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THE PROPERTY RIGHTS OF DISAFFILIATING LOCAL UNIONS IN THE LIGHT OF PUBLIC POLICY

The struggle of workingmen to achieve industrial democracy has long aroused public interest. With the vast growth of labor unions in the 1930's, this public concern became formalized into law. The National Labor Relations Act (NLRA),[1] passed in 1935, expressed the national conscience of the time by giving sympathetic support to the right of workers to organize and to bargain collectively.

While the passage of the NLRA alleviated some of the then persistent problems of labor relations (such as the orderly adjustment of recognitional disputes), the continued development of unions raised new and unforeseen questions. The 1947 amendments to the NLRA[2] reflected the determination of Congress to place more and more of the labor-management relations field under public regulation.[3] With the passage of the 1959 Labor-Management Reporting and Disclosure Act (LMRDA),[4] legislative intervention in the industrial relations field entered a new phase. For the first time, the previously sacrosanct world of internal union affairs[5] was opened to large-scale public scrutiny.

The continuing intrusion of federal law into labor relations seems hardly surprising in view of the vast number of workers now organized into the trade union movement[6] and the disruptive economic and social effects which often flow from breakdowns in the collective bargaining process.[7] Each day, almost every American is in some way affected by the vicissitudes of the labor-management world.

Yet, many courts refuse to recognize that public policy must often be a controlling factor in those areas of labor law not precisely regulated by the Act. The sustaining of old forms, under the aegis of stare decisis, contravenes the realities of modern industrial relations and frustrates the policies which under-

1. 29 U.S.C. § 151 (1964).

2. 29 U.S.C. § 141 (1964).

3. The Labor-Management Relations Act of 1947, 29 U.S.C. § 141 (1964) [hereinafter LMRA], generally placed new and stricter controls on concerted union activities. See, e.g., LMRA § 206, 29 U.S.C. § 176 (1964) (national emergencies).

4. 29 U.S.C. § 401 (1964).

5. See, e.g., International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958), wherein the Court stated: "[T]he protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. The proviso to § 8(b)(1) of the Act states that 'this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .'" Id. at 620. See also Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1050-51 (1951).

6. In 1966 there were over 19 million union members, representing 28% of the nonagricultural work force. This was over double the number of unionized workers in 1940. U.S. Dep't of Commerce, Statistical Abstract of the United States 239 (89th ed. 1968).

7. Some 4,595 work stoppages took place in 1967 involving over 2.8 million workers. Id. at 242.

lay the National Labor Relations Act. Thus it has been that the law which controls the disposition of assets of disaffiliating local unions is nonconforming to the demands of our present-day national labor policy.

I. The Problem of "Reverters"

The reverter clause ("reverter") is a provision appearing in many union constitutions[8] which purports to control the disposition of money and other property of a local union, which, for any reason, has severed its ties with the international. The clause typically has these assets "revert" to the international union upon successful disaffiliation.[9]

When dealing with internal union affairs, the courts have traditionally employed the law of unincorporated associations.[10] In conformity with this analogy, judges have viewed the union constitution as a contract, binding upon the international, the local and the members. In *Polin v. Kaplan*,[11] the New York Court of Appeals stated: "The constitution and by-laws of an unincorporated association [here the Moving Picture Machine Operators' Union] express the terms of a contract which define the privileges secured and the duties assumed by those who have become members."[12] The result has been that, until recently, a local union whose members were dissatisfied with their international invariably faced the prospect of either remaining subject to the international or losing its assets by judicial enforcement of the reverter clause.[13] While the voluntary association theory of unions and its resultant contract doctrine are deeply imbedded in judicial thinking even today, the theory is open to criticism. The notion that labor unions, with their millions of members and often

8. "Provisions in union constitutions of this sort, involving forfeiture or purported reverter of assets to the international, are the rule, rather than the exception." Bradley v. O'Hare, 11 App. Div. 2d 15, 22, 202 N.Y.S.2d 141, 148 (1st Dep't 1960). See also Cohn, The International and the Local Union, N.Y.U. 11th Ann. Conf. on Labor 7, 9 (1958); Isaacson, The Local and the International, N.Y.U. 5th Ann. Conf. on Labor 413, 418 (1952).

