaker, the term "closed shop" has been rather loosely used to designate a number of quite different relationships between workers, union membership, and employment. In these muddled circumstances, the different manifestations of the closed shop should be described more precisely.

The "pre-entry" closed shop is the situation where membership in a union is a precondition of applying for a particular job; this system often takes the form of a "labor supply shop" or "hiring hall," wherein a union agrees to supply the employer with job applicants from a pool of union members. The "post-entry" closed shop, also known as the "union shop," requires an employee to join a union within a certain period of time after the commencement of employment. The legal distinction between the pre-entry and the post-entry closed shop has been aptly described by Professor Kahn-Freund; in the former, membership of a union is a "condition" of making the contract of employment; in the latter, it is a "term" of the contract.311 Another distinction worth making is that membership, whether pre-entry or post-entry, is sometimes required in a particular union, while at other times it is only required in any one of a specified number of unions. The former is typically the case at a single-union plant, while the latter is common at multi-union enterprises.

A. The British Experience

The Donovan Commission, reporting in 1968 on the basis of a 1964 survey, estimated that two out of every five trade unionists worked under some sort of closed shop arrangement.312 Given ten million trade unionists in a total workforce of almost twenty-three million, this figure represents one out of every six workers. This one-sixth part in turn includes three million workers covered by a post-entry closed shop and 50,000 covered by a pre-entry closed shop. These figures have been confirmed by a later survey, which also indicates that "between 1968 and 1971 the closed shop was increasing its coverage."313 Even the best surveys, however, are likely to underestimate the real extent of the closed shop in Britain, since arrangements between man-

311. O. KAHN-FREUND, supra note 6, at 198-99. The term "closed shop" is used here in the generic sense, rather than as a term of art under British or American law.
312. Donovan Report, supra note 154, at ¶ 588.
agement and labor concerning union membership are typically expressed, in the words of the Donovan Commission, by "informal and tacit understandings" rather than formal agreements—another example of the importance of custom and practice in the British system of industrial relations. In 1971, therefore, it appears that the extent of the closed shop was at least as great as, and probably somewhat greater than, the Donovan Commission suggested.

Another feature of the British closed shop noted by the Donovan Commission was the willing acquiescence of most major employers. The most common reason, cited by London Transport in its evidence to the Commission, was that "it ensured that in dealings with the union they were meeting an organisation 'which does represent all your people.'" Opposition to the closed shop has been ideological rather than pragmatic.

Prior to 1971, the British law played a neutral role toward the closed shop; it neither prohibited a requirement of union membership, nor actively encouraged it. The most that the law had to say was that expulsion from a union was subject to the rules of natural justice or, in American terms, to procedural due process. Lord Denning had on occasion enunciated the doctrine of the "right to work," but this had never been upheld by the House of Lords. The law, then, left the parties free to agree to a closed shop, providing only that no one could be expelled from union membership, and hence from employment, without due procedural fairness. Against this background of widespread, informal, legally sanctioned understandings, the BIRA set about to abolish the closed shop.

Section 5(1)(b) of the BIRA created a legally protected right "to be a member of no trade union or organisation of workers," enforceable by a worker against an employer in the event of employer interference with the exercise of the right. The section, however, was not enforceable by a worker against a union, and only an employer could complain of industrial action by a union which tended to interfere with the section 5(1)(b) right. In addition, there was section 7(1), which declared void any agreement containing a pre-entry closed shop or a la-

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314. Donovan Report, supra note 154, at ¶ 600.
315. Id. at ¶¶ 588-618.
316. Id. at ¶ 593.
317. As a Times editorial put it, "the abolition [of the closed shop] by an act of Parliament is basically an ideological and not a practical measure." The Times (London), March 8, 1972.
320. BIRA § 5(2).
321. Id., § 106(1).
The net result of sections 5(1)(b) and 7(1) was to outlaw the closed shop in all its forms, since the right not to belong to a union is of course incompatible with any requirement of union membership.

