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LABOR LAW—Prima Facie Tort Doctrine Bars Unreasonable Deprivation of Union Membership—*Hurwitz v. Directors Guild of America, Inc.**

In July 1965 the officers of the Directors Guild of America (DGA) and the Screen Directors International Guild (SDIG) concluded a merger agreement which provided that DGA was to be the surviving union and SDIG members were to become members of DGA automatically upon signing the DGA non-Communist loyalty oath.[1] Although the SDIG membership ratified the merger agreement by a majority vote,[2] six members steadfastly refused to sign the oath and as a result were not admitted to membership in DGA. They thereupon brought a diversity suit in a New York federal district court[3] and moved for a preliminary injunction ordering DGA to admit them without requiring them to sign the oath. The court denied the motion. On appeal to the United States Court of Appeals for the Second Circuit, *held*, reversed. Deprivation[4] of union membership inevitably causes economic injury, and therefore constitutes a prima facie tort. Although prevention of subversive infiltration may justify

* 364 F.2d 67 (2d Cir.), *cert. denied* 385 U.S. 971 (1966) [hereinafter referred to as principal case].

1. This oath was identical to the now repealed § 9(h) of the National Labor Relations Act, ch. 120, § 9(h), 61 Stat. 146 (1947). It read as follows:

> I am not a member of the Communist Party or affiliated with such party, and I do not believe in, and I am not a member of nor do I support any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods.

2. The tally was 439 to 63 in favor of merger.

3. Plaintiffs alleged both diversity and federal question jurisdiction. The latter claim was dropped on appeal, however, when it was admitted that DGA was a union of supervisors and thus not subject to the provisions of the NLRA. Reply Brief for Appellants, p. 3 n.2, principal case.

4. The court ruled that although plaintiffs had never been members of DGA, they did have contract and property rights to DGA membership sufficient to warrant treating them "as though . . . [they] had been expelled . . . ." Principal case at 72. Nonetheless, the court also stated in dictum that it saw "no sound reason why recovery should not be granted for wrongful exclusion as well . . . ." *Id.* at 72 n.7.

the infliction of such injury, the DGA oath was unreasonably vague and thus an impermissible means of accomplishing this objective.[5]

The decision in the principal case is grounded on the theory that "*prima facie,* the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law . . . requires a justification if the defendant is to escape."[6] The burden of proof is thus placed on the defendant to show that his conduct was "justified." While the prima facie tort theory is fairly well established in Anglo-American law,[7] its use has traditionally remained confined to the original fields of its application: unfair competition[8] and labor-management relations.[9] Apparently, prior to the principal case, no American court had ever applied the doctrine in actions involving either wrongful *expulsion* or wrongful *exclusion* from union membership.[10] Other theories of liability are available to members who

5. *Id.* at 75.

6. Aikens v. Wisconsin, 195 U.S. 194, 204 (1904) (Holmes, J.).

7. Though apparently medieval in its origins [see Forkosch, *An Analysis of the Prima Facie Tort Cause of Action,* 42 CORNELL L.Q. 465-75 (1957)], the prima facie tort theory received its first modern statement in Mogul Steamship Co. v. McGregor, Gow & Co. [1891] 23 Q.B.D. 598, 613 (Lord Bowen), *aff'd* [1893] 17 A.C. 25. In Skinner & Co. v. Shew & Co., [1893] 1 Ch. 413, 422, the same judge said: "At Common Law there was a cause of action whenever one person did damage to another, wilfully and intentionally, and without just cause or excuse." Holmes introduced the doctrine in America in Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E. 1077, 1080 (1896) (dissenting opinion), and the United States Supreme Court accepted it in Aikens v. Wisconsin, 195 U.S. 194, 204 (1904). Sir Frederick Pollock also appears to have approved of the doctrine. POLLOCK, TORTS 17-18 (15th ed. 1951). For a list of eighteen states in which the theory has been accepted, see Note, 52 COLUM. L. REV. 503, 504 n.13 (1952).

8. See, *e.g.,* Boggs v. Duncan-Schell Furniture Co., 163 Iowa 106, 143 N.W. 482 (1913); Memphis Steam Laundry-Cleaners, Inc. v. Lindsey, 192 Miss. 224, 5 So. 2d 277 (1941); Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 83-84, 70 N.E.2d 401, 402-03 (1946).

