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THE CHANGING LEGAL STATUS OF LABOR

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18 September 1952

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MR. HILL: Folks, both Dr. Long, the speaker at yesterday's session, and Dr. Chamberlain are ex-Naval officers. This is purely accidental and in no way represents the policy of the college. The Army and the Air Force can look forward to representation from their own group later.

Some years ago, when we were examining our curriculum in industrial relations, we decided that perhaps the students would get a better understanding of current industrial relations if they had a chance to go back into the roots of the labor movement. For that reason we assigned two committees to that study. Because we are giving more time to it, both committees will look into the history of the labor movement. It will give us a little depth as well as width.

Dr. Chamberlain will talk on "The Changing Legal Status of Labor." But he will do more than that. He will really try to bring us something of the struggle that a portion of the people of our country have made for a better living standard.

It is a long subject and will take at least an hour, Dr. Chamberlain tells me, to cover the subject. I think you will find it a very interesting one. Dr. Chamberlain.

DR. CHAMBERLAIN: We do have a great deal of ground to cover today. So at the beginning I think we had perhaps best limit the scope that we will be covering.

When we are speaking of labor legislation, we can divide it roughly into two broad categories. On the one hand we can think in terms of the protective legislation, such as wage and hour legislation, unemployment compensation, workmen's compensation, and various laws of this sort. There is a second category, that dealing with the relations between unions and management. Because of the limitations on our time, I think we will have to concentrate on the second category today.

In doing so I realize that we are primarily concerned with our current status. The Taft-Hartley Act is always in the headlines. Particularly at this time, while we have political campaigns going on, we see that act daily in the headlines, with arguments being made pro and con. I am sure all of us are interested in that act, in the place, the role, which it occupies in our labor relations today. But equally

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we are interested in how we came to have such an act on the statute books and where it fits into the whole scheme of union-management relations as they are developing in this country.

I think it will be safe to say that we can understand the Taft-Hartley Act as it is today only by retracing our steps and seeing how we arrived at that spot. In doing so we will have to go back some 150 years, to the days when we first encountered the modern labor union in this country.

The unions, as you probably are aware, began to be in evidence in the latter years of the eighteenth century, but their activities did not really begin until the first years of the nineteenth century. I would like to go back to this early period and begin by tracing the development of labor law. We will have to cover the picture in very broad scope, because our time is limited; but I think we can do so enough to put the Taft-Hartley Act in its perspective.

Before we do that, I might start by making clear my own point of view and my own judgment. It will perhaps be necessary to give you the basis for the particular points which I would like to develop.

It would be my position that whenever an organized group of any form--whether business, labor, a veterans organization, a service organization, a religious group--affects the welfare of society at large, then it would seem to me that society has reason for attempting to place certain controls over the activities of these particular groups. That is, whenever a particular assembly or grouping of individuals along whatever line can affect the welfare of the other members of society, then the other members do have some reason to attempt to set certain safeguards around the actions or the program of the particular organization which is involved. And we today are primarily concerned with the labor group; and we will be interested in seeing what kinds of controls or restrictions are placed upon the operations of this organized group, which can affect the welfare of the other members of society.

So as we point to various types of labor law or labor legislation, we will have in mind, then, that this law, this legislation, was designed to control a particular kind of organized group, which could affect very vitally the welfare of other members in the community at large.

If we approach it from that point of view, the first type of law which we encounter and which is designed to control the actions and the activities of our labor unions, as we know them today, goes by the name of the doctrine of criminal conspiracy. I think perhaps it might be useful if we kept a little running outline on the blackboard of the changing law. In doing so we had best divide it into two categories.

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On the one hand we have our common law, that is, the judge-made, non-statutory law, that best illustrates the existing customs and institutions of the time, the interpretations of the judges of the courts in the light of precedent, in the light of the needs of the community. So we have the common law on the one hand and the statutory law on the other--the laws that are actually passed and put on the statute books.

This doctrine of criminal conspiracy, which we encounter at the start, falls in the first category. The first court record of which we have any knowledge involving the application of this doctrine appears in 1807.

It would be desirable, if we could take the time, which I am afraid we cannot do, to discuss briefly some of the reasons that led to the formation of labor unions in these early days. There are half a dozen theories as to why workers organized into groups of this sort. Some of them involve the growth of the technological means of production. The one that John R. Commons has so popularized involves the extension of markets and increasing competition, which led to the necessity of workers' organizing to protect themselves against wage cutting by employers to capture wholesale markets.

These aspects of the labor movement I think you probably will be covering in other sessions. We will have to pass over them here today by simply assuming that there were good economic reasons why labor unions should have developed at this time. We are interested in the legal means that were taken to control the activities of these labor unions and the viewpoints of the courts with respect to these incipient organizations.

The doctrine of criminal conspiracy is variously interpreted. There are several ways of viewing the doctrine. We shall not be concerned with the particular phraseology or the particular statements of the doctrine, as long as we have in mind its general nature.

In its most rigid form it held that labor unions themselves were illegal organizations; that it would be perfectly permissible for an individual worker to attempt to secure wage increases and improvements in the conditions of labor; but that when numbers of workers came together and organized into unions, this constituted an illegal conspiracy. What one could do legally, numbers joined together could not legally do. And the union itself under this rigid interpretation became an illegal organization.

Perhaps the more general application of this doctrine, however, was directed to the means which these organizations employed; and it is interesting to note that one of the actions of labor unions about which the courts were particularly concerned at this time was the closed shop.