To mitigate somewhat the unqualified right not to belong, the BIRA permitted under certain circumstances two limited forms of post-entry closed shop: the agency shop agreement (ASA) and the approved closed shop agreement (ACSA). Section 11 defines the ASA as an agreement between one or more employers (or an organization of employers) and one or more trade unions, wherein they agree that every employee must, as a condition of employment, "be or become a member of that trade union or one of those trade unions," "agree to pay appropriate contributions to that trade union, or . . . to one of those trade unions, in lieu of membership," or, in the case of "any worker who . . . objects on grounds of conscience both to being a member of a trade union and to paying contributions to a trade union in lieu of membership of it," agree to pay "equivalent contributions to a charity." Section 17 defines an ACSA as an agreement wherein these same parties agree that every employee must, as a condition of employment, become a member of that trade union or one of those trade unions if not already such a member, or, in the case of conscientious objection, agree to pay "appropriate contributions to a charity."

The essential difference between the agency shop and the approved closed shop is that the first gave the non-unionist two avenues of escape, while the second permitted only one. In an agency shop, a worker could avoid union membership either by paying dues to the union in lieu of membership or (in the case of a conscientious objector) to a charity; in an approved closed shop, only the conscientious objector could avoid membership. The legal consequences of both arrangements were identical: they permitted the employer and the trade union to enforce a post-entry closed shop without liability for interference with the section 5(1)(b) right.

The procedures for instituting agency shops and approved closed

322. Id., § 7(1). The full section provides:
Insofar as any provision in any agreement purports
(a) to preclude an employer, or, employers of a description specified in the agreement
from engaging workers who are not members of a trade union, or other organiza-
tion of workers, or from engaging workers who are not members of a particular
trade union or other organization of workers specified in the agreement, or are not
members of any two or more trade unions or other such organizations so specified,
or
(b) to preclude an employer, or employers of a description specified in the agreement,
from engaging workers who have not been recommended or approved for engage-
ment by a trade union or other organization of workers specified in the agreement,
or by two or more trade unions or other such organizations so specified,
that provision shall be void.

323. Id., §§ 6(2), 17(2).
shops were similar, though not identical. The most important prerequisite for both agreements was that the applicant trade union must be registered under the BIRA.\textsuperscript{324} In the case of an agency shop, the agreement could be made voluntarily if both parties were willing;\textsuperscript{325} if the employer was unwilling, the trade union could follow a series of statutory steps to compel agreement.\textsuperscript{326} In the event of an affirmative majority of those employees eligible to vote or two-thirds of those voting, the agreement took effect;\textsuperscript{327} in the event of a negative vote, consideration of the agency shop was barred for two years.\textsuperscript{328} If statutory, the agreement could not be challenged for two years;\textsuperscript{329} if voluntary, it could be challenged at any time upon application to the NIRC by one-fifth of the workers to whom the agreement applied.\textsuperscript{330} By contrast, an approved closed shop could not be instituted by voluntary agreement; there had to be a joint employer and trade union application to the NIRC.\textsuperscript{331} No ballot was required unless requested; instead, the CIR made a report to the NIRC on the basis of a number of statutorily defined questions. The provisions for challenging an approved closed shop agreement were similar to those applied to the agency shop.

Between 1971 and 1974, a few small unions and only two major unions—the National Union of Bank Employees and the Bakers Union—agreed to agency shops.\textsuperscript{332} Approved closed shop agreements were made by the National Union of Seamen (NUS)\textsuperscript{333} and by the Actors Equity Association.\textsuperscript{334} All of these unions were registered under the BIRA. But the great majority of unions, as already noted, refused to register; for them, the limited forms of post-entry closed shop were not available, and they were faced with the legally protected right of every worker to object to a closed shop. The application of this newly protected right was most completely explored during the illuminating course of \textit{Langston v. AUEW}.\textsuperscript{335}

Joseph Langston had worked for many years as a welder in the car
assembly plant of Chrysler (U.K.) Ltd. at Ryton near Coventry. He had first joined a union in 1927, at the age of 14, and had served during World War II as a shop steward. While he believed in the right of every worker to belong to a trade union, he was also opposed to the closed shop. His union was the Amalgamated Union of Engineering Workers (AUEW), Britain’s second largest union. By agreement with Chrysler, the AUEW maintained a closed shop at the Ryton plant. Although Langston belonged, of necessity, to the AUEW, he also waged a single-handed campaign against the closed shop. He wrote letters to the union, to the management, and even to Mr. Edward Heath, M.P., at that time leader of the opposition Conservative Party in Parliament.

