Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971*

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"It is not good for trade unions that they should be brought in contact with the courts, and it is not good for the courts."1

Sir Winston Churchill

"The unions should take the position squarely that they are amenable to law, prepared to take the consequences if they transgress, and thus show that they are in full sympathy with the spirit of our people whose political system rests upon the proposition that this is a government of law, and not of men."2

Mr. Justice Brandeis

On this silver anniversary of the enactment of the Taft-Hartley amendments to the National Labor Relations Act of 1935,3 one no longer hears its provisions denounced, as they were, by the leaders of organized labor as a "slave labor" act. The Act, which made collective bargaining agreements enforceable in court,4 prohibited sec-

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* This article benefited from the criticisms of Sir Geoffrey Howe, Solicitor General of the United Kingdom, Professor Cyril Grunfeld, Counsel to the Commission on Industrial Relations, and Professor Norman Selwyn, University of Aston, Birmingham, England. Of course, the views expressed are my own and should not be attributed to any of the individuals mentioned.

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1. TRADE UNION DOCUMENTS 380 (Milne-Bailey ed. 1929).


ondary boycotts\(^5\) and closed shops,\(^6\) placed authority in the Attorney General to sue to enjoin for an eighty-day period strikes which created a national emergency,\(^7\) was anathema to the unions. When Adlai Stevenson, making the first of two losing passes at the presidency, repudiated past Democratic Party pledges, and stated that he would not repeal Taft-Hartley but would only propose its amendment,\(^8\) he was the first Northern leader of his party to state the unthinkable, and not merely think it. The United States would never again seriously contemplate turning away from the legal regulation of trade unions in a modern interdependent economy.

What is particularly significant in this regard is trade union acceptance of the role of law in industrial relations and the labor movement’s acquiescence in the propriety of some portions of Taft-Hartley as representing something quite different from a return to the bad old days which trade unionists legitimately fear. To be sure, some of the provisions adopted by the 80th Congress in 1947 still rankle—and quite properly so.\(^9\) But organized labor in the United States is alive and well. To the extent that it has problems in organizing the unorganized, the primary blame lies with the unions themselves,\(^10\) not with the law.

Far from evolving into repressive legislation, much of Taft-Hartley is of benefit to American trade unions. Nothing was more responsible for the “slave labor” charge than the emergency strike provisions of Taft-Hartley. Yet today, trade union leaders advocate retention of existing Taft-Hartley procedures in this area, and propose their application to public employment labor disputes.\(^11\) Because of the comprehensiveness of the statute’s unfair labor practice provisions,

\(^8\) Actually, after receiving the Democratic nomination, Governor Stevenson retreated to the rhetoric of repeal, but his speeches and press conference comments reveal acceptance of some of Taft-Hartley’s provisions. See A. Stevenson, Major Campaign Speeches of Adlai E. Stevenson 1952, at 46, 157; N.Y. Times, July 31, 1952, at 9.
\(^9\) NLRA § 14(b), 29 U.S.C. § 164(b) (1970) permits states to prohibit any union security arrangement requiring membership or the payment of dues to the collective bargaining representative and, accordingly, precludes labor and management from making their own agreement on this subject and weakens the union as a bargaining entity. Further, some of the limitations on organizational and recognition picketing dull union organization weaponry which are a legitimate part of the arsenal. See, e.g., 29 U.S.C. § 158(b) (1970).
\(^10\) One proof of this proposition is the continued growth of the International Brotherhood of Teamsters against whom most of Taft-Hartley is aimed. See R. James & E. James, Hoffa and the Teamsters 143-58 (1965). The Teamsters succeed simply because they do the best job of organizing workers. On weaknesses plaguing American unions, see generally S. Barkin, The Decline of the Labor Movement (1961).
\(^11\) See T. Kheel, Report to Speaker Anthony J. Travia on the Taylor Law, Feb. 21, 1968, which was met by favorable trade union reaction.
the doctrine of pre-emption has ousted the states' jurisdiction over a wide variety of problems relating to strikes and picketing and thus removed the potential for large awards of compensatory and punitive damages against unions.\textsuperscript{12} When it comes to the enforcement of collective agreements, it is the unions, supposedly the objects of discipline for their irresponsible failure to abide by contractual obligations, which have been plaintiffs in the overwhelming majority of court proceedings and grievants in most of the arbitrations.\textsuperscript{13}

Last year, the British Parliament passed the first comprehensive legislation relating to labor management relations in the United Kingdom. The legislation attempted to both restrict union abuses in the collective bargaining arena and provide statutory protection for unions and employees. The Industrial Relations Act of 1971, which is more comprehensive than all of the major labor legislation enacted by Congress in 1935, 1947 and 1959 viewed together,\textsuperscript{14} establishes a wide variety of unfair industrial practices applicable to both unions and employers,\textsuperscript{15} prohibits the "unfair" dismissal of employees,\textsuperscript{16} introduces an obligation requiring employers to bargain with an exclusive or "sole" bargaining representative\textsuperscript{17} and prohibits the right to strike in a number of contexts. It makes collective agreements legally enforceable for the first time,\textsuperscript{18} and it puts great pressure on the unions to "register"\textsuperscript{19} with the government, and thereby to specify which union officers shall be liable for breaches of collective contracts and of statutory obligations. An abiding theme of the Act is the encouragement of central union authority which, in turn, will be more attuned to responsibility and orderliness in its dealings with employers.\textsuperscript{20}

Thus, from an almost exclusive reliance on "voluntarism," \textit{i.e.}, the promotion of negotiating procedures drawing at most indirectly upon law, Great Britain has now imposed upon the conduct of unions and


\textsuperscript{13} \textit{See}, \textit{e.g.}, Aaron, \textit{Judicial Intervention in Labor Arbitration}, 20 STAN. L. REV. 41 (1967).


\textsuperscript{17} Ind. Rela. Act 1971, §§ 50, 55.

\textsuperscript{18} Ind. Rela. Act 1971, § 54.

\textsuperscript{19} \textit{See pp. 1437-40 infra.}

\textsuperscript{20} \textit{See, e.g.,} Ind. Rela. Act 1971, § 36(2).
employers more formal and far-reaching regulations than those characterizing the U.S. system, a system which British experts traditionally regarded as excessively law-ridden. Moreover, where the U.S. system represents a gradual accretion of statutory and ever-changing case law, and where gradualness has allowed labor and management here to adapt to the system, the British have attempted an abrupt, mammoth, one-step codification. The suddenness of change contributed to causing political and social upheaval. The summer of 1972 in Great Britain was one of nearly unprecedented bitterness and tumult. Not since the Conservative Government’s repeal of the Trade Disputes Union Act of 1913 in 1927, and the Labor Government’s repeal of the 1927 law in 1946, has labor law figured so prominently in the national political arena.\textsuperscript{21} Not since the General Strike of 1926 has Britain moved so near a total collapse of civility.\textsuperscript{22} While government ineptness in administering the statute, an unfavorable judicial ruling,\textsuperscript{23} and ever-worsening unemployment and inflation have aggravated the turmoil, the hard feeling arising out of the summer’s railway and dock strikes is largely attributable to the Act itself. Although some prominent beneficial by-products of statutory intervention in industrial relations are already visible—\textit{i.e.}, an accord between labor and management establishing a conciliation and arbitration service\textsuperscript{24}—the unions remain totally committed to avoiding all involvement with the Act’s institutions and, along with the British Labor Party, to pressing for repeal of the statute.\textsuperscript{25} The jailing of five dockers for contempt of court\textsuperscript{26}

\textsuperscript{21} The Conservative Party, however, had spoken of repealing the Labor Party’s 1946 repeal. See H. \textsc{Laski}, \textit{Trade Unions in the New Society} 57 (1950).


\textsuperscript{23} See the Court of Appeal’s decision in Heaton’s Transport Ltd. \textit{v.} Transport and General Workers Union, [1972] 2 All E.R. 1237 which was, however, reversed by the House of Lords, [1972] 3 All E.R. 101. For some of the pessimistic commentary that followed the Court of Appeal’s decision see Hanna, \textit{Two Ways to Salvage Union Law}, The \textit{Sunday Times} (London) June 25, 1972, at 57; Elliott, \textit{Industrial Relations After Two Big Tests in Court}, The \textit{Financial Times} (London) June 14, 1972, at 16, col. 3.


\textsuperscript{25} See \textsc{Labour Party}, \textit{Statement On Industrial Relations} (1972). This has been said to set “the terms of the Labour Party’s total surrender to the demands of its trade union paymasters.” Wood, \textit{Trade Union Rights, But No Duties}, The \textit{Times} (London) July 31, 1972, at 13, col. 1. See also Rogers, \textit{TUC and Labour Plans to Replace I.R. Act}, \textit{Financial Times} (London) July 28, 1972, at 7, col. 4. For an account of recent trade union strategy against the Act, see pp. 1485-86 infra.

Taft-Hartley Comes to Great Britain

may be just the beginning of a long struggle between a trade union movement, both obstinately resistant to the law and anxious for political combat with Prime Minister Heath and a Conservative Government determined to make good on election promises given in 1970 and before.\[27\]

This article does not purport to explain, or to apportion blame for, Britain's current industrial crisis. Compared to the peaceful acceptance by American unions of legal innovation in the labor-management field, the British crisis will afford intriguing parallels and contrasts in years to come for sociologists, political scientists, and historians. The task here, however, is a more modest one: to examine those provisions of the British Industrial Relations Act which resemble, in language or function, important provisions of the National Labor Relations Act in the United States. British critics and advocates of the Act all borrowed heavily,\[28\] though not always accurately,\[29\] from the American experience, and the Act can fairly be regarded as a highly selective transplant of American labor law. This article highlights the selections which were made and considers their wisdom in light of peculiar British traditions and problems.

The First Section gives the American reader a very brief, and necessarily incomplete, tour of British labor law and labor management practice prior to passage of the Industrial Relations Act. The Second Section introduces some of the novel institutions and concepts created by or used in the Industrial Relations Act. The Third, and main, Section discusses central issues raised by the Act upon which the American experience supplies provocative comment: (a) The Recognition of Union Bargaining Units and the Establishment of Collective Bargaining, (b) Union Security Arrangements, (c) The Enforcement of Collective Agreements and the Right to Strike, (d) The Secondary Boycott Problem, and (e) Emergency Dispute Procedures.

Spread, N.Y. Times, July 25, 1972, at 3, col. 1; Shuster, Britain Facing Industrial Paralysis in Labor Dispute, N.Y. Times, July 26, 1972, at 1, col. 5; Shuster, Wide Strike Peril Eased in Britain, N.Y. Times, July 27, 1972, at 1, col. 1. Apparently there was discussion in TUC quarters about not only a one day general strike against the dockers' jailing, but also a general strike against the Act. See Paterson, 1926 and All That, New Statesman, Aug. 4, 1972, at 150.


I. The Background and Setting

Until 1971, law played a remarkably small role in the British system of industrial relations. The state intervened, with some exceptions, only to provide a floor—in terms of wages, safety, health, etc.—below which employees could not be forced. The rules of the game between labor and management were written, and refereed, by the parties themselves. It was, as Professor Kahn-Freund has said, a system of “collective laissez-faire.”

At one time, however, the British interfered on a large scale with the employer-employee relationship in a manner which repressed workers and which favored the entrepreneurial class. These policies can be traced to the Black Death of the Fourteenth Century, when a badly shaken economy prompted adoption of the Statute of Labourers to impose criminal and civil liability upon employees who, taking advantage of a shortage of labor, refused to accept “pre-plague prices.” As Dean Landis has noted, the aim of such measures was to “strike at the individual bargaining power” of the workers involved. Similarly, in placing the Combination Acts of 1799 and 1800 on the books, Parliament was not the least bit bashful (albeit sometimes quite unsuccessful) about attempting to thwart the first stumbling efforts to establish something akin to what we now call the collective bargaining

30. To Professor Kahn-Freund, collective laissez-faire [means] . . . allowing free play to the collective forces of society, and limiting the intervention of the law to those marginal areas in which the disparity of these forces, that is, in our case, the force of organized labor and of organized management, is so great as to prevent the successful operation of what is characteristically called ‘negotiating machinery.’ It so happens that in this country, this principle of, if you like, ‘collective laissez-faire’ comes to be a preponderant characteristic of labor law of the first half of this century. O. KAHN-FREUND, LABOUR LAW (reprint), p. 224. The system has, however, permitted more legal intervention than Professor Kahn-Freund’s comments would lead one to believe. Prompted by the emergency of World War II, compulsory arbitration in the last resort existed between 1940 and 1951. See generally McCarthy, Compulsory Arbitration in Britain: The Work of the Industrial Disputes Tribunal, 31, RESEARCH PAPERS NO. 8, ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYERS ASSOCIATIONS (1965). McKelvey, Compulsory Arbitration in Britain, 37 CORNELL L.Q. 403 (1952). However, as Professor Kahn-Freund has said: “[I]n so far as it worked at all, it worked as a result of this understanding, and one government after another emphasized that it would be terminated if either side of industry desired this. Without this political background the system cannot be understood.” O. KAHN-FREUND, LABOUR AND THE LAW 116-17 (1972).


32. J. LANDES AND M. MANOFF, CASES ON LABOR LAW 2-3 (2d ed. 1942).

33. Combinations of Workmen Act, 39 & 40 Geo 3, c.81 (1799); Combinations of Workmen Act, 39 & 40 Geo 3, c.106 (1800).

34. See S. WEBB & B. WEBB, THE HISTORY OF TRADE UNIONISM (2d ed. 1920). As one authority summarized: “The Act of 1800 was in reality the last prop of the already decayed wage-fixing system, and while it achieved its object of crushing workers’ trade unions in some trades, it was ineffectual to prevent combinations, either of workmen or masters in other.” M. HICKLING, CITRENE’S TRADE UNION LAW 6 (3rd ed. 1967).
process. These statutes were repealed in 1824 and 1825, thus making the mere combination of workers no longer illegal (although the right to strike was curtailed by the 1825 statute). But, in Britain, as in the United States, the courts subsequently used the law of conspiracy to impose both tort and criminal liability upon workers bold enough to resort to economic pressures against employers with whom they could not resolve their differences. Such liability was eliminated in Britain by the Conspiracy and Protection of Property Act of 1875, the Trade Union Act of 1871 (which declared that a trade union was not an unlawful restraint of trade for criminal or civil purposes), and the Trades Disputes Act of 1906.

Although narrowed by recent House of Lords rulings, the 1906 statute became the cornerstone of trade union legislation in Britain. Not only did it make the civil law of conspiracy inapplicable to labor disputes, but it also legalized peaceful picketing and the calling of strikes and supposedly conferred immunity from court actions on anyone who induced an individual to break his contract of employment in the context of a “trade dispute.”

35. For a review of this early use of the law of conspiracy see C. Gregory, Cases and Materials on Labor Law 3-79 (1941).
36. Id. For a brief and interesting discussion of this history see O. Kahn-Freund, Labour and the Law 167-72 (1972).
39. Trades Disputes Act, 6 Edw. 7, c.47 (1906). The Act was prompted by Taff Vale Railway Co. v. Amalgamated Society of Railway Servants [1901] A.C. 426. Moreover, while the criminal law as a means to control the strike was discouraged by the 1875 statute, the judiciary then turned its attention to tort law. For the discriminatory attitude of the House of Lords, see Quinn v. Leathem, [1901] A.C. 495; Allen v. Flood, [1893] A.C. 1. An excellent treatment of the British legal tradition in this respect is contained in C. Grunfeld, Modern Trade Union Law 366-404 (1955).
The Trades Disputes Act of 1906 was the Magna Charta of the British labor movement. The American labor movement was still to go through the Danbury Hatters experience of coping with anti-trust damages imposed for the use of secondary boycotts deemed to be in "restraint of trade." Also, the American judicially enunciated doctrine of "unlawful objectives," whereby judge-made law permitted the assessment of damages in instances where economic pressure departed from what was philosophically acceptable to the courts, was yet to reach its zenith. Not until 1932, with passage of the Norris-LaGuardia Act, were the American unions successful in dismantling the federal judiciary's policy of indiscriminate and one-sided involvement in labor disputes.

In comparing the two countries, it is important to understand that by the 1930's American unions were unwilling and indeed unable to settle for the same live-and-let-live bargain which British unions struck in 1906 and adhered to for more than half a century. In Britain the unions had gained industrial power before they were able to assert their will in the political arena. Accordingly, they were fully content for the law to stay out of their affairs: They did not require parliamentary assistance at the bargaining table, and they feared that Parliament would not be an entirely friendly partner. For the emerging CIO unions, by contrast, legislative help was vital, and available. Fierce employer resistance, lack of solidarity amongst workers, rampant unemployment in the Great Depression, the struggle of the newly born unions to organize mass production industries from scratch—all these factors made affirmative legal protection seem imperative to the American labor movement. The result was the National Labor Relations Act, with its list of employer unfair labor practices and its obligation on management to bargain with an exclusive bargaining agent representing a majority of workers in an "appropriate unit." The statutory scheme, of course, was at variance with the "hands off" policy


44. Id. at 292-93.
of the Norris-LaGuardia Act, and with the same bias in the British Trades Disputes Act of 1906.48

Owing their economic success to power rather than law, and relying safely on the pride and prejudice of British “class” distinctions,49 British trade unions have, through the Trades Union Congress (the rough equivalent of the AFL-CIO in this country), continued to express unyielding hostility toward any legal restraint upon trade union activity. Enjoying relative success in organizing workers eligible for membership in existing unions,50 the TUC has recognized little need for legislative aid. It is thus entirely unremarkable that the British labor movement has adopted a policy of “non-cooperation” with the Industrial Relations Act.51

But the TUC’s adherence to “collective laissez-faire,” a position once widely shared by the public, has placed it out of step politically52 and has, arguably, injured the prospects of its ally, the British Labor Party. Public pressure for legal intervention in labor-management relations has been building for some time. A compulsory arbitration system was in force during World War II. Further, the Terms and Conditions of Employment Act of 195953 provided for the imposition upon a resisting management of the terms of a “relevant” bargaining agree-

48. More than a decade ago, Professor Kahn-Freund said of the British unions: “Does not their . . . unwillingness . . . to invoke the help of the law which, as is well known, the American unions found to be of the greatest assistance, demonstrate how much the aversion against State intervention in industrial relations, how much in particular union preference for industrial rather than political or legislative action, dominate the impact of public opinion on the development of labour law in our time?” O. KAHN-FREUND, LABOUR LAW (reprint) 229.


