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J.R. Norton v. General Teamsters: The Disintegration of the National Policy on Union Tort Liability

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The Worker: The strike's been going on for four weeks. In the beginning we were together—nothing got in or out of the shop. The boss gets an injunction saying we can't block the entrances—what's a judge know about these things. More and more people are crossing the line. The union's strike benefits can't pay for my mortgage, my car and with Christmas coming . . . Damn!

There's the supervisor looking so smug, like he knew the union would lose. We can't lose now, we can't lose . . . . Maybe this rock will wake him up . . . .

The Owner: I feel bad for those people. I still don't know why they went on strike. I told them there was no money for a raise this year. Everything's gone up . . . taxes, social security, pollution controls . . . . The competition keeps cutting prices—how do they do that? I just had to say no—I can't afford to lose this business—it's the only thing I have. I don't know why they wanted a union anyway—what good will it do?

I. INTRODUCTION

A strike by its very nature is an emotional and potentially volatile event. Section 7 of the National Labor Relations Act ("NLRA") guarantees a worker's right to engage in collective action.[1] Despite this protection, the boundaries between protected activity and unprotected misconduct can become blurred during a strike. When individual emotions erupt into violence, questions of liability frequently emerge. As a result, many courts grapple with the question of when it is proper to hold a union liable for the violent acts of its members.

1. Section 7, as amended, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The National Labor Relations Act, as amended by the 86th Congress in 1959, is codified at 29 U.S.C. §§ 151-168 (1982).

This Comment analyzes the different mechanisms for determining union liability arising from striker misconduct. The resolution of union liability issues primarily involves determining the proper standard of proof. The United States Congress and the California courts have adopted contrasting approaches to determine the appropriate standard of proof.

In 1932, Congress enacted the Norris-LaGuardia Act.[2] Section 6 of the Act rejected common law agency principles and mandated a "clear proof" standard for determining union liability in the federal courts.[3] In contrast, California courts, in two recent decisions, expressly rejected the federal approach and adopted a "preponderance of the evidence" standard as the appropriate level of proof in state tort actions against unions.[4] The federal standard reflects a national labor policy favoring the institutional preservation of unions. California's adoption of a lesser standard of proof illustrates the disintegration of that national policy.

This Comment will compare the California approach with the federal standard, and address other alternative methods for adjudicating union tort liability. Section II will compare the federal and California standards and review the positions taken by other jurisdictions. Section III will analyze *J.R. Norton v. General Teamsters*[5] in order to understand the policy implications behind California's adoption of the "preponderance of the evidence" standard. Section IV will discuss the continuing vitality of the federal standard and explain why support for a national policy appears to be crumbling. Section V will conclude this Comment with some prescriptions for restoring the national policy on union tort liability.

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2. The Norris-LaGuardia Act is codified at 29 U.S.C. §§ 101-115 (1982).

3. Section 6 of the Norris-LaGuardia Act provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute shall be held liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon *clear proof* of actual participation in, or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106 (1982) (emphasis added). This Comment refers to section 6 as the federal standard or "clear proof" standard.

4. *See* J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 256 Cal. Rptr. 246, *cert. denied*, 110 S. Ct. 242 (1989); Vargas v. Retail Clerk's Local 1428, 90 D.A.R. at 9364 (July 20, 1989). The dissenting opinion of P.J. Spencer was an inspiration for this Comment. The California Supreme Court issued an order denying review in *Vargas* and decertifying the opinion on November 7, 1989. 89 D.A.R. at 13354 (Nov. 7, 1989). Decertification means that the opinion cannot be cited for any purpose.

5. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 256 Cal. Rptr. 246, *cert. denied*, 110 S. Ct. 242 (1989).

The federal approach, with its higher standard of proof, protects unions against unwarranted tort liability. States adopting a lesser standard may expose unions to potentially crippling damage awards without significantly benefitting the public. Reaffirming our national policy can accommodate the interests of both unions and tort victims.

II. COMPARATIVE TREATMENT OF UNION LIABILITY

An analysis of the standard of proof required to establish union tort liability touches upon basic labor policies. Some states have adopted policies directly contrary to the national policy expressed by Congress. Perhaps the best way to understand the issue of union liability for a third party's tortious conduct is to visualize the varying treatments on a continuum. At one end, under the California standard, unions can be held liable simply by establishing that the misconduct occurred within the scope of an agency relationship between the union and the individual wrongdoer.[6] This standard represents a form of strict liability. At the other end of the continuum, any form of vicarious liability would be eliminated.[7] The federal standard can be understood as a compromise lying between the two extremes.

A. The Federal Standard

By passing the Norris-LaGuardia Act, Congress sought to achieve a dual purpose. First, the reform was to limit the federal judiciary's involvement in labor disputes.[8] Second, the Act sought to protect the rights of workers to organize and engage in collective action.[9] As a means of achieving these purposes, the "clear proof" standard was incorporated as a part of the major reform effort represented by the Act.[10]

The Act's legislative history expressly recognizes the unique sta-

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6. *Id.* at 438 n.5, 256 Cal. Rptr. at 250 n.5.

7. *See, e.g.*, International Union of Operating Engineers v. Long, 362 So. 2d 987, 989 (Fla. Dist. Ct. App. 1978), *rev. denied*, 372 So. 2d 469 (Fla. 1979).

8. A "labor dispute" is defined in section 13(c) of the Norris-LaGuardia Act as:

> any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(c) (1982).

9. L. MERRIFIELD, T. ST. ANTOINE & C. CRAVER, LABOR RELATIONS LAW 24-26 (1989) [hereinafter LABOR RELATIONS LAW]; S. REP. NO. 163, 72d Cong., 1st Sess. 19-21 (1932).

10. S. REP. NO. 163, 72d Cong., 1st Sess. 19-21 (1932).

tus of unions.[11] As noted in the Senate Report, the structure of a union may resemble a corporate entity, but there are important distinctions.[12] The foundation of the union structure is the local union.[13] Although the local union may range in number from under 100 members to over 50,000 members, it must be understood that at its core the local union is a collection of individuals and not a monolithic entity.[14] Most local unions are affiliated with a national or international union but the local unions usually maintain varying degrees of control and independence.[15]

Since the union, at either the local or international level, is an unincorporated association, it acts through its officers or agents.[16] Given the volatility of a strike environment, even the best intentioned officers may fail to control members.[17] The union exists to serve its membership. Conversely, individual members do not necessarily act at the union's direction.[18] A union may simply be unaware of an individual member's wrongdoing during a strike.[19] Even if a union is not aware of its members misconduct, it may be liable under common law agency theories once the plaintiff establishes a connection between the wrongdoer and the union.[20] Given the sometimes precarious control a union exercises over its own members, Congress enacted the "clear proof" standard to provide reasonable assurance that a union would be responsible for the misconduct of its members.[21]

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11. *Id.*

12. *Id.* at 20.

13. A. GOLDMAN, LABOR LAW AND INDUSTRIAL RELATIONS IN THE UNITED STATES OF AMERICA 182-84 (1979).

14. *Id.* at 182. Goldman notes: "Union members have not totally surrendered their prerogatives of self-governance. Rebellion against the local leadership breaks out frequently enough in most unions to make the elected and appointed officials aware of their vulnerability to an aroused and disgruntled membership." *Id.* at 184.

15. *Id.* at 184-86. The term "International Union" refers to those unions which have affiliated locals in both the United States and Canada.

16. *See, e.g.*, CAL. CORP. CODE § 24001(a) (West 1985). This provision provides that an unincorporated association such as a union is liable to third parties for the acts and omissions of its agents "as if the association were a natural person." *Id.*

17. A. GOLDMAN, *supra* note 13, at 184.

18. *Id.*

19. S. REP. NO. 163, 72d Cong., 1st Sess. 20 (1932). "The officers chosen by a union are not employers of the membership. They have no control over their associates based upon the power of determining whether or not [to] employ them." *Id.*

20. *Id.*

21. *Id.*

> [T]he doctrine that a few lawless men can change the character of an organization whose members and officers are very largely law-abiding is one which has been developed peculiarly as judge-made law in labor disputes, and . . . the courts should be

The Supreme Court has recognized that the federal standard of proof relieves unions "from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members. . . ."[22] The Taft-Hartley Amendments to the NLRA, also known as the Labor Management Relations Act ("LMRA"),[23] diluted the strength of the federal standard. The LMRA restored a common law agency standard of proof in suits involving contractual violations and other actions permitted under the NLRA as amended.[24] Some observers viewed the LMRA as eliminating the special protection previously provided to unions by the "clear proof" standard.[25] Others interpreted the amendments as covering only a certain segment of litigation involving unions.[26] In short, the LMRA recognized that since unions were parties to contracts, they should have the capacity to sue and to be sued. The text of the LMRA did not address the issue of a union's liability in tort.[27]

In 1966, the Supreme Court resolved any ambiguity by reaffirming the continuing vitality of the "clear proof" standard in federal actions involving state tort claims against unions.[28] In *UMW v. Gibbs*, Gibbs sued the union for violations of the LMRA and on a state tort conspiracy claim.[29] Gibbs alleged that the union engaged in a secondary boycott and interfered with his coal hauling contract.[30] The jury returned a verdict against the union on both federal and state claims. The United States district court then set aside the verdict on the LMRA claim but upheld the state tort claim with an

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required to uphold the long-established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts.

Id.

22. United Bhd. of Carpenters and Joiners of Am. v. United States, 330 U.S. 395, 403 (1947).

23. The Labor Management Relations Act is codified at 29 U.S.C. §§ 141-167, 171-197 (1982).

24. *Id.* Section 301(e) of the LMRA states that "in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." 29 U.S.C. § 185(e) (1982).

25. *See* Evans, *The Law of Agency and the National Unions*, 49 KY. L.J. 295, 298-99 (1961).

26. *See* Cox, *The Labor Management Relations Act*, 61 HARV. L. REV. 274, 310 (1948).

27. *Id.*

28. *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966). This case is also recognized as a leading case on the concept of pendent jurisdiction.

29. *Id.* at 717-18.

30. *Id.* at 720.

award of $30,000 in compensatory and $45,000 in punitive damages.[31] The Court of Appeals for the Sixth Circuit affirmed, but the Supreme Court reversed and remanded.[32]

The Supreme Court in *Gibbs* clarified several issues involving the federal standard of proof. First, the Court held that the LMRA did not repeal the "clear proof" standard. In fact, it probably retained the standard since state claims might expose a union to punitive damages.[33] While the LMRA sought to equalize the treatment of employers and unions, it did not remove the special status afforded unions in tort actions. Congress recognized that if unions were exposed to unnecessary tort damages, the national policy of improving working conditions through collective bargaining would be jeopardized.[34]

Additionally, the *Gibbs* Court attempted to define the "clear proof" standard. The Court stated that finding a union liable in tort requires greater proof than the "preponderance of the evidence" customary in civil actions, but less than the "beyond a reasonable doubt" standard required in criminal actions.[35] The plaintiff must actually convince the trier of fact that the union was responsible, rather than merely tip the scales in his favor.[36] The purpose of the "clear proof" standard is to require a close nexus between the union as a legal entity and the alleged harm caused by a union member. Otherwise, the union would face potential liability for the unauthorized and wrongful acts of a single member.[37]

In *Ramsey v. UMW*, the Supreme Court further clarified the federal standard by holding that only the agency and authorization issues must meet the higher "clear proof" standard, while all other issues are determined by a "preponderance of the evidence."[38] A union can

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31. *Id.* at 720-21 n.6.

32. *Id.* at 721.

33. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 736 (1966).

34. *Id.* at 736-37. The Court's concern is illustrated in the following passage:

> The driving force behind § 6 and the opposition to § 303, even in its limited form, was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control. Plainly, § 6 applies to federal court adjudications of state tort claims arising out of labor disputes, whether or not they are associated with claims under section 303 to which the section does not apply.

Id. Section 303 of the LMRA pertains to the prohibition against secondary boycott activity and the availability of federal district court jurisdiction. *See* 29 U.S.C. § 187 (1982).

35. *Gibbs*, 383 U.S. at 737.

36. *Id.* The Court stated: "He is required to persuade by a substantial margin . . . ."