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From the very first day of which we have any record of labor unions in this country, it is evident that they sought to obtain the closed shop. And we find then that this issue, which is very much alive now and one of the points to which the Taft-Hartley Act is directed, was a live issue 150 years ago. The courts in the application of this doctrine of criminal conspiracy maintained that it was illegal for groups of workers to come together and declare that they would not perform their work duties unless the men around them were also members of the same organization, refusing to carry on their work unless all the employees and all the apprentices, journeymen, and so forth, were also members of the union.

But it is not so much the doctrine itself that I would like to emphasize here, as it is the rationale that lay behind the courts' views, the courts' use of this doctrine in its application to labor unions.

There were two primary reasons which the courts gave for applying this doctrine of criminal conspiracy to labor unions. And we might like to underscore this, because we will find that these are recurring themes; and an understanding of the legal aspects of union-management relations is possible only if we keep in mind the two points, the two themes, which recur again and again as we trace the development of our labor law.

The first of these themes was the relationship of an organized group, like a labor union, to the individual; and the second of these themes was the relationship of the organized group, the labor union, to society at large.

In applying the doctrine of criminal conspiracy the courts made arguments like these: On the first theme, the relationship of the union to the individual, here was where they were interested in the closed shop. The courts couldn't see where any organized group of workers could have the right to establish that workers would not be allowed to work unless they were members of some particular organization. They could not see the legality of having a private group determine that only members of a particular organization would be allowed to work in a particular trade.

The courts would reason thus: If our elected state legislature were to pass laws saying that only members of a particular organization would be allowed to work in particular trades, all of us would rise up in arms. We would recognize that this was an exercise of legislative power that had no foundation in the constitutions of the states; that it would be a power which the state legislature could not exercise; that they would be rising above their legal authority if they were to pass laws that only members of certain organizations would be allowed to work at particular trades. If, then, they said, this is a power which we do not delegate even to our elected legislators, how can we possibly leave this power in the hands of a private group? They couldn't see any reason for so doing.

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In consequence of this they held that the attempt of the labor unions to impose a closed shop constituted a deprivation of personal liberty. It was an action by an organized group against individuals, which they thought had no place in their society. So here we have the first of these themes--the relationship of the group to the individual. We have the courts declaring that organized groups--labor unions--should not have this kind of power over the individual workers.

Now, with respect to the second theme--the relationship between the organized groups and society--the early unions, growing up in metropolitan centers, primarily along the eastern seaboard, were composed of workers in particular trades. All the carpenters in the area of New York City, Baltimore, Philadelphia, Chicago, and Boston would be organized into a carpenters' union. All the masons, the tailors, the shoemakers would be organized; and they would negotiate an agreement covering all the shops in their particular trade. When I say "negotiate an agreement" that is perhaps too formal a way to put it, because there was not the type of collective bargaining that we have now. In any event they would take organized action which would be directed to obtaining common terms over all the shops in the particular area.

The courts felt that this was an exercise of monopoly power; and so, relying upon early English precedents, precedents which precluded the use of a strategic economic power by private groups for their own benefit, they reasoned in this fashion. Here is the analysis that occurred in a conspiracy trial in 1815, involving a group of shoemakers in Albany, New York. The court said: Suppose that all the bakers in the city were to come together and agree among themselves that they would not sell bread to anyone in Albany except at a price which they agreed upon among themselves. We would all realize that this was an unwarranted, illegal exercise of monopoly power. It would not be tolerated. Now, the court held, what is the action of this union but another form of the exercise of similar monopoly power? We have here all the shoemakers in the particular community coming together and agreeing among themselves that they will not work except for a particular wage rate; and in so doing they are thereby exposing the community to their monopoly power. The price of shoes is dictated by their joint conspiracy. Now, this kind of action, they said, is inimical to the welfare of the community at large, and we cannot allow this kind of economic power to be exercised by private groups in our community.

These, then, were the two principles adopted by the courts. When we first encountered them, we had a labor law saying that the labor union constituted a deprivation of personal liberties; that the organized group in its relation to the individual was using excessively a power which came to them. On the second aspect they said that the organized group, the labor union, was exercising a power to the detriment of the community at large. It is these two sets of relations that we

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will find again and again in the views of legislatures and courts. What is the position of the union relative to the individual? What is its position relative to the community at large?

The doctrine of criminal conspiracy was applied in at least 16 cases of which we have record. There may have been more of which we have no record. But, in any event, we do know it was applied in this manner down roughly until 1842. In that year we had the landmark case of Commonwealth vs. Hunt, a state of Massachusetts case. In this decision Chief Justice Shaw, on rather technical grounds, refused to apply this criminal conspiracy doctrine to cover the Boston shoemakers, who had organized and who had been keeping a closed shop.

The prosecutor who had been presenting the case felt that his facts were perfectly compatible with those which had been presented in all previous conspiracy trials. He presented evidence establishing that this union had sought a closed shop, believing that this would be sufficient to prove his case and establish criminal conspiracy intent on the part of the union. Chief Justice Shaw, however, said this was insufficient. He argued that a closed shop could be established for good purposes or for bad purposes, and to make the point he used this analysis:

He said: Suppose that all the shoemakers, or a large part of the shoemakers, of the city of Boston had come to the conclusion that the use of strong alcoholic beverages by certain of their number was deteriorating the standards of their craft; that the established standards, which had been built up by apprenticeship regulations over the years, were being threatened by the use of strong drink by certain of the craft. Now, if all the shoemakers, or most of the shoemakers, in Boston had come together and agreed among themselves that they would not work alongside any shoemaker who took strong drink, the community at large would have applauded its action. They would have said: What a fine bunch of outstanding journeymen shoemakers we have here, who would take these steps to maintain their profession at its high level. The community would have welcomed this action and have supported it. But, said Chief Justice Shaw, what would this be but another form of the closed shop? It would mean that these workers would be refusing to work alongside other workers who did not conform to certain standards which they were establishing. This indicates that it is not the closed shop itself which is unlawful, but the purposes to which it is directed. The prosecutor had not established that the purposes of the closed shop were unlawful; it was on this technicality that Chief Justice Shaw threw out the case.