50. As of 1965, 28.5% of the non-agricultural employed labor force were union members in the U.S. while 38.7% were organized in England. D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY, 49 (1970) (note caveat at 49 as to problems with statistical comparison of union membership among countries due to different standards of measurement); for a comprehensive study of the growth patterns of British trade unionism see G. Bain, Trade Union Growth and Recognition, Research Papers No. 6, ROYAL COMMISSION ON TRADE UNIONS AND EMPLOYEES’ ASSOCIATIONS (1967).

51. For representative accounts of the TUC’s reaction, see Routledge, TUC Letter Sets Union Style to Resist Registration, The Times (London) Sept. 24, 1971, at 3, col. 1; Elliott, TUC to Tell Unions Still on Register to Leave Congress, The Financial Times (London), August 22, 1972, at 1, col. 3; Wigham, Time Ripe for T.U.C. to Reconsider its Policy, The Times (London) May 23, 1972, at 7, col. 1; Macheath, Politics of Resistance to the Unions Act, The Times (London), Aug. 6, 1971, at 2, col. 1; Raskin, Britain Goes Through Taft-Hartley Pains, N.Y. Times, June 16, 1969, at 42, col. 3. The TUC has now stated that unions may appear before the Industrial Relations Court to defend themselves, i.e., where an “offensive action” is being taken against a union. GENERAL COUNCIL, REPORT TO THE 104TH ANNUAL TRADES UNION CONGRESS 86-87 (1972); Murray, Mr. Jack Jones is Shattered by Disloyalty to TUC Policy of Boycotting the Industrial Act, The Times (London) May 1, 1972, at 2, col. 7; Hamilton, Union’s Appeal Over Dismissal First Before New Tribunal, The Times (London) May 4, 1972, at 4, col. 1.

52. See generally Pickles, Trade Unions in the Political Climate, in Industrial Relations, Contemporary Problems and Perspectives (B.C. Roberts ed. 1962).

The Yale Law Journal

Vol. 81: 1421, 1972

ment and for incorporation of those terms in each worker's individual contract of employment, the “relevant” agreement usually being read as the pattern of practice in the industry involved.\(^4\) The 1959 Act was for the benefit of unions and employees,\(^5\) and the TUC accepted it for that reason, but the Act represents a clear breach of the spirit of “collective laissez-faire” which the unions now invoke. Indeed, to have the substance of a collective agreement dictated by an outside body is so inconsistent with voluntarism that it would not generally be tolerated in the seemingly more legally regulated American system.\(^6\)

In 1959, therefore, labor's resistance to state interference gave way to self-interest. This may partly explain why public opinion now shows little sympathy for the trade union position. At any rate, the public now appears convinced that the traditional, unregulated manner of resolving trade disputes produces wasteful strikes and inflationary wage settlements which Britain’s foreign-trade-sensitive economy cannot safely tolerate. Whether, and by how much, Britain's peculiar labor-management procedures aggravate the inflation rate, retard the growth rate, and worsen the foreign payments imbalance are matters of dispute among economists.\(^7\) But, beyond question, Britain's procedures are less organized, more acrimonious—at least in key export industries—and considerably more complicated than America's. In no other country is trade union structure as deeply plagued with the consequences of history. Without legislative rationalization, Britain's crazy-quilt multi-union structure has grown like Topsy, small craft unions formed in the mid-19th Century coexisting with large general unions arising from the New Unionism of the 1880's and cutting across industries as well as jobs.\(^8\) All this contrasts sharply with the United States where

\(^{54}\) Id. § 8.

\(^{55}\) In addition, of course, employers who have entered into collective agreements through negotiations have an obvious self-interest in protecting themselves against “sweated” or substandard conditions.


\(^{57}\) The relationship between union negotiated economic packages and inflation is a matter of considerable debate. See, e.g., H.A. Clegg, How to Run an Incomes Policy and Why We Made Such a Mess of the Last One (1971); F. W. Paish, Rise and Fall of Income Policy (1971); O.E.C.D. The Problem of Rising Prices (1961); Dale, As Phase III Approaches: The Virtuous Circle or . . . The Vicious Circle, N.Y. Times, August 27, 1972 (Magazine), at 12.

\(^{58}\) Britain's trade union structure is messy because there are a relatively large number of unions competing for members and because many unions are not organized along any definable industrial or skill lines, and thus represent different interest groups in different industries. See H. A. Clegg, The System of Industrial Relations in Great Britain 41-47 (1970); A. Briggs, Social Background, The System of Industrial Relations
Taft-Hartley Comes to Great Britain

industrial unionism is well accepted, the CIO unions of the 1930's having grown within the mold of the National Labor Relations Act and according to its principles relating to representation.

In addition, Britain's post-World War II full employment economy substantially eroded the collective bargaining authority previously held by national trade union leaderships. As employers competed for scarce labor—particularly in southeast England and the Midlands, the areas of Britain's economic growth during this period—they began to yield to the demands of unorganized "work groups" and shop stewards. Power began to shift from the national leadership, which was short of staff and technical assistance, to the sub-plant level, where shop steward committees assumed de facto influence, although some had no responsibility to any of the unions which were theoretically authorized to bargain.59 Bargaining predictably became fragmented: Management neglected to weigh the implications of the bargain for employees in other sections of the plant. Within the plant, employees represented by rival unions and/or work groups had every incentive to agitate for relative gains, regardless of productivity considerations.60

The result was that industry-wide negotiations, traditionally a major feature of the British industrial relations topography, became the forum at which only minimum conditions were set, the important
bargains being struck informally on the factory floor. This contrasts with the United States, where formalized plant-level bargaining is the rule and where, even in the case of industry or company-wide bargaining, specific supplemental agreements are often negotiated for a particular plant. The British pattern also fails to involve national union officials in local plant bargaining to the extent common in the United States or to require that negotiated contracts meet the approval of national headquarters, a practice common in the United States. This British “organizational gap,” as Professor Stieber has called it, encourages guerrilla type industrial strife, involving multiple stoppages of short duration.

Also virtually unknown in the United Kingdom, though common in America, are detailed collective agreements relating not only to employment conditions and benefits but also to grievance machinery. Further, American agreements often provide for binding arbitration of grievances by an impartial third party; this is almost never the case in Britain. While arbitration has by no means eliminated unauthorized stoppages or strikes in breach of contract in the United States, the fact that a dismissed or abused employee, and his co-workers, are aware of a process through which the claim can be equitably resolved (providing, where appropriate, reinstatement and back pay) obviously discourages resort to self-help in the form of walkouts or slowdowns. In Britain, by contrast, there is no sharp distinction between rights disputes over existing terms of contracts and interest disputes over new contract terms, and arbitration is used rarely in either instance.

In Britain, procedural agreements (the handling of grievances is known as the “procedural” part of the bargain in Britain) arrived at in industry-wide negotiations have been increasingly ignored by employees and plant-level worker organizations. Such procedures typically take too long and do not provide for a final and binding resolu-


63. For a discussion of American arbitrators' remedies and functions, see F. Elkouri & E. Elkouri, How Arbitration Works (1960).

tion of the problem. Thus, economic pressure has been exerted at the plant level as a first rather than a last resort.

In 1965 public discontent with the inefficiencies plaguing labor-management relations prompted Prime Minister Harold Wilson to appoint a Royal Commission, chaired by Lord Donovan, to “[c]onsider relations between managements and employees and the role of the trade unions and employers’ associations in promoting the interests of their members and in accelerating the social and economic advance of the nation, with particular reference to the Law affecting the activities of these bodies.”65 In its report,66 three years later, the Donovan Commission recommended legislation to encourage formal plant-wide bargaining, which would result in detailed and precise collective agreements;67 particular stress was laid on negotiating specific procedures to handle grievances.68 The Commission recognized that lack of rational union organization and discipline was part of Britain’s labor troubles: It found that ninety-five per cent of Britain’s work stoppages were engaged in without trade union authorization.69 But


67. Donovan found that Britain had in effect two systems of industrial relations, one formal and the other informal: “[T]he formal system assumes Industry-wide organizations capable of imposing their decisions on their members. The informal system rests on the wide autonomy of managers of individual companies and factories and the power of industrial groups.” Royal Comm. on Trade Unions, Report, supra note 65, at 36. Issues normally dealt with in American collective bargaining agreements—such as discipline, discharge, lay-offs, and work practices—were either ignored or handled inadequately in the industry-wide formal system, although some were dealt with informally at the local level. The Commission further noted that the gap between the actual pay packet in the plant and the rates set at industry-wide negotiations was continuing to grow. The main solution suggested by the Commission was the negotiation of formal and comprehensive collective agreements at the plant level. Id. at 50.

68. The Commission found a general failure of existing procedural agreements to “cope adequately” with disputes arising in factories. As a result, informal and “fragmented” bargaining was the means through which differences were resolved; many issues were left to “custom and practice.” The Commission recommended that procedure agreements be comprehensive in scope so as to deal with disputes “whether they refer to the interpretation of existing, or the making of new, agreements . . . .” Id. at 50. Donovan further recommended establishment of a Commission on Industrial Relations to investigate and report on disputes concerning procedure agreements. As its central objective, the Commission was to guide the parties to collective agreements covering all employees in a company or factory under a single set of rules, a policy which Donovan argued was the best solution to all recognition disputes between labor groups. Id. at 51.

the Commission rejected the notion that law could play an activist role in suppressing strike activity or enforcing collective agreements. The Commission reasoned that it would be futile to make agreements enforceable or to subject them to binding arbitration unless and until the agreements referred to plant-specific issues and became sufficiently comprehensive and detailed to bear impartial interpretation; similarly, it would be futile to impose liability for breach of agreements on established unions or their officials, since the absence of orderly grievance machinery made strikes inevitable, and since most strikes were unofficial and were conducted by workers and stewards beyond conventional union discipline. To sanction these unruly individuals, Donovan reasoned, would usually prolong and aggravate, not eliminate, wildcat strikes.

Prior to the Commission’s report, the Conservative Party issued its own document, *Fair Deal at Work,* which envisioned a leading and dramatic role for law in restructuring labor-management relations. The collective agreement was to be a legally enforceable contract unless the parties “specifically agreed that the whole, or parts of it, should not be legally binding.” Damages against employers would normally consist of lost earnings or individual “entitlements,” plus expenses incurred by the union. Against unions, damages would be specifically limited by statute. Responding to Donovan’s conclusion that union liability would place sanctions on the wrong party, and would thus be futile, *Fair Deal at Work* suggested imposing liability on unions only if they had failed to do “all in their power to prevent” the particular breach of the collective agreement. Such a rule, the Conservatives reasoned, would encourage negotiation of detailed

70. Royal Comm. on Trade Unions, Report, supra note 65, at 126.
71. Id. at 136.
72. This brief summary does not of course exhaust the Commission’s important findings of major recommendations. Among other things, Donovan also opposed outlawing the closed shop, id. at 162-64, and the secondary boycott, id. at 234-37; expressed doubts that balloting procedures should be used to test union opinion or to determine inter-union jurisdictional issues, id. at 64-65; recommended that collective agreements be registered with the government, id. at 191-202 so that defects in the agreements could be studied; and suggested that Taft-Hartley’s emergency strike provisions would have little utility for Britain’s work stoppage problems, id. at 122-25. On this last point, the Commission reasoned that British strikes rarely threatened the national “health” or “safety” criteria which Taft-Hartley requires be met before invocation of emergency procedures. Id. at 113. This reasoning overlooked the peculiar vulnerability of Britain’s foreign trade-dependent economy to strikes in key industries. For a thorough study of Britain’s economic posture at the time of Donovan, see generally R. Caves, Britain’s Economic Prospects (1968).
73. Conservative Political Center, Fair Deal at Work (1968).
74. Id. at 82.
75. Id. at 93.
agreements and would make the presence of national union leadership felt once more on the workshop floor.\textsuperscript{70}

In 1969, the Labor Government entered the debate with its white paper, \textit{In Place of Strife}.\textsuperscript{77} Like Donovan, the government opposed making collective agreements enforceable. It recommended instead that agreements be required to contain provisions relating to settlement of grievance disputes and to set up arrangements for union-management consultation on matters not specifically negotiated. A Commission on Industrial Relations (CIR) was established by Royal Warrant,\textsuperscript{78} in part to study and promote procedures for settling grievance disputes.\textsuperscript{79} In its most controversial provision, \textit{In Place of Strife} recommended that the government have discretionary reserve power to order a “conciliation pause” or “cooling off period” against strikes declared in breach of collectively negotiated procedures or in cases where no procedures were provided.\textsuperscript{80}

The Wilson Government was compelled to withdraw its legislative proposals because of trade union pressure on the Parliamentary Labor Party.\textsuperscript{81} Accordingly, after the Heath Government replaced it in June of 1970, the stage was set for the national debate on the Industrial Relations Bill. Although there was considerable doubt that the new government would adhere to \textit{Fair Deal at Work} immediately in the wake of the election, the government showed that it was quite serious about making good on its campaign promises with the submission of its Consultative Document in October, 1970.\textsuperscript{82}

\textsuperscript{70} \textit{Fair Deal at Work, supra} note 73, made other points. It urged outlawing the closed shop, but recommended allowing the union shop to impose membership requirements on new employees and to require payment of equivalent of union dues into an agreed fund. \textit{Id.} at 24-27. The document advocated outlawing the secondary boycott or “sympathy strike.” \textit{Id.} at 30. The Conservatives further proposed that a legal duty to bargain be imposed on an employer in the event that a majority of employees desired union membership. \textit{Id.} at 44-45. Finally, the Conservatives recommended that the Minister of Employment and Productivity be empowered to impose a 60-day injunction during emergency strikes, with a ballot to be held, at the Minister’s discretion, during the 60-day period on the employer’s “last offer.” \textit{Id.} at 40-41.

\textsuperscript{77} \textit{In Place of Strife—A Policy for Industrial Relations, CMND No. 3888} (1969).

\textsuperscript{78} \textit{Id.} \S 33-38.

\textsuperscript{79} \textit{Id.} \S 35.

\textsuperscript{80} \textit{In Place of Strife, supra} note 77, made several other points. Like Donovan, it urged registration of collective agreements with the government. \textit{Id.} at 14-15. It wished to obligate management to disclose certain sorts of information to unions which would facilitate collective bargaining. \textit{Id.} at 16. The secondary boycott and the closed shop were to receive legal protection, \textit{Id.} at 30, 34, though conscientious objectors to union membership would be permitted to pay a contribution to charity rather than dues to the union. \textit{Id.} at 34.

\textsuperscript{81} The best description of this episode is contained in P. Jenkins, \textit{The Battle of Downing Street} (1970).

What emerged, however, was an amalgam of Donovan, *Fair Deal at Work, In Place of Strife*, and more.\(^8\)

**II. An Introduction to the Act**

A. *Institutions Created*

The National Industrial Relations Court (NIRC) created by the Act is given all the powers of Britain's High Court. It consists of both judges and lay members, the latter having special knowledge or expertise in industrial relations. Complaints of unfair industrial practices,\(^8\) including disputes relating to the enforcement of collective agreements as well as violations of employer duties,\(^8\) are to be adjudicated by the NIRC within six (6) months of the time of the event.\(^8\) The Court is to make awards that it considers to be "just and equitable." The Court has the power to compel attendance and examination of witnesses as well as the production of documents and it has criminal contempt power to enforce its authority. Decisions of the NIRC on questions of fact are to be final. However, on questions of law, an appeal to the Court of Appeal is provided, as well as a further appeal procedure to the House of Lords.

The Court also has certain responsibilities with regard to union security arrangements, *i.e.*, where the right to refrain from union membership is concerned, and with regard to the enforceability of procedure agreements. Moreover, the Court has appellate jurisdiction over unfair dismissals, although the parties may devise their own procedures in this area. In considering an application by the parties to establish their own machinery in lieu of that of the Industrial Tribunals\(^8\) (which have primary jurisdiction over unfair dismissals), the Court must determine whether the procedure agreement negotiated is as beneficial to the employee as are the provisions of the Act.\(^8\)

The Court also has some responsibility with regard to a union application for exclusive bargaining representative rights. According to

\(^8\) See Howe, Address to Industrial Law Society in London, Nov. 21, 1970 (on file with author).

\(^8\) Ind. Rela. Act 1971, § 101.

\(^8\) *Id.* § 102.

\(^8\) *Id.* sched. 2, § 25.

\(^8\) On Industrial Tribunals, see p. 1437 infra.