37. *Id.*

38. Ramsey v. United Mine Workers of Am., 401 U.S. 302, 310-11 (1971) (reversing district court and Sixth Circuit rulings that all elements of an underlying anti-trust action must

certainly be held liable for unlawful or tortious conduct. The *Ramsey* Court, however, reaffirmed the necessity of the "clear proof" requirement before a union can be held responsible for the alleged harm.[39]

To illustrate the application of the federal "clear proof" standard, it may be helpful to use the example of a business whose equipment is sabotaged during a strike. The business, as plaintiff, must establish the connection between the union and the individual wrongdoer who sabotaged the equipment by "clear proof." The plaintiff may establish other issues, such as the elements of the tort and damages, by a "preponderance of the evidence" standard. Thus, the tort victim has an effective remedy while the union risks financial liability only where its responsibility is clearly established.

B. The California Position

J.R. Norton was a case of first impression in California since the state courts had not yet ruled on the appropriate standard of proof to be applied in state tort actions against a union.[40] The case resulted from a strike by a Teamsters local against a major agricultural company's farming and packaging operations.[41] Shoving and threats by strikers on the picket line as well as arrests of certain strikers led to an injunction prohibiting further violence.[42] Further union member misconduct continued: replacement workers were threatened, a company's truck windshield was broken, nails and spikes were placed in the roadway, strikers drove in front of company trucks in an unsafe manner, and someone even shot at a replacement driver.[43] The company wrote mailgrams to the union leaders complaining about the strike conduct, but the union took no active steps to deter the conduct. In fact, the union actually provided one arrested striker with legal representation and reimbursed his fine.[44]

In response to the misconduct, the agricultural company sued various individuals, the local union and the international union for

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meet the "clear proof" standard). The dissent would hold that proof of the "unlawful acts" must also be established by the "clear proof" standard. *Id.* at 315 (Douglas, J., dissenting).

39. *Id.* at 310-11.

40. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 440-41, 256 Cal. Rptr. 246, 251-52, *cert. denied*, 110 S. Ct. 242 (1989).

41. *Id.* at 435, 256 Cal. Rptr. at 248.

42. *Id.* at 436-37, 256 Cal. Rptr. at 249.

43. *Id.* at 436, 256 Cal. Rptr. at 249.

44. *Id.* at 436-37, 256 Cal. Rptr. at 249.

tortious interference with business.[45] A jury returned a verdict against all the defendants.[46] The local union's share of the damage award included $252,000 in compensatory damages and $360,000 in punitive damages.[47] On appeal, the union contended that the federal "clear proof" standard preempted state common law agency principles.[48] The California court of appeal rejected the union's argument. Thus, the appropriate standard for determining a union's liability remained a "preponderance of the evidence."[49]

1. Agency Theory of Tort Liability

Under *J.R. Norton*, the California courts have adopted common law agency principles to determine union responsibility for tortious conduct.[50] The broad phrase "common law agency principles" actually encompasses two distinct theories of liability. Under a general agency test, a principal is liable for the conduct of its agent or employee where the principal has authorized, or later ratified, the agent's actions. In addition, the acts of the agent or employee must be within the scope of his authority or employment.[51] In effect, the agent is so intertwined with the principal that the agent's tort is imputed to the

45. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 434, 256 Cal. Rptr. 246, 247, *cert. denied*, 110 S. Ct. 242 (1989).

46. *Id.*

47. *Id.* at 434-35, 256 Cal. Rptr. at 248. The local union was the only party involved in the appeal.

48. *Id.* at 437, 256 Cal. Rptr. at 249. The trial court instructed the jury on both the federal and state standards of proof. *Id.* at 437-39, 256 Cal. Rptr. at 250-51. The court of appeal found this to be harmless error since any jury confusion worked to the benefit of the union. *Id.* at 443, 256 Cal. Rptr. at 254.

49. *Id.* Section III discusses the federal preemption issue.

50. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 437-39, 443, 256 Cal. Rptr. 246, 249-51, 254, *cert. denied*, 110 S. Ct. 242 (1989).

51. RESTATEMENT (SECOND) OF AGENCY § 228 (1958) states:

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of a kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master; and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. An agency jury instruction given in *J.R. Norton* stated, "[o]ne is the agent of another person at a given time if he is authorized to act for or in place of such person or if his acts are later ratified by such person. One may be an agent although he receives no payment for his services." 208 Cal. App. 3d at 438 n.5, 256 Cal. Rptr. at 250 n.5.

principal.[52]

A second theory of agency liability is the doctrine of *respondeat superior*.[53] *Respondeat superior* imputes the agent's tortious conduct to the principal if the conduct is "incidental" or "relates" to the employment relationship.[54] Under *respondeat superior*, the principal is liable, without fault, provided the agent or employee acted within the scope of employment. The existing, underlying relationship creates liability for a principal.[55] For example, a company is vicariously liable when its driver is involved in an accident while on duty.[56] Applying this test to a union during a strike, the existence of membership or employment status alone exposes the union to liability.[57]

The general agency test departs only slightly from the federal "clear proof" standard since the plaintiff still must establish the basic agency relationship.[58] In contrast, however, the doctrine of *respondeat superior* completely departs from the federal protection given to unions. While federal courts require a plaintiff to establish that the union authorized or ratified the tortious act, the doctrine of *respondeat superior* can create liability if a relationship alone is established.[59]

A union is more likely to face tort liability for strike-related misconduct under California's approach than under the federal standard.[60] The federal standard not only requires "clear proof" of the

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52. *See* CAL. CIV. CODE §§ 2295, 2338 (West 1985). Under general agency principles there must exist an underlying relationship between agent and principal as well as authority for the agent's actions. *Id.*

53. *J.R. Norton*, 208 Cal. App. 3d at 438 n.5, 256 Cal. Rptr. at 250 n.5. In *J.R. Norton*, the jury instruction on *respondeat superior* stated:

> It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority or employment. Such conduct is within the scope of his authority or employment if it occurs while the agent is engaged in the duties which he was employed to perform and relates to those duties. Conduct for the benefit of the principal which is incidental to, customarily connected with or reasonably necessary for the performance of an authorized act is within the scope of the agent's authority or employment.

Id.

54. *Id.*

55. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 438 n.5, 256 Cal. Rptr. 246, 250 n.5, *cert. denied*, 110 S. Ct. 242 (1989).

56. For a recent discussion on the doctrine of *respondeat superior* in California, see John R. v. Oakland Unified School Dist., 48 Cal. 3d 438, 769 P.2d 948, 256 Cal. Rptr. 766, *reh'g denied*, 57 U.S.L.W. 2591 (1989) (holding school district not vicariously liable for teacher's sexual misconduct with student).

57. *J.R. Norton*, 208 Cal. App. 3d at 438 n.5, 256 Cal. Rptr. at 250 n.5.

58. *See* CAL. CIV. CODE § 2295 (West 1985). This section defines an agent as "one who represents another, called a principal, in dealings with third persons." *Id.*

59. *J.R. Norton*, 208 Cal. App. 3d at 438 n.5, 256 Cal. Rptr. at 250 n.5.

60. *Compare* the text of the federal standard, *supra* note 3, and the discussion in *Gibbs*,

actor's status with the union but also the union's connection with the harm.[61] This federal approach balances the social policies of compensating tort victims and preserving the union as an institution.[62] Common law agency principles shift the trial's focus to the actor's status without recognizing the national policies granting unions limited protection against tort liability.[63] The *J.R. Norton* court, in effect, has elevated the rights of tort victims over the institutional preservation of unions.[64]

2. Quantum of Proof

The *J.R. Norton* court also held that a union's agency liability can be established by the "preponderance of the evidence" instead of the "clear proof" standard.[65] The court noted that the general rule in California civil trials requires a plaintiff to prove a case by the "preponderance of the evidence" unless "otherwise provided by law."[66] In the union context, this means a plaintiff must establish that a person associated with the union committed a specific act.[67] Eligible persons include officers, employees and union members.[68] The plaintiff must also show that the tortious act occurred in the course of the employment or agency relationship.[69] Under *respondeat superior*, however, the plaintiff need only establish that the act was "broadly incidental" to the relationship between the union and the individual tortfeasor.[70] Of course, any specific tort has its own elements which

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supra notes 28-37 and accompanying text, *with* the *J.R. Norton* jury instructions, 208 Cal. App. 3d at 438 n.5, 256 Cal. Rptr. at 250 n.5.

61. Ramsey v. United Mine Workers of Am., 401 U.S. 302, 309-11 (1971).

62. *Id. See also* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 736-37 (1966).

63. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 439-41, 256 Cal. Rptr. 246, 250-53, *cert. denied*, 110 S. Ct. 242 (1989). The court summarized various federal policies before rejecting the application of the higher standard. *Id.*

64. *Id.* at 443, 256 Cal. Rptr. at 253.

65. *Id.*

66. *Id.*; CAL. EVID. CODE § 115 (West 1966).

67. *J.R. Norton*, 208 Cal. App. 3d at 438 n.5, 256 Cal. Rptr. at 250 n.5.

68. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 438 n.5, 256 Cal. Rptr. 246, 250 n.5, *cert. denied*, 110 S. Ct. 242 (1989). Since an agent need not receive compensation, a union sympathizer or family member engaging in tortious conduct incidental to strike activity arguably could be deemed an agent.

69. Under California law a union as an unincorporated association is liable for acts of its members. CAL. CORP. CODE § 24001 (West Supp. 1990). *See J.R. Norton*, 208 Cal. App. 3d at 443, 256 Cal. Rptr. at 253. Section 2338 of the California Civil Code establishes a principal's liability for the tortious acts of an agent committed "in and as a part of the transaction of such business . . . ." CAL. CIV. CODE § 2338 (1985).

70. *See* Perez v. Van Groningen & Sons, Inc., 41 Cal. 3d 962, 719 P.2d 676, 227 Cal.

also must be established.[71]

This Comment now turns to the approaches adopted by other jurisdictions in order to more fully appreciate the implications of *J.R. Norton*. The approach in *J.R. Norton* is similar to that taken by some other jurisdictions but conflicts with others. Moreover, the liability theories recognized in *J.R. Norton* are among the most damaging to the national policy on union tort liability.

C. The Position of Other States

Several states have considered applying the federal "clear proof" standard to state court tort actions against unions.[72] Courts in Massachusetts, North Carolina, Washington and Arizona have explicitly rejected the "clear proof" standard in these actions.[73] In contrast, Pennsylvania, Kansas, Michigan, Louisiana and Connecticut have expressly adopted the "clear proof" standard.[74] This Comment organizes the above states by those which have "little Norris-LaGuardia Acts" and those which lack a statutory scheme. This dichotomy graphically demonstrates the widely conflicting approaches among the states, even where they share similar statutory schemes.

Another group of states has adopted alternative mechanisms for resolving union liability issues. Florida and Rhode Island have not addressed the quantum of proof issue but have rejected liability based on the doctrine of *respondeat superior*.[75] Virginia seems to have adopted a unique approach to the burden of proof issue which requires a defendant union to prove an act was outside the scope of employment once the agency relationship is established.[76]

This Comment will separately discuss England's statutory scheme which allows for union tort liability but limits damage awards. Analyzing the English approach is helpful because it represents a legislative treatment for union tort liability. The American approach, which leaves the issue to the states, effectively erodes a uniform policy by default.

Rptr. 106 (1968) (holding employer liable for injuries to child which occurred while child was passenger on tractor driven by uncle during work—uncle had been expressly told that no passengers were allowed).

71. *J.R. Norton*, 208 Cal. App. 3d at 438 n.4, 256 Cal. Rptr. at 250 n.4. This Comment focuses on the union's responsibility for tortious conduct not on the elements of the tort.

72. *See id.* at 440-41, 256 Cal. Rptr. at 251.

73. *See infra* notes 78-97, 116-133 and accompanying text.

74. *See infra* notes 98-115, 134-158 and accompanying text.

75. *See infra* notes 163-182 and accompanying text.

76. *See infra* notes 159-162 and accompanying text.

1. States with "Little Norris-LaGuardia Acts"

After Congress adopted the Norris-LaGuardia Act in 1932, many states adopted their own versions of the Act.[77] Although using nearly identical language, these states have reached diametrically opposite results regarding the application of the "clear proof" standard to issues of union tort liability.

a. Rejection of "clear proof" in tort actions

Section 6 of the Norris-LaGuardia Act is something of an anomaly. The statute generally governs equity actions, yet the "clear proof" language of section 6 addresses tort actions against unions.[78] Certain states adopted comparable statutory schemes, including the "clear proof" language, yet their courts refused to extend any special protection to unions facing tort actions.

i. Washington

The state of Washington has a "little Norris-LaGuardia Act" which includes "clear proof" language.[79] In *Buchanan v. International Brotherhood of Teamsters*, a non-striking worker sued the union for personal injuries allegedly suffered while driving through a picket line.[80] The trial court denied the union's summary judgment motion and the Washington Supreme Court granted review.[81]

The supreme court recognized that applying a "clear proof" standard could dramatically affect the case.[82] Applying the higher standard of proof "would be a substantial variation of the usual rules of vicarious agency liability and proof thereof."[83] The court rejected the union's plea to use the "clear proof" standard for two reasons.