9. See, *e.g.,* American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 231, 36 N.E.2d 123, 125 (1941); Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 355, 34 N.E.2d 349, 352, *cert. denied,* 314 U.S. 615 (1951); Saveall v. Demers, 322 Mass. 70, 76 N.E.2d 12 (1947). See generally Forkosch, *The Doctrine of Just Cause as Applied to Labor Cases,* 23 TEMPLE L.Q. 178 (1950), *repr.* 1 LAB. L.J. 789 (1950) where it is argued that the prima facie tort theory was the true basis upon which all the great pre-NLRA labor-management relations cases were founded.

10. In New York, the state in which nearly half of the cases involving union expulsions and exclusions have been decided [see Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 YALE L.J. 175, 177 (1960)], the tendency has been to restrict rather than to expand the application of the prima facie tort doctrine. In Reinforce, Inc. v. Birney, 308 N.Y. 164, 124 N.E.2d 104 (1954), for example, the Court of Appeals took the position that in order for the doctrine to apply, the defendant must have been motivated solely by actual malice. [For criticism of the New York approach, see Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle,* 54 NW. U.L. REV. 563, 567-74 (1959); Forkosch, *An Analysis of the Prima Facie Tort Cause of Action,* 42 CORNELL L.Q. 465, 477-81 (1957); Note, 52 COLUM. L. REV. 503, 507-08 (1952).] Three cases, however, suggest that the prima facie tort doctrine may be applied in expulsion situations: Berrien v. Pollitzer, 165 F.2d 21 (D.C. Cir. 1947) (woman's rights party ordered to reinstate group expelled because of their opposition to party leadership); Barile v. Fischer, 197 Misc. 493, 94 N.Y.S.2d 346 (Sup. Ct. 1949) (union held liable in tort for blacklisting an expelled member who had refused to pay his dues in protest

are arbitrarily *expelled* from labor organizations;[11] thus, arguably, the prima facie tort theory will give little or no added protection to such members. Indeed, since the Second Circuit treated the principal case as involving *expulsion*, it might have been able to reach the same result without resort to prima facie tort. However, the court did apply that theory and in dictum went on to add that there was no reason why the doctrine should not be equally applicable when a worker has been unreasonably *excluded* from union membership.[12] It is submitted that in *exclusion* cases the prima facie tort theory will provide a necessary and appropriate means for remedying union abuses.

Despite the tremendous growth in the power and influence of unions in American industrial society,[13] courts have consistently refused to distinguish labor organizations from other nonprofit, voluntary associations.[14] Since the basic judicial policy with respect to the admissions practices of such groups has traditionally been one of noninterference, no special cause of action has been developed for the arbitrarily excluded member.[15] Furthermore, conceptual difficulties have prevented courts from applying to the exclusion situation the same rationales used to protect workers in expulsion cases.

Courts have resorted to two distinct theories in granting relief

against the union officers' failure to comply with § 9(h) of the NLRA); Orchard v. Tunney, [1955] West. Weekly R. (n.s.) 49, [1955] 3 D.L.R. 15 (Man. Ct. App.) (member's expulsion from union held prima facie tortious; but on appeal this theory was rejected by the Canadian Supreme Court, which held that the case could properly be dealt with only under a contract theory. [1957] Can. Sup. Ct. 436, [1957] 8 D.L.R.2d 273).

11. See text accompanying notes 16-20 *infra*.

12. See note 4 *supra*.

13. See Summers, *The Right To Join a Union*, 47 COLUM. L. REV. 33, 39-44 (1947) for an excellent short discussion of the development of labor unions from weak, impotent groups into powerful economic organizations.

14. Thus, the general principles that originally were developed to govern the internal affairs of social clubs, churches, and fraternal lodges have also been applied to unions. *Id.* at 37-38. For example, the same rules employed in union expulsion situations have also been applied to cases involving expulsions from fraternal insurance associations [Wilcox v. Supreme Council of the Royal Arcanum, 210 N.Y. 370, 104 N.E. 624 (1914)], the New York Stock Exchange [Cohen v. Thomas, 209 N.Y. 407, 103 N.E. 708 (1913)], and the New York Produce Exchange [People *ex rel.* Johnson v. New York Produce Exch., 149 N.Y. 401, 44 N.E. 84 (1896)]. For an eloquent criticism of this general policy, see Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

15. The leading cases exemplifying the traditional position are: Walter v. McCarvel, 309 Mass. 260, 34 N.E.2d 677 (1941); Mayer v. Journeymen Stonecutters Ass'n, 47 N.J. Eq. 519, 20 Atl. 492 (Ch. 1890); Miller v. Reuhl, 166 Misc. 479, 2 N.Y.S.2d 394 (Sup. Ct. 1938). In the *Mayer* case, *supra*, immigrant laborers were prevented from pursuing their trade by a combination of union exclusion and closed-shop agreements between the union and all the employers in the area. The Vice Chancellor denied the workers relief, arguing as follows:

> [T]he [union] . . . has clear right . . . to prescribe qualifications for membership; it may make it as exclusive as it sees fit; it may make the restriction on the line of citizenship, nationality, age, creed, or . . . profession, as well as numbers. This power is incident to its character as a voluntary association . . . .