In July 1972, five months after the BIRA came into effect, Langston applied to an industrial tribunal for a declaration that he was entitled not to belong to a trade union. This application failed on procedural grounds, as did his second application in August. As one of the difficulties was his continued membership in the AUEW, he resigned from the union and submitted a third application on October 10. At this point, predictably, he ran into trouble with the AUEW, who complained to the management. On October 30, after receiving complaints from the AUEW, Chrysler sent Langston home on full pay, though he continued to visit the factory every Friday to collect his paycheck. On December 28, the industrial tribunal in Birmingham declared that Langston had a right not to belong to the AUEW. It was, to quote Lord Denning in the Court of Appeal, a “Pyrrhic victory,” for when Langston went to the factory the following day to collect his weekly wages, he was met by a hostile crowd of fellow workers, who pelted him with stones, tin cans, and mud.

Langston applied to the NIRC in January 1973 for an “injunction” to restrain the AUEW from interfering with his “legally-established right of free access to [his] normal place of employment.” In its decision of February 27,336 the NIRC interpreted this application as a complaint under section 105(1) of a section 33(3)(a) unfair industrial practice by the AUEW, specifically that the AUEW had “knowingly induced” Chrysler to “penalize or otherwise discriminate against” Langston for exercising his section 5(1)(b) right “to be a member of no . . . organisation of workers.” The NIRC concluded, however, that a complaint against a union under section 105 could only be made by an employer, and held that a worker whose section 5(1)(b) right is infringed must complain against his or her employer under section 106 rather than against the union. Since Langston had not complained—and had no wish to complain—against Chrysler, his complaint against the AUEW was dismissed.

Undaunted by this procedural setback, Langston proceeded from the NIRC to the Court of Appeal, alleging, inter alia, that the NIRC's judgment left him "in a legal straitjacket" with "no legal remedy" under section 5 of the BIRA, and that the decision was "in contradiction to our constitutional law." The Court of Appeal, giving judgment on December 19, 1973, held that the NIRC was correct in dismissing Langston's section 105 complaint against the union of a section 33(3)(a) unfair industrial practice. Nonetheless, Lord Denning, speaking for the court, expressed the view that Langston's handwritten complaint was "wide enough to come within Section 96." This view allowed Lord Denning to interpret Langston's application as a complaint that the AUEW had "knowingly induced" Chrysler to break his contract of employment contrary to section 96. Under section 101, there was no procedural bar to a section 96 complaint by a worker against his union.

But if, as already noted, section 96 required proof of a breach of contract, whether for employment or otherwise, where is the breach in suspending an employee on full pay? Through selective use of judicial and other precedent, Lord Denning found it "arguable" that a worker "has a right to have the opportunity of doing . . . work when it is there to be done." By depriving Langston of this opportunity, Chrysler had broken an implied term of his contract, and the AUEW was of course guilty under section 96 of inducing the company to do so. In support of this implied "right to work," Lord Denning not only cited his own judgments on the subject, but also found extra-judicial backing in Longfellow's *The Village Blacksmith* ("Something attempted, something done/Has earned a night's repose") and reiterated the well-known sacerdotal canon that "[t]he devil tempts those who have nothing to do." It is important to note that Lord Denning—harboring, perhaps, a doubt about the weight of the judicial, poetic, and biblical authorities he had cited—spoke of the right to work only as an "argument," and it was on this basis alone that his two colleagues supported him. The appeal was accordingly allowed and the case

338. *Id.* at 189.
339. *Id.*
340. *Id.* at 191.
341. *Id.* at 190.
344. *Id.*
345. *Id.*
346. *Id.* at 192 (Cairns, L.J.); *Id.* at 193 (Stephenson, L.J.).
remitted to the NIRC for a re-hearing on the merits of a section 96 complaint.