\(^8\) A "designating order" permitting the parties to utilize their own machinery may be granted and subsequently revoked if, in the opinion of the court, the agreement no longer meets the statutory requirements. Ind. Rela. Act 1971, § 32.
Section 45, an application may be made to the NIRC for reference to the Commission on Industrial Relations on the following issues: (1) whether a specified group of employees should be recognized or continue to be recognized as a bargaining unit; and (2) whether a "sole bargaining agent" or "joint negotiating panel" should be recognized and if so, what organization should be the bargaining agent or agents.89

The Court also has jurisdiction over so-called emergency strikes and has the authority to order the strike ballot in appropriate circumstances.90

The Commission on Industrial Relations (CIR), having been created initially by Royal Warrant in 1969, is given a permanent statutory base by the Act. The Commission has responsibility for the conduct of ballots in union security situations and in those involving exclusive bargaining representative questions. In union security matters as well as representation questions, it may hold the elections itself or designate another party to do so.

The jurisdiction of Industrial Tribunals, originally the result of previously enacted legislation,91 is expanded by the Act. The Tribunals are authorized to hear complaints against employers concerning unfair dismissals or cases relating to the employees' right to join or refrain from union membership. Like the NIRC, they are authorized to fashion relief which is just and equitable.

Finally, the Industrial Court, created in 1919 to hear voluntary arbitrations, will continue its previous function as the Industrial Arbitration Board.

B. Registration

The system of registration is central to the statutory scheme. It has no real analogue in American labor law.92 The Act creates a Chief Registrar of Trade Unions and Employers Associations and orders

89. The NIRC is not to entertain an application for representation unless notice of it is given to the Secretary of State (Minister of Employment and Productivity). Ind. Rela. Act 1971, § 45, ¶ 4.
90. Id. §§ 138-45.
91. Summarized id. § 100.
92. The only analogous provision among modern American statutes was the Taft-Hartley Act, 1947, ch. 120, Title I, § 101, Title I, § 101, 57 Stat. 146, adding § 9(h) to the National Labor Relations Act. This provision restricted investigation under NLRA § 9(c), 29 U.S.C. § 159(c), and access to complaint procedures under NLRA § 10(b), to unions whose officers had filed non-Communist affidavits. This Section was, however, repealed in 1959 by the Landrum-Griffin Act, Pub. L. No. 86-257, § 201(d). Since then, the only vaguely similar restraint on US worker group activities has been the definition of a labor organization, to which a workers' group must conform before it has access to the Act's recognition machinery. NLRA § 2(5), 29 U.S.C. § 152(5) (1970).
him to register every organization which "immediately prior to the passing of this Act" was registered as a trade union under the Trade Unions Acts of 1871 to 1964. The burden of de-registration is placed upon unions: Given the almost total opposition of the labor movement to the statute, it was thought that unions might not wish to register, but would nonetheless hesitate to seek de-registration because of the serious consequences for organizations which are not registered.

The consequences of failing to register are enormous: A worker is not protected against discrimination for trade union membership if the union is unregistered. An unregistered union may not utilize the machinery through which a union may obtain recognition, agency shop or closed shop rights. If an unregistered union violates a collective bargaining agreement, induces individuals to break their individual contract of employment, or engages in other activity condemned by the Act, the amount of damages that may be assessed against it is unlimited. Unregistered unions thus lose the immunity,

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99. This results from a combination of the effects of the repeal of the Trades Disputes Act of 1906, 6 Edw. 7, c.47 and of the Trade Disputes Act of 1965, c.48, sched. 9, §§ 96-98, 117. In effect, the Trades Disputes Acts, particularly § 3 of the 1906 Act, protected trade unions from liability for acts done in furtherance of trade disputes. These sections were repealed by the Industrial Relations Act. Their protections were replaced in part by §§ 96-98. But see § 132 as to tort actions. § 96 makes it an unfair industrial practice for any non-registered group to induce breach of contract. Collective bargaining agreements are excluded from the coverage of the term "contract" but employment contracts are included. § 97(2) makes certain steps, such as calling or organizing a strike, in furtherance of an unfair industrial practice also an unfair industrial practice. The limits on recovery in proceedings before the Industrial Court on complaints under the Act are only available to registered trade unions. Therefore, the practical effect may often be that stated by Mrs. Castle during the Committee stage of the bill in the House of Commons (albeit whilst discussing the Solicitor General's earlier acknowledgment that the principles of § 61 were expected to apply to unregistered groups): "The simple fact is that, if an unregistered union goes on strike, the protection of Section 3 of the 1906 Act is withdrawn. If an unregistered union goes on strike, it faces specific terms under the Bill unlimited financial damages... The Government themselves have to admit that it is almost impossible to have a strike without a breach of contract of employment. What they are doing is taking away something far more than just the protection of Section 3. The protection of Section 3, which gave to unions the present traditional immunity for action in furtherance of a trade dispute, does not apply under this Bill to unregistered unions. If such a union tries to operate such a strike, it faces actual unlimited damages." 811 Parl.
Taft-Hartley Comes to Great Britain

heretofore provided by the Trades Disputes Act of 1906, against tort liability for inducing breaches of individual employment contracts in a trade dispute.\(^9\) This is of enormous significance: Most individual contracts require the worker to give proper notice to his employer before terminating work, and most strikes, and certainly most unofficial strikes (which arise spontaneously and often unpredictably), violate these proper notice clauses.\(^{10}\) Moreover, unions which refuse to register relinquish tax rebates available to the registered unions with respect to interest on investments actually applied to the payment of non-strike or non-“industrial action” benefits (e.g., sickness payments).\(^{11}\) It has been estimated that non-registration will impose new tax liabilities of up to five million pounds a year on the unions.\(^{12}\)

For a trade union movement that is financially beleaguered, this is no small matter.\(^{13}\) Further, while officials of registered unions acting within the scope of their authority are protected against personal liability, as are union officials in the United States, this is not the case with non-registered unions.\(^{14}\)
The Registrar has the authority to examine rules of the organization and, if they are not in accord with basic principles of the Act, the organization must revise them. If this is not done, the Registrar is to apply to the NIRC for registration to be cancelled. Although unregistered unions do not submit their rules to the scrutiny of the Registrar, the principles that the Registrar devises with regard to union rules are generally applicable to unregistered unions in legal proceedings before the Industrial Court, as well as to those which are registered.105

A complaint alleging unfair industrial practices or breaches of an organization's rules may be lodged with the Registrar. If he finds merit in the complaint, the Registrar may attempt to bring about a settlement. If no settlement is reached, the Registrar may present the case to the NIRC. (Challenges to the rules and internal practices are taken by an Industrial Tribunal where the union is unregistered.)

A significant purpose of the registration system is to determine who has responsibility for violations of collective agreements and for fulfilling various statutory obligations. The TUC and most of Britain's major unions have declared unequivocal opposition to submitting to registration.106 Unregistered unions will also have ample incentive under the Act to revise their internal procedures and to regulate the times and manner in which shop stewards and other officials call stoppages: Strikes by an unregistered union will usually constitute a breach of the individual employment contracts of its members, and the union, no longer protected by the Trades Disputes Act of 1906,107 will be subject to unlimited damages for inducement of this breach.108 In case of registration, the Registrar facilitates internal reorganization of the union by requiring that officials responsible for industrial action be identified.109

PARL. DEB. H.C. (5th ser.) 981-82 (1970). See also 811 PARL. DEB. H.C. (5th ser.) 1705-09. As to protection from personal liability in the United States, see LMRA § 301(b), 29 U.S.C. § 185(b) (1970), and Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962). See also Atlantic Richfield Co. v. Oil, Chemical and Atomic Workers Union, 447 F.2d 945 (7th Cir. 1971). Whether individuals are subject to injunctions in American labor law remains a troubled question.

105. That this is the intended effect of § 61 was made apparent during the House of Commons committee stage. 814 PARL. DEB. H.C. (5th ser.) 274 (1971).

106. See note 51 supra.

107. 6 Edw. 7, c.47. The landmark case holding that there is tort liability for inducing breach of the contract of employment is Lumley v. Guy, [1852] 2 El. & Bl. 216, 118 Eng. Rep. 749.

108. See pp. 1462-63 infra.

109. Ind. Rela. Act 1971, sched. 4, § 10. This identification provision is central to the Act's purposes. The Act requires unions to prevent and halt, through reasonably practicable steps, all actions contrary to the terms of an enforceable collective bargaining
C. Policies

The "general principles" of the Industrial Relations Act of 1971 are set forth in Part I of the statute. The first principle supports the practice of collective bargaining "freely conducted on behalf of workers and employers and with due regard to the general interest of the community . . . ." The second, once again stated in the context of the general interest of the community, supports the "developing and maintaining of orderly procedures in industry for peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration." Third, the statute endorses the principle of "free association" of workers in "independent trade unions" and provides the same right to employers' associations. Finally, the Act states that the principle of "freedom and security" for workers is to be protected by the safeguards against unfair industrial practices whether engaged in by employers or unions.

In the United States, the National Labor Relations Act enunciates certain "policies" which are devised in light of "findings" set forth in § 1. While both statutes pay specific heed to the self-organization rights of workers, as well as to the desirability of collective bargaining, the British statute makes specific reference to a "general interest of the community" which can presumably conflict with the objectives of both unions and employers. Moreover, the American statute, in its findings, contains statements which the British Parliament would have been reluctant to make in 1971. The central one is that an "inequality" of bargaining power between unions and employers, to the advantage of employers, is a cause of industrial strife. It is this factor which necessitated the right of self-organization, the promotion of collective bargaining and the encouragement to devise peaceful procedures to resolve differences in the United States. It is not at all clear that the same finding could have been made with regard to Brit-
ish unions. If inequality of bargaining power exists in Britain, the employer is arguably as likely as the union to be the weaker party.\textsuperscript{112} Certainly that was the view of the Parliament which enacted the Industrial Relations Act of 1971.

D. Code of Practice

The purpose of the Code,\textsuperscript{113} adopted by parliamentary resolution, is to provide practical guidance for the promotion of good relationships between unions and employers. It is an attempt to define the proper behavior of unions and employers in collective bargaining as well as to clarify the meaning of new statutory concepts, \textit{e.g.}, the appropriate unit. While it binds no one and is without the force of law, the Code is to be “taken into account” by both the National Industrial Relations Court and Industrial Tribunals. Presumably, a violation of recommendations contained in the Code would be relevant in determining a remedy under the Act’s “just and equitable” provisions. In a system where litigation has rarely been used to date, the effect of the Code upon the parties may be substantial. It may well be that, like the detailed collective agreement in the United States, the Code will soon become a critical element in the collective relationship. This could occur regardless of the Act’s impact or failure in other respects.

III. An Analysis of the Act

A. Recognition and the Establishment of Collective Bargaining

The 1971 Act represents Parliament’s first attempt to outlaw anti-union discrimination by employers and thus to shield the right to organize from employer pressures. The Act establishes procedures under which employers may be obligated to bargain with unions and under which recognition rights as a sole bargaining agent may be granted and withdrawn. After the Industrial Court promulgates an order obligating an employer to recognize the union as a sole bargaining agent, it is an unfair industrial practice for the employer to carry on bargaining in that unit with any other organization of workers.\textsuperscript{114} Moreover, it is an unfair practice for a union to engage

\begin{itemize}
  \item \textsuperscript{112} Cf. O. KAHN-FREUND, LABOR LAW: OLD TRADITIONS AND NEW DEVELOPMENTS (1968).
  \item \textsuperscript{113} DEPARTMENT OF EMPLOYMENT, THE CENTRAL OFFICE OF INFORMATION, INDUSTRIAL RELATION CODE OF PRACTICE (1972) [hereinafter cited as CODE OF PRACTICE].
  \item \textsuperscript{114} Ind. Rela. Act 1971, § 55(1)(a).
\end{itemize}
Taft-Hartley Comes to Great Britain

in a strike aimed at compelling negotiations with another union, or for an employer to engage in a lock-out which is an attempt to induce a party to withdraw an application for recognition under the Act.I15

The Act requires employers to bargain collectively with unions where they have been properly recognized (although no corresponding duty is imposed on unions),I16 and employers must disclose to unions information which is necessary for the "carrying on [of] collective bargaining" and information the disclosure of which is "in accordance with good industrial relations practice."I17

The Act in Section 5 authorizes every worker to join a trade union "as he may choose" and, subject to the statute's union security provisions, to be a member of no union or "other organization of workers."I18 The statute makes it an unfair industrial practice for an employer to "prevent or deter" the exercise of these rights or to "discriminate" [against] a worker for the exercise of these rights.119 As in the United States, the closed shop is prohibited in most circumstances,120 although the agency shop, in

115. Id. §§ 55(5), (7), and (8). Even if there is no Court order subsequent to a ballot, but rather a CIR report to the Court, industrial action by unions and employers is precluded to the same extent.


117. A general duty to disclose, applicable only to registered trade unions (see 319 PABL. DEB. H.L. (5th ser.) 415-22 (1971), is imposed by § 56. Under § 158, however, certain information need not be disclosed if it would be "against the interests of national security," "seriously prejudicial to the interests of the employer's undertaking for reasons other than its effect on collective bargaining," etc. In addition § 57 provides that a company employing more than 350 non-excepted persons must issue a yearly financial statement to its employees (an obligation which is subject to such exemptions as are allowed under regulations issued by the Secretary of State).

It should be noted that this obligation on the part of employers was introduced by the government. See 808 PRAL. DEB. H.C. (5th ser.) 975-76 (1970). Some attempts to increase the burden were made in the House of Lords. See 319 PABL. DEB. H.L. (5th ser.) 402-31 (1971); 321 PABL. DEB. H.L. (5th ser) 1058-90 (1971); 322 PABL. DEB. H.L. (5th ser.) 889-902 (1971). However, relatively little commotion arose over the imposition of this obligation. By contrast, fierce battles have been waged in the United States both before and after the obligation was imposed by the Supreme Court in NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956), upholding an NLRB decision that an employer breached its obligation to bargain in good faith by not disclosing information to support its claimed inability to pay increased wages.

118. Ind. Rela. Act 1971, § 5(1)(a) and (b). The union security provisions specifically referred to in this section are found in § 6 (the agency shop) and § 17 (the approved closed shop). The government's policy motivations in conferring a right not to join a union may be found at 810 PABL. DEB. H.C. (5th ser.) 667-73 (1971).

119. Ind. Rela. Act 1971, § 5(2)(a) and (b).

120. Approved post-entry closed shop agreements are allowed under § 17 of the Act. However, a worker with a conscientious objection to joining a trade union can be "specially exempted," in which case he must make "appropriate contributions" to charity. The procedures for obtaining such an exemption and for determining the amount of such contribution are set out in Part IV of Schedule 1 of the Act. Provision is made therein for reference to an Industrial Tribunal of disputes concerning genuineness of a worker's objection to membership. See 815 PABL. DEB. H.C. (5th ser.) 850-84 (general threat to certain unions, particularly entertainment, if closed shops were not allowed), 689-96 (threat to seafaring unions) (1971).
which the equivalent of union dues and initiation fees must be paid by the worker, is permitted.\textsuperscript{121} 

Difficult problems of legal theory and practice are raised by this injection of statutory rules into the heretofore informal procedures by which unions won the membership of workers and the recognition of employers. Here three of the major problems are considered: How, if at all, will the formal rules and traditional TUC procedures co-exist? Does the statutory language sufficiently protect an employee's right to join, to refrain from joining, or to resign from a union? Is the machinery whereby unions gain recognition for bargaining realistic and workable?

1. \textit{Bridlington and Croydon: Internal TUC Procedures.}

In establishing legal recognition machinery, and in creating the right to join and resign from unions, the Act is in potential conflict with the Trades Union Congress Bridlington Principles and Procedures\textsuperscript{122} and with the 1969 Croydon Congress,\textsuperscript{123} under which the TUC has authority to settle both membership disputes and differences about which unions should be recognized. To the extent that the TUC designates a particular union as representative, and insofar as this requires other unions to discourage their members from recruiting and to desist from further organizational efforts, Bridlington and Croydon both interfere with employee free choice as prescribed by the Act. Apparently, however, the statute's provisions concerning recognition and right to join and resign will be interpreted with due deference to the established TUC practice. The Code of Industrial Relations Practice, which controls interpretation of the statute's guiding principles in cases arising under the Act, states that "responsibility for avoiding disputes between trade unions about recognition lies principally with the unions themselves and, in the case of affiliated unions, with the Trades Union Congress," and unions are to make full use of the available procedures.\textsuperscript{124} Evident here is one of the main themes of the Act, \textit{i.e.}, the encouragement of voluntary machinery or efforts to re-

\textsuperscript{121} \textit{Ind. Rela. Act 1971, § 5(1)(b), § 6.}

\textsuperscript{122} On major disputes, the TUC Disputes Committee adjudicates, with the only sanction being disaffiliation. I. \textsc{MacBeath}, \textsc{The Times Guide to the Industrial Relations Act 102} (1971).

\textsuperscript{123} Croydon simply applies the principles of Bridlington, under which recognition disputes are heard by TUC, to jurisdictional stoppages. Croydon was the product of the 1969 Labour Party-TUC accord. See \textsc{Wood}, \textit{Anti-Strike Bill Abandoned by Wilson: Agreement Heals Breach in the Labour Movement}, \textsc{The Times} (London) June 19, 1969, at 1, col. 1.

\textsuperscript{124} \textit{Code of Practice, supra} note 113, at ¶ 85.
solve disputes. The Code refers to “recognition” disputes, which are the subject of Bridlington, and not to “membership” or jurisdictional disputes, which are the subject of Croydon. Presumably, however, since it is often difficult to differentiate between the two in a given situation, TUC procedures will be of relevance in interpreting the Act in both contexts. The Act further buttresses the position taken in the Code by precluding unions from denying application for membership only if the denial is arbitrary. Thus, though an employee has a statutory right to resign from a union to which he has been assigned by TUC procedures, he does not have an absolute right to join another union, and the Bridlington procedures will apparently be taken into consideration by authorities weighing whether a particular union’s refusal to admit a new member is arbitrary within the meaning of the Act.