9. A typical reverter clause is found in the 1964-68 Constitution of the International Union of Operating Engineers. Art. XIV, § 8(b) reads in part: "If at any time a Local Union or other subdivision shall withdraw, lapse, dissolve, be suspended, placed under supervision or expelled from the International Union, or shall have its charter revoked, all of its real and personal property, paraphernalia, books, charter, seal, records, card indexes and funds shall immediately revert to the International Union and the General President shall at once, in person or by deputy, take possession of such property . . . ."

10. See Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 799, 16 Cal. Rptr. 813, 814-15 (1961). See also Summers, supra note 5, at 1051.

11. 257 N.Y. 277, 177 N.E. 833 (1931).

12. Id. at 281, 177 N.E. at 834.

13. See, e.g., Brown v. Hook, 79 Cal. App. 2d 181, 180 P.2d 982 (1947); United Pub. Workers v. Fennimore, 6 N.J. Super. 589, 70 A.2d 901 (Super. Ct. 1950); House v. Schwartz, 18 Misc. 2d 21, 188 N.Y.S.2d 308 (Sup. Ct. 1959); Brownfield v. Simon, 94 Misc. 720, 158 N.Y.S. 187 (Sup. Ct.), aff'd mem., 174 App. Div. 872, 159 N.Y.S. 1102 (1st Dep't 1916), aff'd mem., 225 N.Y. 643, 121 N.E. 858 (1919). See also Summers, Union Schism in Perspective: Flexible Doctrines, Double Standards, and Projected Answers, 45 Va. L. Rev. 261, 265-66 (1959).

tremendous economic power, should be treated in the same legal fashion as a women's church auxiliary, is surely an absurd idea. Factual dissimilarities, however, are not the only reasons calling for different judicial treatment of labor unions from that accorded other voluntary associations. Unions, unlike other groups, are closely protected and regulated by state and federal law. They are indeed charged with a public responsibility by Congress.[14] Moreover, membership in a union is often not voluntary at all, but rather a required condition of employment.[15] "Unions are not only involuntary associations but obtain a substantial measure of their compulsory jurisdiction over individuals from the law itself."[16]

There has, in recent years, been a slow but growing recognition of the inappropriateness of applying the law of voluntary associations to trade unions. Thus in *House v. Schwartz*,[17] the court, while unwilling to embark on new paths, at least expressed recognition of the problem: "Perhaps, there will be finally evolved some concept as the result of legislation or changing circumstances which will recognize the essential differences between labor unions and fraternal associations and provide equitable rules appropriate to the *sui generis* nature of union relationships."[18]

In addition to criticism of the underlying voluntary association theory, the contract doctrine has itself come under attack. An examination of the doctrine reveals the tremendous difficulties in reconciling it to existing contract law. Some of the problems are explored in the following statement by Professor Clyde Summers:

> With whom does the member make his contract? Most courts say that it is with the union—but the union may not be a legal entity. A few courts have attempted to avoid this difficulty by saying that the contract is with the other members—a contract with a million others who have no knowledge and little concern! What are the terms of the contract? The constitutional provisions, particularly those governing

14. See, e.g., Labor-Management Reporting and Disclosure Act of 1959, § 501(a), 29 U.S.C. § 501(a) (1964) (fiduciary obligations of union officers).

15. National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964), allows for compulsory union membership after 30 days employment under a "union shop" agreement.

16. Summers, Union Democracy and Union Discipline, N.Y.U. 5th Ann. Conf. on Labor 443, 460 (1952).

17. 18 Misc. 2d 21, 188 N.Y.S.2d 308 (Sup. Ct. 1959).

18. Id. at 27, 188 N.Y.S.2d at 315. Other courts have not been so hesitant. Thus in Crocker v. Weil, 227 Ore. 260, 361 P.2d 1014 (1961), the court said: "[T]here simply is no other form of organization, corporate or otherwise, in which membership therein is directly comparable to [unions] . . . . He who would solve this case by comparison to some other forms of organization and the respective rights of its members and stockholders can only reach frustration." Id. at 283, 361 P.2d at 1025. "The first [illusion] is that unions are purely voluntary organizations like Republicans, Democrats, Elks, and church groups. A modern labor union, both in structure and in function, bears little resemblance to other voluntary associations. . . . 'It is this omnipotent analogy that leads the courts astray.'" Mitchell v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 799, 16 Cal. Rptr. 813, 814 (1961) (citations omitted). See also Bradley v. O'Hare, 11 App. Div. 2d 15, 27, 202 N.Y.S.2d 141, 153 (1st Dep't 1960).