Because the criminal conspiracy doctrine was merely common law, there was no legislation to be overturned. But because Chief Justice Shaw was sufficiently great authority in other states, a great many of the other courts followed his lead; and from this time on we have very little application of the doctrine of criminal conspiracy.

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However, some of the problems still remained. We had these groups of organized labor, a rather novel form of organization. Society and the courts were still uncertain as to how to deal with these groups of workers who had come together to advance their own working conditions. There were large numbers of people who felt that this kind of organization was necessary. We had a good many ardent spokesmen on their behalf. Horace Greeley, for example, though himself an employer, supported the labor union as necessary if the working man was not to be downtrodden, and said that this kind of action should be supported by society.

But, even though there were a number of reasons for supporting workingmen's organizations, we still had these same problems facing us. What should the function of the group be as it affected the individual? What should be the role of the group as it affected society at large? The courts, understandingly enough, felt there must be some means of controlling the actions of groups of individuals who could so vitally affect the welfare of the community.

After the lapse of the doctrine of criminal conspiracy, we find a new doctrine rising to take its place. This doctrine goes by various names, and perhaps the simplest term we can apply is the doctrine of civil conspiracy. Sometimes it is called the doctrine of illegal purpose. The latter title suggests its genesis--it follows from the argument of Chief Justice Shaw in *Commonwealth vs. Hunt*, that it is the purpose of the organization which establishes its legality. This doctrine was elaborated somewhat to take account of the means employed by labor unions.

From this time on the courts began to examine the motivation behind the demands that unions were making. They continued to examine labor unions with an eye to the impact on the individual and with an eye to the impact on the community. But in doing so they examined, not the labor union itself, but, rather, the particular demands which it was making, the objectives which it was seeking, the purposes which it was after.

This doctrine of legal purpose or civil conspiracy took the place of the criminal conspiracy doctrine, but, whereas under the criminal conspiracy doctrine it had been the public prosecutor who brought the charge, and whereas the penalty involved fine and imprisonment, under the doctrine of civil conspiracy it became the aggrieved party, the employer himself, who took the initiative, and the penalty usually came in the form of a suit for damages.

We could spend a good deal of time elaborating this doctrine of civil conspiracy, but I am afraid we will be unable to do so this morning. So let us just simply accept this as being a restatement, a new form in essence, of the criminal conspiracy doctrine, now, however,

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with this limitation: No longer are we questioning the legality of the union organization itself--that is accepted--but we are questioning the purposes to which that organization is put; and this kind of action comes primarily through a suit initiated by private parties.

The doctrine of civil conspiracy was given a substantial lift and its application considerably aided and abetted by the use, beginning about 1877, of the labor injunction. The labor injunction came into effect by a rather devious path, which we will not have the opportunity of tracing here today. But it meant that, instead of the employer having to wait for the commission of an act which he argued had damaged him and then enter a suit for the recovery of damages, he could petition the court to estop the action of the union before it had been undertaken. He could ask the court to enter a restraining order that would prevent the union from undertaking some kind of action which the employer argued might irreparably damage his business.

The use of the injunction was of substantial assistance to the doctrine of civil conspiracy. And, if we adopt the point of view with which we started, namely, that where we have organized groups that can vitally affect the welfare of the community at large, there is ground for having some means of control over that organization, certainly you can see that the doctrine of civil conspiracy, coupled with the injunction, placed in the hands of the courts a very strong power of control over these labor unions.

But while with a wise use of injunction many people felt that there would simply be a curtailing or limiting of the actions of labor unions as they affected the individual and as they affected society at large, some people felt that the injunction was being misused or abused to make the actions of labor unions totally ineffective. In any event, we can say that here society certainly did have protection for the interest of itself at large or the individual component members.

We might take specific note here too of the courts' attitude toward picketing as a form of organized union activity. Under the doctrine of civil conspiracy the courts would entertain arguments that the means employed by the unions were inimical to the welfare of society by threatening the rights of the community at large or of individuals; and picketing was one of the instruments employed by the unions which the courts particularly frowned upon.

Even down until about the 1920's we have courts making such sweeping statements as: "Peaceful picketing is a contradiction in terms," the view being that whenever a union undertook to picket, its purpose was not simply the carrying of sandwich signs or placards advertising the dispute, but the essence of it was an implicit threat of potential violence which would be brought against those who undertook to violate the picketing line. And in consequence of this, gradually the courts

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adopted the view that picketing by itself was something which could not be condoned, carrying the seeds of violence, carrying a threat to other people in their private actions. So we have this very strong condemnation of picketing; and when Chief Justice Taft in a decision in 1921 allowed a union to post two "missionaries" at each plant entrance, this was construed by many individuals as a rather liberal decision.

We have been talking about the common law so far as a form of control over the actions of labor unions. It is time for us to point out the statutory law which also came into being and was used to control the actions of labor unions.