Id. at 525, 20 Atl. at 494.

to union members who have been arbitrarily expelled. First, the union member has been regarded as having a vested *property* right in the assets and benefit programs of the organization to which he belongs.[16] On this basis, courts have held that his expulsion, if not justified by the union's constitution or by-laws, constitutes an illegal deprivation of property.[17] Second, the act of joining a union has been said to create a *contract* between the individual and the organization, the terms of which are represented by the provisions of the union's constitution and by-laws.[18] Thus, if a member has been expelled on grounds not provided for in those documents, he has a cause of action for breach of contract.[19] The resort to contract theory, of course, implies that the traditional defenses of contract law will be available to both the employee and the union. Thus, in rare instances, courts have afforded relief to union members who have been expelled in accordance with the rules of the constitution or by-laws on the ground that the rule in question was void as against public policy or contrary to natural justice.[20] Although there is considerable doubt that the property and contract theories accurately reflect the worker's actual interests in union membership,[21] it appears

16. See, *e.g.*, Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931); Angrisani v. Stearn, 167 Misc. 728, 3 N.Y.S.2d 698 (Sup. Ct.), *aff'd mem.* 255 App. Div. 975, 8 N.Y.S.2d 997 (1938); see Chafee, *supra* note 14, at 999; Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 613 (1959); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1051-52 (1951).

17. See, *e.g.*, Truax v. Raich, 239 U.S. 33 (1915); Bogni v. Periotti, 224 Mass. 152, 112 N.E. 853 (1916); Angrisani v. Stearn, *supra* note 16. In the *Angrisani* case a union was directed to reinstate a member who had been expelled for bringing suit against the union's officers. The court held that the member's conduct did not violate a union by-law that prohibited the carrying on of union business outside union meetings or the union's executive board rooms.

18. Cason v. Glass Bottle Blowers Ass'n, 37 Cal. 2d 134, 231 P.2d 6 (1951); Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931); see Chafee, *supra* note 14, at 1001; Cox, *supra* note 16, at 613; Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1054 (1951).

19. Cason v. Glass Bottle Blowers Ass'n, *supra* note 18; see Chafee, *supra* note 14, at 1001; Cox, *supra* note 16, at 613, Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1051 (1951).

20. See, *e.g.*, Spayd v. Ringing Rock Lodge No. 665, Bhd. of R.R. Trainmen, 270 Pa. 67, 113 Atl. 70 (1921), where the court voided the expulsion of a union member who had violated a union regulation prohibiting members from using their influence to defeat any federal or state legislation. In ordering reinstatement the court said:

> [T]he by-laws, rules, and regulations of [corporations and unincorporated associations] . . . will be enforced only when they are reasonable [citing cases]; and they never can be adjudged reasonable when, as here, they would compel the citizen to lose his property rights in accumulated assets, or forego the exercise of other rights which are constitutionally inviolable.

Id. at 70.

21. An employee's only true property interest in union membership lies in the benefit programs provided by the labor organization, for if a union member has any property right in his union's *assets*, it certainly bears little resemblance to traditional forms of ownership. A member cannot transfer or devise his rights; moreover, if the local to which he belongs should be dissolved, its assets will pass to the international rather than being divided among the local members. Indeed, even if the assets were divided,

that they provide reasonably adequate protection against arbitrary expulsions. However, the conceptualization of theories of recovery in terms of property and contract rights prevents these theories from also being applied to provide remedies for unreasonable exclusions, since an excluded applicant for membership, not having a vested interest in union assets or benefit programs and not having engaged in the act of joining the organization, can assert neither property nor contract claims against the union. Thus, it has been asserted that the common law provides no basis for preventing labor organizations from refusing a worker's application for membership "for any reason or for no reason."[22]