discipline, are so notoriously vague that they fall far short of the certainty ordinarily required of a contract. The member has no choice as to terms but is compelled to adhere to the inflexible ones presented. Even then, the union is not bound, for it retains the unlimited power to amend any term at any time.[19]

There also remains the fact that the contract is not even voluntarily entered into when membership is a condition of employment.[20]

Finding themselves in sympathy with locals attempting to disaffiliate from left wing or corrupt internationals, judges began inventing exceptions to the formal contract theory. Thus there has evolved the "implied condition" and "frustration of purpose" doctrines,[21] the "trust fund" theory,[22] and the "local autonomy" doctrine,[23] among others. The trouble with all of these was that they reflected shortsighted and ephemeral solutions to problems which should have been handled by reference to the national labor policy.

While thorough discussions of the various theories have appeared elsewhere,[24] it would perhaps be beneficial to briefly explore one or two before offering an alternative solution to the legal issues raised by reverters.

The decisions involving property rights of locals upon disaffiliation have been deeply influenced by their factual context. Thus in 1949, the courts were faced with the choice of either enforcing reverter clauses against locals which were disaffiliating from the CIO-expelled United Electrical Workers Union (UEW), or finding some legal basis for these locals to retain their assets. Nearly a decade later, the courts were faced with the same choice, this time when the Bakery and Confectionery Workers were expelled from the AFL-CIO for al-

19. Summers, supra note 5, at 1055 (citations omitted).

20. "In short, the member's 'contract' . . . is often a legal fiction which prevents the courts from considering attentively the genuine reasons for and against relief." Chafee, The Internal Affairs of Associations Not For Profit, 43 Harv. L. Rev. 993, 1007 (1930). See also Greenberg, Disposition of Union Assets Upon Disaffiliation, 33 Temp. L.Q. 152, 154 (1960); Stone, Wrongful Expulsion From Trade Unions: Judicial Intervention at Anglo-American Law, 34 Can. B. Rev. 1111, 1115-16 (1956).

21. See, e.g., Olson v. Carbonara, 21 Ill. App. 2d 69, 157 N.E.2d 273 (1959); West Va. Pulp & Paper Co. v. Lewis, 17 Misc. 2d 94, 191 N.Y.S.2d 303 (Sup. Ct. 1958), aff'd mem., 8 App. Div. 2d 899, 187 N.Y.S.2d 1002 (3d Dep't 1959); Clark v. Fitzgerald, 197 Misc. 355, 93 N.Y.S.2d 768 (Sup. Ct. 1949); Bozeman v. Fitzmaurice, 62 Ohio L. Abs. 526, 107 N.E.2d 627 (Ct. App. 1951).

22. See, e.g., Donovan v. Danielson, 271 Mass. 267, 171 N.E. 823 (1930); Local 1, Lithographers v. Brown, 26 App. Div. 2d 90, 270 N.Y.S.2d 891 (1st Dep't 1966), aff'd mem., 20 N.Y.2d 962, 233 N.E.2d 856, 286 N.Y.S.2d 853 (1967); House v. Schwartz, 18 Misc. 2d 21, 188 N.Y.S.2d 308 (Sup. Ct. 1959).

23. See, e.g., Local 1140, UEW v. UEW, 232 Minn. 217, 45 N.W.2d 408 (1950); International Brewery Workers v. Becherer, 142 N.J. Eq. 561, 61 A.2d 16 (Ch. 1948), aff'd, 4 N.J. Super. 456, 67 A.2d 900 (Super. Ct. 1949); Herman v. UAW, 264 Wis. 562, 59 N.W.2d 475 (1953).

24. See, e.g., Cohn & Lubell, Control of a Labor Union—By Whom, Over What?, 22 Ohio St. L.J. 163 (1961); Greenberg, supra note 20; Note, Disposition of Union Assets on Disaffiliation, 45 Va. L. Rev. 244 (1959); Note, Rights to Local Union Property After Secession, 58 Yale L.J. 1171 (1949).

leged corruption. The judicial response was largely based on the implied condition and frustration of purpose doctrine, which had been introduced in the leading case of *Clark v. Fitzgerald*.[25] This doctrine presupposes the critical importance to the local of the international's affiliation with a national labor federation (*e.g.*, the CIO). The doctrine further assumes that the local "impliedly contracted" with the international that affiliation with a federation would continue. When the international is expelled, the implied condition is thereby breached, the contract is frustrated, and thus ended (along with its reverter clause).[26]