The first piece of legislation which has any major impact upon unions is the Sherman Act, passed in 1890. There has been considerable controversy as to whether the Sherman Act was ever intended to apply to labor unions. There are people who believe that it was intended to apply only to business organizations, as an antitrust measure growing out of the heated agitation of the eighties and nineties against the growth of large-scale business organizations which were using various sorts of business-restricting devices.

Whether or not it was intended to apply to labor unions, however, the fact is that it was so applied. In fact, in the early years, the first 15 or 20 years of its use, it was more frequently applied to labor unions than it was to business organizations.

The application of the Sherman Act to labor unions took two forms, principally. First, it affected the use of one of their weapons, the boycott. And here we can allude to one of the most famous Supreme Court decisions in the field of labor. Actually this was two cases, heard first in 1907 and again in 1915. But the purport of the Danbury Hatters case was to rule out the use of the boycott as a weapon of labor unions whenever the boycott would have a tendency to inhibit the flow of interstate commerce.

In this case the organized hatters of the city of Danbury, those who were working for one of the hat manufacturers there, had been unable to secure recognition from their employer. They had struck and organized a boycott. The A.F. of L. had circulated a "We do not patronize" list. Sympathetic groups had picketed stores in which the hats of this manufacturer were being sold. And here the court held that by so doing, they were preventing the flow of the hats of this particular manufacturer across state lines and therefore had subjected themselves to the terms of the Sherman Antitrust Act.

They were found guilty and a fine of 210,000 dollars was assessed against them. For a period of time it looked as though the houses of

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the workers would have to be sold to satisfy the judgment. But the A.F. of L. circulated a petition for contributions, and the fine was finally satisfied without such a dire consequence. In any event this decision and other decisions of the same sort limited the use of the union technique of the organized boycott in interstate operations.

The second use to which the Sherman Act was put in limiting the weapons of labor unions was with respect to strikes. Here the key case-- again there were two of them--was the Coronado case. The Coronado case involved the United Mine Workers, who were attempting to organize the Coronado Coal Company down in Oklahoma. The company had stocks of coal already mined and at the pit heads. The picketing operations in the strike prevented the movement of this coal in the normal channels of trade, prevented their moving it to those dealers who had already placed orders for it. The company, therefore, entered suit against the mine workers' union on the ground that this was a prevention or a restriction, a restraint, upon interstate commerce.

In the first case the court refused to hold that the union was guilty. They said that the union did not intend to prevent the movement of interstate commerce, as in the case of the boycott they had so intended; that this was simply an incidental effect of a strike for recognition and did not establish any conspiracy to restrain the movement of interstate trade.

A second case was brought two years later, however, in which new evidence was obtained from a disgruntled official of the Mine Workers, who had himself been active in creating the strike. He testified before the court that in strike councils which he had attended the union officials there had given it as their purpose to prevent this coal that was already mined from moving out in the channels of trade. On the strength of this additional evidence, the court found the union guilty.

So here we have then the application of the Sherman Act to two major kinds of union activities--the boycott and the strike--as they affect the interstate operations.

I am not going to speak of the Clayton Act, which was passed in 1914 and which the unions at that time believed would lift from them the burden of the Sherman Act, but which by judicial interpretation did not modify the application of the Sherman Act. The Coronado cases came in 1925 and 1927, subsequent to the Clayton Act, indicating its ineffectiveness in modifying the burden of the Sherman Act on the labor unions.

We have before us, then, a rather imposing structure of labor law, in the form of common law and statute law, acting as a regulation of or control over the labor unions. Again, if you adopt the view with which we started, namely, that where we have organized groups that can vitally

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affect the welfare of the community at large, there is reason for exercising controls over their operations, then surely you can say that here was an abundance of controls. By 1930 a great many people were arguing that the controls were far too sweeping and that they were preventing the exercise by labor unions of rights and privileges which they should be able to exercise. But whichever view you take, whether the controls so established were only adequate to the necessity, or whether they were excessive for the need in regulating or controlling these organizations which had been established--and most people would say necessarily so--for the benefit of the workers, nevertheless the controls did exist. And it could very well be argued that, if there were any harmful effects which labor unions could wreak upon individuals or society through a power which their organization brought them, these powers were effectively curbed by the legislative and the common law devices.

We will revert for a moment to these two themes which we found the courts enunciating when we first came upon the doctrine of criminal conspiracy--the role of the unions relative to the individual and their role relative to society. We can note, beginning roughly, I suppose, with the date of about the First World War, the growth of a new current of thought, the development of new attitudes, toward the organized activities of labor unions. We can note this development in a variety of ways, but here I will suggest only two of the most important causes for this change in attitude.

One was the growth in size of business organizations themselves, the growth of large corporations, massing together thousands of individual employees. People began to appreciate the old notion that the employer-employee relationship should be an individual one; that the terms of employment should be established between two individuals and in individual contract obligations was no longer applicable when you have so many individuals massed together in a single operation.

Here the individual was virtually powerless against his employer. He had nothing that he could say relating to the terms of the private labor contract under which he worked. The terms were set and he accepted or rejected them; but he couldn't modify them. And in many instances, because of lack of employment opportunity in particular communities or in times of business depression, there was very little opportunity to reject them.