2. Restraining Employer and Union Pressure on Employee Rights

Developing in the courts, case by case, the American law on employer discrimination against union activity has acquired a certain flexibility. In attempting to accomplish this task with a single, though concededly detailed, statute, the British may have missed important subtleties. For example, Section 5(4) of the Industrial Relations Act states that where an employer offers a benefit of “any kind” to a worker as an inducement to refrain from exercising Section 5 rights, the employer violates the Act if the employer has (a) conferred the benefit on workers who agree to refrain from exercising Section 5 rights and (b) withheld the benefit from one or more who did not agree to refrain. The narrow, technical terms in which these criteria are framed may defeat achievement of a praiseworthy objective. In the United States the Board and the Supreme Court have prohibited more broadly the promising and granting of benefits during organizational campaigns. In a leading case, Mr. Justice Har-

127. Resignation is specifically allowed under § 65(3).
lan stated that the granting of such benefits during organizational campaigns could be regarded by the Board as an unlawful and improper interference with the rights of self-organization. The Court's reasoning was that employees will recognize that an employer which has the authority to grant such benefits can also take them away. Fearing a "get tough" policy by the employer after the campaign, if the union should win, employees might be deterred from showing an interest in union organizational activity. Of course this theory is not without difficulties. As commentators have pointed out, employees could use the benefits as a floor for future bargaining once the union representative is on the scene. Alternatively, the employees might not have had any interest in the union to begin with and might be using the representation petition simply to extract the benefits granted. Nevertheless, a law dealing with employer campaign strategies should be broad and flexible enough to cover a wide variety of coercive employer techniques. The Act is surely too rigid in assuming that employers are so unsophisticated as to confer benefits for refusal to exercise rights and simultaneously withhold them from those engaged in union activity.

Rigidity may also plague Section 5(1)(c), which states that employees have the right as trade union members to participate politically "at an appropriate time." Section 5(5) defines an appropriate time as one "outside" working hours or as a "time within his [the employee's] working hours at which, in accordance with the arrangements agreed with, or consent given by or on behalf of his employer, it is permissible for him to take part in those activities." Conceivably, the language of Section 5 may mean that union organizational activity and political participation in union matters may never take place on company property, and never during working time, absent management consent. One may hope, however, that the meaning is otherwise, because such a blanket prohibition would surely be draconian.

In an apparent divergence from American law, the Industrial Relations Act, in Section 5(3), specifically permits an employer to "encourage" workers to become union members subsequent to the time that the union has achieved recognition and bargaining status. Accordingly, it might be said that Section 5 is less neutral, and more

130. See Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 112 (1964).
131. Debates on two amendments dealing with the section suggest that the government's purpose was to moderately expand workers' inplant union rights somewhat, without in any way limiting extant rights. See 318 Parl. Deb. H.L. (5th ser.) 301-12 (1971).
solicitous of the right to join, than is the case in the United States. For two reasons, however, this conclusion would be erroneous. First, the American statute, while neutral in the sense of protecting the right to refrain, nevertheless has as a basic policy the promotion of free collective bargaining. Second, employer encouragement of union activity has its obvious analogue in the National Labor Relations Act's legitimization of check-off provisions\(^3\) and of employer arrangements for unions to meet on company property and for union officials to use company facilities.\(^4\) Further, unlike the British Act, Taft-Hartley specifically provides employers with a right of free speech,\(^3\) which effectively permits management to express a view in favor of unionization. Finally, like the NLRA, which opposes company dominated or assisted unions,\(^1\) the Act provides that Section 5 rights, and the statute's support of the principles of collective bargaining, pertain only to "independent" trade unions.\(^2\) Thus, despite superficial appearances, the statutes adopt similar policy toward employer encouragement of union activity.

Unlike the NLRA,\(^38\) the British Act does not specifically prohibit unions from interfering with an individual's right to refrain from joining a union. Unions are, however, effectively barred from pressuring employers to discriminate against non-members, for Section 5 prohibits employer discrimination against an employee who refrains from membership, and an employer charged with a statutory violation may claim that a third party, i.e., the union, is primarily or jointly liable, and damages may, as in the United States, be assessed against the union.\(^39\)

\(^3\) NLRA § 8(c), 29 U.S.C. § 158(c) (1970).

\(^2\) Section 5 rights exist in a registered union only if it "is an independent organization of workers," §67(1)(a). Under the interpretation provision § 167, except as the context otherwise requires, "independent," in relation to a trade union or other organization, means "not under the domination or control of an employer or of a group of employers or of one or more organizations of employers."

Similarly, labor applications to the Industrial Court for recognition as a sole bargaining agent under § 45 may be made only by "trade unions," a term of art which, according to § 61, covers only those organizations of workers which are registered. See 813 Parl. Deb. H.C. (5th ser.) 1241-86 (1971) and 321 Parl. Deb. H.L. (5th ser.) 932-42 (1971). Regarding the issue of independence, it has been alleged that unions are being permitted to register although only a small percentage of their activities are devoted to bargaining, and with no inquiry into the "union's" financial viability rules or accounts. But see Acid Test of Registration, The Times (London), Sept. 12, 1972, at 17, col. 1, which indicates that the Registrar is now removing a number of "staff associations" from the register.

Section 65 prohibits unions from excluding individuals from membership unreasonably or arbitrarily, and from imposing unreasonable or unfair disciplinary action. A union must give reasonable notice to terminate a member. As in the United States, however, the scope of an individual's right to resign from a union is somewhat clouded. Developing American case law indicates that employees generally have the right to renounce union membership at the time that they resign, but it appears that unions may qualify this right in their constitutions or by-laws. In Britain, under the Act, an employee may resign his membership by giving reasonable notice and complying with reasonable conditions. Since this provision reads in the conjunctive, union rules may apparently impose additional rules for retirement than the mere giving of reasonable notice.

Generally, the Act's Section 65, and its registration provisions, indicate that statutory agencies in Britain will be much concerned with internal union affairs. In the United States, by contrast, Section 8(b)-(1) (A) creates a presumption against interference in internal union affairs.

140. See note 126 supra. It should also be noted that unsuccessful attempts were made to enlarge reasonableness to include exclusion of members who previously resigned pursuant to the exercise of § 5 rights, 319 Parl. Deb. H.L. (5th ser.) 633-40 (1971), and to include exclusion of publicly anti-union individuals, 319 Parl. Deb. H.L. (5th ser.) 641-48 (1971).

141. The Labour Party voiced no opposition to the principle of limiting unfair or unreasonable disciplinary action by unions. An amendment to delete § 65(7) (the section that prohibits unfair or unreasonable disciplinary action) was introduced in the professed hope of getting clarification of the Registrar's probable view of rules possibly inconsistent with § 65(7) when exercising his responsibility to review the rules of trade unions as to their consistency with the Act. See 319 Parl. Deb. H.L. (5th ser.) 674-75 (1971).

In addition, an unsuccessful attempt was made to give unions the power to discipline employees for non-participation in industrial action without violating the provision of subsec. 7, 319 Parl. Deb. H.L. (5th ser.) 675-86 (1971).


144. Id. However, even in the absence of constitutional limitations, one court has held—in a case now before the Supreme Court—that union members may temporarily waive their resignation rights by voting to strike. NLRB v. Local 1029, Textile Workers, 446 F.2d 369 (1st Cir. 1971), cert. granted, 405 U.S. 987 (1972).

145. The government's motive for including this right was apparently to make explicit a right implicit in the larger right not to be a union member. That this right is to be exercisable only within reasonable limits is apparent from the Lord Chancellor's reply to an amendment (which was defeated) to delete § 65(3), the resignation section. 319 Parl. Deb. H.L. (5th ser.) 649-50 (1971); 321 Parl. Deb. H.L. (5th ser.) 1155-58 (1971). (Debate on requiring payment of dues before union membership could be terminated where the government representative, Lord Beith, again voiced the expectation that any reasonable restrictions in union rules would be acceptable but contented it would be inappropriate to spell out what rules would be reasonable in the Act).

3. The Recognition Machinery

Under the National Labor Relations Act labor organizations, employers, employees or groups of employees may file representation petitions with the Board.147 If the Board finds that there is a question of representation, it may hold a hearing on this and other issues. The Board has the obligation to determine the appropriate unit within which the election shall take place and, assuming that a majority of employees designate a union representative, within which bargaining shall take place.148 The Board has devised numerous criteria for the purpose of determining which unit is appropriate. Employees who have a "community of interest" with one another are generally regarded as part of one appropriate unit.149 In making this determination the Board looks to whether employees work geographically proximate to one another, are under the same common supervision, interchange positions with one another, have similar wages, hours and fringe benefits and other employment conditions. The employer's administrative structure is also studied, to determine whether the employees are on the same payroll or under the same accounting system.150 The Board may not lump professionals with non-professionals in one unit,151 unless the professionals vote for inclusion in such a unit, nor may the Board determine that a craft unit is inappropriate simply because a different unit was previously established by the Board.152 And the Board may not include building guards in a unit which contains other employees.153 Once a valid election has been held, no election is to be held within the next twelve months.154 If a union wins the election and is certified, the employer cannot challenge the union's majority status during the first certification year absent unusual circumstances. Even subsequent to the first certifica-


149. Continental Baking Co., 99 N.L.R.B. No. 123 (1952) and cases cited therein. See generally THE DEVELOPING LABOR LAW 217-22 (C. Morris ed. 1971). In order to encourage plant bargaining, the Industrial Relations Act of 1971 indicates that an appropriate unit will not normally consist of a national bargaining arrangement. Such arrangements are referred to as "more extensive bargaining arrangements" and are distinguished from a "bargaining unit." Id. § 44.
150. However, employer administrative structures alone do not determine the appropriate unit. Cf. Swift & Co., 101 N.L.R.B. No. 2 (1953).
tion year, a negotiated collective bargaining agreement operates as a bar for up to three years against an intervening representation petition, and an employer challenging a union’s majority status must overcome a presumption that the union retains that status.\textsuperscript{155}

In Britain the machinery is more complicated, in large measure because an attempt has been made to encourage the parties to rely upon their own devices.

Applications for recognition and sole bargaining agent status may be made to the NIRC by trade unions and employers which are registered under the Act, and by the Secretary of State as well.\textsuperscript{156} The Court is not to entertain an application under Section 45 unless notice has been given to the Secretary of State and the Secretary has first provided advice and assistance to the parties giving the notice that the Secretary believes to be appropriate.\textsuperscript{157} This provision aims to promote agreement between the parties concerning matters referred to in the application. While the NLRA also encourages voluntary settlement, once a petition is filed with the Board, negotiations look toward a consent election through which employee free choice will manifest itself at the ballot box. This is clearly not the case with the Industrial Relations Act. Even if settlement is not achieved, a recommendation of the Commission on Industrial Relations on recognition can be accepted by the parties without further proceedings before the Court—proceedings which would lead to a ballot and order.\textsuperscript{158} If the

\textsuperscript{155} The bar on representation petitions is referred to as the “contract bar” rule. Its term was extended to 3 years in 1962 by the Board in General Cable Corp., 139 N.L.R.B. 1123 (1962).

\textsuperscript{156} The continuing majority status presumption was recently reiterated by the Board in Terrell Machine Co., 173 N.L.R.B. 1480 (1969), citing Celanese Corporation of America, 95 N.L.R.B. 684, 671-72 (1951).

\textsuperscript{157} Clause 3 of section 45 requires the Secretary of State, before making an application with respect to a group of employees, to consult the employer(s) and “any organization of workers or joint negotiating panel appearing to him to be directly concerned in the matters to which the proposed application would relate.” One of the reasons for such consultation is that the parties in respect of whom he was making the application “should not . . . be taken by a reference to the court in that way.” 813 PARL. DEB. H.C. (5th ser.) 1546 (1971). Thus, a non-registered trade union could be consulted; for that matter, a company union could be consulted.

\textsuperscript{158} Subsection 4 of \textsection{} 45 was originally introduced and accepted as an amendment to the replaced cl. 42, and was included in the later introduced section. See 811 PARL. DEB. H.C. (5th ser.) 427-28 (1971), and 813 PARL. DEB. H.C. (5th ser.) 1547-50 (1971).

\textsuperscript{159} The Act is structured so that, even though the Commission has recommended that a particular organization of workers or joint negotiating panel should be recognized as sole bargaining agent for a bargaining unit, application must be made to the Industrial Court for an order making the recommendation binding. Ind. Rela. Act 1971, \textsection{} 50. Only after such an application has been made is a ballot taken to ascertain employee sentiment (sentiment, that is, on the question of whether the Commission’s recommendation should be made binding). Id. \textsection{} 49(3). Thus, employee sentiment is not canvassed via ballot until the very last stage of the recognition procedure, prior to which time the question of who will represent employees can be set-
Court is satisfied that the parties have endeavored to settle the issues concerning the scope of the bargaining unit as well as the identity of the bargaining agent, the Court may refer the questions to the Commission so that a "lasting settlement" may be promoted. Here the Court must not only examine the extent to which the parties have exerted themselves, but also satisfy itself that the parties have made adequate use of conciliation facilities made available by the Department of Employment. If settlement cannot be achieved, the Commission is to report to the Court on the outstanding issues.

In determining the appropriate bargaining unit, the Commission is specifically directed to consider the "nature of the work" performed by the employees as well as their "training, experience and professional and other qualifications."\(^{159}\) (The Code of Practice provides more detailed criteria.)\(^{160}\) Since the unit may not extend to employees other than those "of an employer or two or more as-

\(^{159}\) Ind. Rela. Act 1971, § 48(5). The inclusion of the word "professional" in the list of considerations resulted from a desire by both the Labour and Conservative Parties to protect the interests of true professionals. Though finally included as the result of a government proposed amendment in the House of Lords, the same amendment was offered earlier by the opposition, 319 Parl. Deb. H.L. (5th ser.) 543-48 (1971). The earlier amendment was withdrawn pending government consideration of the best way to define professional so that every skilled group could not make a claim of professionalism. Unable to do that adequately without being over-inclusive or, worse, leaving out some clearly recognizable professionals, the government stayed with the single word description "professional," leaving further refinement to the Commission on Industrial Relations, 321 Parl. Deb. H.L. (5th ser.) 346-47 (1971). The rationale for the distinction strongly suggests that the term was included not because of limited concerns about possible conflicts of interest, but rather because of a broader fear of inadequate representation. 822 Parl. Deb. H.C. (5th ser.) 1621-34 (1971). It should be noted that professional organizations can be entered on a special register under §§ 84-86, giving them a standing similar to that of a registered trade union.

\(^{160}\) Code of Practice, supra note 115, §§ 74-81.
associated employers," industry-wide bargaining units are ruled out. The provision comports with the Donovan Commission's promotion of company and plant agreements, but the Act does not intend to eliminate industry-wide or company bargaining on matters not covered by plant bargaining. The Commission may recommend recognition of an organization of workers if it appears to the Commission that the organization is "independent" and that its recognition would be in "accordance with the general wishes of the employees comprised in that bargaining unit." The Commission, in this connection, is also to consider whether recognition would provide a "satisfactory and lasting settlement" of the issues involved. More particularly, the Commission is to determine whether the organization in question possesses the support of a "substantial proportion" of the employees in the appropriate unit and whether the organization has the resources requisite to effective representation of the employees in question. Presumably, the Commission will conduct the same kind of soundings undertaken by that agency before the Act's existence. While an unregistered union may not apply for recognition under Section 45, the CIR may recommend that such a union should be the sole bargaining agent. Moreover, an unregistered union may achieve sole bargaining status through voluntary agreements with the employer. In neither instance, however, may such a relationship be protected by an NIRC order.

Subsequent to the Commission's recommendations, the employer or the union may make an application to the Court and, if the Court is satisfied that the recommendations of the Commission were unconditional or that any conditions have been "sufficiently complied with," the Court is to request the Commission to establish a ballot of the employees in the unit to determine whether the recommendations of the Commission should be binding. The Commission or some other "body" may conduct the ballot but it must be kept "secret." If a "majority of the employees voting on the ballot are in favor" of making the Commission recommendation a binding one, the Court is to issue an order defining both the bargaining unit and the parties who are obligated to bargain. In Great Britain, one bargaining agent or joint panel recommended by the Commission is to be considered by the workers in an Industrial Court-ordered election, rather than any number of unions being on the ballot as in an NLRB-ordered election.

Where there is no order by the Court—and this includes unregistered union relationships—a decertification petition or application may be entertained by the Court if it is “satisfied that not less than one-fifth of the employees for the time being comprised in the bargaining unit have signified in writing their concurrence in the application.” This may be done at any time. Accordingly, where settlement has been achieved or where no ballot has been applied for subsequent to a Commission recommendation, the relationship between union and employer is relatively unsheltered. Where there is an order by the Court in effect, such an application cannot be heard if it is filed within two years of the time that the initial recognition order was issued by the Court. Moreover, where there is an order by the Court the requisite number of employees supporting the petition is two-fifths rather than one-fifth. In the United States, of course, there are no such distinctions. In all cases a petition can be triggered by thirty per cent of the workers in an appropriate unit—the same number requisite to the filing of a representation petition.