The doctrine suffers from a number of weaknesses. First, the presupposition of the critical importance of affiliation with a federation seems in a good many cases to be unwarranted.[27] Second, the doctrine is limited to expulsion from a federation (now only the AFL-CIO). What of a local seeking to disaffiliate from an undemocratic or weak-kneed, yet fully affiliated international? Such locals under this doctrine presumably must either remain "frustrated" in their disaffiliation wishes or else face the wrath of the reverter clause.[28]

A sounder neutralizer for the reverter clause has been found in the local autonomy doctrine. Here the courts looked at the local-international relationship. If they found a high degree of local autonomy, a history which antedated the existence of the international, an identification by the members mostly with the local union, the courts would more than likely allow the local to retain its assets.[29] While less fictitious than the frustration of purpose doctrine, the local autonomy theory also contains inherent weaknesses. "[I]t ultimately leads the courts deep into the thicket of union structures. Furthermore, it provides

25. 197 Misc. 355, 93 N.Y.S.2d 768 (Sup. Ct. 1949).

26. The court in Clark v. Fitzgerald well expressed the basis for the widely applied doctrine: "While not so precisely expressed in the contract between U.E.[W.] and the Local, both parties must be supposed to have contemplated the continuance of the affiliation of the United Electrical with the C.I.O. as one of the conditions of the compact and such contract is subject to this implied condition.

"When performance depends on the continued existence of a given thing and such continued existence is assumed as a basis of the agreement, an implied condition that such existence shall continue is to be read into the contract, and the destruction of the thing puts an end to the contract . . . . Where an event substantially frustrates the objects contemplated by the parties when they enter into the contract the foundation of the contract is gone." Id. at 360, 93 N.Y.S.2d at 773-74. "The 'frustration of purpose' doctrine was used extensively by the courts in both the UE[W] and BCW expulsions, with the majority of the courts following the decision in Clark v. Fitzgerald." Greenberg, supra note 20, at 157 (footnote omitted).

27. See Note, supra note 24, at 249; Comment, Effects of a Union Split Upon Property Rights, 1952 Wis. L. Rev. 139, 149. The continued strength of the Teamsters Union and the recent voluntary disaffiliation of the UAW shows that no blanket assumptions can be made as to the importance of affiliation.

28. "It seems fair to say that the theory itself was created to meet with the UE[W] expulsion situation, and will probably be limited in use to like conditions." Greenberg, supra note 20, at 157-58.

29. See cases cited note 23 supra.

no intelligible guide as to how independent a local union must be, and in what respects, to be entitled to walk out with assets in hand."[30] Again, what of the local which doesn't fit the strictures of the doctrine, yet has just cause for disaffiliating?

Undoubtedly, each of the many doctrines employed by the courts could be and have been criticized for their own inherent limitations and weaknesses. There is, however, a more fundamental charge which should be leveled: *all* of these doctrines are nothing more than convenient judicial devices to achieve desired ends. While mouthing the doctrine of judicial restraint in internal union affairs, the courts have in fact deeply interfered in those affairs, but not on the basis of any reasoned or public labor policy. *"In the end the courts do decide the cases and the majority inject their own values while disclaiming the role they in fact play."*[31] The results have been undesirable for the courts, the bar, and most importantly for the unions involved. Some judges enforce reverters, and others, faced with substantially the same facts, do not.[32] Attorneys are forced to deal with any number of theories which may be currently fashionable, while unionists remain uncertain as to their legal rights and remedies.[33] As we shall see, the narrowness of these ill-conceived exceptions to the enforcement of reverter clauses has had the deleterious effect of thwarting a clear and demanding public policy in this area.

II. The New Approach in Judicial Thinking

The first steps toward the achievement of a sound judicial approach to the enforcement of reverters has already been taken in several recent cases.[34] The signal for this more enlightened trend was the decision in *Bradley v. O'Hare*.[35] The *Bradley* case is noteworthy not so much for accepting a public policy approach to reverters; indeed, the court expressly rejected counsel's arguments on this point.[36] Rather, the case stands out for the court's ability to transcend the standard theories and to see the true issues involved in any battle involving reverters.