Thus it was that in May 1974, only weeks before the imminent repeal of the BIRA, Langston appeared before the NIRC for the second time. Sir John Donaldson, giving judgment, could find no legal authority for the so-called "right to work"—apart, perhaps, from the narrow cases of theatrical employees, where the opportunity to work and gain recognition may be as important as the right to be paid, and of piece-rate workers, where there may be an implied obligation on the part of the employer to provide work for the employee to do. Fortunately for Langston, Sir John was able to find that he was indeed a piece-rate worker, and that although Chrysler had done its best to calculate what Langston would have earned had he stayed at work, it had inadvertently deprived him of some extra premium payments he could have gained from overtime and night shifts. This itself constituted a breach of contract, so there was no need to rely on Lord Denning's purported right to work.

Having established, albeit circuitously, Langston's right not to belong to the AUEW, the court turned to consideration of the proper remedy for the infringement of that right. Chrysler had already willingly paid Langston all the financial compensation to which he was entitled. But to Langston, the only satisfactory remedy was total vindication of the principle: he wanted to return to work. Although the BIRA did not empower an industrial tribunal, nor, on appeal, the NIRC, to reinstate a complainant, it did allow and require the court to "recommend re-engagement," under section 106(4), "where [the court] considers that it would be practicable, and in accordance with equity . . . ." Sir John had "no doubt" that it would accord with equity to re-engage Langston, but he reluctantly refused to recommend re-engagement because that it would not be practicable. The word "practicable," he declared, "indicates one must be satisfied with less than perfection . . . . Whatever its context, the quality of the word is that there are circumstances in which we must be content with less than 100 per cent." In response to Langston's questions during argument of the case, Sir John was less coy. According to the Times: "Mr. Langston replied that Sir John was suggesting that the closed shop could be operated irrespective of the law. Sir John said: 'That may be the fact.'" This was the third and final blow against the BIRA: an open ad-
mission by the President of the NIRC that between 1972 and 1974 the closed shop continued to exist as a social fact irrespective of its declared illegality. There is no clearer illustration of the failure of the BIRA. Subsequent statistical studies support Sir John’s impression. According to the Warwick Study, “those closed shops which were operating before the Act became law were hardly affected.”

Before turning to the reasons for this failure of the BIRA, it is useful to compare the Act’s provisions for closed shops with the American approach to “union security.”

B. The American Law of Union Security

Since 1947, federal labor law has played a major role in shaping union security agreements. Section 7 of the NLRA, as amended, states that: “Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities.” The right to join a labor organization was created by the Wagner Act of 1935, and the correlative “right to refrain” was added by the Taft-Hartley Act of 1947. The parallel with the right to belong under section 5(1)(a) of the BIRA, and the right not to belong under section 5(1)(b), could not be more obvious. Against the right to refrain, and its implicit prohibition of union security, the American law, like the BIRA, permits a number of limited exceptions.

First, the NLRA sanctions a union shop arrangement. Under section 8(a)(3), an employer and a union—if recognized as the majority bargaining representative under section 9(a)—may make an agreement “to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment . . . .” Judicial interpretation of section 8(a)(3) has also sanctioned an agency shop agreement. In *NLRB v. General Motors Corp.*, the U.S. Supreme Court upheld provisions requiring, as a condition of employment, membership in a union or payment of dues to the union in lieu of membership.

The legal consequence of section 8(a)(3), and of its interpretation in the *General Motors Corp.*, is that an employer and a union are permitted to enforce a post-entry closed shop without liability for infringe-

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354. 29 U.S.C. § 157(a)(3) (1976). Although since 1951 an election has not been needed to authorize the making of a union shop agreement, § 9(e) does require the NLRB to hold a secret ballot upon a petition by 30 per cent of the affected employees alleging that they desire such authority to be rescinded. If the vote is affirmative, the union shop agreement will be voided and no further agreement may be made during the next twelve months. If the vote is negative, the agreement will of course remain and no further de-authorization election may be held for twelve months.
ment of the right to refrain from membership. The only proviso, and an important one, is that neither the employer (under section 8(a)(3)) nor the union (under section 8(b)(2)) may discriminate against a non-member for reasons other than the failure to tender the periodic dues and the initiation fees uniformly required.