Finally, where an application with the Court has been filed pursuant to Section 45, and where questions have been referred to the Commission or are to be referred, neither the employer nor union may engage in lockouts, strikes or “irregular industrial action” or threaten to do so concerning the issues in dispute, while the matter is pending. Further, where the Court has issued an order, it is an unfair industrial practice for the employer to bargain with an organization other than that referred to in the order or to refuse to bargain collectively with the appropriate party. Similarly, it is an unfair industrial practice for any party to engage in or threaten a strike or other irregular industrial action which would induce or attempt to induce the employer to engage in the above-mentioned violations. Accordingly, if a party moves quickly to utilize the Act’s recognition

163. The thirty per cent requirement for decertification petitions is contained in the National Labor Relations Act, 29 U.S.C. § 195(c) (1970). However, the thirty per cent requirement for the filing of a representation petition is an administrative regulation of the NLRB, promulgated pursuant to the Board’s investigatory power under § 159. The regulation reflects the Board’s administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least thirty per cent of the employees. 29 C.F.R. § 101.18 (1972).
164. See note 115 supra. Such activities are declared to be unfair industrial practices by § 54 of the Act. The purpose of the section is relatively clear on its face. The section does contain two rather wooly definitions of what questions qualify to create the potential for an unfair industrial practice and of when such questions are pending. See 319 Parl. Deb. H.L. (5th ser.) 397-400 (1971).
machinery under appropriate circumstances, economic pressure that would otherwise be lawful becomes unlawful. However, although there is no American-type requirement that the union have made a demand for recognition as a prerequisite to the issuance of an injunction, the Industrial Relations Court has already held that a recognition dispute must exist for an unfair industrial practice to be made out.

The most glaring problem with the British recognition machinery is its apparent inability to function expeditiously. Section 45 sets into motion a very lengthy and complicated procedure. The involvement of two separate agencies would appear to compound such difficulties. The American experience is that speed is of special importance in the representation arena. Procedures have been devised to make the Board’s representation process move more quickly because employers are otherwise able to undermine union representation claims by delaying the workers’ right of free choice. Consequently, although British employers may not prove as litigious or as likely to play for time in which to mount an effective anti-union campaign as their American counterparts, one should not be surprised if unions complain about the effectiveness of the procedures. However, if CIR investigation of a representation claim indicated that the employer were attempting to undermine the union during a delay, the Commission could report such a finding to NIRC. There is no indication that the Court will brook interference with the administration of the Act and, where the Court’s own processes are at stake, the contempt power promises to catch short employers as well as unions. The American statutory scheme provides an unfavorable contrast by encouraging delay without providing judicial powers to a specialized labor court able to end the delay.

165. United States employers’ attempts to frustrate union organization campaigns by initiating § 9(c) representation petitions before the union is ready to face a representation election are barred by an NLRB Regulation that if a petition is filed by an employer, the petitioner must supply, within 48 hours after filing, proof of demand for recognition by the labor organization named in the petition and, in the event the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status.


168. Effective May 15, 1961, the NLRB delegated to its regional directors “Its power under § 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof.” 26 Fed. Reg. 3911 (1961).
Of course, the recognition procedures have been established with a view towards reaching settlements without the recommendations of the Commission and the orders of the Court. Although in the United States the NLRA does not so explicitly promote the parties' own arrangements, many employers and unions do enter into recognition agreements without a secret ballot and, indeed, some are compelled to do so on the basis of authorization cards by the Board. It would appear, therefore, that private settlements may be encouraged by statutory machinery less unwieldy and delay-prone than that in the Act. Moreover, the statutory provisions which provide more protection to union-employer relationships established through court order than to those voluntarily negotiated contradict the spirit of voluntarism. Unions and employers which settle or accede to CIR recommendations without the ballot are more exposed to another union's raids than they would be otherwise. The principal reason for this is that a union which files for recognition must be both registered and independent, and it would detract from the importance of registration and independence to allow unions which lack these characteristics the same protection as those which have them.

So far as the recognition issue is concerned, the most difficult, and important, of the unanswered questions relate to the principle of exclusivity. It is quite clear that the Act obligates an employer confronted with an NIRC order to negotiate with none other than the "sole" or exclusive bargaining agent. Although joint panels of bargaining agents are contemplated by the statute, the indirect effect here may be to rationalize the untidiness of British trade union structure and to squeeze out the weaker or smaller unions and groups of shop stewards who now negotiate on behalf of a relatively small group of employees. Further, it seems likely that factory or plant comprehensive agreements can be more effectively negotiated where management is dealing with a sole bargaining agent. But union jurisdictional conflicts are typically bitter and, to the extent that the recognition machinery is used by unions and employers, the first years of Section 45 will be difficult ones indeed.

To some degree, however, the impact of the Act's provisions on recognition will be more gently felt if the parties devise their own solutions, as the framers of the statute hoped. Moreover, just as the Act provides for bargaining by a joint negotiating panel of trade unions, The Code of Industrial Relations Practice encourages co-

operation between the stewards of different unions bargaining with one employer.\textsuperscript{170} Therefore, unions which negotiate alongside other organizations, where relationships cut across the lines of an appropriate unit, need not fight to determine which party will be obliterated. The joint panel arrangement allows unions to come together in a process short of amalgamation.

The exclusivity issue will be troublesome for another reason as well. The individual contract of employment, which has little weight in the United States, is an important element in British labor laws.\textsuperscript{171} No change in this tradition is attempted by the Act. Yet, the Act does not clarify the rights and responsibilities of unions with regard to non-union employees who are included in the bargaining unit. In the U.S., exclusivity means that a union bargains for all within the unit regardless of union membership and that a union owes each worker a duty of fair representation.\textsuperscript{172} But, contrary to United States law, the individual contract of employment is retained in Britain even where the collective relationship between labor and management exists. Indeed, some of the Act's provisions relating to strike liability are framed around the inducement to breach an individual contract of employment.\textsuperscript{173} The unions will apparently bargain only for those in the unit who desire to have them do so.\textsuperscript{174}

Several provisions of the Act seem to look toward American-style exclusivity, but appearances here are deceptive. First, the Act amends the Contracts of Employment Act of 1963\textsuperscript{175} so as to obligate the

\textsuperscript{170} Code of Practice, supra note 113, ¶¶ 112-15.


\textsuperscript{173} Ind. Rela. Act 1971, § 96. Liability premised on inducement of such breaches provides a sizeable deterrent to non-registered trade unions' organization of industrial action simply because of the omnipresence and nature of individual contracts of employment. See generally R. Hepple & R. O'Higgins, Individual Employment Law (1971).

\textsuperscript{174} The individual contract issue aside, the British wished to avoid involvement in the complicated, frustrating, and largely ineffectual duty of fair representation doctrine so prominent in United States law. See Herring, The "Fair Representation" Doctrine: An Effective Weapon Against Racial Discrimination?, 24 Md. L. Rev. 113 (1964). This duty comes fully into play only when the union speaks for all individuals in the bargaining unit. Whether the British can avoid the problems raised by the duty through mere avoidance of legal doctrine is questionable. Even more puzzling is the encouragement provided to individual bargaining in legislation designed to promote union responsibility.

employer to notify the employee of the grievance procedure which he may utilize. This obligation might reasonably imply that all workers have access to the procedure negotiated and that the union be held responsible for processing the grievances of non-unionists. However, it is possible that the Act's framers contemplated the existence of non-negotiated procedures for non-unionists in an otherwise unionized workplace. Professor Selwyn, in one of the early writings on the Act,176 said that a union has no responsibility to process grievances for non-unionists. If this is true, it will be necessary, where designating orders are obtained, to provide a parallel procedure for non-union employees. Secondly, the statutory provision for the agency shop177 might reasonably imply adoption of American-style exclusivity. In an agency shop, the individual's freedom of choice regarding membership is preserved, but no premium is placed upon being a non-union member, i.e., a "free rider," as would be the case if all payments could be avoided. The "free rider" problem, and thus the chief rationale for the agency shop, derives from a union's ability to negotiate for all within the union and its obligation to represent all fairly.178 However, the framers of the Act did not articulate the "free rider" argument, which attracted Senator Taft during the 1947 debate in this country,179 and we must assume that the agency shop was allowed for other reasons. Thus, without statutory or contractual instruction to the contrary, representation of non-unionists clearly overstates what the British intended in the Industrial Relations Act of 1971.

B. Union Security Arrangements

Under the Act, a worker covered by an agency shop agreement may refuse to become a member of a trade union if he agrees to pay "ap-
propriate contributions to the trade union in lieu of membership in it."\textsuperscript{180} Unions and employers may enter into collective agreements containing agency shop clauses. If the employer is unwilling to do so, and the union is unregistered, there will be no agency shop. A registered union may, however, apply to the Industrial Court, and thus trigger a balloting procedure. Preliminarily, the Court must determine whether the petitioning union has "negotiating" rights with the employer. If the union has such rights, the Court requests the CIR to take charge of the matter "with a view to the taking of a ballot on the question of whether an agency shop agreement should be made between the parties."\textsuperscript{181} The Commission determines what group of workers should be covered by the ballot and reports to the Court on this matter. If a majority of the workers "eligible to vote" or not less than two-thirds of those who actually voted are in favor of an agency shop, the employer must enter into such a contract.\textsuperscript{182} If a majority of those eligible to vote or two-thirds of those voting do not vote in favor of the agency shop, the Court shall make an order directing that no agency shop agreement involving the workers in question shall be negotiated for two years beginning with the date upon which the result of the election was reported by the Commission to the Court. Any such agreement made during that period shall be "void."\textsuperscript{183}

This is to be contrasted with the procedures relating to the recognition of trade unions both in the United States and Great Britain, where a majority of those voting is required.\textsuperscript{184} Moreover, this provision compares unfavorably with the now repealed portions of Taft-Hartley which provided for union shop elections in which, once again, a mere majority of those voting resulted in the creation of that form of union security. Employers will of course often negotiate the agency shop voluntarily but, where they do not, the voting is likely to prove a waste of the taxpayers' money, just as have union shop elections in the United States: Workers overwhelmingly vote for such clauses.\textsuperscript{185} One would assume that voting will seem even more superfluous in Britain, where union security concepts are more

\textsuperscript{180} Ind. Rela. Act 1971, § 11; appropriate contributions are defined in § 8.
\textsuperscript{181} Id. § 11.
\textsuperscript{182} Id. § 13.
\textsuperscript{183} Id. § 13(3)(b). Where an agency shop has been instituted by a negotiation or an election, an application to rescind the agreement may be made by one-fifth of the workers covered by it. The Court will rescind the agreement unless a majority of those eligible to vote or those voting are in favor of the provision's continuance. Id. §§ 14, 15.
\textsuperscript{184} New York Handkerchief Mfg. Co. v. NLRB, 114 F.2d 144 (7th Cir. 1940), cert. denied, 311 U.S. 704 (1941).
firmly established—albeit on a more informal basis. Accordingly, this aspect of the Act seems to be wasted motion, and the "two-thirds" provision, violating the concept of majority rule, can only cause acrimony and hard feelings.

In contrast to American law, an employee who objects on "the grounds of conscience both to being a member of a trade union and paying contributions to a trade union" may, in lieu of membership, agree to make equivalent contributions to a charity to be determined by agreement between him and the union. Whether conscience includes non-religious moral convictions is not clear at this time. In the United States employees who have had religious objections to joining a union have been permitted to pay dues and initiation fees in lieu thereof.

In the United States, Taft-Hartley specifically prohibits the closed shop, although some of the provisions make it possible for such an arrangement to survive in the construction industry. In Great Britain the Act makes the pre-entry closed shop void, even though its existence in that country on both the formal and informal basis is widespread. A worker who is refused employment because of a closed shop provision may apply to the Industrial Court and, if the Court finds that the clause in question is in "substantial derogation" of Section 5 rights, the Court declares the provision void. As in the United States, this legislation will strike down formal contract provisions, but may have little impact upon informal arrangements.

186. For instance, "the 'closed shop' affected in 1964 about three and three-quarters million workers in Britain, about one in six of the total work force but about two in five of trade union members." K. Wedderburn, THE WORKER AND THE LAW 461 (2d ed. 1971). See also W. McCarthy, THE CLOSED SHOP (1964).
189. For a typical discussion of the moral vs. conscientious objector controversy, see 318 Parl. Deb. H.L. (5th ser.) 655-86 (1971).
191. Union Starch & Refining Co., 87 N.L.R.B. 779 (1949), enforced, 186 F.2d 1008 (7th Cir. 1951), cert. denied, 342 U.S. 815 (1951). Indeed the Supreme Court has made it clear that the strongest mandatory form of union security is the agency shop. This is quite contrary to a very general impression held by both lawyers and workers, i.e., that membership and the union shop can be required. See Note, Judicial Enforcement of Union Disciplinary Fines, 76 Yale L.J. 563 (1967).
on the de facto closed shop. These arrangements are common and well-established in British industry. Thus, the Act encourages acrimony over an issue important to many unions without any real prospect of changing the conditions which triggered the individual employee's complaint.

Britain will permit "approved closed shop agreements." These are so-called post-entry closed shops, equivalent to our union shop (membership being required after employment). Here too a worker to whom the agreement applies may pay appropriate contributions to a charity in lieu of membership or the payment of monies to the union. But the parties cannot make a post-entry closed shop agreement themselves. Application must be made to NIRC by both parties jointly. If there has been no ballot rejecting the closed shop within the past two years, the Court will send the matter to the Commission for examination. The Commission must satisfy itself that certain criteria are met. The Commission may sanction an agreement where it is necessary to enable employees to be organized or to continue to be organized, to maintain reasonable terms and conditions of employment as well as reasonable prospects of continued employment, to promote or maintain stable arrangements for collective bargaining relating to such workers, or to prevent collective bargaining agreements from being frustrated. If the Commission finds that all factors warrant a closed shop, and the purposes involved could not be achieved through the agency shop, the Court orders a ballot to be taken, if such has been applied for, or simply approves the closed shop. The voting requirements for approved closed shops are identical to those for agency shops—either a majority of those eligible to vote or two-thirds of those voting must support this form of union security. It should be noted that the amendment to the Act which established the "approved closed shop" was aimed at the peculiar problems of two or three industries, and such shops will probably be approved in very few cases.

Taken as a whole, the union security provisions generate much wasted motion, since the closed shop prohibitions will be nearly impossible to enforce, the approved closed shop criteria are difficult to


194. The central two being the entertainment and shipping industries, see note 120 supra. See also debate following quoted material at 813 Parl. Deb. H.C. (5th ser.) 929-1082 (1971); 822 Parl. Deb. H.C. (5th ser.) 941-42 (1971). It should be remembered however that attempts to retain pre-entry closed shops in these industries were successfully resisted. See 318 Parl. Deb. H.L. (5th ser.) 919-27, 950-1024 (1971).
Taft-Hartley Comes to Great Britain

satisfy, and the agency shop elections will be mere formalities. The various procedures and prohibitions also undermine somewhat the Act's larger goal of promoting union responsibility and eliminating fragmented bargaining. These defects may be tempered, however, by management's statutory right to "encourage" union membership through non-coercive advice.\footnote{Ind. Rela. Act 1971, § 5(5).} One must assume that, for the sake of amicable relations, many British employers will make good use of this right.

C. Enforcement of Collective Bargaining Agreements and the Right to Strike

The malaise of British industrial relations consists of both fragmented bargaining and the unconstitutional (in breach of agreed upon procedures) or unofficial (unauthorized) work stoppage. To some extent, statutory procedures concerning recognition and the appropriate bargaining unit cope with the former problem. But just as the alleged contractual irresponsibility of trade unions prompted Congress to pass the Taft-Hartley amendment, making labor contracts enforceable, so also has Britain's labor unrest led Parliament to embrace enforceability: The Industrial Relations Act creates a "conclusive presumption" that a collective bargaining agreement is a "legally enforceable contract"\footnote{Ind. Rela. Act 1971, § 34(1).} and allows the parties to escape this presumption only by expressly specifying non-enforceability in the agreement.\footnote{Id. § 34(2).} In both countries legislative concern focussed on the disruption of orderly negotiation or grievance procedures by "wildcat" or unofficial strike action.\footnote{For the United States, see S. Rep. No. 105, Pt. I, 80th Cong., 1st Sess., 15-18 (1947).} But the solutions devised differ markedly.