30. Summers, supra note 13, at 264 (footnote omitted).

31. Summers, The Impact of Landrum-Griffin in State Courts, N.Y.U. 13th Ann. Conf. on Labor 333, 349-50 (1960) (emphasis added). "With the BCW cases, the last vestiges of judicial restraint have disappeared.

. . . .

"The courts have boldly used their self-made freedom to noble ends—aiding the labor movement in combatting communism and corruption. However there is little reason to rejoice, for precedents have been established which lead to the most irresponsible form of judicial intervention in internal union affairs. The courts have made the rights of the parties depend on the court's approval of their general pattern of conduct or their observance of 'the basic principles of a trade union.'" Summers, supra note 13, at 268.

32. See id. at 266.

33. See Summers, The Political Liberties of Labor Union Members—A Comment, 33 Texas L. Rev. 603, 609 (1955).

34. See cases cited note 41 infra.

35. 11 App. Div. 2d 15, 202 N.Y.S.2d 141 (1st Dep't 1960).

36. Id. at 22, 202 N.Y.S.2d at 148.

Bradley arose as a result of a disaffiliation action by Local 333 of the International Longshoremen's Association and the subsequent attempt of the International to enforce the reverter clause. The court first proceeded to review the various doctrines which had arisen to protect the assets of disaffiliating locals.[37] The decision recognized the differences between labor unions and other voluntary associations, and the consequent inappropriateness of simple contract theories.[38] Most significantly, the court affirmed a rather simple but basic proposition that is too often lost sight of: unions exist for the sole purpose of advancing the interests of their members. "Thus viewed, insulating language, expressed in terms of simple contract or property law, in the constitutions of the unions offers neither a proper description of the facts nor an effective obstacle to achieving the best interests of the ultimate beneficiaries."[39] The entire union structure, maintained the court, is tied together by fiduciary obligations. A breach of such obligations can have the effect of invalidating a reverter clause, if enforcement of the same would benefit the wrongdoers.[40] Thus, the *Bradley* case, by its recognition of the paramount interests of the union membership and its emphasis on the fiduciary obligations which exist within a union, took a major step toward the establishment of a sound approach to the problem of reverters.[41]

III. Reverters and Public Policy

There are at least four principles of public policy which have a significant bearing on the question of reverters. The first is found in sections 1[42] and 7[43] of the Act. It affirms the right of employees to have free choice in the designation of representatives. A second and closely related principle (also found in section 1 of the Act) proclaims the need for stability in the field of labor-management relations.[44] A third principle, derived from the Declaration of Findings, Purposes and Policy of the 1959 Labor-Management Reporting and Disclosure Act,[45] is that unions exist solely for the benefit of the persons they represent and must always act accordingly. Closely tied to this is the duty of

37. Id. at 25-27, 202 N.Y.S.2d at 150-52.

38. Id. at 27, 202 N.Y.S.2d at 153.

39. Id.

40. Id. at 28-29, 202 N.Y.S.2d at 154. See notes 93-96 infra and accompanying text.

41. The decision was followed in Crocker v. Weil, 227 Ore. 260, 361 P.2d 1014 (1961), and in Local 1, Lithographers v. Brown, 26 App. Div. 2d 90, 270 N.Y.S.2d 891 (1st Dep't 1966), aff'd mem., 20 N.Y.2d 962, 233 N.E.2d 856, 286 N.Y.S.2d 853 (1967).

42. 29 U.S.C. § 151 (1964) (findings and policies).

43. 29 U.S.C. § 157 (1964) (rights of employees).

44. 29 U.S.C. § 151 (1964) states in part: "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ."

45. 29 U.S.C. § 401 (1964).

fair representation which has been placed upon unions by the courts.[46] Finally, the 1959 amendments to the Act established that unions are charged with fiduciary obligations vis-à-vis their members.[47]

A. *Reverters and the Concept of Free Choice*

The concept that employees shall have the right to "representatives of their own choosing" is basic to the National Labor Relations Act. This provision appears in section 7, "the heart" of the original NLRA. It was recently reaffirmed in the policy provisions of the 1959 amendments.[48]

While the free choice provision is typically thought of in terms of forbidding *employer* interference with his employees' choice of bargaining agent, this is by no means its exclusive meaning, as developed in case law. In *Brown v. Union of Marine Cooks*,[49] the court stated the broad rights given employees under section 7: "[These employees] have the right to bargain collectively through representatives of their own choosing, to join or not to join a union, to assist a union in furthering its purposes to be substituted for another union as their bargaining representative, and to engage in concerted activities for their mutual aid or protection though no union activity is involved . . . ."[50] The early case of *NLRB v. Hollywood-Maxwell Co.*[51] expressly affirmed the right of employees to revoke their designation of a bargaining agent.[52] Under the elections provisions of the Act (section 9),[53] and within certain limitations established by the Act and Board, employees can and do[54] change their bargaining representatives in accordance with their section 7 rights.