So that in the case of the large corporation, which had been growing throughout this period, the individual employees became relatively helpless as bargaining agents. People began to see the function and the purpose more clearly of a labor union, which did not deny liberty to the individual but acted as the servant of the individual and as his representative; a labor union became the agent of the individual rather

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than depriving him of agency. One of the evidences of this changing attitude comes from the employers themselves. Strangely enough, one of the best bits of evidence of this changing current of thought comes with the company union movement, which gained headway after the First World War.

At the close of the First World War we had a union-management conference, the National Labor-Management Conference, assembled by President Wilson, and intended to look into the area of union-management relations and attempt to find some kind of workable relationship between these two groups. In the course of this conference, it became clear that no agreement could be reached between the labor and the management groups, because the unions, organized labor, insisted upon free collective bargaining, with the workers represented by unions of their own choosing, whether or not those representatives were employees of a particular employer. But the position of the employers was, not that there should be no union but that the union should be confined to employees of a particular company. And here we have the growth of the company union movement.

Note that this acceptance of the company union is evidence of the fact that even the employers were coming to appreciate that relations between employer and employee could no longer be continued on an individual basis, but that some kind of representation was necessary. The argument now turned on the method of representation.

But here we have a changing approach to the question of the relationship between the individual and the group, with increasing acceptance of the group as the agent or representative of the individual, not depriving him of liberty but guaranteeing him liberty, making his liberty real.

The second major cause perhaps leading to this change in the attitude was the great depression of the thirties. Here again in the face of mass unemployment of millions of workers, we have very clear evidence of the impotence of the individual in the face of an economic catastrophe. Here we have the growth of a feeling that the individuals in such a situation are powerless; and that, if they are to influence the course of economic events, it could only be through organization. In the preamble to the National Labor Relations Act, passed in 1935, you will find a statement that the depression was largely brought about by maldistribution of income, and that it could only be through the organized efforts of employees to secure a fairer distribution of income that purchasing power could be sustained and the economy kept on an even keel.

Regardless of the economic soundness of the argument, there is recognition here of the fact that the organized group, the labor union, has a distinct role to play in society, protective of the individual

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and also protective in a sense of the community welfare, of its economic prosperity. So that here we find a changing attitude toward the role of the union with respect to the individual and with respect to society at large.

As a consequence of this changing attitude, and with the depression still upon us, we find during the thirties a rather startling and abrupt change in the legal attitude toward labor unions. Sometimes we attempt to identify this changing attitude, this changing legislative program, with the New Deal. I think to a very large extent the New Deal did act as the agent through which this changing trend was recognized and that it promoted much of the legislation that we will consider in just a moment. But it is worth noting that perhaps the first major piece of legislation evidencing this changing trend came in the closing days of the Administration of President Hoover. The Norris-LaGuardia Act was passed in his term. So we can not say, I think, that this changing attitude must be identified wholly with the Democratic New Deal Administration. The recognition, I think, was far more general. I think we can say that there was throughout society at large a new viewpoint that was being brought to assess union-management relations.

The first of these basic pieces of legislation that occurred was the Norris-LaGuardia Act, passed in 1932. This was the Anti-Injunction Act. Actually it did not forbid or ban injunctions. What it did was to curb their use in the Federal courts. It laid down a series of very sweeping restrictions on the granting of injunctions by Federal courts, and said that only under the most rigid of conditions, including the offer of arbitration by the employer, could an injunction finally be entered into by the court. Procedural safeguards were written into this act as well.

This applies to the Federal courts only, but it was followed by a series of what are sometimes referred to as baby Norris-LaGuardia state Anti-Injunction Acts. They were not passed in all the states, but it is worthy of note that among the 17 or so states which did pass Anti-Injunction Acts were included the principal industrial centers.

The consequence of this was, then, that through the Anti-Injunction Acts, both Federal and state, we had a very substantial limitation upon the use of the injunction to support the doctrine of civil conspiracy. I do not want to suggest that the injunction ceased to be effective as of this date. Injunctions were still granted. The restrictions were most potent in the Federal courts and less so in the state courts. But I think it is safe to say that the passage of these Anti-Injunction Acts drew the teeth of the use of the injunction in its support of the doctrine of civil conspiracy.

We find decisions coming from the Supreme Court also modifying the structure of controls which had been imposed. With respect to picketing

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we find the case--I put it over in the section involving constitutional law--of Thornhill vs. Alabama, in 1940. In this case the Supreme Court adopted this point of view: It said that in a labor dispute the employer had adequate means of having its statements made public. It has the necessary means of purchasing advertising in the newspapers. It can buy radio time. It can distribute leaflets making clear its position, its view, to its employees. But the labor union does not have the means or the methods of making known its viewpoint to the community or to the employer. They usually lack the financial resources to do so. So the employees have to fall back on more simple means of publishing their position. Picketing is the principal method--by sandwich signs carried by the pickets in front of the plant advertising the fact of the labor dispute to the employees and to the public. Now, said the court, this is a form of communication, it is a form of speech, and as such is entitled to all the constitutional protection of the First Amendment.

So here, instead of picketing being so frowned upon by courts that some were willing to make the statement that peaceful picketing is a contradiction in terms, we find now a constitutional protection for the exercise of picketing.

This constitutional protection was somewhat watered down by subsequent cases, especially by the Meadowmoor decision about three or four years later; but, nevertheless, it established a new tenor, a new view, toward the exercise of picketing, giving it a certain major constitutional protection.

Also, beginning about 1940, we find a new series of decisions of major relevance to the application or the interpretation of the Sherman Act. The first of these came in 1940 with the case of Apex vs. Leader. This case was remarkably similar to the Coronado case, under which the doctrine had been established that strikes or any operations inhibiting the flow of interstate commerce were illegal under the Sherman Act.