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77. LABOR RELATIONS LAW, *supra* note 9, at 52.

78. *See* Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1982); S. REP. NO. 163, 72d Cong., 1st Sess. 19-21 (1932).

79. *See* Buchanan v. International Bhd. of Teamsters, 94 Wash. 2d 508, 510, 617 P.2d 1004, 1005 (1980). The relevant state statute is codified at WASH. REV. CODE ANN. § 49.32.070 (1989). It provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held liable in any court of the state of Washington for the unlawful acts of individual officers, members, or agents, except upon *clear proof* of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Id. (emphasis added).

80. *Buchanan*, 94 Wash. 2d at 509, 617 P.2d at 1004.

81. *Id.* at 510, 617 P.2d at 1004-05.

82. *Id.* at 510, 617 P.2d at 1005.

83. *Id.*

First, *Titus v. Tacoma Smeltermen's Union Local 25*, an earlier state decision, had limited the state statute to equitable relief such as restraining orders, injunctions and contempt matters.[84] The court recognized that *Titus* was decided before the United States Supreme Court issued its decision in *Gibbs*, but chose not to extend the "clear proof" requirement to state tort actions.[85] Second, by the state legislature's silence on the issue, the court presumed the legislature was aware of *Titus*, yet had chosen not to enact remedial legislation to protect unions in tort actions.[86]

ii. Massachusetts

Massachusetts has a statutory provision nearly identical to section 6 of the Norris-LaGuardia Act.[87] In *Tosti v. Ayik*, a union was sued for libel after publishing an article in the union newspaper.[88] The Massachusetts' Supreme Judicial Court held that the "clear proof" standard did not apply in tort actions against unions.[89] The court relied on the title of the Massachusetts act which referred to injunction procedures in labor disputes.[90] The court also cited the legislative history which expressed concern with liberalizing the state's injunction laws.[91]

Curiously, the supreme court cited both *Ramsey*[92] and *United Aircraft Corp. v. International Association of Machinists*[93] which extended the "clear proof" statutory protection to tort actions.[94] The

84. Buchanan v. International Bhd. of Teamsters, 94 Wash. 2d 508, 511, 617 P.2d 1004, 1005 (1980) (discussing Titus v. Tacoma Smeltermen's Union Local 25, 62 Wash. 2d 461, 383 P.2d 504 (1963)).

85. *Id.* at 509-10, 617 P.2d at 1005. For a discussion on *Gibbs*, see *supra* notes 28-37 and accompanying text.

86. *Buchanan*, 94 Wash. 2d at 511, 617 P.2d at 1005-06. "Since [the *Titus* decision the] legislature has met in 22 sessions. The legislature is presumed to know the decision and its effect." *Id.*

87. Massachusetts' statute provides in part:

> No officer . . . and no organization, participating or interested in a labor dispute . . . shall be held responsible or liable in any court for the acts of individual officers . . . except upon *clear proof* of actual participation in, actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

MASS. GEN. L. ch. 149, § 20B (1982) (emphasis added).

88. Tosti v. Ayik, 394 Mass. 482, 476 N.E.2d 928 (1985).

89. *Id.* at 488, 476 N.E.2d at 933.

90. *Id.* at 487, 476 N.E.2d at 933.

91. *Id.*

92. For a discussion of *Ramsey*, see *supra* note 38 and accompanying text.

93. *See infra* note 98 and accompanying text.

94. Tosti v. Ayik, 394 Mass. 482, 488, 476 N.E.2d 928, 933 (1985).

court distinguished these cases because they involved "violent labor disputes" and not general tort liability.[95] The "clear proof" standard was not available since the libel action did not arise out of a "violent labor dispute."[96] Where Washington relies on legislative acquiescence, Massachusetts strictly construes the statute and applies ordinary agency liability principles to unions.

The Massachusetts interpretation runs counter to all federal interpretations of Norris-LaGuardia's section 6.[97] The Massachusetts and Washington cases demonstrate that state courts are not bound by United States Supreme Court decisions construing identical statutes. Attorneys with cases in state courts, therefore, may not rely on national policy principles.

b. Acceptance of "clear proof" in tort actions

Connecticut and Pennsylvania courts extended the "clear proof" language in their respective statutes to tort actions involving unions. Connecticut directly relied on *Gibbs*, while Pennsylvania evoked a more general policy rationale. Both states accepted the national policy concern of limiting union liability.

i. Connecticut

Connecticut has a "little Norris-LaGuardia Act" with a provision similar to section 6. However, Connecticut's statute uses the term "proof" instead of "clear proof."[98] In *United Aircraft Corp. v. International Association of Machinists*,[99] the court rejected the employer's contention that the union should be held liable under a *re-*

95. *Id.* (citing with approval Nelson v. Haley, 112 N.E.2d 442 (Ind. 1953), and Buchanan v. International Bhd. of Teamsters, 94 Wash. 2d 508, 617 P.2d 1004 (1980)).

96. *Id.*

97. *See, e.g.*, United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966); Ramsey v. United Mine Workers of Am., 401 U.S. 302 (1971). The Senate Report's original description of the Norris-LaGuardia Act reads as follows: "to define and limit the jurisdiction of courts sitting in equity." S. REP. No. 163, 72d Cong., 1st Sess. 18 (1932).

98. CONN. GEN. STAT. ANN. § 31-114 (West 1989). The statute provides in pertinent part:

> No officer . . . and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court for the unlawful acts of individual officers, members or agents, except upon *proof* of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof.

Id. (emphasis added).

99. 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972).

spondeat superior theory.[100] Since the state statute was similar to the federal statute, the court chose to follow the United States Supreme Court's construction of the "clear proof" requirement in *Gibbs*.[101]

The court found that the legislature intended to require more than common law agency proof to hold a union liable in a state tort action.[102] In *United Aircraft*, the plaintiff was able to meet the higher standard of proof. There was evidence that officers and staff were involved in planning and participated in violent acts.[103] The court found that such evidence was sufficient to hold the union liable, even under the higher proof standard.[104] *United Aircraft* illustrates that under proper factual circumstances, unions can be held accountable for the misconduct of its members.

ii. Pennsylvania

Pennsylvania has a statutory provision which does not contain the same "clear proof" language as the Norris-LaGuardia Act, but protects unions against unwarranted tort liability.[105] In *Gajkowski v. International Brotherhood of Teamsters*, the Pennsylvania Supreme Court held that the state statute precluded the application of *respondeat superior* liability to unions.[106]

Gajkowski involved a wrongful death claim against the union arising when a security guard was shot by an intoxicated striker.[107]

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100. *Id.* at 85-86, 285 A.2d at 336. The court found "clear proof" and upheld liability but remanded on the issue of damages. *Id.* at 97-98, 285 A.2d at 341.

101. *Id.* at 86-87, 285 A.2d at 336-37.

102. *Id.* at 86, 285 A.2d at 336.

103. *Id.* at 96, 285 A.2d at 340-41.

104. United Aircraft Corp. v. International Ass'n of Machinists, 161 Conn. 79, 96-97, 285 A.2d 330, 340-41 (1971), *cert. denied*, 404 U.S. 1016 (1972).

105. 43 PA. CONS. STAT. § 206(h) (1964). The statute provides in pertinent part:

> No officer . . . [nor] association . . . participating or interested in a labor dispute . . . shall be held responsible or liable in any civil action . . . for the unlawful acts of individual officers . . . by the *weight of evidence* in other cases, and without the aid of any presumptions of law or fact, both of—(a) the doing of such acts by persons who are officers, members . . . (b) actual participation in, or actual authorization of, such acts, or of ratification . . . .

Id. (emphasis added).

106. Gajkowski v. International Bhd. of Teamsters, 548 A.2d 533, 541 (Pa. 1988).

107. *Id.* at 535. The case is remarkable for both its tragic elements and procedural complexity. The court was reconsidering an earlier decision, reported at 504 A.2d 840 (Pa. 1986), where it upheld a sizable jury verdict against the union. The union's request for rehearing was granted after it had been driven into bankruptcy proceedings due to the judgment. *Id.* at 536. For a critique of the earlier decision, see Comment, *Local Union Liability Imposed for Picket Line Violence—Gajkowski v. International Brotherhood of Teamsters*, 61 TEMP. L. REV. 607 (1988).

The shooting incident occurred after ten weeks of peaceful picketing against a 3M facility.[108]

The Pennsylvania court found that the statute's overriding purpose was the protection of unions against damage awards resulting from individual acts.[109] Given this legislative purpose, the doctrine of *respondeat superior* was deemed contrary to the statute.[110] The court reasoned that the statute reaches both individual and organizational liability.[111] The key distinction is that the organization, as an entity, cannot physically "participate" in an act, but can only "authorize" or "ratify" an agent's action.[112]

The doctrine of *respondeat superior* imputes constructive participation to the union, even if the act was never authorized or ratified.[113] In the first *Gajkowski* decision, the union's liability was predicated upon the tortfeasor's membership status and the union's organization of the picket line.[114] This reasoning demonstrates how easy it can be to establish a striker's relationship to a union or a union's involvement in the dispute. The second *Gajkowski* decision recognized that imposing liability in such situations would jeopardize the institutional stability of unions.[115]

When state and federal courts construe similar statutory language consistently, the results promote uniform judicial treatment of union tort liability. The Pennsylvania and Connecticut cases also show how courts may take national policy considerations into account while adjudicating state matters.

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108. *Gajkowski*, 548 A.2d at 536. Two picketers also were injured in the shooting. *Id.*

109. *Id.* at 537 (quoting with approval United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966)).

110. *Id.* at 543.

111. Gajkowski v. International Bhd. of Teamsters, 548 A.2d 533, 543 (Pa. 1988).

112. *Id.* at 543-44. Justice Papadakos, in his opinion announcing the judgment of the court, stated:

> I think it can be plausibly argued that the term "actual participation in" in our statute is meant to refer to the exposure to liability of an individual officer or member; and that an association or organization can only be found liable for damages if it authorized or ratified the unlawful acts.

Id.

113. *Id.* at 541.

114. *Id.*

115. *Id.* at 544. "Some years ago, our legislature made the judgment that imposing such liability on organizations or associations involved in a labor dispute is against public policy and would tend to the destruction of labor unions, a fate to be avoided." *Id.*

2. States Without "Little Norris-LaGuardia Acts"

Several states have confronted the problem of union tort liability without a guiding statutory scheme setting out the appropriate standard of proof. While some states have rejected the higher "clear proof" requirement, other states have embraced this special protection for unions.

a. Rejection of "clear proof" in tort actions involving unions

North Carolina and Arizona rejected attempts to extend the "clear proof" protection to state tort actions. Certain themes emerge from these cases. First, the reach of Norris-LaGuardia's section 6 protection is textually limited to the federal judicial system.[116] Second, the United States Supreme Court has chosen not to resolve this particular conflict among the states.[117] Finally, legislative silence is construed as an affirmative expression of public policy—if the legislature wished to protect unions, it would have enacted legislation.

i. North Carolina

In *R.H. Bouligny, Inc. v. United Steelworkers of America*, the court faced the issue of whether a union was entitled to a higher standard of proof in tort actions.[118] During an organizing drive, the Steelworkers' Union published various leaflets which stated, in essence, that the company did not care about its workers.[119] When the company brought a state libel action, the union based its defense on section 6 of the Norris-LaGuardia Act.[120]

The state supreme court held that it was appropriate to use state evidentiary standards.[121] Reasoning that the "clear proof" standard

116. *See* text of section 6, *supra* note 3.

117. Interestingly, the Supreme Court has denied *certiorari* in three of the cases under discussion. *See* J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 256 Cal. Rptr. 246, *cert. denied*, 110 S. Ct. 242 (1989); United Aircraft Corp. v. International Ass'n of Machinists, 161 Conn. 79, 285 A.2d 330 (1971), *cert. denied*, 404 U.S. 1016 (1972) (the state court protected the union); United Bhd. of Carpenters v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1962), *cert. denied*, 371 U.S. 954 (1963) (partially shifting the burden of proof to the union).

118. R.H. Bouligny, Inc. v. United Steelworkers of Am., 270 N.C. 160, 174, 154 S.E.2d 344, 356 (1967).

119. *Id.* at 163-66, 154 S.E.2d at 349-50.