Until very recently, Congress had also made no attempt to regulate union admission policies. Section 8(b)(1)(A) of the National Labor Relations Act (NLRA)[23] specifically places the regulation of union membership policies beyond the purview of the National Labor Relations Board (NLRB). To be sure, section 8(b)(2) of the NLRA[24] prohibits unions from causing an employer to discriminate against a worker who has been denied union membership for reasons other than his failure to tender dues and initiation fees.[25] However,

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the share of any individual member would be minimal: a statistical study of thirty-two of the largest and wealthiest unions reveals that if the assets of these organizations were divided among their respective memberships, each member would only receive approximately $22. Life, May 31, 1948, pp. 80-81. Thus the interest of a union member in the assets of his union clearly is not an accurate measure of the economic and social harm which he suffers when expelled. In practice the courts appear to have recognized this and consequently do not limit relief to actual damages but invariably order total reinstatement. See, *e.g.*, Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 853 (1931).

The contract theory is even more unsatisfactory. Few ordinary contracts would be enforced if phrased in terms as vague as those found in most union constitutions and by-laws. There is also a serious question whether the requisite mutuality of obligation exists, since the union is generally free to change its regulations by majority vote over the objections of any individual member. Finally, it is totally unrealistic to treat the act of joining a union as a "bargain" between two equally free "contracting" parties: "The man is supposed to have contracted to give . . . [the union] these great powers; but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the [union's executive] committee . . . ." Lee v. Showmen's Guild, (1952) 1 All E.R. 1175, 1181 (C.A.) (Lord Justice Denning).

22. Summers, *The Right To Join a Union*, 47 COLUM. L. REV. 33, 38 (1947); see note 15 *supra* and accompanying text.

23. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964):

> It shall be an unfair labor practice for a labor organization or its agents . . . to restrain . . . employees in the exercise of the rights . . . guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

24. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964):

> It shall be an unfair labor practice for a labor organization or its agents . . . to cause . . . an employer to discriminate against an employee . . . to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition for acquiring or retaining membership . . . .

25. Thus, in Hoisting & Portable Eng'rs, Local 4, Int'l Union of Operating Eng'rs,

while this provision assures an employee the right to obtain or retain a job without arbitrary union interference, it does not force the union to accept him into membership even when a "union shop" agreement is in effect. The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[26] significantly limited the right of labor organizations arbitrarily to discipline their *members*;[27] however, attempts to extend protection to *applicants* for union membership were expressly rejected.[28]

In 1964 Congress *did* substantially restrict the right of labor unions to exclude workers from membership. Section 703(c) of the Civil Rights Act[29] prohibits a labor organization from discriminating in any way on the basis of race, color, religion, sex, or national origin. Any person claiming to be aggrieved under this provision may file a written charge with the Equal Employment Opportunities Commission,[30] which will attempt to resolve the dispute through informal

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141 N.L.R.B. 1231 (1963), the Board held that the union had violated § 8(b)(2) when it caused an employer to discharge a worker because he was known as a "wage cutter" and, therefore, was not acceptable to the union's membership.

26. 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (1964).

27. The act purports to create a "Bill of Rights" for union members. 73 Stat. 522 (1959), 29 U.S.C. §§ 411-15 (1964).

28. While the LMRDA was still in House committee, Representative Powell of New York proposed an amendment providing that "no labor organization shall discriminate unfairly in its representation of all employees in the negotiation and administration of collective bargaining agreements, *or refuse membership, segregate or expel any person on the grounds of race, religion, color, sex, or national origin.*" (Emphasis added.) However, the bill's two sponsors opposed adoption of the amendment.

Mr. Landrum:

> We do not seek in this legislation, in no way, no shape, no guise, to tell the labor unions of this country whom they shall admit to their unions. No part of this legislation attempts to do that. . . . The law is designed only to say that, if [a man] . . . is a member of a union, he shall have equal rights. . . . We do not here seek to withdraw or take away from the unions the right to fix their own rules for the acquisition or retention of membership. . . .

Mr. Griffin:

> Everybody knows why this particular amendment was offered at this time—to kill the legislation. The labor reform legislation before the House . . . does not touch or deal in any way with the admission to, or retention of, membership in a union.

The record of the entire debate appears in II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 1648-51 (1959).