In this particular case there had been a sit-down strike in the plant of the Apex Hosiery Company in Philadelphia. Local 1 of the Hosiery Workers, under the presidency of a man by the name of Leader, conducted this sit-down strike, during the course of which very substantial damage was done to the equipment in the plant, running into several hundred thousands of dollars.

The sit-down strike also prevented the flow of orders for stockings by the refusal to permit the sending out of accumulated stocks of hosiery. That was a situation quite similar and parallel to the Coronado case, where stocks of coal had been available and where the operations of the strikers had prevented it from moving in interstate commerce. Here were inventories of hosiery available and orders on the books and customers were waiting for the goods but the strikers prevented their moving out.

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Here, however, the court reversed itself, in essence if not in law, and held that this strike could not be touched by the Sherman Act. Justice Stone, speaking for the court, argued that it had not been the intent of the union to affect either the price of the product or to limit the production of the hosiery in this plant except incidentally to the strike; that there had been no conspiracy or design to curb in any way the operations of this company or design to impose any kind of monopolistic effect on the movement of hosiery. The court said this is what the Sherman Act was designed to do. It was designed to prevent the monopolistic exercise of economic power. If we were to hold that the union, by preventing the flow of hosiery into interstate commerce, was monopolistically exercising its economic power, we would in effect be arguing that any strike would be illegal under the Sherman Act, because virtually every strike affects interstate commerce in some degree. And if we were to hold that the conduct of a strike itself inhibited the movement of interstate commerce, then all strikes would be unlawful under this act; and surely it was not the intent of Congress to outlaw all strikes.

Perhaps one reason for this changing view, other than the changing attitude which we have already spoken about, was the fact that in the preceding period of four or five years the notion of what constituted interstate commerce had undergone a considerable expansion, and courts became more aware of what their interpretation of the Coronado case would do to the right to strike with this more liberalized interpretation of what constituted interstate commerce. More strikes if not virtually all strikes would be affected, whereas in 1927 the courts would have held interstate commerce to have been a much narrower field of activity.

Well, in any event, the 1940 decision conveyed the impression to a great many people that the court's view of what constituted illegal union activities under the Sherman Act was undergoing a change; but how far that change would be carried was still uncertain.

The court put doubts to rest by a subsequent decision coming in 1944 in the Allen Bradley case. This was a case involving Local 3 of the International Brotherhood of Electrical Workers of New York City. That local had worked out a very ingenious arrangement with the manufacturers association producing electrical fixtures and the contractors' association which installed those fixtures, a three-cornered agreement. Under this agreement the local union provided that it would not furnish any employees to any contractor who did not install fixtures made in New York City, and it secured the consent of both the contractors' and the manufacturers' associations to employ only union labor.

Note the effect of this three-cornered agreement; it was that virtually no fixtures could be installed in New York City that were not made in New York City and installed by members of the contractors' association, because the labor market was very tightly organized. This

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erected an virtual embargo around fixtures made outside the city, and manufacturers of fixtures were now unable to use or sell any goods not made in New York City, because the local union would refuse to install them.

In some instances these manufacturers would attempt to erect their own plant within the limits of New York City, so they could conform to the requirements of this tripartite agreement and manufacture their fixtures in New York City. But here the union and the manufacturers and the contractors' associations would not entertain the proposals of all those who wanted to build plants in New York City or assure them that they could get the labor to operate their plants if they did build them. The result of this was that the wages of the union labor could be raised and this could be passed along in the form of price increases to the consumer, because the consumer had no other place to go.

This was the case which was being tested by the Allen Bradley Company; it was an outside firm that wanted to crash the New York market. Here the Supreme Court held that the action of the union was illegal under the Sherman Act.

This finding itself was less important than the rationale which supported it. The court said the reason the union was guilty was because it had entered into a specific agreement with the employers' association. It had combined or conspired with the employers' association; and it was the employers who had tainted the agreement. If the union had itself undertaken to police this arrangement without formal agreement, the Sherman Act would not have touched the union. It was only because they entered into a specific agreement with the employers.

This goes back to one of the earlier interpretations of the intent of the Sherman Act, namely, that it had not been designed against unions; it had been designed to take care of employers, of their business activities; and it is the purpose of the activity which determines whether the operation is unlawful or not. For all practical purposes this decision releases labor unions from effective control of the Sherman Act.

See now what has happened. Within the rather short period of time from 1932 to 1944 we have struck down this whole imposing structure of controls which had been erected to limit the actions of labor unions in society with respect to these two themes--the role of the union versus the individual and the role of the union versus the community at large. There were now very few specific restraints operating--only those that were applicable under the more general police acts of various states. So we have here now a very substantial lessening of the legal controls over the operations of labor unions.

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It was during this same period of time in which this structure of controls was being very largely eliminated that we saw the growth and expansion of the labor movement in this country as it had never before occurred. This again meant an attitude toward the role of the union. We were beginning to see that the unions could play a function as a supporter of the privileges and liberties of individuals; that they did have an important place right in the society at large.

And the Government encouraged this through legislation. We first had the NRA section 7, which was effective to only a very limited extent. That was succeeded by the National Labor Relations Act of 1935, validated by Supreme Court action in 1937.

Simultaneously we had the birth and growth of the CIO, meaning that for the first time in American history we had effective organization in our mass production industries--automobiles, radio, electrical appliances, steel, and right on down the line. In all our major mass production industries we had now effective organization through this new institution.