C. The British Rejection of the American Model

A comparison of the British and American law thus reveals a very substantial similarity; the section 8(a)(3) union shop and the General Motors agency shop are clearly the models for the approved closed shop and agency shop agreements, respectively, in the BIRA. Why, then, was the American transplant rejected? At the outset, it must be conceded that the refusal of the TUC unions to register under the BIRA robbed the union security mechanism of two of its most vital parts. In American law, the individual's right to refrain from union membership has been counterbalanced by the freedom of labor and management (subject to certain safeguards) to make lawful union shop and agency shop agreements. In Britain, this freedom was denied to unregistered unions, so that the individual's right not to belong was left absolute and unqualified. The government's scheme of voluntary registration was a massive miscalculation which truncated the closed shop provisions of the BIRA, just as it distorted the impact of section 96.

For those who did register in defiance of TUC policy, the agency shop and approved closed shop provisions proved to be something of a mixed blessing. A small number of white collar unions, notably the National Union of Bank Employees, showed some gains in recruitment. The National Union of Seamen and Actors' Equity were also able to secure closed shop agreements that satisfied most of their mutual concerns about maintaining union discipline in industries of infrequent and casual employment. On the other hand, the political cost to all these unions within the trade union movement was high. The white collar unions, no longer protected by the TUC's Bridlington Agreement, which forbids poaching by affiliated unions, were faced with piracy and bitter hostility from rival unregistered unions. Two unions later decided to revoke their registry for this very reason. The NUS and Actors' Equity were wracked by internal dissension over

357. Warwick Report, supra note 224, at 51-52.
358. See material cited at notes 323 and 324 supra.
360. These were the Scottish Union of Bakery and Allied Workers (with 11,000 members), which de-registered in September 1973, and the Electrical Power Engineers' Association which de-registered in June 1973. Id.
their policy of cooperation with the BIRA and its institutions, and both decided to de-register as soon as repeal seemed likely. On balance, it appears in retrospect that the legal advantages of registration were far outweighed by its political costs.

For the great majority of unions, however, the BIRA prescribed an absolute ban on the closed shop—pre-entry and post entry. There seem to be several related reasons for the failure of this rule. First, the prohibition of the closed shop is wholly inconsistent with the concept of union discipline expressed by section 36 of the BIRA and by the interpretation of section 96 in the *Heatons* case. As noted, these sections espouse a view of union leaders as the police of industrial order. Yet if the ultimate weapon of the union leader is expulsion of a dissident worker from union membership, it is obvious that this weapon carries no weight at all in an open shop where every worker is free to belong or not to belong to the union. This elementary argument was the central plank of the application by Actors’ Equity to the CIR for an approved closed shop, and the CIR expressly affirmed the argument in terms that seem to have a significance beyond the theatre, independent television and film industries; yet those who created the CIR appear to have disregarded the point from the beginning.

This inconsistency within the BIRA is symptomatic of a second reason for the failure of the closed shop provisions—an inability to distinguish and evaluate individual rights and collective interests in labor relations. This is nowhere more apparent than in section 5 itself. The BIRA equated the right to belong of section 5(1)(a) with the right not to belong of section 5(1)(b), and accorded them equal weight. While this equation is superficially appealing to one’s sense of syllogism, it bears no relation to industrial reality. The right to belong serves the collective interest, since it is conducive—indeed, essential—to the collective bargaining system, whereas the right not to belong is subversive of it. Furthermore, the collective bargaining system, for better or worse, necessitates a subordination of individual rights to the collective interest. It presupposes a balancing of power between management and labor; the closed shop is of course a key element in labor’s power, without which no balance is possible. Section 5 thus equates two distinct and unequal interests, and serves only to undermine the principle of free collective bargaining declared in section 1 of the BIRA.

A third and critical reason for the failure of the closed shop provisions lies in the unwillingness of the Conservative government to heed the overwhelming evidence that the closed shop was accepted and even

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361. *Id.* at 55.
362. *Id.*
welcomed by most major employers prior to 1971. This evidence was readily available in the 1968 report of the Donovan Commission, subsequently confirmed by the conduct of Chrysler throughout the *Langston* litigation, and corroborated after repeal by the Warwick Study. Yet this evidence was ignored, perhaps because the authors of the BIRA were inclined to overestimate the power of law to induce employers to prefer individual rights to their own vested interest in the collective bargaining system. Without the support of employers, the prohibition of the closed shop could not be enforced by individuals acting alone.