120. *Id.* at 167, 154 S.E.2d at 351-52. The union claimed that it had not authorized or ratified the publication. The matter was before the Supreme Court on appeal from the trial court's sustaining of a demurrer against the union. *Id.* at 167, 154 S.E.2d at 351.

121. *Id.* at 174, 154 S.E.2d at 356.

was textually limited to "courts of the United States,"[122] the court noted that no United States Supreme Court case had extended the "clear proof" standard to state courts.[123] The court's rationale reflects a fundamental tension in our federal system. States are free to experiment unless the national government enacts a statute preempting the field.[124] Labor law occupies a unique legal position in that it is both a national and a local concern and thus a victim of this fundamental tension.

ii. Arizona

In *Carter-Glogau Laboratories v. Construction Laborers' Local 383*, the Arizona courts faced the issue of union liability for strike-related misconduct.[125] Strikers allegedly committed numerous acts of vandalism against Carter-Glogau property.[126] The company was awarded $118,672.62 in compensatory and $200,000 in punitive damages against the union.[127]

The Arizona Supreme Court flatly rejected the union's contention that the trial court erroneously applied the "preponderance of the evidence" standard.[128] The court reasoned that *Gibbs* allowed states to control strike-related violence.[129] Since *Gibbs* did not grant unions tort immunity, state courts were free to apply state evidentiary standards.[130]

The court then analyzed whether there was any mandate to apply the "clear proof" standard in Arizona public policy. The court found no express mention of "clear proof" in the relevant statutes.[131] Even more telling for the court was the fact that Arizona did not

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122. *Id.*

123. R.H. Bouligny, Inc. v. United Steelworkers of Am., 270 N.C. 160, 174, 154 S.E.2d 344, 356 (1967).

124. U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

125. Carter-Glogau Laboratories v. Construction Laborers' Local 383, 153 Ariz. 351, 736 P.2d 1163 (1968).

126. *Id.* at 353, 736 P.2d at 1165.

127. *Id.*

128. *Id.* at 354, 736 P.2d at 1166.

129. *Id.*

130. Carter-Glogau Laboratories v. Construction Laborers' Local 383, 153 Ariz. 351, 354, 736 P.2d 1163, 1166 (1968).

131. *Id.* at 354-55, 736 P.2d at 1166-67. The court was examining Arizona's labor relations statutes which are codified at ARIZ. REV. STAT. ANN. §§ 23-1301 to -1411 (1983 & Supp. 1989). These statutes are commonly referred to as Arizona's "right to work" law.

incorporate the federal standard when the voters approved the labor legislation in 1947 and 1948.[132] Since the Norris-LaGuardia Act existed at the time Arizona passed its labor legislation, the court held that the legislature's failure to enact a "clear proof" standard reflected a deliberate policy choice.[133] The Arizona court's reliance on legislative silence is yet another theme reflected in the cases.

b. *Adoption of the "clear proof" standard in tort actions against unions*

Certain state courts have voluntarily adopted the higher proof standard for union tort liability. The courts of these states defer to the national policy of preserving the institutional stability of unions. In Kansas, the adoption of the "clear proof" standard is additionally supported by the judicial comity rationale.

i. Louisiana

Louisiana does not have a counterpart to the section 6 "clear proof" standard of the Norris-LaGuardia Act, yet its courts have adopted the federal standard.[134] In *Melancon v. United Association of Journeymen*, the plaintiff, a strikebreaker, suffered physical injuries and damage to his car in a fight with strikers.[135] The trial court's dismissal was affirmed on appeal.[136]

The appellate court simply adopted the "clear proof" standard without comment.[137] The court agreed that there was insufficient evidence to support a connection between the union and the assault.[138] Louisiana's approach is difficult to analyze because the court did not provide any rationale for its decision. The case suggests that a union should not be financially responsible for the actions of individuals beyond the union's practical control.

Melancon is consistent with an earlier Louisiana decision which also refused to extend liability to the union absent evidence of union

132. *Carter-Glogau*, 153 Ariz. at 355, 736 P.2d at 1167.

133. *Id.*

134. *See* Melancon v. United Ass'n of Journeymen, 386 So. 2d 669, *rev. denied*, 387 So. 2d 596 (La. 1980).

135. *Id.* at 670.

136. *Id.* at 669-70.

137. *Id.* at 670. The court stated: "The 'clear proof' required by the [Norris-LaGuardia] Act is not present." *Id.* The court provided no reasoning as to why Louisiana courts should be bound by the federal evidentiary standard.

138. *Id.*

responsibility.[139] There are other states, without statutory schemes, which have not only adopted the "clear proof" protective standard but have provided detailed analyses of their decisions.

ii. Michigan

Michigan does not have a statute mandating a "clear proof" standard. Nevertheless, its courts chose to adopt the stricter standard of proof.[140] In *Sowels v. Laborers' International Union of North America*, several union members assaulted a fellow member working as a supervisor.[141] The victim sued under a negligence theory but raised agency liability for the first time on appeal.[142] The appellate court affirmed the summary judgment in the union's favor.[143]

In adopting the "clear proof" standard, the appellate court held that unions were entitled to the federal standard's special protection, especially in cases involving vicarious liability.[144] The court found the reasoning of the Sixth Circuit in *North American Coal Corp. v. Local Union 2262 of UMW* persuasive:

> It has been clear to Congress for many years that imposition upon unions of vicarious liability for the unauthorized acts of individuals could easily mean the elimination of labor unions as a social institution in America. . . . Irresponsible or violent acts by individual workers (or by agents provocateur) if automatically attributable to the union on the scene could, of course, serve to destroy it. But such vicarious liability is repugnant to due process of law.[145]

The Michigan court in *Sowel* considered the institutional preservation of unions to be a compelling consideration.[146] Large damage awards could destroy a union. In addition, the national policy favoring collective bargaining would be meaningless without unions.[147]

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139. *See* Roddy v. Independent Oil Workers Union of Louisiana, 181 So. 2d 285, 287-88 (La. 1965) (union may be liable where union members physically prevent replacement worker from entering refinery but not for anonymous phone calls and harassment).

140. *See* Sowels v. Laborers' Int'l Union of N. Am., 112 Mich. App. 616, 317 N.W.2d 195 (1981).

141. *Id.*

142. *Id.* at 619, 623, 317 N.W.2d at 196, 198.

143. *Id.* at 625, 317 N.W.2d at 199.

144. *Id.* at 620-21, 317 N.W.2d at 197.

145. *Id.* at 620, 317 N.W.2d at 197 (quoting North Am. Coal Corp. v. Local Union 2262 of U.M.W., 497 F.2d 459, 466 (6th Cir. 1974)).

146. Sowels v. Laborers' Int'l Union of N. Am., 112 Mich. App. 616, 620-21, 317 N.W.2d 195, 197 (1981).

147. *See* section 7 of the National Labor Relations Act, *supra* note 1.

iii. Kansas

Kansas adopted the "clear proof" standard despite the state legislature's silence on the issue.[148] In *Hiestand v. Amalgamated Meatcutters*, the court reversed the trial court's award of personal injury damages against a union because the jury instructions allowed liability based upon a preponderance of the evidence.[149] The court recognized that it was not bound to adopt the higher federal standard of proof.[150] The court also recognized that there were compelling reasons to retain the "preponderance of the evidence" standard in tort actions against unions.[151] Retaining the customary state standard would ensure that all vicarious liability actions within Kansas would be subject to the same evidentiary standards.[152]

Nevertheless, the court held that the equities favored adoption of the higher standard.[153] The court reasoned that requiring the "clear proof" standard in tort actions against unions promoted consistency between the federal and state judicial systems, discouraged forum shopping and guaranteed fairness, since not all litigants have access to federal courts.[154] In essence, the court found that judicial comity outweighed concerns of internal consistency.[155]

The *Hiestand* court also distinguished the standard of proof required for the different issues arising out of tort litigation involving unions. The court held that the "preponderance of the evidence" standard was appropriate for proof of the alleged act and damages because the protective policy does not entirely eliminate agency liability for a union.[156] On the other hand, the plaintiff must have "clear proof" of a union's actual participation, authorization or later ratification of the act before the union can be held liable.[157]

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148. *See* Heistand v. Amalgamated Meatcutters, 233 Kan. 759, 666 P.2d 671 (1983).

149. *Id.* at 759-60, 666 P.2d at 672. The Kansas Supreme Court affirmed the appellate court's reversal of the trial court. *Id.* at 764, 666 P.2d at 675.

150. *Id.* at 763, 666 P.2d at 674.

151. *Id.* at 763, 666 P.2d at 675.

152. *Id.* In addition, the same evidentiary standards would be applicable to all elements within a case.

153. Heistand v. Amalgamated Meatcutters, 233 Kan. 759, 764, 666 P.2d 671, 675 (1983).

154. *Id.* at 763-64, 666 P.2d at 675.

155. *Id.* at 764, 666 P.2d at 675. The court stated: "Plaintiffs would have no reason to commence actions in state courts attempting to avoid the clear proof standard of the federal courts thereby bypassing Congressional intent." *Id.*

156. *Id.* "The burden of proof as to whether the tortious or illegal act occurred . . . is by a preponderance of the evidence." *Id.*

157. *Id. See also* discussion of *Ramsey*, *supra* notes 38-39 and accompanying text.

The Kansas approach recognizes the competing considerations of the rights of tort victims and union's institutional prerogatives. Kansas also introduces the element of judicial comity as a justification for adoption of the "clear proof" standard. Kansas recognizes that although torts may be a "local" concern, the issue of union liability is a national concern.[158]

3. Alternative Approaches to Union Tort Liability

A group of states has addressed union liability issues without reference to the "clear proof" standard. These alternative measures illustrate the extreme positions. On the one hand, a jurisdiction may shift the burden of proof toward the union once an agency relationship is established. At the other end of the spectrum is an approach which sharply limits agency liability.

a. Shifting the burden of proof to the union

i. Virginia

Although the Virginia Supreme Court has not directly addressed the quantum of proof issue, the court offers even less protection to unions than those states that reject a "clear proof" standard.[159] In *United Brotherhood of Carpenters v. Humphreys*, the court upheld an $11,000 judgment against the union for an assault by union members against a worker who decided to return to work during a strike.[160] The state supreme court held that once an agency relationship was established, the burden of proof shifted to the union to show that the alleged act was not within the scope of employment.[161]

The court did not provide an extended rationale for their decision, but it did find that unions were subject to common law agency liability.[162] Implicit in this decision is the policy that unions should be responsible for the actions of individual members during a union-related activity. This type of unrestricted agency liability equates a union with any other corporate entity. The approach of California courts is similar to Virginia's approach to union tort liability.

158. Heistand v. Amalgamated Meatcutters, 233 Kan. 759, 764, 666 P.2d 671, 675 (1983).

159. *See* United Bhd. of Carpenters v. Humphreys, 203 Va. 781, 127 S.E.2d 98 (1962), *cert. denied*, 371 U.S. 954 (1963).

160. *Id.* at 789, 127 S.E.2d at 103.

161. *Id.* at 787, 127 S.E.2d at 102.