So, with the Government's support and encouragement of collective bargaining and therefore the necessity of union organization, with this new labor legislation specifically designed to build up the organization where it had previously been weak, we see the growth during the late thirties of our labor movement from an organization which about 1930 had numbered no more than 4 million members until in 1940 it numbered close to 15 million members; and by the close of the war, 16 million members. We can see that within a period of about a decade and a half the labor movement in this country had quadrupled and expanded its power in the major industrial centers, the major fortresses, of the American economy. We have here this double movement taking place--a very substantial weakening of the controls over labor unions, occurring at precisely the same time as we have this increasing build-up of the labor movement and increasing power on their part.

The war intervened for a period of about five years and prevented us from seeing the full extent of the growth of this power. But with the end of the war we had those demonstrations of union power which had never before been given in this country. I think you can remember well enough the instances that occurred in that year. Sometimes it is well worth while just to go back to a file of newspapers and see all the strikes which we had in late 1945 and 1946. Automobiles went down, coal went down. We had our first major industry-wide railroad strike. Tug boats went down in New York City. Mayor O'Dwyer declared a state of emergency for that community. We had our longest public utility strike on record--27 days. Electrical appliances were struck. Steel went down. Oil went down. All of our major industries were subjected to strike actions as the unions, released from the wartime controls, sought to make good on what they thought had been the reduction of benefits, or at least catch up with benefits that they thought should have accrued to them.

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And this occurred at a time when there was a hungry buying public, eager for a flow of goods to replace those which they had been unable to replace during the war. Just as people were anxious to get that new model car, just as they were anxious to get that new refrigerator, the new radio, we had this wave of strikes slowing down the movement of goods into the market. Here we had a demonstration, then both of the power of the labor union in the economy, the power to affect the welfare of society at large, and at the same time a demonstration of the relative lack of any controls or limitations over such organizations.

It seems to me--this is a personal viewpoint--that it is only in the light of this development in legal history that we can place the Taft-Hartley Act. I recognize that the Taft-Hartley Act was supported and partly written by employers, who had much to gain by putting these controls over labor unions. But it doesn't seem that it is a sufficient answer for the analysis that we want. It seems to me that the Taft-Hartley Act came in response to a reassessment of the role of the labor union relative to the individual and relative to society at large, which caused a considerable popular acceptance of the thought, the need, for types of control to be established over the unions.

If you will read through the Taft-Hartley Act, whether or not you agree with the specific provisions of that act--and probably all of us could find provisions that we might take exception to--I think it will stand out as we go through it that very much of the emphasis of this act is upon the individual as opposed to the group, attempting to balance off the power of the organization by encouraging the privileges and the liberties of the individual who does not want to conform to the labor union, an emphasis upon small bargaining units in contrast to large bargaining units. There is an effort to remove the power of the union over the rights and privileges of the small group or of the individual--not a denial of the fact that the labor union still is the only effective means by which the working man can express his individuality. There is still recognition of the fact that the labor union must play this necessary role in society, that it is the permanently established policy of this country to encourage the practice of collective bargaining--that still remains--but there is a shift of emphasis away from encouragement of the power of the union vis-a-vis the individual and a greater insistence on the individual vis-a-vis the labor union. And at the same time you find in these provisions with respect to national emergency situations that are a direct outflow of the wave of strikes of 1946.

Here again it could be argued whether this is the best means of meeting national emergency strikes. But, whether you accept it as a desirable means or not, I think it does again effect a reassessment of the role of the union relative to the community at large, and a recognition of the fact that some kind of restraint or some kind of community power over this organization, which can so importantly affect the welfare of society, must be encouraged.

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Anyhow, I think all of us would agree that the Taft-Hartley Act is not the final answer. There is no reason to believe that the two themes, which will always be with us--the role of the organized group against the individual and the role of the organized group in its relationship to society--have been settled. These two themes we can never escape. They are bound to evolve as long as we have any kind of social organization; and there is no reason to believe that assessment of the current need will not continue to change. We will have undoubtedly, as our economic society changes, as the form of our economic organization develops, further reassessments of these two important relationships; and, as we do, we certainly will have a changing emphasis upon the individual in his relation to the group and to society, and upon the rights of society in relation to the group.

Certainly each of these groups has at different times profited by these changing attitudes, both the employers and the unions. The unions profited in the thirties by the lessening of controls over the union activities, and the employers profited during the forties by the changed attitude toward the union in its relation to the individual and to society at large. So we are going to have these pressure groups with us, and the power of one or the other is bound to develop. We can, of course, expect that they will take maximum advantage of such development.

However, to credit these private pressure groups with having the intrinsic power to change labor legislation and modify the whole structure of controls, it seems to me is to credit them with too much. This kind of change, it seems to me, must have as its underlying basis this reassessment of the relationship of the individual and of the group to society. As society, as we as a citizenry, change our estimates of the value of things, private groups can profit and they can encourage attitudes which are developing to their advantage. But I think it would be as naive to credit them with the power to make these changes themselves as it would be naive to say that they have no influence whatsoever on these changes.

I am sorry to have taken more time than perhaps I should, but I thought it necessary to trace these historical developments as they affect this primary relationship in order to place the Taft-Hartley Act in its present status.

QUESTION: I am wondering whether you would consider what happened in that period around 1940, when they threw all the previous interpretations out, was that a result of the change in the composition of the Supreme Court or a result from below in the ranks of labor?