Finally, the failure of the closed shop provisions reveals that there are certain things the law cannot do. This, surely, is the lesson of the *Langston* cases, though it was apparent much earlier in the Donovan Report and the writings of Professor Kahn-Freund. In 1968, the Donovan Commission explicitly rejected any legal prohibition of the closed shop—not out of any great enthusiasm for compulsory unionism, but rather because its members were convinced that this phenomenon could not, in practice, be prohibited by law. In 1972, Professor Kahn-Freund warned: “It is for me very hard to understand how . . . the law can suppress practices based on informal and generally shared understandings of the workers, and for good reasons, tolerated and sometimes even welcomed by employers.” Both these views were roundly vindicated in 1975 when the Warwick Study found that “[t]he closed shop has proved such a stable and sturdy institution that . . . in the end even the law had to bend to the inevitable.”

This does not, of course, mean that the law can never change human behavior. There are, however, certain limits of law, and certain preconditions for successful law reform in an industrial context. Analysis of the closed shop suggests that the following are necessary preconditions. First, the change must be compatible with other changes in the new legal code. Second, the change must have the support of at least management or labor, preferably of both. The distinction drawn between individual rights and collective interests suggests a third caveat—that it will be harder to promote new individual rights unless they are congenial to the interest of management and labor in maintaining the system of collective bargaining as a social institution. None of these preconditions was met by the closed shop provisions of the BIRA.

V

CONCLUSION

In this article, three aspects of the British Industrial Relations Act of 1971 have been examined, and some reasons for its failure suggested. Section II discussed how the emergency procedures contributed nothing to resolving the dispute on the railways in 1972, and that these procedures were never again used by the government prior to repeal. Section III addressed the fact that neither the unions nor ultimately the courts were able to enforce the concept of union responsibility envisaged by sections 36 and 96 and applied by the House of Lords in the Heatons case. Section IV established that the prohibition of the closed shop was flouted by unions and employers alike, and that the NIRC was powerless to intervene on behalf of an individual nonunionist in the Langston case. This chronicle of failure, it is suggested, killed the BIRA long before its statutory demise in 1974.

The review of the BIRA has included reference to the parallel provisions of American law, found in the Wagner and Taft-Hartley Acts. The relative success of these provisions in America since 1947, and their abject failure when transplanted to Britain between 1971 and 1974, establishes the wisdom of Montesquieu's dictum, quoted at the outset of this article, that it is very unlikely that the laws of one nation can be applied to another. Yet comparative law reform is an increasingly popular approach; more and more countries look to foreign legal systems as a model for their own law reform. While this process is both inevitable and desirable in a shrinking world, the history of the BIRA should give comparative law reformers pause for reflection before rushing to adopt laws founded in foreign systems. At the very least, this history comports with Professor Kahn-Freund's observation that "we cannot take for granted that rules or institutions are transplantable."\(^{369}\)

This concluding section is intended to restate how the failure of the BIRA may serve as a guide to comparative law reformers in judging the transplantability of other rules and institutions in the future and avoiding their subsequent rejection. One general principle is suggested by the failure of the emergency procedures of the BIRA: the borrower should study not only the rule or institution to be transplanted but also its established results. Was it a success or a failure in its country of development? In what ways could the rule or institution be improved? The comparative law reformer ought to look a little further than the statute book. For instance, a study of the application of the American law would have shown the British lawmakers that the American ballot order has invariably resulted in a majority vote to continue industrial

\(^{369}\) Kahn-Freund, supra note 10, at 27.
action—that union members have voted, by and large, to follow their leaders. It would also have revealed that the cooling-off order has done nothing to promote a resolution of the underlying industrial dispute; rather, that it has been roundly criticized by lawyers, judges, and academics as an exercise of essentially political judgment, an offense against the principle of separate executive and judicial functions, and an obstacle to the process of voluntary collective bargaining. Whether the authors of the BIRA studied the history of the ballot and cooling-off orders in America may perhaps be inferred from the fact that such a study would have revealed a set of rules which, in the case of the ballot order, had demonstrated no utility whatsoever and, in the case of the cooling-off order, had been subject to serious criticism from all sides.