29. 78 Stat. 255-56, 42 U.S.C. § 2000e-2(c) (1964):

> It shall be unlawful employment practice for a labor organization—
>
> (1) to exclude or expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

30. 78 Stat. 259, 42 U.S.C. § 2000e-5(a) (1964).

procedures.[31] Should these procedures fail, the complainant is then permitted to bring a civil suit in federal district court.[32]

Although in theory the Civil Rights Act should provide a remedy for the most common[33] types of arbitrary exclusion from union membership, procedural barriers in the act may prevent it from being fully effective.[34] Moreover, while the coverage of the act is broad, it is not all-inclusive. The Commerce Clause is an absolute limit on its applicability.[35] In addition, there are a number of types of discrimination to which its protection does not even purport to extend. Exclusion on the grounds of unorthodox political beliefs is in no way proscribed. The act does not prohibit unions from making the signing of a non-Communist affidavit a prerequisite for membership. Nor does it forbid unions to expel or exclude workers because they favor "right-to-work" laws or political candidates not approved by the union leadership. Another basis for discrimination that remains legally acceptable is nepotism, a practice quite prevalent in the building trades unions.[36] Many of these organizations for years have restricted membership on a racial basis;[37] thus, the effect of allowing "family unions" to continue is to permit the virtual total exclusion of nonwhite groups from the skilled craft unions.

In light of the tremendous economic and social importance which

31. The act requires the Commission first to try to eliminate the alleged unlawful practice by conference, conciliation, and persuasion. 78 Stat. 259, 42 U.S.C. § 2000e-5(a) (1964).

32. 78 Stat. 260-61, 42 U.S.C. §§ 2000e-5(e) & (f) (1964). Upon application of the complainant, it is within the discretion of the court to appoint an attorney to conduct the litigation without payment of fees. 78 Stat. 260, 42 U.S.C. § 2000e-5(e) (1964). The court may also permit the Attorney General to intervene if he should certify that the case is of general public importance. 78 Stat. 260, 42 U.S.C. § 2000e-5(e) (1964).

33. See Hewitt, *The Right To Join a Labor Union*, 99 U. PA. L. REV. 919-22 (1951) which indicates that the great majority of arbitrary union exclusions involve racial discrimination.

34. See, *e.g.*, Strauss & Ingerman, *Public Policy and Discrimination in Apprenticeship*, 16 HASTINGS L.J. 285, 314 (1965): "[T]here is no reason to believe the federal law will be any more effective than have been similar state laws. . . . Indeed, since the federal law contains many procedural barriers to enforcement, we may well expect it to be less effective." See text accompanying notes 58-59 *infra* for a discussion of the procedural advantage of the prima facie tort theory.

35. 78 Stat. 254-55, 42 U.S.C. §§ 2000-1(e) to (g) (1964).

36. See Strauss & Ingerman, *supra* note 34, at 304-06.

37. A 1964 study of apprenticeship statistics discloses a tremendous racial imbalance. The following figures show the percentage of Negro apprentices in some of the larger industrial areas: California—1.9%; Connecticut—0.5%; Maryland—0.8%; Montgomery County, Md. (outside Washington, D.C.)—0%; New Jersey—0.5%; New York—2%. In the cities of Milwaukee, Minneapolis, Newark, and St. Louis there are no Negro apprentices in any of the printing or building trades unions. *Id.* at 289-91. The 1950 census reveals that in the nation as a whole Negroes comprise only 0.3% of the tool and die makers, only 1% of the electricians, only 2% of the machinists and millwrights, only 2.4% of the cabinetmakers, and only 3.9% of the carpenters. On the other hand, the percentage of Negro participation in certain other trades is considerably higher; cement finishers—26.1%; brickmasons, stonemasons, and tilesetters—10.9%; paperhangers—11.1%; structural metal workers—7.2%; and roofers and slaters—6.94%. MARSHALL, THE NEGRO AND ORGANIZED LABOR 110 (1965).

union membership has come to have in the modern industrial society, protection against arbitrary exclusion should be given to all workers and not left to piecemeal legislation. Labor organizations long ago ceased to bear more than the most superficial resemblance to other voluntary associations, and presently exert extensive influence over the lives of millions of workers. Unions are generally in control of employee grievances "from the shop committee stage, up to arbitration."[38] While every labor organization regulated by the NLRA has a legal duty to represent fairly nonunion members,[39] a breach of this duty is often difficult to prove.[40] Thus, the nonmember may not always receive the protection to which he is entitled. Deprivation of union membership can also have a substantial defamatory effect: in many trades social acceptability is directly related to membership in a labor organization. Yet, while some courts have recognized this by awarding damages for loss of reputation due to wrongful suspensions and expulsions,[41] they apparently have never done so in cases of arbitrary exclusion.