162. *Id.* at 786, 127 S.E.2d at 101-02.

b. Limitations on agency liability

Other states allow tort actions against unions on agency theories, but reject the doctrine of *respondeat superior*. This line of cases defers to the national policy favoring unions, without adopting a higher evidentiary standard.

i. Florida

Florida has taken a position contrary to that of Virginia by rejecting the doctrine of *respondeat superior* as a theory for holding unions liable in tort.[163] In *International Union of Operating Engineers v. Long*, the Florida Supreme Court reversed a judgment awarded against the union for $400,000 in compensatory damages and $400,000 in punitive damages.[164] The plaintiff, an innocent bystander, was struck by high tension wires and became permanently disabled.[165] The wires had fallen when a worker hit them with machinery while being verbally harassed by picketing workers.[166]

The court reversed based on a jury instruction that held the union liable without first requiring proof of a connection between the union and the accident.[167] The jury had been wrongly instructed to find the union responsible for the tortious acts of its members because "by and through their membership, [unions] are, as a matter of law liable for the common law torts, negligent or intentional, of their officers or members."[168] The appellate court held that a union is liable only upon proof of authorization, participation or subsequent ratification of a member's actions.[169]

The Florida court did not provide a detailed rationale for its decision nor did it use the term *respondeat superior*. Implicit in its approach, however, is a respect for the national policy favoring the preservation of unions against unwarranted tort liability. The erroneous jury instruction created liability based on the wrongdoer's status as a member rather than on the union's culpability for the harm.[170]

163. *See* International Union of Operating Engineers v. Long, 362 So. 2d 987 (Fla. Dist. Ct. App. 1978), *rev. denied*, 372 So. 2d 469 (Fla. 1979).
164. *Id.* at 988.
165. *Id.*
166. *Id.* at 988-89.
167. *Id.* at 989.
168. *See* International Union of Operating Engineers v. Long, 362 So. 2d 987, 989 (Fla. Dist. Ct. App. 1978), *rev. denied*, 372 So. 2d 469 (Fla. 1979).
169. *Id.*
170. *Id.*

Florida does not exempt unions from tort liability, but it does require convincing proof of their responsibility for the alleged harm.[171]

ii. Rhode Island

Just as Florida limited the agency liability of unions, Rhode Island has also chosen not to apply broad agency liability in tort actions against unions.[172] In *Murphy v. United Steelworkers of America*, a management employee sued the union for personal injuries.[173] A striking worker threw a rock at Murphy, which struck him in the eye causing a permanent loss of peripheral vision.[174] After a jury trial, the court awarded $13,000 in compensatory and $150,000 in punitive damages against the union.[175]

However, the Rhode Island Supreme Court reversed this judgment because the trial judge had instructed the jury that the union could be liable even for unauthorized acts.[176] The erroneous instruction extended liability to the union for any act "incidental to the performance of a duty that the agent . . . was authorized to perform."[177] While the supreme court refused to adopt the federal "clear proof" standard, it held that union tort liability must be predicated upon actual authorization, participation or ratification.[178] Even though the striker was a member of the union, this alone did not establish union liability.

Rhode Island does not eliminate a union's tort liability. It does, however, limit common law agency liability to those cases where the plaintiff establishes the requisite connection between the union and the injury.[179] In other words, a union is not liable for the tortious acts of individuals simply because they are union members.

Before turning to the English experience, it would be helpful to summarize the themes which have emerged in this comparative analysis of the states. States have taken diverse and conflicting approaches to the issue of union tort liability, even where they share identical

171. *Id.*
172. *See* Murphy v. United Steelworkers of Am., 507 A.2d 1342 (R.I. 1986).
173. *Id.* at 1343.
174. *Id.* at 1343-44.
175. *Id.* at 1344.
176. *Id.* at 1344-45.
177. Murphy v. United Steelworkers of Am., 507 A.2d 1342, 1344 (R.I. 1986).
178. *Id.*
179. *Id.* at 1345. The court acknowledged general agency liability principles, but found such principles "not controlling as this court attempts to determine the liability of a labor union for the tortious acts of individual members." *Id.*

statutory language. Furthermore, the United States Supreme Court has not addressed any of these conflicting state cases. Of course, the Supreme Court lacks jurisdiction over any case which rests entirely on a valid state law.[180]

Some dominant themes have emerged from this thicket of confusion. In every state surveyed, one may bring a tort action against a labor union. In those states which treat unions like any other entity, the policies of strict construction of legislative intent and concern for the rights of tort victims predominate.[181] On the other hand, where unions have received some measure of protection against tort liability, the policies of institutional preservation and judicial comity are given priority.[182] This Comment will now review the English scheme which illustrates an alternative approach to union tort liability.

D. The English Approach

An examination of the English experience helps place both the federal and the various state approaches into better perspective. In recent years, England has shifted its position on union tort liability. This Comment will first review the earlier statutory tort immunity granted to unions. This period of statutory tort immunity coincides with the rise of unions' political power. Unions succeeded, through the political process, in elevating their institutional prerogatives over the interests of tort victims.

England's present statutory scheme will also be surveyed. Although the present law repeals union tort immunity, it still provides significant protection against tort liability. The discussion of the present statutory scheme is helpful for two reasons. First, the English scheme provides a model for balancing the competing interests of unions and tort victims. Second, the policy change abolishing tort immunity illustrates a political, as opposed to judicial, resolution of union tort liability issues.

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180. The principles governing the Supreme Court's grant of *certiorari* can be found at 28 U.S.C.A. § 1257 (Supp. 1989). *See also* SUP. CT. R. 17.1 (1982).

181. Based on the above discussion, states which can be loosely categorized as strict constructionists include Arizona, Indiana, Massachusetts and Washington. A state which favors the tort victim over the union is Virginia. As will be discussed below, California has adopted both of these themes.

182. States which clearly favor the institutional preservation of labor unions include Connecticut, Florida, Louisiana, Michigan, Pennsylvania and Rhode Island. In addition, Kansas also relied on the notion of judicial comity. *See* Hiestand v. Amalgamated Meatcutters, 233 Kan. 759, 764, 666 P.2d 671, 675 (1983).

1. Statutory Immunity from Tort Liability

The Trades Disputes Act of 1906 granted English unions immunity from tort actions.[183] A union could not claim statutory immunity unless the alleged tort arose from a "trade dispute."[184] The statute's definition of "trade dispute" was so broad that it included nearly any dispute involving workers, including political disputes.[185]

The Trade Union and Labour Relations Act of 1974 narrowed the definition of a "trade dispute."[186] The new definition effectively eliminated political disputes from statutory immunity.[187] Unions could still be held liable, however, for personal injuries in cases where the tort did not arise from a trade dispute.[188] The 1974 Act, however, retained statutory immunity for unions against tort liability.[189] Thus, whenever a union was sued, the court was required to consider whether the tort arose from a labor dispute, and if so, the court dismissed the union as a party.[190]

2. The Current Statutory Scheme

Under Margaret Thatcher, the Conservative Party rose to power on a platform of curbing union power in Great Britain.[191] With the Employment Act of 1982, unions lost their statutory immunity in tort

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183. Trade Disputes Act, 1906, 6 Edw. 7, ch. 47, § 4. This section provides:

> An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

Id.

184. *Id.* § 3.

185. *Id.* § 5(3). This section provides:

> [T]he expression "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises . . . .

Id.

186. *See* Trade Union and Labour Relations Act, 1974, ch. 52, § 29.

187. *Id.* In listing the types of disputes which are included in the definition of "trade dispute," the Act focuses on the immediate relationship between the employer and the union members. Covered disputes include those over wages, contract terms, discipline, work rules, union membership, facilities and negotiation procedures.

188. *Id.* § 14(2)(a).

189. *Id.* § 14.

190. *See* 47 L. HAILSHAM, HALSBURY'S LAWS OF ENGLAND para. 574 (1984).

191. *See* Benedictus, *The Use of the Law of Tort in the Miners' Dispute*, 14 INDUS. L.J. 176, 188-89 (1985).

actions.[192] Thus, the Employment Act restricts union power by potentially allowing tort liability.

Nevertheless, the English scheme extends important benefits to unions. The Employment Act provides that unions are only liable for tortious conduct which "was authorised or endorsed by a responsible person."[193] The statute proceeds to identify the types of "responsible" persons who can expose the union to liability, such as executive officers or those authorized by union rules to act on behalf of the organization.[194] Another key provision in the statute allows a union to "repudiate" a purportedly authorized act.[195] For example, if an officer encouraged violence, the union's executive board could disavow the activity through timely resolution and publicity.[196] Finally, the Employment Act limits the amount of monetary damages available according to the size of the union.[197]

The Employment Act does not set out a "clear proof" evidentiary standard. This allows a plaintiff to establish his or her case by a "balance of probabilities."[198] Under common law, a union can be vicariously liable only upon a showing of authorization or ratification of the action.[199] A person connected with the union may authorize or ratify an action through union rules, specific office, delegation or custom.[200] Absent a showing of express or implied authority, a mere relationship with the union is insufficient to establish tort liability.[201] In other words, England places limitations on common law agency liability as applied to unions by not allowing recovery under broad *respondeat superior* theories.[202]

The loss of tort immunity is a serious blow to union power.

192. Employment Act, 1982, ch. 46, § 15. This section provides in part: "[s]ection 14 of the 1974 Act (immunity for trade unions and employers' associations from certain actions in tort) shall cease to have effect." *Id.*

193. *Id.* § 15(2).

194. *Id.* § 15(3).

195. *Id.* §§ 15(4)(b), (5).

196. *Id.*

197. *Id.* § 16. These limits do not attach to personal injury actions which do not arise from a trade dispute. *Id.* § 16(2)(a).

198. This standard is England's description of the legal burden of proof in a civil case. It is the practical equivalent of the "preponderance of the evidence" standard. *See* 17 L. HAILSHAM, *supra* note 190, para. 19.

199. *See* Heatons Transport Ltd. v. TGWU, 3 All E.R. 101 (1972).

200. *Id.* at 110.

201. *Id.* Although *Heatons* involved a statutory proceeding against a union, it has been cited as expressing the law on the vicarious liability of unions. *See* 47 L. HAILSHAM, *supra* note 190, para. 578.

202. *Heatons*, 3 All E.R. at 110-11.

However, when compared to their American counterparts, English unions may actually have greater statutory protection. In some American jurisdictions, the doctrine of *respondeat superior* allows any hot-headed union member to create potential tort liability for the union.[203] By contrast, the English statute limits the number of individuals who can create liability for the union.[204] In addition, the statutory limits on monetary damages protects unions from financial destruction while providing some redress to tort victims.[205] The English scheme also allows a union to effectively repudiate a wrongful act,[206] which is not possible in some states.

The English approach teaches two important lessons. First, the statutory scheme is predictable, thereby allowing uniform treatment of union tort liability. Along with uniformity, the statute attempts to balance the rights of tort victims against the policy of preserving the institutional stability of unions. One commentator has suggested, however, that unions will cynically revise their rules in order to limit their exposure to tort liability.[207]

Second, this radical shift from tort immunity to potential liability occurred through the political process. Whether one approves or disapproves of the Conservative Party's policies, the Thatcher government won free elections and enacted legislation. This contrasts sharply with the American experience which allows individual state judicial systems to abrogate a national policy favoring labor unions.

Section II illustrated the various approaches taken on the issue of a union's tort liability. As this survey shows, there is no uniform treatment of the appropriate proof standard for union liability. Jurisdictions vary in their treatment of unions, ranging from strong protection to refusal to extend any form of shield against unwarranted tort liability.

It is clear that the federal standard reflects a national policy favoring the preservation of unions as institutions. Those jurisdictions that extend protection to unions in tort actions base their deci-

203. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 438 n.5, 256 Cal. Rptr. 246, 250 n.5, *cert. denied*, 110 S. Ct. 242 (1989).

204. Employment Act, 1982, ch. 46, § 15.

205. One commentator suggests that English employers have not rushed to sue unions under the 1982 Act. Part II of the 1984 Trade Union Act allows parties to sue unions when the union fails to comply with the requirements for a strike vote. There are no statutory limits on damage awards in these suits. *See* Benedictus, *supra* note 191, at 188-89.

206. Employment Act, 1982, ch. 46, § 15(4)-(5).

207. Benedictus, *supra* note 191, at 187.

sions on respect for the national policy. Those jurisdictions that refuse to recognize any special status for unions avoid any discussion of national policy considerations. The next section will closely examine the reasons California courts have chosen to treat unions like any other agency tortfeasor.

III. AN ANALYSIS OF *J.R. NORTON V. GENERAL TEAMSTERS*

We now re-visit *J.R. Norton* to analyze why the California appellate court opted to impose common law agency liability on unions. Initially, it is necessary to explore the federal preemption issue in order to determine why the court was not bound to accept the "clear proof" standard. This Comment will then examine whether national policy considerations should have prevailed over state concerns.

A. Preemption

In *J.R. Norton*, the Teamsters contended that the federal "clear proof" standard preempted state agency liability principles.[208] The concept of preemption can be traced to the supremacy clause of the United States Constitution which makes laws passed by Congress in accordance with the Constitution supreme over state laws.[209] Congress has the power to enact legislation in the labor relations area under the commerce clause.[210] A brief review of the preemption doctrine is essential to understanding why the union raised the issue and why the *J.R. Norton* court held that the "clear proof" standard did not preempt the traditional tort liability standards.

The three branches of the preemption doctrine pertaining to federal regulation of labor relations are categorized as follows: (1) matters within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"); (2) matters intended by Congress to be unregulated; and (3) matters requiring the application of federal substantive law.[211] The first branch is governed by the Supreme Court rule an-

208. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 437, 256 Cal. Rptr. 246, 249, *cert. denied*, 110 S. Ct. 242 (1989).