It is at this point that an anomalous and troublesome situation presents itself. The Board, employing its broad discretionary powers, has refused to rule on the property rights of disaffiliating local unions even though it may be con-

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46. See, e.g., Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).

47. 29 U.S.C. § 501(a) (1964).

48. 29 U.S.C. § 401 (1964). The "Congressional declaration of findings, purposes, and policy" of the 1959 Act states in part: "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . . ."

49. 104 F. Supp. 685 (N.D. Cal. 1951).

50. Id. at 689.

51. 126 F.2d 815 (9th Cir. 1942).

52. "[Employees] have the right under Section 9(a) to designate a union they form themselves or a national union, as it best suits them. Obviously, this included the right to revoke a designation of a national union as their bargaining agent." Id. at 820. "Under Secs. 1 and 7 of the Act, the employees have the right 'to bargain collectively through representatives of their own choosing.' They have the right to designate. They have the right to revoke." NLRB v. Mayer, 196 F.2d 286, 289 (5th Cir. 1952). See also Local 770, Retail Clerks v. NLRB, 370 F.2d 205 (9th Cir. 1966); Air Products, Inc., 91 N.L.R.B. 1381 (1950).

53. 29 U.S.C. § 159 (1964).

54. See, e.g., N.L.R.B. Election Report (May-Sept. 1968).

ducting the representation election from which the reverter dispute arises.[55] The question thus being left to the state courts, the result is often an enforcement of the reverter clause with the probability of consequent stultification of the section 7 rights recently manifested by the Board's representation election. It would be an unusual local union that could operate without assets. In *Harker v. McKissock*,[56] the New Jersey Superior Court well expressed the problem:

> The local's representative status over the years has been given substance and vitality through the possession and use of the funds and property contributed by its members for the purposes of the representation. The loss of these funds and property would threaten impairment, if not the throttling, of the local's performance of its representative functions and its organizing and bargaining ability. *The inevitable result may be a deterrent effect on the employees' right of a free choice of representatives.*[57]

The possible debilitating effect of a reverter clause on employee free choice is, of course, one factor which a court should weigh when dealing with a dispute over the property rights of a disaffiliating local. The effect of the reverter on free choice may, however, be only minimal. Thus, if a disaffiliating local aligns itself with a new, powerful international, willing to give financial assistance to the local, the burden imposed on employee choice would be only minor. In such a case, the union's constitution should control. On the other hand, where the members decide to set up an independent, unaffiliated local, the reverter provisions might effectively destroy the employees' right to representatives of their own choosing and should then be considered invalid. For the divers other situations which may arise, the court must decide in each instance if the right of unions to enforce their internal systems of government conflicts with the public policy of free choice for the worker-members.

B. *Reverters and Industrial Instability*

Typically, stability in labor relations is presented as a concept mutually exclusive with employee free choice.[58] Ironically, both policies are derived from

55. In Boston Machine Works, 89 N.L.R.B. 59 (1950), the Board stated this position by saying simply: "So far as the property rights of the parties are concerned, that is a matter properly for the courts rather than this Board to decide." Id. at 61.

56. 10 N.J. Super. 26, 76 A.2d 89 (App. Div. 1950), modified, 7 N.J. 323, 81 A.2d 480 (1951).

57. Id. at 40-41, 76 A.2d at 96 (emphasis added). In Crawford v. Newman, 11 Misc. 2d 322, 174 N.Y.S.2d 667 (Sup. Ct.), aff'd mem., 5 App. Div. 2d 859, 174 N.Y.S.2d 881 (1st Dep't 1958), the court, in refusing to grant a temporary injunction against a disaffiliating local's use of its assets said: "[W]hile no harm appears probable from denial of the motion, its granting could irreparably harm [the local], to whom a large membership of workers in the industry look for day-to-day service with respect to dues, grievances, transfers, layoffs, rehirings and all the manifold duties of trade union officials. There is, indeed, danger that the granting of a temporary injunction—if ultimately defendants prevail—will cause the disintegration of the Locals and the individual defendants' interests therein." Id. at 327, 174 N.Y.S.2d at 672.