The NLRA has magnified the importance of union membership and has diminished the power of the individual vis-à-vis his employer. Under section 9(a) of the NLRA,[42] a union which is selected by a majority of the workers in an appropriate bargaining unit becomes the exclusive bargaining representative of all the employees in that unit. An employee's only weapons for inducing the union to perform in accordance with his desires are his rights to vote, run for office, and participate in union meetings.[43] Since these weapons are not available to nonmembers, they are bound by collective bargaining contracts negotiated by organizations in whose policies they have no voice. They also run the risk of being discriminated against at the bargaining table. If particular bargaining goals are being urged by non union members, the union's legal duty of fair representation might be insufficient to insure that the negotiators, over whose selection the nonmembers have no control, will pursue those goals in good faith.[44]

38. Hewitt, *supra* note 33, at 924.

39. Steele v. Louisville & N.R.R., 323 U.S. 192, 201-04 (1944).

40. Hewitt, *supra* note 33, at 923:

> Because of the intangibles involved and the difficulty of proving unfair differentiation, the right to a fair representation has not, in its enforcement, always proved effective in preventing unjust treatment. And if the worker is not a participant, he may not always know whether he is being fairly represented.

41. See, *e.g.*, Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 139 (1950); Simmons v. Avisco, Local 713, 350 F.2d 1012 (4th Cir. 1965).

42. 49 Stat. 453 (1935), 29 U.S.C. § 159(a) (1964):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive bargaining representatives of all the employees in such unit. . . .

43. See Hewitt, *supra* note 33, at 924; Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1056 (1951); Wellington, *Union Democracy and Fair Representation*, 67 YALE L.J. 1327, 1329 (1958).

44. See note 40 *supra* and accompanying text. See generally Blumrosen, *Legal Protection Against Exclusion From Union Activities*, 22 OHIO ST. L.J. 21 (1961).

A final weakness in the existing law is that "supervisory" employees and employees who do not qualify under the Commerce Clause limitation of the NLRB's authority are not covered by the protective provisions of the NLRA. Nonmembers who fall within either of these categories may actually be prevented from obtaining or retaining *employment*, since in the majority of states without "right-to-work" laws, labor organizations, when not covered by the NLRA, remain free to enter into contracts which bind employers to hire only union members and to enforce such contracts by strikes or threats to strike.[45]

Thus the need for greater protection of the individual worker against unreasonable union admissions policies is apparent. Yet the three most commonly proposed remedies are unsatisfactory. First, it has been argued that since unions exercise vast power over the nation's economy as a direct result of the protection afforded them by federal legislation, they should be treated as governmental instrumentalities and consequently should be subjected to the constitutional limitations applicable to such instrumentalities.[46] Courts have found this argument troublesome. The approach might result in rendering unconstitutional section 102(a)(2) of the LMRDA, which allows unions to restrict speech and assembly considered detrimental to the union as an institution.[47] Beyond this, there is a rather im-

45. The position of unions not covered by the NLRA is directly analogous to that of all labor organizations prior to 1947 when the Taft-Hartley Act added § 8(b)(2) to the National Labor Relations Act. Thus, pre-1947 decisions are helpful in indicating the extent to which unions, not limited by federal legislation, can affect the ability of nonmember workers to earn a livelihood in their chosen trade. The vast majority of these cases held that unions could simultaneously pursue arbitrary membership policies and enforce closed-shop agreements. See note 22 *supra*. The courts of only three states appear to have deviated from this rule: James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Wilson v. Newspaper & Mail Deliverers Union, 123 N.J. Eq. 347, 197 Atl. 720 (1938); Dorrington v. Manning, 135 Pa. Super. 194, 4 A.2d 886 (1939). In each of these cases the union was enjoined from arbitrarily excluding workers, but was not prohibited from enforcing a union-shop agreement. This would appear to be the appropriate means for protecting workers since a judicial refusal to enforce a union-shop agreement would contravene the legislative policy of those states which have not enacted "right-to-work" laws. It is important to note, however, that the prima facie tort theory would also accomplish this objective without vitiating the effect of union-shop agreements.