A second general principle emerges from the application of union responsibility in sections 36, 96, and the Heatons case: that the borrower should study not only the rule or institution to be transplanted but also the balance of social power upon which it depends. Laws are not enforced by moral suasion alone; their success depends upon a certain balance of power. Tip the balance of power, and the law may prove to be unenforceable. This is especially true of the law of agency, where the imposition of legal responsibility upon the principal for the acts of an agent can only be justified by the power of the principal to control the acts of the agent. Legal responsibility rests, in theory as well as practice, upon the power of control. A study of American national unions would have shown a high degree of centralized control by the leadership over subordinate officers, shop stewards, and local members. The imposition of legal responsibility upon American unions—whether desirable as a matter of policy or not—does seem at least to accord with the capacity of the principal to exercise real social power over its agents. Comparative study of social power within American and British unions would have shown a much greater degree of decentralization within British unions, particularly after 1960, and it would have indicated that the American law of agency is not a transplantable rule in the context of union responsibility.

The very size of the BIRA created problems of internal consistency. The Warwick Study concluded in 1975: "From its inception the [Industrial Relations] Act was a long and complicated piece of legislation. Its complications hid a confusion of thought and contradiction of aims which experience revealed." These contradictions are exposed when the grass roots democracy implicit in the ballot order is juxtaposed to the authoritarian centralism of the Heatons case, or the abolition of the closed shop is considered in conjunction with the affirmative duty of union discipline required by section 36. These comparisons
suggest a third general principle: that the borrower should examine the rules and institutions to be transplanted as a whole in order to assure their internal consistency. While consistency is not, of course, a guarantee of success, the BIRA shows that consistency acquires an increasing importance in direct proportion to the size of the transplanted body of law.

The negative lesson derived from this third general principle obviously is this: do not transplant rules or institutions that are mutually inconsistent. This lesson would surely have restrained the authors of the BIRA from proclaiming their dedication to the principle of "representative, responsible, and effective" unions in section 1 while at the same time abolishing the closed shop in section 7. Indeed, Professor Wedderburn had already warned in 1970 that "[p]olicies on labour law, as on other things, are bound to differ. What is impermissible is the pursuit of a policy in one part of labour law without account being taken of its effects in another." A preliminary examination of the American Law would have revealed that precisely the same criticism of internal inconsistency was made of the Taft-Hartley amendments in 1947 by Professor Archibald Cox.

In quality as well as quantity, the BIRA was a massive departure from previous law and practice. Specifically, it took 180-degree turns—repudiating the Emergency Powers Act of 1920, providing for the legal enforceability of collective bargaining agreements, creating liability for inducing a breach of contract in an industrial dispute, prohibiting the closed shop. In its widest sense, it was a reversal of 100 years of "legal abstention" in British labor relations. Whatever the content of the new rules and institutions, their mere existence as law was thus a radical overthrow of previous practice. This gap between the old and the new regimes is significant in and of itself, for it raises both a small issue, and a very large one.

The small issue is exemplified by the emergency procedures of the BIRA, and it may be reduced to a fourth general principle: the borrower must consider the adequacy of its existing law and practice before transplanting a foreign rule or institution. The emergency procedures in the BIRA were designed to supplant the Emergency Powers Act of 1920. Yet the 1920 Act had been in use for more than 50 years and no one had convincingly demonstrated its inadequacy for dealing

By depriving the union of its most effective means of disciplining workers who disregard their obligations under a collective agreement, § 8(a)(3)(B) also disables the union from accepting responsibility for the employees' observance of the other terms of a collective agreement.

*Id.* at 299.
with national emergencies. The mere fact that the Taft-Hartley Act adopted a different approach to the resolution of emergency disputes is scarcely a proof of the need for reform. The comparative law reformer cannot escape this burden of proof merely by asserting that they do things differently elsewhere; in the absence of proof of benefit, the transplanted system is likely to be treated with suspicion or hostility which will further lessen its chance of successful application.