58. This has traditionally been the attitude of the NLRB. "Many decisions of the Board, and almost every one of its Annual Reports, have devoted attention to the problem of stability in collective bargaining relations versus the free choice of representatives." G.

the same section of the NLRA.[59] The achievement of industrial stability is encouraged in several ways by the Act and Board. Thus, section 9(c)(3)[60] prohibits more than one election per year in a particular bargaining unit. In addition, the Board has established the so-called "contract-bar" rule.[61] This rule forbids a representation election at the behest of a rival union while a valid collective bargaining agreement is in effect. That the contract-bar rule impinges on employee free choice is indisputable.[62] That the bar serves to promote industrial stability is open to question.[63] The Board has recognized this contradiction and has attempted to resolve it through its "schism doctrine." The schism doctrine holds within it the implicit admission that, *at least under certain circumstances*, it is free choice and not enforced acceptance of the status quo which is the true basis of industrial stability.[64] An examination of the schism doctrine and the reasoning behind it throws a good deal of light on the problem of reverters. It is the existence of an intraunion "schism" which often precipitates the eventual employment of the reverter clause.

The schism doctrine, in existence for many years,[65] was well stated in the *Hershey Chocolate Corp.*[66] decision of the NLRB. The doctrine provides that

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Brooks, The Sources of Vitality in the American Labor Movement 34 (1960). Philip Rodgers, a member of the Board has stated: "The Board's task has been to balance and reconcile these conflicting policies [i.e., stability vs. free choice] into practicable operation." Rodgers, A Result: Union Division, 45 Va. L. Rev. 207, 208 (1959).

59. NLRA § 1, 29 U.S.C. § 151 (1964).

60. 29 U.S.C. § 159(c)(3) (1964).

61. See, e.g., Appalachian Shale Prod. Co., 121 N.L.R.B. 1160 (1958); Association of Pulp & Paper Mfrs., 121 N.L.R.B. 990 (1958).

62. The Board addressed itself to this question in the early contract-bar case, Reed Roller Bit Co., 72 N.L.R.B. 927, 929 (1947): "Whenever a contract is urged as a bar, the Board is faced with the problem of balancing two separate interests of employees and society which the Act was designed to protect: the interest in such stability as is essential to encourage effective collective bargaining, and the sometimes conflicting interest in the freedom of employees to select and change their representatives. In furtherance of the purposes of the Act, we have repeatedly held that employees are entitled to change their representatives, if they so desire, at reasonable intervals; or conversely, that a collective bargaining contract may preclude a determination of representatives for a reasonable period."

63. It seems clear that if workers are forced to remain in a union they no longer want, they are likely to take out their frustration by rebelling against their union, and possibly, their employer. Such rebellion seems hardly likely to promote industrial stability. See generally G. Brooks, supra note 58, at 34-37; A. Cox & D. Bok, Labor Law 313 (1965).

64. "The disinclination to change representatives in the presence of an ample opportunity to do so is a kind of continuous consent to the work of the union. This kind of faith in one's union representative is essential to the process of consent in collective bargaining.

"The same conclusion is implied by the National Labor Relations Board in . . . [its] 'schism' doctrine." G. Brooks, supra note 58, at 36.

65. See, e.g., Foley Lumber & Export Corp., 70 N.L.R.B. 73 (1946); National Tea Co., 35 N.L.R.B. 340 (1941); Brewster Aeronautical Corp., 14 N.L.R.B. 1024 (1939).

66. 121 N.L.R.B. 901 (1958), enforcement denied on other grounds, 297 F.2d 286 (3d Cir. 1961).

where there is a "basic intraunion conflict" over policy at the highest levels of an international union, which conflict results in confusion and disruption at the local level, the contract-bar will be dropped, and a representation election may be held during the contract period.[67] The Board presented, *as examples* of such conflict, the shift of some of the union leadership to a rival union, and the expulsion of the union from a labor federation.[68] The Board required that the members take some action at the local level (e.g., hold an open meeting) in response to the conflict, before the contract-bar would be suspended.[69] This prerequisite presumably would demonstrate confusion and instability in the bargaining unit.