209. U.S. CONST. art. VI.

210. *Id.* art. I, § 8. The constitutionality of the National Labor Relations Act was upheld in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). The Norris-LaGuardia Act survived challenge in Lauf v. E.G. Shinner & Co., 303 U.S. 323 (1938).

211. For an overview of the current state of preemption, see Gomez, *Preemption and Preclusion of Employee Common Law Rights by Federal and State Statutes*, 11 INDUS. REL. L.J. 44 (1989).

nounced in *San Diego Building Trades Council v. Garmon*.[212] Under the *Garmon* rule, state courts lack jurisdiction where the conduct is either protected under section 7, or prohibited under section 8 of the NLRA.[213] The NLRB has exclusive jurisdiction over such conduct even if the conduct is only "arguably" reached by the NLRA.[214]

The second branch of the preemption doctrine, from *Machinists v. Wisconsin Employment Relations Commission*, concerns conduct which Congress intended to leave unregulated.[215] The national labor policy favors management and labor developing their own relationships without intrusion from either federal or state agencies. For example, the courts consistently override attempts to regulate bargaining tactics.[216]

The third branch involves suits for breach of contract and other matters under the LMRA. This branch does not necessarily preempt state court jurisdiction, but it does require the application of federal substantive law.[217] This branch of the preemption doctrine recognizes the concurrent jurisdiction of state courts in certain labor relations cases.[218] Federal substantive law controls when a determination of the controversy requires interpretation of the collective bargaining agreement or federal statutory rights.[219]

It is unclear from the *J.R. Norton* opinion which aspect of pre-

212. 359 U.S. 236 (1959) (state tort damages reversed where union engaged in peaceful picketing).

213. *Id.* at 245. Section 8 of the National Labor Relations Act pertains to unfair labor practices by either an employer or the union. For the text of section 7, see *supra* note 1.

214. *Garmon*, 359 U.S. at 245.

215. *See* Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) (state law barring refusal to work overtime preempted where refusal was a bargaining tactic which Congress intended to leave to the parties' own devices).

216. *Id. See also* American Ship Builders Co. v. NLRB, 380 U.S. 300 (1965) (employer lockout of employees in anticipation of strike viewed as legitimate bargaining tactic not subject to regulation).

217. *See* Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) (state tort of retaliatory discharge is not preempted). *See also* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) (preemption proper when state law inextricably intertwined with interpretation of the collective bargaining agreement).

218. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal courts authorized to fashion body of federal law for enforcement of rights under the LMRA); Teamsters, Chauffeurs, Warehousemen and Helpers, Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962) (state courts allowed jurisdiction in breach of contract suit but must apply federal law).

219. *See supra* note 206. *See also* Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (alleged promises by employer to strikebreakers does not require interpretation of union contract, nor does it involve statutory rights).

emption the union argued was controlling.[220] Since the NLRB has expressly declined to exercise jurisdiction over state tort claims, the union could not succeed in claiming that the state court lacked subject matter jurisdiction.[221] As for the argument that strike violence is an unregulated bargaining tactic, the Supreme Court has consistently upheld state court jurisdiction over tortious conduct claims arising out of labor disputes.[222]

Given this relatively clear case law, the union most likely argued that the "clear proof" standard was a matter of federal law imposed upon the states.[223] Case law suggests two approaches where federal substantive law has preempted state law. First, the statutory text may expressly require federal law to be applied.[224] Second, preemption may be achieved by weighing national policy more heavily than local policy considerations.[225] The *J.R. Norton* court correctly found that there was no statutory preemption of state agency liability.[226] However, the court did not adequately address whether the "clear proof" standard should preempt agency liability as a matter of policy.[227]

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220. *See* J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 437, 256 Cal. Rptr. 246, 249, *cert. denied*, 110 S. Ct. 242 (1989).

221. *See* Teamsters, Local 901 (Lock Joint Pipe Co.), 202 NLRB Dec. (CCH) No. 43, 399, 399 n.5 (1973). Since NLRB jurisdiction is confined to the NLRA by section 10 of the Act, section 6 of Norris-LaGuardia could not logically apply to NLRB proceedings. 29 U.S.C. § 160 (1982).

222. Some of the leading cases allowing state court jurisdiction over tortious conduct claims include: Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (state courts may reach trespass in violation of state law even where picketing is peaceful); Farmer v. Carpenters, 430 U.S. 290 (1977) (action for intentional infliction of emotional distress); International Union, United Auto., Aircraft & Agric. Implement Workers of Am. v. Russell, 356 U.S. 634, *reh'g denied*, 357 U.S. 944 (1958) (violence); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957) (state court may enjoin violence but not peaceful picketing); United Construction Workers v. Laburnum Const. Corp., 347 U.S. 656 (1954) (threats of violence).

223. For the *J.R. Norton* court's discussion of the preemption issue, see 208 Cal. App. 3d at 437-43, 256 Cal. Rptr. at 250-54.

224. *See, e.g.*, Labor Management Relations Act § 303(b), 29 U.S.C. § 187(b) (1982). This section provides:

> Whoever shall be injured in his business or property by reason of a violation . . . may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 . . . or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Id. See also Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218-19 (1985) (where the Court announced the doctrine).

225. *See infra* notes 283-287 and accompanying text.

226. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 443, 256 Cal. Rptr. 246, 253-54, *cert. denied*, 110 S. Ct. 242 (1989).

227. *Id.* at 441-43, 256 Cal. Rptr. at 252-54.

California was not statutorily bound by the "clear proof" standard. Even in its original form, the *Garmon* rule allowed for exceptions.[228] State courts have jurisdiction and may apply state substantive law where the action is only of "peripheral concern" to federal law.[229] The *Garmon* Court did not recognize exceptions to federal preemption without reservations. The Court noted, albeit without resolving, the potential conflict between state remedies and national labor policy.[230] The Court stated that state courts should exercise caution when adjudicating in the field of labor relations precisely because of the potential overlap between national and state concerns.[231]

The *J.R. Norton* court had little difficulty in exempting agency liability standards from federal preemption.[232] The NLRB certainly has neither express nor arguable jurisdiction over a union's tortious conduct.[233] There is also no support for an argument that Congress intended tortious conduct to be unregulated.[234]

As noted in *J.R. Norton*, the state tort action fit within the exceptions to the preemption rule.[235] The court reasoned that Congress had not prescribed a substitute for state tort remedies and that protection of citizens from violence had traditionally been a matter of local concern.[236] Thus, the court found a compelling state interest to extend tort remedies to injured parties, even in cases where the injuries arose from a labor dispute.[237]

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228. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

229. *See id.* (maintaining domestic peace is a prime example of a purely local concern).

230. *See id.* In *Garmon*, the Court stated:

> It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves two law-making sources to govern. In fact, since remedies form an ingredient scheme of regulation, to allow the state to grant a remedy here which has been withheld from the NLRB only accentuates the danger.

Id. at 247.

231. *Id.* at 246-47.

232. *See* J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 437-43, 256 Cal. Rptr. 246, 250-54, *cert. denied*, 110 S. Ct. 242 (1989).

233. The court did not address NLRB jurisdiction. *But see* Teamsters, Local 901 (Lock Joint Pipe Co.), 202 NLRB Dec. (CCH) No. 43, 399 (1973).

234. *J.R. Norton*, 208 Cal. App. 3d at 440, 256 Cal. Rptr. at 251-52.

235. For example, in *J.R. Norton*, the court stated that "the United States Supreme Court has long recognized the power of state courts to award tort damages under state law for violent conduct." *Id.*, 256 Cal. Rptr. at 251.

236. *Id.*, 256 Cal. Rptr. at 251-52.

237. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 440, 256 Cal. Rptr. 246, 252, *cert. denied*, 110 S. Ct. 242 (1989).

J.R. Norton held that the "clear proof" language of the Norris-LaGuardia Act did not preempt state evidentiary standards because the federal Act was textually limited to the federal judiciary.[238] This construction is consistent with an earlier California decision which expressed doubt about congressional authority to reach state remedies through the Norris-LaGuardia Act.[239] Given the traditional state police power over violence, combined with the absence of a clear federal mandate, the *J.R. Norton* court applied the ordinary civil "preponderance of the evidence" standard.[240]

In another argument before the court, the union contended that the federal standard should govern since California's labor policy generally resembled the national policy.[241] The argument invited the court to balance state and national concerns. In rejecting this argument, the *J.R. Norton* court relied on the purported silence of the California legislature. While the California legislature adopted an anti-injunction statute similar to the Norris-LaGuardia Act, it has not adopted an equivalent of the section 6 "clear proof" legislation.[242]

The court found that the silence in the statute affirmatively demonstrated the legislature's intent *not* to impose a "clear proof" standard in state court actions against unions.[243] The court found it inappropriate to create its own evidentiary standard when the legislature had ample opportunity but declined to do so.[244]

On the one hand, the court's attitude reflects a reluctance to usurp the legislative function. On the other hand, the court is argua-

238. *Id.* at 439, 256 Cal. Rptr. at 251.

239. *Id.* at 441, 256 Cal. Rptr. at 252. The court cited McCarroll v. Los Angeles County District Council of Carpenters, 49 Cal. 2d 45, 63, 315 P.2d 322 (1957). Chief Justice Traynor's views in *McCarroll*, regarding Congress' inability to deprive state courts of their remedial power, were later adopted by the Supreme Court in Boys Market, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 247 (1970).

240. The NLRB itself appeared to invite state tort claims by its refusal to offer remedies in the context of union violence. *See* Teamsters, Local 901 (Lock Joint Pipe Co.), 202 NLRB Dec. (CCH) No. 43, 399, 399 n.5 (1973).

241. *J.R. Norton*, 208 Cal. App. 3d at 441, 256 Cal. Rptr. at 252.

242. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 441-42, 256 Cal. Rptr. 246, 253, *cert. denied*, 110 S. Ct. 242 (1989). The court referred to the Moscone Act, codified at CAL. CIV. PROC. CODE § 527.3 (West 1989).

243. *See J.R. Norton*, 208 Cal. App. 3d at 442, 256 Cal. Rptr. at 253. The court stated that "[t]he omission of a provision contained in a foreign statute providing the model for action by the Legislature is a strong indication that the Legislature did not intend to import such provision into the state statute." *Id.*

244. *Id.* at 443, 256 Cal. Rptr. at 254. The court cited with approval similar reasoning by the Arizona court in Carter-Glogau Laboratories v. Construction Laborers' Local 383, 153 Ariz. 351, 736 P.2d 1163 (1968). *See supra* notes 128-133 and accompanying text.

bly engaging in judicial legislation by indirectly undermining the national policy. While the *J.R. Norton* court sought to ascertain the California legislature's intent, it did not address the congressional intent behind the "clear proof" standard.[245] Thus, the court adopted a narrow reading of preemption.

B. Form over Substance

The *J.R. Norton* court was confronted with egregious strike misconduct that included outright violence endorsed by the local union.[246] Given the facts, a jury may very well have found the Teamsters union liable under any evidentiary standard.[247] Nevertheless, California's rejection of the "clear proof" standard in determining union liability for tort claims is subject to criticism. For example, the *J.R. Norton* court failed to balance the national policy underlying the "clear proof" standard against state interests.

1. National Policy Considerations

As discussed in Section II, the primary purpose of the "clear proof" standard is to ensure that unions are not financially destroyed as a result of the conduct of a few individuals who are beyond the union's control.[248] The *J.R. Norton* opinion never addressed the underlying policy considerations favoring the "clear proof" standard. The court also failed to consider judicial comity—the same case in the federal district court would require the use of the higher "clear proof" standard. The court's holding was premised on the absence of jurisdictional preemption and the enactment of an anti-injunction statute by the California legislature that did not include the "clear proof" standard.[249]

Furthermore, the *J.R. Norton* court cited language from *Gibbs* to support its adoption of ordinary agency principles established by a "preponderance of the evidence" as the rule governing state tort actions against unions.[250] The very same passage in *Gibbs*, however, comments on the validity of the national policy protecting unions

245. *J.R. Norton*, 208 Cal. App. 3d at 437-43, 256 Cal. Rptr. at 250-54.

246. For a summary of the conduct which the court found offensive, see *J.R. Norton*, 208 Cal. App. 3d at 435-37, 256 Cal. Rptr. at 248-49.

247. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 436-37, 256 Cal. Rptr. 246, 248-49, *cert. denied*, 110 S. Ct. 242 (1989).

248. *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 736-37 (1966).

249. *J.R. Norton*, 208 Cal. App. 3d at 440, 442, 256 Cal. Rptr. at 251-52, 253.