46. Hewitt, *supra* note 33, at 939-42. At 942, the author states: "In negotiating a collective bargaining contract, and otherwise representing the workers, the recognized union is exercising legislative and governmental power." A similar opinion is expressed in Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1074 (1951): "If unions are recognized as a form of industrial government, then the rights of a member within a union should be equivalent to the rights of a citizen within a democratic society." The author of the Note in 58 HARV. L. REV. 448 (1945), on the other hand, takes a slightly different tack, arguing that the certification of discriminatory unions is unconstitutional.

47. 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(2) (1964):

> Every member of a labor organization shall have the right to . . . express any views, arguments, or opinions . . . *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . . .

precise fear among courts and commentators that treating unions as instrumentalities of the government will jeopardize union autonomy by inviting increased governmental regulation of legitimate union activities.[48] While such fears may be unjustified, only the Supreme Court of Kansas has accepted the government-instrumentality approach.[49] Second, Congress has been urged to enact a law prohibiting labor organizations from excluding applicants for membership on any arbitrary or unreasonable grounds.[50] Such legislation could clearly be effective and would have the additional advantage of providing a national standard which would be subject to Supreme Court review. However, since Congress has shown no sign of being prepared to interfere further in internal union affairs, this approach does not appear to be a practical alternative. Third, it has been suggested that the NLRB expand its operations into the exclusion-expulsion area.[51] Several cases suggest that the NLRB is willing to remedy unreasonable expulsions and suspensions in certain particularized circumstances.[52] However, the proviso to section 8(b)(1)(A) of the NLRA[53] is so explicit in its protection of the right of unions to "prescribe . . . [their] own rules with respect to the acquisition and retention of membership therein . . ." that it seems unlikely that arbitrary expulsion or exclusion cases can generally be remedied by the NLRB.

48. See, *e.g.*, Oliphant v. Brotherhood of Locomotive Firemen, 262 F.2d 359, 363 (6th Cir.), *cert. denied*, 359 U.S. 935 (1958) (holding that Negro workers have no constitutional right to admission to membership in a union representing them under the Railway Labor Act); Cox, *supra* note 16, at 620:

> It has also been argued that the powers which the NLRA vests in labor unions are so far governmental that all actions, including election and rejection of members, are subject to the restrictions which the fifth and fourteenth amendments impose upon the federal and state authorities. . . . In my opinion the reasoning is highly dangerous. The implications of calling labor unions governmental instrumentalities are not easy to perceive but surely the designation would invite more and more regulation with consequent loss of independence.

49. Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946) (holding that a union which represented Negro employees under the Railway Labor Act was constitutionally bound to admit them to membership).

50. Aaron & Kamaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 631 (1949); Cox, *supra* note 16, at 620-24; Hewitt, *supra* note 33, at 944-46 (but prefers creation of a common-law "right to union membership"); Summers, *The Right To Join a Union*, 47 COLUM. L. REV. 33, 68-74 (1947) (regards this as the only practical way to solve the problem in light of the lack of likelihood that the courts will adopt the constitutional approach).

51. Note, *Union Disciplinary Power and Section 8(b)(1)(A) of the National Labor Relations Act: Limitations on the Immunity Doctrine*, 41 N.Y.U.L. REV. 584 (1966).

52. In Local 138, Int'l Union of Operating Eng'rs (Charles S. Skura), 148 N.L.R.B. 679 (1964) the Board overruled prior authority and held that a union could not fine a member for having filed unfair practice charges against it. This decision was expanded into the expulsion area in Cannery Workers, 159 N.L.R.B. No. 47 (June 21, 1966), where the Board ruled that a union could not expel a member for filing charges with the Regional Director. Moreover, in Philadelphia Moving Picture Mach. Operators Union, 159 N.L.R.B. No. 124 (June 27, 1966), it was held that a member could not be expelled for inducing a nonmember to charge the union with an unfair labor practice.

53. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).

The prima facie tort doctrine avoids the difficulties inherent in these approaches and in the traditional common-law property and contract theories. It affords the worker the broadest possible protection against unreasonable deprivation of membership status, while not unduly limiting the freedom of labor organizations to pursue legitimate union interests. Because prima facie tort is wholly a common-law doctrine,[54] the protection it provides is not confined within the jurisdictional limits that restrict the reach of federal labor legislation and the Civil Rights Act. Yet, unlike the traditional common-law theories,[55] the tort principle is applicable in exclusion as well as expulsion cases. Moreover, the theory recognizes that the worker's real interest in union membership rests not on semifictional property and contract rights,[56] but rather on the benefits that he derives from having a voice in the organization that represents him. Finally, the prima facie tort doctrine could prove even more effective in cases of racial discrimination than the remedies provided in the Civil Rights Act.[57] A party suing under that act has the burden of showing that the rejection of his membership application was a product of racial discrimination,[58] a difficult task at best. On the other hand, under the prima facie tort theory, once a worker can show that he was excluded, the burden of proof shifts to the union to show that the denial of membership was "justified."