DR. CHAMBERLAIN: I think you would have to say so. No doubt the new faces in the court were largely responsible for the changing interpretation. However, it does seem to me that we could not have interpreted

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this as being simply a partisan or party interpretation of events. It seems to me the issues go more deeply than that; they evidence very fundamental changes in the attitude generally throughout society, to which the court was giving expression.

Now, with respect to the Apex and the Allen Bradley cases, for example, these in essence, I think, follow rather logically from the passage of the National Labor Relations Act. When this act had been constitutionally upheld, the jurisdiction of the courts on the basis of the interstate commerce clause considerably expanded. The judicial attitude as to what constituted interstate commerce had increased to the point where it became more evident that the court's interpretation in the Coronado case would have had an impact on the right to strike that nobody could have foreseen in 1927. Now, that is not so much a reflection of a party or political viewpoint as it is a judgment on the part of those who had come freshly into the courts with a firsthand knowledge of the events that they saw shaping up around them.

QUESTION: You mentioned--and I think a number of us here agree with you--that the Taft-Hartley Act is not the final answer. Can you take a few minutes to tell us some of the things that you think are wrong with it?

DR. CHAMBERLAIN: I am afraid that might take too much of our time if I were to try to catalog them. I can mention a few things.

For one thing, there is a provision that requires that what they call an 8 (b) (4) (A) charge, a secondary boycott action, must be heard by the board prior to any other cases that may be before it. This constitutes an unfair labor charge against the unions; and I think the unions can rightly complain that there is no reason why a charge which they might bring against an employer might not be just as important. There seems to me to be a greater recognition here of the employer's position than of the union's.

There is also a provision with respect to elections which even the people who favor the Taft-Hartley Act have raised a question about. If an election to determine a majority representative is held during the time when a strike is in progress, those strikers whose jobs have been filled by strike-breakers or replacements, however you choose to call them, are unable to vote in the election. There are many people, including some of those who favor the Taft-Hartley Act, who believe this would constitute a union-breaking device at a time when there is substantial unemployment. And I am inclined to feel that this might be one area in which amendment might take place, if we get around to it in the next Congress.

There are particular provisions of that sort, if you went through the act bit by bit, where you might logically, it seems to me, see

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grave objection. Perhaps the greatest objection which might be raised is the spirit in which the act was passed. I think the underlying causes of the act were the changed attitudes that I have spoken about. But, if you read through the hearings on the act, you certainly do catch a note of vindictiveness with respect to the unions. That did create an impression that there was hostility toward these groups, even though their functions were still very largely retained. That, I think, has held over, and that causes the unions to continue to feel resentful. So that the very name "Taft-Hartley Act" carries with it the feeling of opposition on their part, because of the manner in which the legislation was heard before Congress.

I think they object very strongly to the affidavits, to the signing of the noncommunist affidavits, not because these are particularly onerous to them, but because it carries the impression that they are particularly susceptible to this form of disloyalty. And here it seems to me that this might have been an unwise provision, causing greater damage than it might correct.

It is aspects of this kind that I would object to, rather than to the act as a whole.

QUESTION: A restricted area of public opinion was recently expressed by Senator Hoey, of North Carolina, when he said that the time was approaching when the labor unions should again be prosecuted under the Sherman Act. Is that feeling occurring nationwide, or is it restricted to the Senator's area in the South? In other words will it flame up into actual action, or is it just a senator trying to make the headlines?

DR. CHAMBERLAIN: Your question is whether the contention of Senator Hoey, that some kind of antitrust proceeding against the unions should be reinstated legislatively to take care of the present situation, is more general than simply an expression of the views of just one senator?

QUESTION: Yes.

DR. CHAMBERLAIN: It certainly is more general than that. We do find a number of individuals suggesting that we do need some kind of provision, applicable to unions, restraining their economic power in the same manner that the Sherman Act restrains business organizations.

How general this is I cannot say; but I am inclined to think that it has more currency than simply the views of one individual. Obviously, it takes different forms.

There is a great deal of comment on the practices which some unions have followed of preventing the installing of technological improvements. Take the campaign carried on by Thurman Arnold on this ground. In just

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the last year there has been a revival of interest in whether this kind of action on the part of the unions might not be contested. So I think it has more generality than simply a few senators. I think we probably will hear more in the future about the desire for this kind of legislation.

QUESTION: What were the factors that caused the Clayton Act to become ineffective in modifying the Sherman doctrine?

DR. CHAMBERLAIN: It was rather a technical point of interpretation, involving the construction of sections 6 and 20, I believe, of the Clayton Act, the question being as to what particular kinds of union-management relations the act was designed to cover, or these particular sections.

There is a clause in that act which speaks about disputes that are engendered in the proximate relationship of employer to employee. The courts' question was whether a sympathetic strike or a boycott initiated by a union which did not stand in the proximate relationship of employer to employer--it might be another local of the same national union, but not the local that was involved in the dispute with the employer--was covered by the act. Their interpretation was that it was only this immediate relationship between employer and employee which was affected; and that the act still controls and still applies to sympathetic actions of other locals of the same national union. It was this interpretation which led them to say that it had not affected the primary application of the Sherman Act. The Norris-LaGuardia Act to some extent remedied that interpretation, at least as the courts subsequently interpreted it to apply to the union-management relationship of virtually any type that you could conceive of.

MR. HILL: Dr. Chamberlain, on behalf of the faculty as well as the students, I thank you very much indeed for helping us bear the load on this most important part of our course.

(25 Nov 1952--250)S/rrb

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