250. *Id.* at 439, 256 Cal. Rptr. at 251 (quoting *Gibbs*, 383 U.S. at 736).

from unwarranted tort liability.[251] The *J.R. Norton* court also cited *Ramsey* to support the proposition that Congress did not intend a higher standard of proof in civil damage actions.[252] *Ramsey* is inapposite as it merely bifurcates which elements of the case must be established by "clear proof."[253] The *Ramsey* opinion holds that the underlying elements of a tort action must be proven by the "preponderance of the evidence." However, the issue of union responsibility must be established by the "clear proof" standard.[254]

While the *J.R. Norton* court cited the appropriate federal authorities, it misinterpreted their meanings. Congress enacted limited tort protection for unions because unions serve the national policy favoring collective bargaining.[255] *Gibbs* and *Ramsey* clearly articulate both the importance and the validity of this national policy. *J.R. Norton*, in effect, turned these cases on their heads by weakening unions' protection from unwarranted tort liability.

The *J.R. Norton* opinion adopted the "preponderance of the evidence" standard in addition to holding that common law agency principles govern tort actions against unions.[256] This rubric of common law agency also encompasses the doctrine of *respondeat superior*.[257] Arguably, when liability is predicated on actual participation, authorization or ratification, the evidentiary standard may not be significant. By contrast, where *respondeat superior* is the theory of liability, the choice of an evidentiary standard may be determinative.

The practical effect of coupling the "preponderance of the evidence" standard with the doctrine of *respondeat superior* is to expose unions to a form of strict liability.[258] Under the California scheme, the mere fact that damage is caused by a picketer is sufficient to ex-

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251. *See Gibbs*, 383 U.S. at 736-37. *See also supra* notes 28-37 and accompanying text.

252. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 439, 256 Cal. Rptr. 246, 251, *cert. denied*, 110 S. Ct. 242 (1989) (quoting Ramsey v. United Mine Workers of Am., 401 U.S. 302, 309-10 (1971)).

253. *See supra* notes 38-39 and accompanying text.

254. *Ramsey*, 401 U.S. at 310-11.

255. *See* S. REP. NO. 163, 72d Cong., 1st Sess. 19-21 (1932). *See also* LABOR RELATIONS LAW, *supra* note 9, at 27. The authors describe the NLRA as "the statute which placed the full power and influence of the national government behind trade unionism." *Id.*

256. *J.R. Norton*, 208 Cal. App. 3d at 443, 256 Cal. Rptr. at 253-54.

257. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 438 n.5, 256 Cal. Rptr. 246, 250 n.5, *cert. denied*, 110 S. Ct. 242 (1989). For a discussion on *respondeat superior* liability, see *supra* notes 53-60 and accompanying text.

258. *See* Gajkowski v. International Bhd. of Teamsters, 548 A.2d 533, 544 (Pa. 1988). *See supra* notes 106-115 and accompanying text.

pose the entire union to liability.[259] Even where the picketer harbors an individual motive or a personal grudge, the union is liable unless it disproves its connection with the individual tortfeasor's act.[260] Thus, the net effect of the *J.R. Norton* holding is to increase the probability that a union will be held liable in a state tort action.

While *J.R. Norton* is silent on the national policy towards protecting unions as institutional entities, the opinion does express disdain for the union's behavior.[261] The court's opinion may have been influenced by the union's egregious conduct. In any event, California's position, as illustrated by *J.R. Norton*, reflects an implicit policy choice that redressing private wrongs outweighs the national policy toward union liability.[262] In other words, unions are not entitled to any form of judicial protection and, as a result, have become "deep pockets."[263]

2. State Considerations

As previously discussed, the *J.R. Norton* decision rests on the absence of either congressional or state legislative mandates to adopt the "clear proof" standard. The court, however, did have a choice. While the "preponderance of the evidence" standard is the general rule in California civil actions, there is an exception where a different standard is "otherwise provided by law."[264] This alternate provision encompasses constitutional, statutory and decisional law.[265] Hence, when confronted by compelling policy reasons, California courts may adopt a higher evidentiary standard.[266]

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259. The jury in *J.R. Norton* was given a *respondeat superior* instruction. *See J.R. Norton*, 208 Cal. App. 3d at 438 n.5, 256 Cal. Rptr. at 250 n.5.

260. *See* Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1964) (in tort action against union company need not show damages caused by tort and by other factors—"substantial factor" rule). *See also* Perez v. Van Groningen & Sons, Inc., 41 Cal. 3d 962, 719 P.2d 676, 227 Cal. Rptr. 106 (1968). This problem approaches the "burden shifting" discussed in *Humphreys*, *supra* notes 149-152 and accompanying text.

261. *See, e.g.*, *J.R. Norton*, 208 Cal. App. 3d at 445, 256 Cal. Rptr. at 255 (the court discusses the union's behavior as grounds for affirming the punitive damage award).

262. For an argument that unions no longer need any form of deference, such as the "clear proof" standard, see Note, *The Liability of Labor Unions for Picket Line Assaults*, 21 UCLA L. REV. 600, 622-23 (1973).

263. *Id.*

264. *See* CAL. EVID. CODE § 115 (West 1989).

265. *See id.* § 160.

266. *See, e.g.*, Lillian F. v. Superior Court, 160 Cal. App. 3d 314, 206 Cal. Rptr. 603 (1984) (adopting higher standard of proof for treatment to be administered to involuntarily committed mental patient).

The *J.R. Norton* court could have rejected the "clear proof" standard on the grounds of countervailing state policy considerations. The federal standard does not appear to conflict with any state policies because it does not absolve unions from liability.[267] California could still protect its citizens while adopting the federal standard for union liability. The stricter federal standard merely places a higher burden on a plaintiff to show the nexus between the union and the alleged harm, but it avoids the result of tort liability based on a wrongdoer's status as a union member.[268] The court in *J.R. Norton* not only glossed over the implications of the federal policy but also failed to articulate any relevant state policy concerns.[269]

Beyond legislative silence, the *J.R. Norton* opinion did not explicitly cite any compelling state policy considerations that supported their rejection of the "clear proof" standard.[270] Legislative silence, however, does not represent an affirmative expression of public policy. On the one hand, this form of deference to the legislature can be seen as judicial restraint.[271] On the other hand, this reliance on silence to determine legislative intent may be seen as an abdication of judicial responsibility.[272] Although there may be many reasons for legislative inaction, the courts do have a positive obligation to resolve controversies before them.[273]

It would be hard to fault a California court for adopting the "clear proof" standard, given its well entrenched status in the federal courts and the fact that other states have also adopted this standard.[274] Moreover, the "clear proof" standard represents an express

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267. *See, e.g.*, Ramsey v. United Mine Workers of Am., 401 U.S. 302 (1971).

268. *See id.*; United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966).

269. The typical strike situation at best represents institutionalized conflict. At its worst, a strike can rapidly escalate into warfare. Given the inherent volatility of a strike, holding unions liable in tort may simply be unfair, absent proof of true union responsibility for the tort. For an account of a recent strike, see *Greyhound Bus Crushes Striking Driver*, L.A. Times, Mar. 4, 1990, at A1, col. 4.

270. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 441-43, 256 Cal. Rptr. 246, 253-54, *cert. denied*, 110 S. Ct. 242 (1989).

271. *See, e.g.*, Buchanan v. International Bhd. of Teamsters, 94 Wash. 2d 508, 617 P.2d 1004 (1980); Carter-Glogau Laboratories v. Construction Laborers' Local 383, 153 Ariz. 351, 736 P.2d 1163 (1968). The court in *J.R. Norton* cited both of these cases. *See J.R. Norton*, 208 Cal. App. 3d at 441 n.9, 443, 256 Cal. Rptr. at 252 n.9, 253.

272. *See, e.g.*, Sowels v. Laborers' Int'l Union of N. Am., 112 Mich. App. 616, 317 N.W.2d 195 (1981). *See supra* notes 140-147 and accompanying text.

273. *See Buchanan*, 94 Wash. 2d at 517-20, 617 P.2d at 1009-10 (dissenting opinion of J. Horowitz, criticizing the concept of ascertaining legislative intent through silence or inaction).

274. For a list of those states which have adopted the "clear proof" standard, see *supra* notes 98-115 and 134-158 and accompanying text.

public policy. While there may be state considerations which are more compelling than the national policy, they are not expressed in the *J.R. Norton* decision. The court's failure to address national policy concerns and to articulate an overriding state interest undermines the legitimacy of the decision.[275]

IV. THE VIABILITY OF THE FEDERAL STANDARD

The main theme of this section is that the "clear proof" standard remains useful. There is also a principled means of justifying judicial adoption of heightened protection for unions in tort actions. The uniform adoption of the "clear proof" standard would serve the national interest without denigrating the rights of tort victims. Given today's judicial and social environment, however, it is doubtful whether courts will move toward protecting unions from unwarranted tort liability.

A. Furthering National Labor Policy

Neither Congress nor the Supreme Court has suggested that the national policy favoring the existence of free trade unions has been repealed. The "clear proof" standard was enacted to promote labor unions as institutional entities.[276] Both the national policy and the reasons underlying its enactment retain their importance today.

1. Pragmatic Concerns

The "clear proof" standard has endured since the adoption of the Norris-LaGuardia Act in 1932. Over this period, countless federal cases have applied this standard.[277] The lesson to be gleaned from the federal courts is that unions can be held accountable when there is a clear nexus between the union and the alleged misconduct. Conversely, misconduct by a person associated with the union, but beyond its practical control, will not expose a union to liability.[278]

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275. The decertification of the *Vargas* decision, which expressly relied on *J.R. Norton*, raises some doubt regarding the state of the law in the area of union tort liability. *See supra* note 4.

276. *See, e.g.*, S. REP. NO. 163, 72d Cong., 1st Sess. 19-21 (1932).

277. *See, e.g.*, Kerry Coal Co. v. United Mine Workers of Am., 637 F.2d 957 (3d Cir. 1981) (affirming $1.2 million damage award against union where there was "clear proof" that union agent participated in acts of violence and interfered with contractual relationships at the union's request); Ritchie v. United Mine Workers of Am., 410 F.2d 827 (6th Cir. 1969) (reversing state damage award against union where persons responsible for property damage were never identified).

278. *See also* Annotation, *Liability of Labor Union or Its Membership for Torts Committed*

Congress has not repealed the "clear proof" standard nor has the Supreme Court overruled *Gibbs*, despite criticism from some commentators.[279] State court adoption of the "clear proof" standard would have the salutary effect of discouraging forum shopping since parties would receive similar treatment whether they were in federal or state court.[280] Attorneys, especially those representing national organizations, would appreciate uniform rules governing union tort liability.

The California approach may encourage plaintiffs to draft their complaints in a manner that would avoid federal jurisdiction in order to rely exclusively on state tort remedies.[281] Such an outcome fosters the potential for conflict cited by the *Garmon* court and further detracts from a national labor policy.[282] In short, the relative success of the "clear proof" standard and the principles of comity (avoidance of forum shopping) tend to operate in favor of state adoption of the federal standard.

2. A Conceptual Approach Justifying the Adoption of the "Clear Proof" Standard

Aside from pragmatic considerations, precedent exists for adopting a federal standard even when there is an existing state standard.[283] In *Linn v. United Plant Guard Workers*, the United States Supreme Court stated that a libel action based on materials published during a labor dispute was not preempted by the NLRA.[284] The Court went on, however, to hold that normal state libel standards should not ap-

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by Officers, Members, Pickets or Others in Connection with Lawful Primary Labor Activities, 36 A.L.R. 3d 405 (1971 & Supp. 1989).

279. For arguments that Section 6 should be repealed, see Note, *supra* note 262; A. THIEBLOT & T. HAGGARD, UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES AND THE NLRB 496 (1983).

280. *See* Hiestand v. Amalgamated Meatcutters, 233 Kan. 759, 666 P.2d 671 (1983).

281. A plaintiff's choice of forum may be determined by whether a defendant local union can satisfy a judgment. Where a local union has sufficient funds, the rational plaintiff will now use California state courts because of their more lenient evidentiary standards. A party may lose its forum if it must rely on the national or international parent union and a motion for removal is granted. *See* 28 U.S.C.A. § 1441 (Supp. 1989).

282. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959). *See also* Schwartz & Parrot, *A New Look at Federal Labor Law Preemption: Unionized Employees Claims in State Courts*, 7 ST. LOUIS U. PUB. L. REV. 297 (1988) (examines "master of complaint" rule of national policy).