Despite the broad protection the doctrine affords the individual employee, its use will not prevent unions from imposing reasonable membership requirements. A fundamental aspect of the prima facie tort principle is that the defendant will not be held liable if he can show justification for his action.[59] Consequently, while the theory will prevent unions from arbitrarily restricting their membership, it will not proscribe the good-faith application of reasonable admissions standards.[60] Occupational skill requirements, nondiscriminatory quotas, rules barring adherents to "dual unionism," and provisions for weeding out persons who have clearly manifested subversive

54. See note 7 *supra*.

55. See note 22 *supra* and accompanying text.

56. See note 21 *supra* and accompanying text.

57. See notes 29-32 & 34 *supra* and accompanying text.

58. The act merely allows the aggrieved party to bring suit in federal court and does nothing to relieve the plaintiff of his traditional burden to prove his case. 78 Stat. 260-61, 41 U.S.C. §§ 2000e-5(e) & (f) (1964).

59. In unfair trade cases, one who puts another out of business will escape liability if he can prove he was acting in the course of otherwise lawful business competition. See, *e.g.*, Tuttle v. Buck, 107 Minn. 145, 151, 119 N.W. 946, 948 (1909). Similarly, in labor-management relations cases, advancement of worker interests will "justify" causing injury to an employer through a strike. See, *e.g.*, Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 360-75, 34 N.E.2d 349, 354-61 (dissenting opinion of Justice Lehman), *cert. denied*, 314 U.S. 615 (1941).

60. In *Hurwitz* the court suggested that a union may lawfully restrict its membership if the restriction is "necessary for the union's welfare and [is] . . . invoked in good faith and without malice." Principal case at 74.

tendencies all might still legally be imposed. Thus, there is no danger that the application of prima facie tort to prevent arbitrary union exclusions will conflict with the provisions of the NLRA[61] and the LMRDA[62] which are designed to permit labor organizations to protect themselves against infiltration by persons whose membership would be detrimental to the union as an institution.[63] Moreover, unlike the treatment of unions as governmental instrumentalities, the use of the doctrine will not jeopardize union autonomy.[64]

A significant practical advantage of the prima facie tort theory is that there are no obstacles preventing the courts from immediately applying it to union exclusions. As noted earlier,[65] many states long ago adopted the doctrine into their common law. While none has expanded its application to cover internal union affairs, the principal case indicates the facility with which this may be done. Nor is there a problem of federal pre-emption: the Supreme Court has held that union expulsions are primarily a matter of state law,[66] the LMRDA expressly leaves undiminished the power of the states to regulate internal union affairs,[67] and the Civil Rights Act specifically makes provision for resort to state procedures.[68]

Conclusion

The growth of the influence of labor organizations has brought with it an increase in the value of union membership. As a result, deprivation of union membership has come to have a more significant effect upon the person so deprived. If the union action causing this hardship is unjustifiable, the injured worker should be afforded legal protection. The most logical, effective, and practicable means of granting this protection is through the application of the prima facie tort doctrine.

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61. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964), quoted in note 23 *supra.*

62. 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(2) (1964), quoted in note 47 *supra.*

63. The language of the LMRDA is expressly limited to such situations. 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(2) (1964), quoted in note 47 *supra.* Although the NLRA provision is broader [61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964), quoted in note 23 *supra*], it has been applied primarily to cases where expulsion was justified in order to preserve the union's very existence. See, *e.g.*, Tawas Tube Prods., Inc., 151 N.L.R.B. 46 (1965) (expulsion of members for filing decertification petition is within proviso to § 8(b)(1)(A)).

64. For example, the doctrine could have no restrictive force in the area of labor-management relations where the common law is pre-empted by federal legislation. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (holding that the state and federal courts must defer to the exclusive competence of the NLRB whenever the activity which is the subject matter of the litigation is arguably either prohibited by § 8 or protected by § 7 of the NLRA).

65. See note 7 *supra.*

66. International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958).

67. 73 Stat. 523 (1959), 29 U.S.C. § 413 (1964).

68. 78 Stat. 259-60, 42 U.S.C. §§ 2000e-5(b) & (c) (1964).