1. The Role of the Collective Bargaining Agreement

It is important to understand that, under the Industrial Relations Act, the employer's right to discharge an employee for any reason,\footnote{As summarized in dicta by Lord Reid in Ridge v. Baldwin, [1964] A.C. 40, 65: "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract, he must pay damages for breach of contract."} including the exercise of the strike weapon,\footnote{Dismissal for striking was possible without the incurrence by the employer of breach of contract responsibility because a strike was itself considered a breach. K. Wedderburn, THE WORKER AND THE LAW 109 (2d ed. 1971).} and the employee's...
right to strike or engage in slowdowns, are governed almost exclusively by an individual’s contract of employment and by the unfair dismissal provisions of the Act.201 By contrast, under the principles of exclusivity in American labor law, these matters are typically governed by the collective bargaining agreement, which almost completely submerges any individual contract of employment.202 Of necessity, given their central importance, American collective bargaining agreements are typically comprehensive and precise in their terms. This presents a stark contrast to Britain, and to most other industrially advanced countries, where the formal collective agreement, quite often an industry-wide document, speaks merely in terms of minimum wages and conditions of employment.203

The Industrial Relations Act accords a central role to the individual contract of employment. Under the Act, it is 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” unless the party so inducing or threatening is a registered trade union within the meaning of the Act, or is an individual acting “within the scope of his authority on behalf of a [registered] trade union.”204 The new provision, carrying with it the potential for unlimited judgments for unlawful stoppages, is the Act’s most formidable weapon against strikes by unregistered unions. The burden imposed upon the union in many instances may be substantial, because the notice provisions of contracts of employment of individual employees may vary considerably. It is quite possible that the union will be obligated to refrain from striking or engaging in other forms of

202. This has been definitively established ever since the Supreme Court’s landmark decision in J.I. Case Co. v. NLRB, 321 U.S. 332 (1944). Because American labor law seeks affirmatively to promote unionization and employee solidarity, the statutory scheme, as interpreted by J.I. Case, seeks to discourage individual advantages which will lead to divisiveness.
204. Ind. Rela. Act 1971, § 96(1). Until 1971, inducing an individual breach of an employment contract was immunized from liability by the Trades Disputes Act of 1906, 6 Edw. 7, c.47, §§ 1, 3. But that Act did not immunize the secondary boycott. Under the new Act, it must be remembered, the liability imposed is not tort liability or liability for civil or criminal conspiracy. Rather, if an individual acts without the authority of a registered union to persuade others to strike in breach of their individual contracts, whether the strike is primary or secondary, he commits an unfair industrial practice. Action against him can only be taken in the NIRC. Thus the secondary boycott exception to the immunity provided by the Trades Disputes Act of 1906 is eliminated. The Solicitor General referred to § 96(1) as a “narrow modest” proposal. 811 PARL. DEB. H.C. (5th ser.) 1762 (1971). But the Opposition characterized it as not only “intolerable” but “vicious.” 811 PARL. DEB. H.C. (5th ser.) 1703 (1971).
economic pressure until the workers or the union have given the employer notice of termination for each individual contract and the time required in each contract between notice and actual termination has elapsed. Moreover, unregistered unions cannot trigger industrial action where the procedural agreement which sets forth the manner for dispute resolution has been breached, even though the parties do not intend the agreement to be enforceable in court. On the other hand, registered unions may strike or engage in other kinds of economic pressure even though due notice for the individual contract of employment has not been provided or the procedure agreement has not been followed by the union.205

Similarly, the Act directly addresses the issue of unfair dismissals of employees, rather than leaving the problem to negotiation and to the collective-agreement. Section 22 of the Act protects employees206 against an unfair dismissal and makes such employer conduct an unfair industrial practice.207 American law does, of course, bar unfair discharges if they represent discrimination against union membership, or are in retaliation for other concerted activities but the closer American analogue to Section 22 is the “just cause” provision, typically found in collective agreements, which imposes a burden on the employer to evidence a substantial reason for the discharge.208 A key advantage of Britain’s statutory approach is that all employees are protected against unfair dismissals, while in America collective agreements protect only a minority of the labor force. The British Act also innovates by providing “conciliation officers” to administer the unfair dismissal rule, a feature conducive to the voluntary settlement of disputes which has no counterpart either in privately negotiated American grievance-arbitration machinery or in the unfair labor practice provisions of the NLRA.

205. See the thorough treatment of notice and the right to strike in N. SELVYN, GUIDE TO THE INDUSTRIAL RELATIONS ACT 1971, at 138-43 (1971).

206. It should be noted that the section protects “employees,” not the broader class, “workers.” An employee is “an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.” Ind. Rela. Act 1971, § 167.

That a conscious choice was made between the two terms is apparent from the dialogue at 318 PARL. DEB. H.L. (5th ser.) 1399-1402 (1971).

207. That the intent of the Government here was to create a third right in addition to the right to redundancy payments or to the right to sue in contract if a breach had occurred is apparent from 318 PARL. DEB. H.L. (5th ser.) 1388-92 (1971). For a discussion of law and proposals prior to the Act see G. CLARK, REMEDIES FOR UNJUST DISMISSAL: PROPOSALS FOR LEGISLATION (1970); Levy, The Role of Law in the United States and England in Protecting the Worker From Discharge and Discrimination, 18 INT'L AND COMP. L.Q. 538 (1969).

But, compared with American practice, the British approach is not without flaws. First, the Act apparently places the burden of proving a dismissal is unfair upon the worker once the employer has provided his reason for the discharge.\(^{209}\) Accordingly, the Act may provide less substantial protection than American “just cause” clauses in collective agreements. Second, the Act appears to allow an employer to dismiss any worker for engaging in any kind of strike. The appearance, however, may be deceptive. The Industrial Court may hold that Section 22’s prohibition on unfair dismissals precludes discharge of employees for engaging in strike activity for registered unions, just as American arbitrators often hold that dismissal for union activity is inconsistent with a “just cause” provision in the collective agreement. Section 5 of the Act, which protects involvement in union activity, supports this view. At any rate, British management will not have much flexibility: An employee dismissed for strike activity must be reinstated\(^{210}\) or were never similarly dismissed.\(^{211}\) Though an American employer cannot discharge a worker for engaging in a walkout,\(^ {212}\) he can permanently replace the worker, even if other workers are not replaced.\(^ {213}\)

Finally, the British scheme may be crippled by a substantial reluctance in Britain to compel reinstatement as a remedy for unfair dismissal because of the common law view that the courts cannot compel the performance of personal services.\(^ {214}\) This view is reflected

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211. Ind. Rela. Act 1971, § 26(2)(a). It should be noted that once again registration is important since the third clause of § 26 is applicable only to situations where dismissal or refusal to reinstate was premised on the exercise of § 5(1) rights, which are enjoyed only by members of registered trade unions. 318 Parl. Deb. H.L. (6th ser.) 1941-42 (1971). For a general description of the section’s intent, see 318 Parl. Deb. H.L. (5th ser.) 1438-84 (1971). A proviso which would have limited the protection of the section only to pre-strike activities was eliminated in the House of Lords, 321 Parl. Deb. H.L. (5th ser.) 753-60 (1971). This elimination was upheld in the House of Commons, 822 Parl. Deb. H.C. (6th ser.) 1345-48 (1971) apparently because the proviso conflicted with recommendation of the 1970 ILO Conference.
in the Act. The NIRC or Industrial Tribunals may assess damages, but cannot impose reinstatement or re-engagement as a remedy.215 However, re-engagement may be recommended by a Tribunal, and the threat of damages may, of course, be used to encourage reinstatement. In the United States, reinstatement is a well-accepted remedy in cases arising under the National Labor Relations Act.216 Arbitrators appointed under collective bargaining agreements are more prone to restate workers than to award back-pay. The absence of similar authority in Britain could contribute to industrial strife rather than reduce it. Trade unions retain the right to strike to compel reinstatement when it is not forthcoming or where resort has not been made to the appropriate machinery.217 In America, workers generally abjure self-help measures in discharge cases, since the remedy of reinstatement is available through arbitration. Although the prospect of damages may promote settlement providing for re-engagement, the process could be bitter and lengthy in Britain if the parties have not provided their own machinery of settlement.

Thus, although the Act affords the collective agreement a lesser role than it enjoys in the United States, the Act's success may turn on its ability to encourage labor and management to compose agreements of greater scope and precision than is customary in Britain. Several features of the Act provide such encouragement.

On the subject of unfair dismissals, the parties may obtain "designating orders" which permit them to devise their own machinery, so long as it provides benefits equal or superior to those contained in the statute.218 Although other problems may provide a more substantial impetus to the arbitral process, this provision could con-
stitute the beginning of a system of arbitration similar to that in the
United States. Because of the large number of these cases, Section
22 could be one of the most important provisions of the Act. However,
one important factor stands in the path of this development—and that
is the attitude of the unions. Part of their policy of “non-co-operation” is a refusal by TUC-affiliated unions to apply for designating
orders. While this position preserves consistency with overall trade
union policy toward the Act, it ironically prevents workers from
escaping the clutches of the Act’s institutions and rules.

Like Taft-Hartley, the Act imposes an obligation to bargain collec-
tively upon the employer, and this may encourage the negotiation
of comprehensive agreements. This is particularly likely since the
remedy for failure to bargain collectively is the imposition on the em-
ployer of contract terms by the government. While contrary to the
freedom of contract principles found in American labor law, and
once adhered to in Britain, this solution should avoid the frustra-
tions this country has faced in fashioning remedies for breach of the
duty to bargain. The imposition of terms may also help some of the
more obstreperous unions to accept the notion of comprehensive
agreements.

It must be anticipated, however, that a good number of parties
in Britain—usually at union insistence—will choose to make their
agreements non-enforceable under Section 34(2). In Britain provi-
sion for this possibility was appropriate since, as the Donovan Com-
mision noted, many collective agreements are not in a state to be
enforced. Looking to the long term, the Act, through the Code of
Practice, attempts to improve agreements by inducing in the par-
ties a sense of responsibility about bargaining. If problems de-
velop because of the ineffectiveness or absence of grievance proce-
dures, the Act establishes a means of coping with this problem which
is entirely foreign to the American experience. The Secretary of State
or parties may apply to the Industrial Court claiming that existing
procedure agreements are unsuitable to settle “disputes or grievances
properly and fairly” or that a strike or irregular industrial action
short of a strike is occurring contrary to the “terms or intentions” of
the agreement that has been negotiated. The Court may then, in

220. ROYAL COMM. ON TRADE UNIONS, REPORT, supra note 65, at 126.
221. Paragraphs 1-23 enumerate the responsibilities of management, trade unions,
employers’ associations and the individual employee, portraying an ideal scheme based
on awareness of a community of interests. CODE OF PRACTICE, supra note 113.
some circumstances, impose grievance machinery upon the parties, a remedy once again antithetical to the collective bargaining philosophy incorporated in § 8(d) of the National Labor Relations Act.223

Unlike the Act, American law does not provide stop-gap solutions where the parties have made their agreement non-enforceable. Although the possibility was discussed at the time of Taft-Hartley's enactment,224 the non-enforceable agreement has been a rare phenomenon in the United States. It raises, however, difficult legal questions—sufficiently difficult to make understandable the British desire to avoid them through detailed statutory mechanisms.

First, suppose that an American employer acquiesces to a union demand that the contract not contain a no-strike pledge225 or that it contain an express employer waiver of the right to sue for breach of the contract. Since § 301 of the L.M.R.A. creates substantive law predicated on contract,226 the courts would presumably respect such provisions. A second, and more difficult question, is whether a union would violate its duty to bargain in good faith by insisting on such forms of non-enforceability. Because that duty presumably requires the parties to have a good faith intention to reach an agreement,227 the union could not simply insist on having no collective agreement. If, however, the union's demand were only to exclude the no-strike clause or to include the right-to-sue waiver, the matter would be less clear. Arguably, the manner in which disputes are to be resolved (e.g., strikes, arbitration, court suits, etc.) is a condition of employment and a mandatory subject of bargaining, and, if so, insistence upon a particular view to the point of impasse would not violate the duty to bargain in good faith.228 While there is authority that a particular remedy for contract breach, i.e., the requirement of a performance bond, is not a mandatory item of bargain-


224. A Government amendment which required any applicant to Industrial Court to notify the Secretary of State, who would then offer his services in the cause of promoting agreement. S. J. PARL. DEB. H.C. (5th ser.) 1577-1600 (1971). The opposition, however, still feared the effects of introducing law into the shop via imposition. S. J. PARL. DEB. H.C. (5th ser.) 1541-43, 1546-52 (1971).

225. The most prominent example of a union attempt to exclude a no-strike clause was made by the United Mine Workers, who insisted that their no-strike pledge be operative only if the workers were "able and willing" to work. See S. J. ALINSKY, JOHN L. LEWIS: AN UNAUTHORIZED BIOGRAPHY 337 (1970).


The Supreme Court in *Boys Markets* stated that the employer's remedy for union breach of a no-strike pledge was critical to the very existence of the employer's contract right to be free of strikes during the term of the agreement. This argues for construing the question of remedy as a mandatory subject of bargaining.

As a practical matter, however, the no-strike pledge and the employer's right to sue often constitute the vital *quid pro quo* for the employer's acceptance of arbitration. If, as the *Steelworkers Trilogy* teaches, arbitration is essential to industrial peace, and if, as *Boys Markets* teaches, an enforceable no-strike pledge may sometimes be essential to maintaining the integrity and attractiveness of arbitration, we might expect the Court to find a breach of the duty to bargain when a union insists to the point of impasse on excluding the no-strike pledge or on securing a waiver-of-suit from the employer. It does appear, however, that a union can more modestly insist that the employer seek his remedy for breach of the no-strike pledge in the forum of arbitration, rather than in a court; in *Drake Bakeries*, the Court stayed judicial proceedings where the employer had a contractual right to grieve and arbitrate union violation of the no-strike pledge.

2. Regulation of Industrial Warfare

Section 36(1)(a) makes it an unfair industrial practice for any party to a collective agreement to break it where the contract is enforceable. The primary question here is whether the parties will utilize the provision. The Labor Government, in its proposed anti-strike legislation which provided for a "conciliation pause," placed responsibility for bringing actions to the judiciary in the hands of the Minister of Employment and Productivity. In vain, employers sought the same statutory scheme from the Conservative Government in 1970 and 1971.

To critics of the Act, this employer lobbying confirmed that man-

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management would not take legal action in any event, and that Section 36 was at best an irrelevance. This view was bolstered by the accurate (but nevertheless incomplete) reporting on the American system which indicated that employers in the United States rarely sue. It was also pointed out that damage actions in the courts based upon no-strike violations are often withdrawn as part of the settlement reached after termination of the stoppage. Withdrawal of the action is often the price of ending the strike. What was pushed into the background in this discussion, however, was evidence that the legal right to sue serves as a deterrent against the use of the strike weapon and that the withdrawal of the suit is often a necessary *quid pro quo* for the withdrawal of the strike. Doubters could focus upon the reluctance of British employers to sue individual workers for breach of employment contract, a remedy which was available prior to the passage of the Act. But large union treasuries, albeit protected by statutory limitations upon the amount of damages that may be collected from registered unions, may present a more inviting target than suits which might be entertained against individual employees. Section 36(2) obliges a party to the agreement to take all such steps that are “reasonably practicable” to prevent breach, language devised specifically for unofficial strike situations where individual employees, work groups, and shop steward committees, rather than unions, are normally the offending parties. Since the effective date of the Act, all indications are that British management will not be bashful about relying upon litigation where there is no practicable alternative; indeed, the main criticism now seems to be that employers are too trigger-happy in filing actions with the Industrial Court.

Nevertheless, while the Government may have exhibited wisdom in refusing to involve itself in enforcing breaches of contracts, and

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236. Ind. Rela. Act 1971, § 117. Trade unions of less than 5,000 membership may be assessed a maximum of £5,000; those with 5,000 to 25,000 members, a maximum of £25,000; 25,000 to 100,000 a maximum of £50,000; 100,000 or more members, a maximum of £100,000. In addition a formula recovery limit of up to 104 weeks or £4,160, whichever is less, is imposed by § 118 on recoveries involving irregular treatment of members by trade unions or employee associations, employer violations of the basic rights section or unfair dismissal section, or breach by employers or workers organizations of the basic principles set out in the Act or their own rules.
237. ROYAL COMM. ON TRADE UNIONS, REPORT, supra note 65, at 128-40.
238. See generally *The Sunday Times* (London), July 30, 1972, for background on last summer’s dock strike, which was aggravated by employer readiness to invoke the Act’s remedies.
while this stance preserves the spirit of voluntarism, government involvement does carry with it the trappings of impartiality. The National Labor Relations Board, while it is not primarily concerned with breach of contract actions, has responsibility for enforcing secondary boycotts, jurisdictional stoppages and organizational and recognitional picketing prohibitions contained in Taft-Hartley. Although private parties may bring suits in the first two areas, the Board has carried most of the burden. That unions have reconciled themselves to these prohibitions is undoubtedly attributable in part to the fact that the Board and not employers is the litigant.

The Conservatives did not wish government to impinge unduly upon the parties' autonomous relationships and feared the political undertones of government-initiated litigation.

But, ironically, the case for a government role seems stronger now that private litigation arising out of the dock strike has polarized TUC and the Government. If the Commission on Industrial Relations, for instance, occupied a position similar to that of the National Labor Relations Board, and could exercise discretion in the matters that could be heard by the Court, the statute would possess more flexibility. The CIR or some other agency could screen out those cases not suited to the judicial forum with its contempt powers. Perhaps the 1972 dock strike would have been less bitter if the CIR had been able to break it off before it reached the Court. It would also help if the CIR could require or encourage the parties to submit to arbitration. In the United States, the Board has held in the Collyer Insulated Wire case that grievance-machinery is appropriate for deferral purposes where unfair labor practice charges are filed. Once arbitration begins to flourish in England, an amendment to the Act looking in this direction should be considered.

241. Id.
242. Cf. Cox, The Role of Law in Labor Disputes, 39 CORNELL L.Q. 592 (1954). However, charges must be filed by private parties and, under § 303, employers may file suits for § 8(b)(4) violations.
244. 192 N.L.R.B. No. 150 (1971).
3. *Trade Union Reorganization: The Role of Law*

Although Professor Turner has contended that making collective agreements enforceable will simply create friction *inside* the union and, if anything, produce industrial warfare on a grander scale, the Conservative Party’s prophecies are equally plausible. The Government’s view is that Section 36 will induce the unions to take a more active interest in employment conditions at the plant level. This, of course, means more staff and technical assistance as well as involvement in both the negotiation and administration of the contract, changes which would move Britain toward the American model insofar as industrial unions are concerned.

But the unions, particularly the Transport and General Workers Union, have rationalized the absence of central union authority as “grass roots democracy.” They fear that cumbersome procedures for calling strikes and instituting policy will diminish both the spontaneity and the effectiveness of the workers’ representatives. Also, it may be that the unions’ organizational structure is too weak to support legal regulation. Even though the impact of law in this context is concededly long run, the short run may see shop stewards, work groups and other local officials driven away from the national unions, which bargain minimum rates, and into the arms of small rival or “breakaway” unions. This would, of course, be antithetical to the objectives of the Act’s framers, and it would most certainly be disruptive. The dynamics of industrial relations in both the United States and Great Britain make local union acceptance of orders from Washington, D.C. or London a very chancy business. The risk is that local leaders have more to gain from defiance than acquiescence. Quite clearly, Parliament is relying upon what it hopes to be the law-abiding character of British workers. After this summer’s events, that reliance seems somewhat questionable.