The larger issue raised by the radicalism of the BIRA is equally simple, and lies in the familiar concept of consent. It is by now an axiom of democratic wisdom that law requires the consent of the governed. The need for consent is apparent when a government seeks to make radical changes in existing law or practice; this axiom applies a fortiori when the law is to be borrowed from another country. Comparative law reform therefore shares a fifth general principle with all law reform: secure the consent of the affected parties.

The lack of consent by unions, and to a lesser extent by employers and the public at large, has been noted throughout this article. Non-cooperation by the TUC unions was fatal to the scheme of voluntary registration, which in turn exerted a distorting influence on section 96 and the closed shop provisions. The unwillingness of unions and employers to make legally enforceable collective agreements under section 34 effectively killed section 36. The misgivings of most major employers—at first silent, later more vociferous—ensured that the NIRC was rarely used and that the court's capacity to enforce the new standards of industrial conduct was crippled for lack of a plaintiff. Most employers wanted nothing to do with section 96; thus, when a plaintiff did appear in Langston, he was not supported by his own employer.

The government's failure to secure the consent of employers and unions to the BIRA is no doubt attributable to many causes beyond the scope of this article. One cause which may be pertinent is that they were perhaps misled by the appearance of a consensus between management and labor to the American system of labor relations law. If employers and unions had acquiesced to a legal framework of industrial order since 1947, could not their British counterparts be persuaded to do the same? This cosy but quite mistaken prediction affirms that the process of comparative law reform is not, of itself, a substitute for the more fundamental need to secure consent to any new rule or institution.

There was ample evidence to infer a lack of consent in Britain not merely to a legal framework in general, but to the American labor law in particular. The report of the Donovan Commission, reflecting a wide spectrum of management, labor and academic opinion, had rejected every American idea that was eventually adopted in the BIRA,
including the emergency procedures;\footnote{373} union responsibility for inducing a breach of contract;\footnote{374} and abolition of the closed shop.\footnote{375} In rejecting the American model, the Commission had explicitly allied itself with the existing practice of legal abstention:

The British system of industrial relations is based on voluntarily agreed rules which, as a matter of principle, are not enforced by law. . . . [I]t has been the traditional policy of the law as far as possible not to intervene in the system of industrial relations. . . . The evidence we have received shows a wide measure of agreement that this non-intervention should continue to be the normal policy. Most of us arrive at the same conclusion.\footnote{376}

If the lack of consent was not apparent from reading the Donovan Commission’s report, it was made abundantly clear to the government by discussions with the TUC and the mass demonstrations in the streets while the bill was being heard in Parliament.

One final and overriding general principle emerges from the Langston cases in particular and from the BIRA as a whole: remember the limits of the law. The BIRA teaches that there are certain things the law cannot do. It cannot overturn a norm of industrial conduct which is generally supported by management and labor, nor can it secure compliance with alien norms of industrial conduct which are generally opposed by management and labor, or solve emergency disputes. As the Warwick Study declared: “Our evidence is that the Act had little influence on the general practice of industrial relations.”\footnote{377} It appears that the authors of the BIRA overestimated the power of law to affect human behavior. They and other aspiring law reformers—whether comparative or otherwise—ought take heed of Professor Kahn-Freund’s aphorism: “I regard law as a secondary force in human affairs, and especially in labour relations.”\footnote{378}

The ultimate conclusion is that the job of the comparative law reformer is really no different from the job of every law reformer. While the study of foreign laws may be instructive, even inspirational, it does not in the end absolve a government of its inescapable obligations in initiating any domestic law reform of moulding the law to the needs, attributes, and desires of its people. Any law reformer who looks to comparative law reform for a short cut is apt to be sadly disillusioned.

\footnote{373} Donovan Report, supra note 154, at §§ 424-25, 430.
\footnote{374} Id. at ¶ 893.
\footnote{375} Id. at §§ 598-602.
\footnote{376} Id. at §§ 751-52.
\footnote{377} Warwick Report, supra note 224, at 232.
\footnote{378} O. KAHN-FREUND, supra note 6, at 3.
In fact, it might be far better for law reformers to rely on a presumption of non-transplantability when studying foreign rules or institutions; that, surely, was Montesquieu's point, and there is no better proof of his foresight than the British Industrial Relations Act of 1971-74.