283. This discussion is based upon Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966).

284. *Id.* at 57-58.

ply. Instead, the Court imposed an actual harm and malice test.[285] The Court feared that in defamation cases the prospect of excessive damages would pose "a threat to the stability of labor unions . . . ."[286] To justify the higher standard, the Court reasoned: "[i]n order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy, the possibility of such consequences must be minimized."[287]

For any state court facing a request to adopt the federal standard, *Linn*, by analogy, offers a principled justification. The "clear proof" standard still allows protection of state interests, but also provides some protection against unwarranted tort liability where the union did not participate, authorize or condone the offensive conduct. *Linn*, therefore, reflects a careful balancing of the state interest in protecting citizens from libel and the institutional stability of unions. *Linn* reconciles these interests by requiring a higher level of proof in libel actions.[288]

Every lawsuit requires a judicial balancing of interests. This balancing is absent from the decisions of those states which reject any form of special protection for union tort liability. These cases uniformly avoid discussion of national policy considerations.[289] While courts may fear charges of judicial activism, applying the federal "clear proof" standard could hardly be considered activism. Perhaps those courts rejecting the federal standard are actually engaging in legislation by judicial fiat.

If labor law is viewed as a national concern, the issue boils down to basic principles of federalism. There are both pragmatic and principled reasons supporting the protection of unions from unwarranted tort liability. The *J.R. Norton* court could have elected the "clear proof" standard as a matter of state law.[290] The court also could have balanced the national policy of protecting unions from unwarranted tort liability against tort victims' rights of redress. Since the "clear

285. *Id.* at 64-65. The test is derived from New York Times v. Sullivan, 376 U.S. 254 (1964).

286. *Linn*, 383 U.S. at 64.

287. *Id.*

288. Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 64-65 (1966).

289. Those states which have rejected any form of special protection for unions are Washington, Massachusetts, Indiana, North Carolina, Arizona, Virginia and California. *See supra* the discussion associated with each respective state.

290. *See* CAL. EVID. CODE § 115 (West 1989).

proof" standard serves both of these interests, the national policy should prevail.

B. The Decline of National Policy

"As between present law and no law, I'd prefer no law."[291]

Although Congress did not extend the "clear proof" standard to state courts, it is difficult to understand how courts could ignore the national policy concerns. Current national trends may clarify this difficulty and help place the *J.R. Norton* decision in better perspective. This section examines the present state of unions as institutions and then revisits the current status of the doctrine of preemption. When unions lack vitality and courts lack a legal mechanism to apply federal principles, perhaps the national policy itself lacks substance.

1. The Decline of Unionization

Union influence has declined in recent years. Unions represent some 17 percent of the work force, which is a decline from 25.5 percent in 1953.[292] Unions have also ceased to be a center of social life for its members.[293] The inability of unions to convince a greater percentage of the work force to join may enable courts to ignore the existence of a national labor policy. Perhaps it is no coincidence that those states which have adopted heightened protection for unions also tend to have strong rates of union membership.[294]

In both *Gibbs* and *Linn*, the United States Supreme Court made strong statements about the importance of unions as social institutions.[295] In a series of relatively recent decisions, the Court has rendered decisions arguably weakening the institutional base of union power. One of the keys to union strength has been the concept of solidarity, sometimes enforced through union discipline. The Court has eroded this concept by holding that a union member may resign from the union at any time, including during a strike, and thereby

291. Lane Kirkland, President of the AFL-CIO, *quoted in* Tolchin, *Labor Chief Laments State of Nation's Labor Laws*, DAILY J., Sept. 4, 1989, at 2.

292. *See* LABOR RELATIONS LAW, *supra* note 9, at 42.

293. *See*, A. GOLDMAN, *supra* note 13, at 183-84.

294. *Id.* at 179 (discussing geographical variations in union strength). Those states which have extended special protection to unions in tort actions are Connecticut, Pennsylvania, Louisiana, Michigan, Kansas, Florida and Rhode Island.

295. United Mine Workers of Am. v. Gibbs, 383 U.S. 715 (1966); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966).

avoid union discipline.[296]

The seniority system has been recognized as one of the prime sources of job security for union members. The Supreme Court recently refused to find an unfair labor practice when the employer refused to restore the full benefits of seniority to flight attendants at the end of a strike.[297] Finally, the Court attacked the union's purse strings by placing limits on the types of expenditures a union can pass along to those members "forced" to pay dues or fees as a result of contractual agreements.[298] These cases illustrate a tendency to erode unions as institutions. Judicial limitations on union discipline, seniority systems and union treasuries can only further the process of lowering the utility of unions, both in the eyes of its members and perhaps, in the eyes of state judges.

There are other non-legal factors which erode the institutional strength of unions. For example, the availability of television and general material prosperity probably erode union solidarity more than a court decision.[299] When an individual is satisfied, the need for collective activity is not obvious. Furthermore, individual members no longer need to rely on unions to furnish social activities.[300] Thus, unions are no longer at the center of the individual member's social or economic life.[301]

Labor legislation favoring unions was enacted at a time when unions were powerful social and political institutions.[302] As unions lose their institutional vitality, the underlying national policies will also lose their meaning. This institutional erosion of unions may be inevitable, but state courts should not accelerate the process.

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296. *See* Pattern Makers' League of N. Am. v. NLRB, 473 U.S. 95 (1985).

297. *See* Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 109 S. Ct. 1225 (1989).

298. *See* Communications Workers of Am. v. Beck, 487 U.S. 735 (1988). For a discussion of the effect of the *Beck* decision in the entertainment industry, see Comment, *The Beck Decision: Will It Divide the Entertainment Unions*, 9 LOY. L.A. ENT. L.J. 425 (1989).

299. *See* A. GOLDMAN, *supra* note 13, at 179.

300. *Id.*

301. Many collective bargaining arrangements between labor and management have a long history, e.g. the auto manufacturers and the UAW. Even where individuals are members of a union, they may never have voted to be represented by their union. This "passive" form of membership, as opposed to active participation in an organizing campaign, further distances the individual from the union.

302. *See* LABOR RELATIONS LAW, *supra* note 9, at 24-28.

2. The Demise of Preemption

While Congress may enact labor legislation, it did not extend the "clear proof" standard to state courts. Nor has Congress enacted a statutory scheme to address union tort liability. This congressional inaction creates a threshold obstacle in applying federal preemption principles to state tort actions against unions. Although the threshold is not insurmountable, it is by no means an easy process. The current status of labor law preemption makes it even more difficult.

The public, and certainly potential victims, are justified in their concern with preventing violence during labor disputes. Preemption presupposes the existence of alternative jurisdictions or remedies. Some state courts have declined to find that the federal "clear proof" standard has any preemptive force.[303] When the NLRB takes a "hands off" approach to union violence, state courts may feel obligated to fill the void.[304] Once the matter is before a state court, it may be awkward to apply a federal standard of proof. After all, if there were an effective federal remedy through the NLRB, the parties would not be in state court.[305]

Current labor law preemption doctrine is in a state of flux. The uncertainty of whether a particular issue is preempted may be turning the doctrine into a dead letter.[306] State judges are not compelled to preempt state evidentiary rules with a federal policy because the federal system (courts, Congress and the NLRB) has ceded tort jurisdiction to the states.[307] Indeed, the only principled way to apply the "clear proof" standard in state courts is to adopt a *Linn*-type analysis—finding a federal policy preemption.[308] A *Linn* approach seems contrary to the current trend away from a coherent doctrine of federal labor law preemption.[309]

In sum, there are powerful reasons to support the adoption of the federal standard of "clear proof" in state court actions against unions.

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303. J.R. Norton Co. v. General Teamsters, Warehousemen and Helpers, Local 890, 208 Cal. App. 3d 430, 440-43, 256 Cal. Rptr. 246, 251-54, *cert. denied*, 110 S. Ct. 242 (1989).

304. *See* Teamsters, Local 901 (Lock Joint Pipe Co.), 202 NLRB Dec. (CCH) No. 43, 399 (1973).

305. *J.R. Norton*, 208 Cal. App. 3d at 440, 256 Cal. Rptr. at 251-52.

306. Neither labor nor management seems to be pleased with the current state of preemption. *See, e.g.*, *State Labor Law Development*, 4 THE LABOR LAWYER 349, 370 (1988). "[T]he Court appears to have gone from a liberalized preemption which emphasized national uniformity to an eviscerated doctrine where the exceptions have virtually swallowed the rule." *Id.*

307. *J.R. Norton*, 208 Cal. App. 3d at 440-41, 256 Cal. Rptr. at 251-52.

308. Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 64-65 (1966).

309. *State Labor Law Development*, *supra* note 306, at 369-70.

The reasons are both pragmatic and fair. On the other hand, there are forces, both extra-judicial and within the federal and state legal systems, which may explain the reluctance to adopt a higher standard of proof. Abandoning union tort liability issues to the individual states has created an unpredictable legal situation. Liability depends more on the caprice of geography, rather than on consistent legal principles. The question becomes whether there are viable alternatives to this state of affairs.

V. CONCLUSION

American labor policy has long favored the existence of a free trade union movement. The "clear proof" standard mandated by section 6 of the Norris-LaGuardia Act is an express statement of this strong national policy. The "clear proof" standard, both textually and through the case law, protects labor unions from unwarranted tort liability. The operative word is "unwarranted," since the national policy does not immunize labor unions from all tort liability.[310]

In spite of this relatively straightforward national policy, states are free to devise their own approaches. Some states chose to apply the same standards to unions as they apply to any corporate entity. Such decisions refer to legislative silence or strict statutory construction. Conspicuously absent from this line of decisions is the recognition that unions, as associations of individuals, are not equivalent to other corporate entities. Another line of cases has extended protection to unions in tort actions. These cases make reference to the national policy favoring labor unions, with one decision evoking concerns about federalism.[311]

This Comment also illustrated the English approach, which through its statutory scheme and common law, significantly protects the union against liability resulting from the tortious conduct of an individual member. The English experience is instructive because it is a modern effort to address union tort liability. The English statutory scheme attempts to reconcile the competing interests of unions and tort victims.

When individual states are left free to their own whims, the situation can properly be categorized as judicial *laissez faire*. The resulting uncertainty about unions' legal status bears some resemblance to the time prior to the enactment of protective labor legislation. When the

310. *See* Annotation, *supra* note 278.

311. *See* Hiestand v. Amalgamated Meatcutters, 233 Kan. 759, 666 P.2d 671 (1983).

issue is truly one of local concern, there is nothing wrong with leaving the states to experiment. When a national policy has been articulated, however, it is undemocratic to allow state judiciaries to erode this policy without a single vote being cast.

There are both short-term and long-term solutions. California courts should immediately reassess the position of union tort liability. The *J.R. Norton* decision is persuasive authority, yet the California Supreme Court ordered the *Vargas* decision, which expressly relied on *J.R. Norton*, decertified.[312] Needless to say, this leaves the state of law in California unsettled. The California legislature could also intervene to legislatively overrule *J.R. Norton* by enacting the "clear proof" standard.

Over the long term, it is time to re-evaluate our national labor policy. Norris-LaGuardia, the NLRA and the LMRA, which comprise the three central bodies of labor law, were enacted at different times in our political history. Each of these statutes, as well as the other related employment law statutes, were enacted to serve different needs and interests. For example, American labor law has at times sought to foster union growth, while at other times attempted to equalize the bargaining power between union and management.

Time, as well as conflicting state law, has obscured our national policy. The "clear proof" evidentiary standard was enacted to further the preservation of unions. "Clear proof" may, or may not, be relevant today. Congress is the most appropriate place to articulate our national labor policy. Allowing various judicial systems to enact policy by default is inappropriate and undemocratic. Perhaps a comprehensive revision of our statutes would reconcile the conflicting interests present in our current laws.

The United States should reaffirm the policy favoring a free trade union movement. Regardless of one's attitudes towards unions, they serve an important societal function as the countervailing force to organized capital. Unions, at their best, are the most effective means of empowering people with a voice on the central issues in their lives. As the poet Yeats so eloquently wrote:

"Things fall apart, the centre cannot hold;

312. *See supra* note 4.

Mere anarchy is loosed upon the world . . . ."[313]

*Robert F. Hunt**

313. W.B. YEATS, *The Second Coming*, in THE COLLECTED POEMS OF W.B. YEATS 184-85 (1976).

* I dedicate this Comment to my wife, Annette, and our children, Erin and Tom. I hope to reward their patience and understanding sometime during this lifetime. I also wish to express gratitude to all my friends at Local 347—over the years they have taught me the positive aspects of unions.