In the United States, union responsibility for membership actions exists by virtue of the collective agreement and is governed generally by Taft-Hartley common law agency principles. A mem-

246. Of course rationalization of trade union structures is also the aim of the Act’s recognition and registration provisions.
ber's acts are not imputed to the union, generally speaking, but officers, including unpaid stewards, can make unions responsible for their behavior. Remaining somewhat cloudy is the extent of the union's obligation in a contempt action, particularly in a Section 301 proceeding where the agreement normally sets forth the steps to be taken by the union in urging its members back to work. The sanctions for contempt, as John L. Lewis and the United Mine Workers learned to their dismay, bite into the union's treasury.

The British Act requires unions to use their best endeavors to prevent breaches of the collective agreement. Such endeavors include bona fide urgings and, when that cannot achieve the back-to-work objective, disciplinary action in the form of fines or expulsion.

As stated by Solicitor General Geoffrey Howe:

Section 36 does not necessarily require a union, for example, to discipline those of its members who do no more than participate in an unconstitutional strike. But it does require (and this is surely reasonable) a union which has itself agreed not to call, support or finance a strike in given circumstances to take active steps to discourage and prevent its members or officials from playing any part in promoting just such a strike. And this is the main purpose behind Section 36.

In the recent landmark case, Heaton's Transport, Ltd. v. Transport and General Workers Union, the House of Lords upheld an


250. See, e.g., NLRB v. Local 135, Teamsters, 207 F.2d 870 (7th Cir. 1955), cert. denied, 361 U.S. 914. But see NLRB v. P. R. Mallory & Co., 237 F.2d 437 (7th Cir. 1956).


253. [1972] 3 All E.R. 101. For British reaction to this decision see Elliott, What the Lords' Decision Means for the Union Leadership, Financial Times (London), July 28, 1972, at 14, col. 5; Hanna, New Decisions on Strike Law May Add to the Chaos, The Sunday Times (London), July 30, 1972, at 47, col. 1; Wigham, Ruling the Unions Are Unable to Enforce, The Times (London), Aug. 1, 1972, at 21, col. 1. Mr. Wigham, a member of the Donovan Commission, states that the principal roadblock to union enforcement of discipline is the open shop which permits non-unionists to escape the union's wrath. "The Act attempts to do virtually contradictory things—to force the unions to exercise greater central authority and to prevent them from doing so by giving workers the right to leave their unions whenever they wish without suffering any adverse consequences." Id. While the charge that workers have the right to leave whenever they wish is erroneous, nevertheless the criticism is valid and argues persuasively for repeal of the closed shop provisions of the Act. It is interesting to note
Taft-Hartley Comes to Great Britain

Industrial Court ruling, which the Court of Appeals had reversed, that shop stewards may be regarded as officers and agents of the unions who must be disciplined by national officers if the union is to purge itself of contempt. The House found that the union's stewards were acting as agents because (1) the union rule book did not preclude shop steward industrial action, (2) custom and practice implied the grant of the requisite authority for stewards, (3) shop stewards were instructed by the union to represent their union and its members, and (4) the circumstances indicated that the stewards were enforcing the national union's policy. With regard to disciplinary actions which should have been taken by the union against stewards, the Industrial Court had noted simply that no union rules or policy had been issued to stewards concerning unfair industrial practices.

But how will the unions be induced to take whatever steps are necessary? While injunctions can be issued against unions, no orders can be issued compelling individuals to work. While the officials of unregistered unions are exposed to personal liability, and the Court has the traditional contempt sanctions to be employed against union officials and strike leaders, in the final analysis the use of such procedures merely creates instant martyrdom. The principal remedies are apparently damages against a union treasury, not to be recovered against individuals even if they are union officials, and the deterrent of contempt. Unions threatened with sequestration of their property (as occurred in Heaton) will think again about their course of conduct. This, according to the House of Lords in Heaton, is the "primary method contemplated by the Act" to implement the contempt power. For unregistered unions the amount of compensation that may be assessed is unlimited.


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254. The NLRC opinion is at [1972] 2 All E.R. 1214; the reversal by the Court of Appeals is at [1972] 2 All E.R. 1237.
260. This is because no limit is placed on compensation against unregistered workers' organizations under § 117 and because § 96 makes all persons liable, with a special reservation for trade union officials operating within the scope of their authority. In addition, trade union officials alone are exempted from compensation awards by § 101 while the personal property of union trustees is protected by § 125.
In the U.S., under Section 301, the Court has held that union officials are not individually liable.\textsuperscript{261} The contrary rule prevailing at the time of the \textit{Danbury Hatters} case, where organized labor literally had to pass the hat to pay off damages assessed against the union, left an extremely bad taste in the mouths of unionized workers. Congress did not wish to reintroduce that bitterness under Section 301. Insofar as the Act permits British employers to sue entities other than the union itself, it risks serious discord. Insofar as the statute encourages employers to sue the unions rather than individuals, it seems to be soundly conceived.

Finally, and unfortunately, Section 36 apparently requires a union to take reasonably practicable steps to suppress a work stoppage even if the stoppage was precipitated by the improper, or indeed unlawful, conduct of the employer.\textsuperscript{262} One is reminded of the sorry failure of the courts and the NLRB in this country to protect the rights of those who incidentally break collective agreement provisions when striking or picketing to protest employer and union discrimination against minority group workers.\textsuperscript{263} As this example shows, the American system's greatest deficiency is its refusal to permit considerations of public policy to override strict legal doctrine. In Britain, fortunately, the NIRC has remarkably broad discretion to weigh the equities in assessing damages or in issuing other decrees.\textsuperscript{264} Certainly, in any action against a union, the Court should consider whether the employer has himself adhered to the standards established in the Code of Practice.

\textsuperscript{261} Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962), and cases discussed therein.

\textsuperscript{262} This is because no exceptions are provided in § 36 for action taken in light of mitigating circumstances. \textit{But see} discussions at 321 \textsc{parl. deb. h.l.} (5th ser.) 894-70 (1971) on an amendment which would have conditioned the obligation of trade unionists on the “reasonable justification” for a strike. The issue in point during that “presence or absence” discussion was the analogous one of strikes over unsafe working conditions. The Lord Chancellor replied that the protection afforded by the “just and equitable standard,” to be applied to remedies, gave far more protection than would the amendatory language. Debate on § 36 generally focused on the inequity of forcing union officials to act as policemen and on the ambiguity of the phrase “reasonably practical steps.” \textit{See generally} 810 \textsc{parl. deb. h.c.} (5th ser.) 1397-1419, 1466-1504 (1971); 822 \textsc{parl. deb. h.c.} (5th ser.) 1493-1505 (1971).


\textsuperscript{264} Thus § 101 provides that the NIRC if it finds an unfair industrial practice, may grant compensation or prohibitory injunctions “if it considers that it would be just and equitable to do so.” In addition § 116 introduces the just and equitable concept into the determination of the amount of such compensation. \textit{See} 319 \textsc{parl. deb. h.l.} (5th ser.) 1358-74 (1971). \textit{Compare}, in the United States, Mastro Plastic Corp. v. NLRB, 350 U.S. 270 (1956); Arian’s Department Store, 133 N.L.R.B. 802 (1961); Nat’l Tea Co., 198 N.L.R.B. No. 62 (1972).
4. **Adjudication of the Act**

The Act places exclusive jurisdiction for the interpretation of collective agreements in the hands of the Industrial Relations Court which is composed of both lawyers and lay people knowledgeable about industrial relations. While Parliament did not provide any grant of authority to the Court to fashion a law of contract for collective agreements similar to what Mr. Justice Douglas was able to extrapolate from Section 301 in *Lincoln Mills*, it is obvious that the composition of the Court, and its charge to conduct itself in an informal manner, means that special rules of law were anticipated. By contrast, Section 301 places authority and confidence in courts which are not specialized and not nearly so well equipped. Of course, in reality, both before and after the *Steelworkers Trilogy*, most collective agreement interpretation went to arbitration. In Britain the framers of the Act contemplate a similar trend. Indeed, the Act gives a boost to arbitration by encouraging the parties to devise their own procedures on dismissals. This year's pact between the Trades Union Congress and the Confederation of British Industry providing for conciliation and arbitration, may also be a step in the right direction, although it is difficult at this point to say what role arbitration will play in the mix. There is no corps of arbitrators ready to be pressed into action, as was the case in the United States after World War II, when War Labor Board personnel—both knowledgeable and familiar to the parties—moved into private arbitration. When the unions decide to participate with employers in making joint applications for "designating orders" permitting them to establish their own unfair dismissal settlement machinery, arbitrators may begin to appear on the British industrial relations scene.

How broadly the NIRC will construe the concept of collective agreement is not clear. Written minutes which reflect agreements, as well as documents which set forth "side" agreements or amendments to existing contracts, will probably be included. A more difficult problem relates to oral contracts. On the one hand, one might assume that the rules established by the *Ford* decision would argue...
against legal enforceability for such contracts. On the other hand, it would appear that Parliament assumed that there might be a new legal status for agreements not specifically covered by Section 34. (That Section excludes from its coverage both oral contracts and pre-1971 contracts.) After all, the Act repealed prospectively Section 4 of the Trade Union Act of 1871,\(^{269}\) which had previously precluded the enforcement of agreements negotiated between unions and employer associations. The Industrial Relations Act does not state that agreements must be in writing or must be made subsequent to the effective date of the Act to be enforceable. Accordingly, it is arguable that Parliament viewed such agreements as enforceable in the courts.

5. Reminder on the American Experience

It is obviously difficult to predict whether, and to what degree, the Act, and in particular its enforceability provisions, will lead to comprehensive collective bargaining agreements, to acceptance of arbitration as an institution, and to more centralized and responsible national unions. To expect an immediate replication of American practices would, however, be clearly naive. Americans often forget, and the British fail to understand, that the law did not shape the institutions which are at the heart of the industrial relations system in this country. To be sure, the duty to bargain established by statute in 1935 forced employers to come to the bargaining table where many of them would not have done so without the law, and to some extent the obligation to negotiate to the point of impasse over particular subjects influences what items go into the contract.\(^{270}\) But grievance-arbitration machinery in collective agreements, with some form of no-strike pledge\(^{271}\) by the unions, was well on its way before the Taft-Hartley amendments with Section 301 came on the scene. Indeed, six years before the enactment of Section 301, the Supreme Court held that the obligation to bargain in good faith includes the requirement that both parties must reduce their agreement to writing

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271. See generally Bureau of National Affairs, Basic Patterns in Union Contracts (1971).
once they have reached accord.\textsuperscript{272} This legal doctrine facilitated the negotiation of comprehensive and detailed contracts in writing. Moreover, the War Labor Board during World War II set the stage for the more activist role which Congress, the Court, and arbitrators were later to play.\textsuperscript{273} The Board encouraged and sometimes ordered the use of grievance and no-strike clauses in contracts and familiarized the parties with impartial arbitrators upon whom they might rely for the interpretation of such documents. Accordingly, Section 301 as well as the Court's holdings in \textit{Lincoln Mills}, \textit{Steelworkers Trilogy} and \textit{Boys Markets} essentially reflect what the private parties, albeit operating within a legal framework which did not hesitate to nudge them, had done for themselves already. While the Court and Congress have since become more activist, through the enactment of and interpretation given to Taft-Hartley, and while it would appear that the rules of law have thus had some impact on the parties' behavior, this impact has never been measured with any exactitude.\textsuperscript{274} The promotion of arbitration and of informal, non-legal procedures makes actual judicial intervention infrequent.\textsuperscript{275} The American experience thus teaches that law is most useful in ratifying prior trends, and that legal rights contribute to industrial peace—but only when invoked as a last resort.

D. \textit{Secondary Boycotts}

Section 98 of the Act makes it an unfair industrial practice to threaten or engage in strikes or “irregular industrial action” against a third per-

\textsuperscript{272} H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941). The rule articulated in \textit{Heinz} was enacted in 1947, \textit{LMRA} § 101, 29 U.S.C. § 158(d) (1970). Moreover, the NLRB has held that a contract must be in writing to act as a contract bar to a rival union's representation petition. Appalachian Shale Co., 121 N.L.R.B. 1160 (1958). The contract must not only be written but also “comprehensive.”

\textsuperscript{273} Frank and Edna Elkouri appraised the War Labor Board's effect in this way: A great impetus in the use of arbitration was given by the National War Labor Board during World War II. The work of the Board constitutes an extensive experience in the use of arbitration. It was created by executive order in 1942 and was given statutory authority by the War Labor Disputes Act in 1943. Most of the 20,000 labor dispute cases determined by the Board during the war emergency were disputes over the terms of collective agreements. Of special importance was the Board's policy of requiring the use of clauses providing for arbitration of future disputes over the interpretation or application of the agreement. This policy of the Board laid the foundation for the popular practice today of terminating the contract grievance procedure with the final step of arbitration. F. Elkouri & E. Elkouri, \textit{How Arbitration Works} 10 (1960). See also Freiden & Ulan, \textit{Arbitration and the War Labor Board}, 58 \textit{Harv. L. Rev.} 309 (1945).


\textsuperscript{275} Mr. Justice Brennan, speaking for the Court in \textit{Boys Market}, where it was held that injunctions could be issued by the courts in cases of strikes over arbitrable grievances, reasoned that if the courts could enjoin stoppages and order arbitration of the underlying dispute, employers might be less tempted to sue for damages. \textit{Boys Market}, Inc. v. Local 770, Retail Clerks, 398 U.S. 235, 248 (1970).
son who has entered into a contract with the primary employer, where the purpose is to induce a breach of the contract or to prevent the third person from performing it. Though phrased more specifically than its American counterpart in Section 8(b)(4) of the NLRA, Section 98 presents the same concepts.\textsuperscript{276}

The British secondary boycott provisions are defective in prohibiting a union only from threatening or engaging in economic pressure to break the commercial contract between the primary and secondary. As American unions were quick to realize in 1947, there are more subtle means available to bring pressure on a secondary, and the statute was amended in 1959 to reach such methods.\textsuperscript{277} The Industrial Relations Act is more narrowly drawn than the 1959 amendments, and this may encourage union appeals to management which have the unlawful object but which contain no threat of economic sanctions by the union.

Section 98(1)(c) states that the party whose commercial contract is interfered with must be "extraneous" to the dispute. This seems a formulation of the "ally" doctrine, a product of case law in the United States.\textsuperscript{278} It is no easy task to determine when a secondary is an ally of the primary and thereby without immunity from trade union action. The ally doctrine permits unions to picket and encourage strikes where the primary employer has farmed out or subcontracted work that would have been performed, but for the strike, by primary employees. If unions could not take action against the secondary under such circumstances, primary strikes could be broken easily. But what is struck work? How substantial must be the benefit to the primary from the subcontract to permit union action? To use the British statutory language, how "material" must the support of the secondary be? Does it matter when the subcontract was made—or whether or not the subcontract can be justified on an economic basis unconnected with

\textsuperscript{276} In the United States, the Supreme Court has held that union pressure for an unlawful object, \textit{i.e.}, to require a third party to cease doing business with a primary employer, is found even where the pressure simply has the effect of disrupting the business relationship. NLRB v. Local 825, Operating Engineers, 400 U.S. 297 (1971).

\textsuperscript{277} \textit{See note 3 supra.} Under the 1947 amendments, the NLRA did not "speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. It forbids a union to strike against or to refuse to handle goods . . . . Employees must be induced; they must be induced to engage in a strike or concerted refusal. . . . A boycott voluntarily engaged in by a secondary employer for his own business reasons is not covered by the statute." Mr. Justice Frankfurter for the Court in Local 1976, United Brotherhood of Carpenters & Joiners v. NLRB, 357 U.S. 93, 98-99 (1958). This situation was altered by the 1959 amendments. \textit{See NLRB v. Servette, Inc.}, 376 U.S. 46 (1964).

the strike? These are but some of the questions left open, both in America and in Great Britain.\textsuperscript{279}

A union breaks the British Act, only by "knowingly" inducing the secondary employer to break its contract with the primary or, in the absence of a full breach, by knowingly preventing performance of the contract. But the Act does not state whether the secondary employer must also knowingly enter into the commercial contract, in the sense of knowing about the industrial dispute between the union and the primary. In the United States an employer can be viewed as an ally of the primary by "unknowingly" performing strike work, if the secondary might have reasonably ascertained that a labor dispute was in progress.\textsuperscript{280} The Board has stated that the employer has the "burden of determining whether he is engaged in neutral or ally type work."\textsuperscript{281}

These problems aside, it seems unlikely that Britain will go through the same painful twists and turns which have characterized American labor law in the secondary boycott arena. In the first place, even in this country, secondary boycott litigation is concentrated in the construction and trucking industries—and, generally speaking, in areas of work where the International Brotherhood of Teamsters represents workers. Major industrial unions, like the United Auto Workers, rarely, if ever, use the boycott. Second, as Bok has pointed out,\textsuperscript{282} secondary boycotts are less prevalent in a country like Britain where bargaining is industry-wide and thus where replacements can rarely be brought in to keep the primary enterprise operating. Nevertheless, whatever the forum of bargaining, British \textit{strikes} often occur on a plant basis. But given British working class solidarity, workers thrown out of work by a stoppage in another plant are not likely to break ranks and move to replace their striking "brothers." In the United States, where unions are less well organized in some industries, one cannot always make the same confident estimate of worker loyalty.

Section 98(3) does attempt to answer some questions which are frequently litigated in the United States. That subsection states, for instance, that a party is not to be regarded as an ally "only" because it is an employer who is "associated" with the primary or because it is "a


\textsuperscript{280} Fox Valley Material Supplies Ass'n, 176 N.L.R.B. No. 51 (1969).

\textsuperscript{281} \textit{Id.}

member of an organization of employers of which a party to the industrial dispute is also a member." 283 Similarly, the fact that a party has contributed to a fund established to defray losses in connection with the labor dispute will not automatically establish the employer as an ally. Where the contract between the secondary employer and the primary was established prior to the time when the "industrial dispute began," the secondary is not regarded as an ally. Presumably, however, the way is open for the Industrial Court to inquire carefully into the circumstances surrounding the negotiations of the commercial agreement so as to determine whether the secondary had notice or should have had notice of the impending industrial dispute. The mere fact that the contract was entered into prior to the dispute ought not to be conclusive, and it appears that Section 98(3)(d) of the British law, like its American counterpart, intends no such result.

E. Emergency Dispute Procedures

Applications may be made by the Secretary of State to the Industrial Court where industrial action has caused or would cause an interruption in services "likely" to be "gravely injurious to the national economy, to imperil national security or to create a serious risk of public disorder . . . ." 284 An application may also be made where

283. For the American analogue on interference with the commercial contracts of secondary employees and their employers, see NLRB v. Internat'l Rice Milling Co., 311 U.S. 665 (1951). The opposition in Britain not only expressed fears that this provision of the statute would be a backdoor approach to curtailing all legitimate striking but also argued that the clause as drawn was fundamentally unfair. This argument was founded in part upon the fact that "associated employer" is defined in § 167(8) as a company under the control of another company, either directly or indirectly, or under the control of the same third person as another company. The argument was that such companies were not innocent and that combinations of employers for mutual support were being allowed while combinations of workmen for mutual support were not. See generally 811 PARI. DEB. H.C. (5th ser.) 1923-2005 (1971). Compare, e.g., J. G. Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958); Local 46, Miami Newspaper Pressmen v. NLRB, 322 F.2d 405 (D.C. Cir. 1963).

284. Ind. Rela. Act 1971, § 138(2)(c). Section 138 of the Act speaks of "irregular industrial action short of a strike" as a triggering mechanism for the emergency strike procedures. In Secretary of State for Employment v. Aslef and Others, reported in The Times (London), May 20, 1972, at 5. col. 3, the Court of Appeals held that a "working to rule"—a sophisticated British version of the slowdown in which the employee strictly adheres to rules not normally followed—constitutes irregular industrial action within the meaning of the Act. (The NIRC decision is at [1972] 2 All E.R. 853.) This decision will trouble British authorities like Professor Kahn-Freund who regard work to rule as an "insoluble problem" for lawyers. See O. KAHN-FREUND, LABOUR AND THE LAW 266-67 (1972). The decision in Aslef is significant because all of the anti-strike provisions of the Act attempt to catch "irregular industrial action" and because "work to rule" is a favorite tactic of British unions. Much of the debate surrounding this whole section of the Act centered on the relative success or lack of success of the American Taft-Hartley procedure. See generally 812 PARI. DEB. H.C. (5th ser.) 665-732 (1971). Concern was also expressed over removing control of such issues from Parliament and
the dispute endangers the lives of a substantial number of individuals or exposes many people to serious risk of disease or personal injury.\textsuperscript{285} Although Section 138 differs superficially from Taft-Hartley in scope, the latter statute covering only disputes which affect the national “health and safety,” the American cases interpreting the NLRA have not yet established whether strikes injurious to the national economy, and of massive dimension, may be enjoined as contrary to the national health and safety. Mr. Justice Douglas, dissenting in the one national emergency dispute to reach the Court, stated that the majority applied a “material” well-being test to Taft-Hartley.\textsuperscript{286} Facially, however, the British statute is broader. The justification for this is that the British economy is more open to, and dependent on, foreign trade; strikes in export industries are thus more likely to affect directly the nation’s well-being than is the case in the United States.

The Industrial Court may, subsequent to receiving an application, order the discontinuance of a strike or other form of industrial action for a period not to exceed sixty days.\textsuperscript{287} This sixty-day “injunction” parallels American law which, subsequent to the petition by the Attorney General to a federal district court, allows the issuance of an injunction for a period of eighty days if the dispute affects the nation’s health and safety.

The most controversial portion of the emergency procedures, Section 141, provides for a ballot by the workers where “there are reasons for doubting whether the workers who are taking part or expect to take part in the strike or other industrial action are or would be taking part in accordance with their wishes, and whether they have giving it to the courts. \textsuperscript{1481}

\textsuperscript{285} Ind. Rela. Act 1971, § 138(2)(b). British emergency strike powers, such as they were prior to the 1971 Act, were contained in the Emergency Powers Act of 1920. However, that statute was more narrowly geared to essential services and provided for the requisitioning of troops, goods and property and the control of prices rather than for strike injunctions.

\textsuperscript{286} United Steelworkers v. United States, 361 U.S. at 62-77. Some of the recent American cases indicate that the meaning of “health and safety” is not defined with clarity as of this time. See, e.g., United States v. Local 418, ILA, 78 L.R.R.M. 2801 (7th Cir. 1971); United States v. Longshoremen, 79 L.R.R.M. 3043 (S.D. Ga. 1971).

\textsuperscript{287} Ind. Rela. Act 1971, § 139(1)[c]. The relative success of the Taft-Hartley cooling-off procedure was cited by the government as support for instituting such a plan in Britain. However, the government opted for a plan with no mandatory “best offer” vote because of an evaluation that this element of the American Taft-Hartley procedure was more conducive to heightened tensions than to settlement. See 812 Parl. Deb. H.C. (5th ser.) 687-88 (1971).
had an opportunity to indicate their wishes in this respect . . . ."288

The Court of Appeal has already held that the Minister himself is only required to have the doubts and the burden is upon the opposing party to show that a reasonable man could not have doubts on this question.289 Unlike Taft-Hartley which provides for a ballot fifteen days prior to the expiration of the eighty-day injunction on the employer’s last offer, the Industrial Relations Act permits the Secretary of State to order a ballot at his discretion. That there is nothing automatic about the process is fortunate, for American experience indicates that ballot procedures weaken emergency dispute legislation.

The American legislation was predicated upon the notion that the rank-and-file in many instances are more reasonable than their leaders. In fact, however, the rank-and-file are typically more militant than the leadership, and despite the fact that the British Ford workers undercut union leaders in a ballot procedure in 1970,290 all indications are that British workers will also put pressure upon, rather than tamely follow, their leaders. In the 1972 railway strike the Government sought a ballot and achieved the same result as do the American authorities, i.e., rejection of the offer.291 In the United States, the ballot procedure has made the emergency pause a time for heating up rather than cooling off. Union leaders and the rank and file see the ballot as a vote of confidence for union leadership. The bargaining position of the parties becomes frozen as they posture for advantage.

Another major weakness of emergency strike provisions is that the parties come to rely upon them to “save the day.” This stultifies col-

288. Ind. Rela. Act 1971, § 141(c). Section 143 prohibits economic pressure from the time the ballot is ordered by the Industrial Court until the result is reported to the court. The Secretary of State can apply for such a ballot if he has the doubt referred to in the text, and if in addition it appears to him there are or will be risks to the national economy or security, public order, or people’s lives, or risks to the livelihood of a substantial number of workers in the industry involved. Id., § 141(2). The first of these tests derives from the emergency cooling-off order section. The second is unique to the ballot section and was seriously questioned in the debates. In addition, concern was expressed that such a ballot procedure would be more conducive to heightened tensions than to resolution of disputes. On the standard for the test regarding effect on livelihood see 322 PARL. DEB. H.L. (5th ser.) 413-16 (1971). On the absence of court review of the secretary’s doubts, and possible CIR involvement in the ballot order procedure, see 320 PARL. DEB. H.L. (5th ser.) 315-19 (1971), dealing with § 142, which is the section providing for ballot orders pursuant to a 141 application. See also 322 PARL. DEB. H.L. (5th ser.) 421-26 (1971). Though there is a sixty day limit on cooling-off periods under § 139, the Industrial Court determines the period within which ballot results are to be reported to the court, and concern was expressed that this extends the cooling-off periods, given that no limit is placed on the ballot period. See 320 PARL. DEB. H.L. (5th ser.) 328-34 (1971).

289. Secretary of State for Employment v. Aslef and Others, supra note 284. Both American and British law place primary interpretive authority in the hands of the executive branch of government.


291. The Times (London), June 1, 1972, at 15, col. 1.
lective bargaining. Moreover, the remedy, i.e., injunction, is one-sided relief, inequitable from the union's point of view, even where the status quo is preserved. These factors have prompted scholars to propose a "choice of procedures" approach which would provide the government with more flexibility and a wide variety of weapons to be used in different situations. Under this approach, the parties would be uncertain what would happen in the event government intervened, an uncertainty which might encourage them to resolve their problems on their own. Under the related "final offer" approach, both parties would make a final offer representing their true and uncomproimisable positions and, after mediation of remaining issues, an arbitrator would have to select one of the two in toto, thus encouraging the parties to make reasonable offers or to settle voluntarily.

On balance, however, the Taft-Hartley procedures have been successful. Before the two longshore strikes of 1971, the provision had been invoked only twenty-nine times since 1947. Strikes had actually taken place in twenty-four instances. Of these twenty-four, sixteen have been settled without resort to another stoppage, thirteen during the eighty-day cooling-off period. The statistics show that Taft-Hartley works reasonably well; its provisions are accepted by trade unionists today and proposed by them as an acceptable alternative to an unqualified right to strike in public employment disputes. While the British labor unions are just as upset today with the sixty-day cooling-


293. This approach was embodied in R. Nixon, RECOMMENDATIONS AND PROPOSALS TO DEAL WITH NATIONAL EMERGENCY LABOR DISPUTES, Doc. No. 91-266, 91st Cong., 2d Sess., March 2, 1970 (hereinafter cited as RECOMMENDATIONS). However, a recent version of the proposal has been withdrawn. Bernstein, Nixon Switch on Anti-Strike Bill Seen as Bid for Labor Support, Los Angeles Times, July 21, 1972, at 1, col. 1.

294. "[W]hen the final offer selection is the ultimate recourse, the disputants will compete to make the most reasonable and realistic final offer, one which will have the best chance to win the panel's endorsement." RECOMMENDATIONS, supra note 293, at p. 4. See also Silberman, National Emergency Disputes—The Considerations Behind a Legislative Proposal, 4 GEORGIA L. REV. 673 (1970). The final offer procedure has, however, several possible defects: (1) The union may be less able to compromise once its offer is made public, and this may encourage employers to offer less than they otherwise might. (2) The parties may hold back compromises until the final offer, in which case final offers will diverge by large margins. (3) It may be very difficult for a side to put together a reasonable final offer without knowledge of the other party's position on all the unresolved issues. (4) The "win or lose" nature of the procedure would not seem conducive to good relations between the parties during the term of the agreement.

295. On the success of Taft-Hartley generally, see pp. 1421-23 supra.

off provisions contained in the Industrial Relations Act as were their American counterparts twenty-five years ago, their fears may well be as unfounded.

Conclusion

In selectively borrowing from American law, the drafters of the Industrial Relations Act have made some advantageous choices, and a few unfortunate ones. In determining appropriate bargaining units, the British have supplied detailed criteria in the Act and in the Code of Practice, while the American statute leaves details to the NLRB, but the concepts are similar, and should prove workable. Like the NLRA, the British Act sensibly permits the parties to establish voluntary machinery for settlements. The Act's dismissal provisions, for instance, specifically encourage the parties to fashion their own procedures, and further—if inadvertent—encouragement is supplied by the Act's crusty refusal to impose reinstatement as a statutory remedy for wrongful dismissal. By permitting the parties to have unenforceable agreements, and by relying on a "best endeavors" theory of union liability when the agreement is enforceable, the Act allows the parties to adapt their relationships to change in a gradual and orderly manner. As a last resort, the Commission on Industrial Relations is usefully empowered to impose grievance machinery on the parties. The Act also promises to rationalize trade union structures and practices. The recognition machinery should bring the unions and their stewards together in one bargaining panel. The duty to bargain, the presumption of enforceability, and the system of registration, which requires unions to identify their responsible officers, should bring the leadership into the workplace and should thus foster negotiation of comprehensive collective agreements.

On the other hand, the union security provisions are either irrelevant or inimical to the Act's larger purposes. Prohibiting the closed shop will hardly help unions to discipline and control their members and stewards, as Heaton requires. There is no justification for the stringent vote procedures necessary to obtain an agency shop. In America, union security elections have proved largely a waste of time. In Britain, where the tradition of union security is more deeply rooted, the voting procedures may cause unnecessary bitterness in the Act's early years.

Two other major flaws in the Act contributed directly to last summer's turmoil. The controversial provision for contempt sanctions against individuals was used to jail the shop stewards in the Heaton
Taft-Hartley Comes to Great Britain

case after the Court of Appeals held that the national union was not responsible for their actions and could not thus be sanctioned by sequestration of union property. As soon as the House of Lords reversed the Court of Appeals in Healon, the Industrial Court quite properly released the stewards, since future contempt could be dealt with by sanctions against the union itself. But the stewards had by then been martyred, and the labor movement's resistance to the Act had hardened, perhaps irreversibly. Second, the Government foolishly relied on the emergency strike ballot procedure during the acrimonious railway dispute. Predictably, the rank-and-file rallied to the leadership, and negotiations made no progress during the emergency pause. The Government had wasted the one asset possessed in the Act's emergency provisions and not contained in Taft-Hartley, i.e., the discretion not to hold a strike ballot.

Amendment of the Act seems certain. No legislation so comprehensive and detailed can escape change. The Government has announced its intention to consider amendments sometime within the next year. The Labor Party insists on complete repeal. The TUC, encouraged by the Government's tactical blunders, believes that Prime Minister Heath can be forced to back down on the whole subject of labor legislation, just as the Wilson Government was successfully pressured in June of 1969. While thus far rejecting left wing exhortations to refuse to appear defensively before the NIRG, the TUC remains ready to expel unions which comply with the Act's registration provisions. The TUC's position may be strong, in part because the Government needs union cooperation on wage restraint

297. The history of American labor legislation has, for instance, been one of substantial amendment.
301. The Seamen's Union seems prepared to litigate the question of whether the T.U.C. may lawfully suspend or expel unions because they seek access to the Act's institutions, i.e., because they seek to register with the Registrar. Routledge, Seamen's Union May Sue General Council, The Times (London), Sept. 5, 1972, at 1, col. 1. For the American position on this subject, see NLRB v. Marine & Shipbuilding Workers of America, 391 U.S. 418 (1968). But see Local 4028, United Steelworkers, 134 N.L.R.B. 692 (1965), enforced, 373 F.2d 443 (9th Cir. 1967), cert. denied, 392 U.S. 904 (1968), which indicates that the general rule protecting employees against expulsion for filing unfair labor practice complaints is not applicable where the filing of decertification petitions prompts the discipline. Query to what extent this is analogous to the British case where unions may compete more effectively with other TUC affiliates by utilizing the Act's recognition and union security machinery.
if the current inflation is to be halted. At the same time, that strength may be eroded if enough unions resist the TUC's edict against registration. The prospect of a rival labor federation of registered unions is not entirely beyond the realm of possibility at this time. If such a federation develops, one can anticipate extensive attempts by each to "raid" or "poach" the members of the other.

In the end, whatever amendments are adopted, the Act will not succeed without the consent and cooperation of the governed. Employers must learn to rely on the Act's machinery only as a last resort; a continued absence of effective voluntary institutions and procedures to settle disputes will undermine the Act as certainly as would a continued labor boycott. For their part, union leaders might review the American experience. In the years after Taft-Hartley's enactment, American unions forecast a flood of anti-union contract litigation, sponsored by employers colluding with misbehaving union members and non-unionists, whom the union would be powerless to discharge. The unions resolved to avoid enforceable contracts and to refrain from no-strike obligations. Nothing came of all this, largely because arbitration supplanted the judiciary as the principal forum to hear disputes arising during the term of the agreement. Arbitration is both a form of adjudication and an extension of the collective bargaining process. Its widespread adoption in Britain would reduce reliance on the NIRC. The transplanting of no other American institution or technique offers greater promise of effectuating the ultimate purposes of the British Act.

The experience of America is that law cannot coerce where resistance is unyielding, but that it can shape attitudes and, ultimately, conduct. Brown v. Board of Education, despite all the difficulties of its implementation, has altered opinions about integration, and some practices are changing in consequence. There may be more "summers of '72" in Britain's future. But that country still enjoys a better reputation for respecting law than does America, and the Industrial Relations Act—if sensibly amended—therefore retains a decent chance to achieve some of its central objectives.

302. See Elliott, E.P.T.U. in Big Row at the TUC, The Financial Times (London), Sept. 7, 1972, at 1, col. 3; Routledge, Electricians' Union May Quit the Congress, The Times (London), Sept. 7, 1972, at 1, col. 7.

303. See Torode, T.U.C. Cuts Off 32 Rebel Unions, The Manchester Guardian Weekly, Sept. 9, 1972, at 10, col. 1, where it is reported that the protection from raiding afforded by the Bridlington Agreement would be withdrawn from suspended unions. See also Elliott, T.U.C Suspends 32 Rebel Unions, The Financial Times (London), Sept. 5, 1972, at 1, col. 3. The prospect is that a rival union federation would use the Act's machinery to fight back against T.U.C. affiliates.