The schism doctrine, as previously noted, simply recognizes the fact that, under the circumstances of a union split, industrial stability is better served by allowing free choice than by barring a representation election. It was thus the Board's experience that: "[W]hen 'the split in the organization was created by a basic intraunion conflict . . . no salutary stabilizing purpose could have been served by applying the contract bar rule . . . [and] an immediate direction of election was the only means by which the Board could hope to assist the employer, the employees, and a bargaining representative to continue to live together with some semblance of stability.' "[70]

It has been forcefully argued that the schism doctrine in its present form is too narrow in scope.[71] Obviously, basic intraunion conflict at the highest levels is of concern to the Board only if it results in instability in the bargaining unit. If secession of a single local results in such instability, the resolution of which could be satisfied by a representation election, why cling stubbornly to the contract-bar?[72] While this argument has been advanced, it has yet to be accepted by the Board.

In any case, the schism doctrine even in its present form, raises grave questions insofar as reverters are concerned. As we have seen, disputes over reverters typically arise in those situations involving basic intraunion conflict.

67. Id. at 907.

68. Id.

69. Id. at 908.

70. Id. at 907. The rationale of the schism doctrine has been elaborated on by Board member Philip Rodgers: "[F]or the Board to remain oblivious to major intraunion conflicts over basic philosophy, would amount to nothing less than the Board's arrogating to itself a decision which should be made solely by the employees affected. By refusing an election in such a situation, the Board would in effect be ruling that the 'ins' have it, no matter what the employees think or how strongly they feel." Rodgers, supra note 58, at 209.

71. See Harbor Carriers v. NLRB, 306 F.2d 89, 97 (2d Cir. 1962); G. Brooks, supra note 58, at 36; Mayer, A House Divided—The Schism Doctrine, 22 Ohio St. L.J. 154, 162 (1961); Summers, supra note 13, at 273-76.

72. "Board refusal to hold an election when the bulk of the union members have seceded is not likely to bring bargaining stability. The remnant, clothed with official status, may go through the motions of settling grievances, but the underlying dissatisfactions will only be magnified by resentment . . . . An election may not put the matter wholly at rest . . . but it can help clear the air and gain for the winning group the acquiescence which comes with majority rule." Summers, supra note 13, at 275-76.

Indeed, the Board expressly mentioned expulsion from a federation as a typical schism situation. It has been found to be consistent with, and in furtherance of the national labor policy of industrial stability to permit employees the right to designate the same or a new labor representative under such circumstances. If the employees then choose to disaffiliate from their international in pursuance of an election following an intraunion schism, and the state court on motion of the international enforces the reverter clause of the union constitution,[73] the result may be the destruction of the local,[74] frustration for the worker-members, and the defeat of the public policy favoring labor stability.

Under these circumstances, a court need merely review the facts and determine if there will be a conflict between the private law of the union constitution and the public law as presented in the Act. If there is, the public law must of course prevail. If there is no conflict (e.g., if the local were to affiliate with a wealthy and generous international), the union constitution should be enforced.

C. *Reverters and the Duty of Fair Representation*

Because unions are given the role of exclusive representative in their respective bargaining units,[75] they carry the responsibility of representing fairly all the employees in such units. The duty of fair representation, the violation of which the Board today considers a union unfair labor practice,[76] was established in a line of cases involving racial discrimination under the Railway Labor Act.[77] The principles established in those cases have been ruled applicable to the NLRA.[78]

The duty imposed on the union was well expressed in the leading case of *Steele v. Louisville & Nashville R.R.*[79] There, the Supreme Court stated: "We hold that the language of the Act . . . expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[80] The Act did not bar the creation of differences in treatment between various classes of employees. The ban was only on those discriminations which were, for example, based on race

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73. Even in 1949, when the courts were seeking to find exceptions to the UEW's reverter clause, the "contract" was enforced in almost half the cases. Id. at 267.

74. See notes 56-57 supra and accompanying text.

75. NLRA § 9(a), 29 U.S.C. § 159(a) (1964) states in part: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . ."

76. Local 12, Rubber Workers, 150 N.L.R.B. 312 (1964), enforced, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).

77. 45 U.S.C. § 151 (1964). See also Conley v. Gibson, 355 U.S. 41 (1957); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

78. Syres v. Local 23, Oil Workers, 350 U.S. 892 (1956) (per curiam).

79. 323 U.S. 192 (1944).

80. Id. at 202-03.

or religion, and thus "irrelevant and invidious."[81] It is now established that the duty extends to both the negotiation of contracts and the handling of grievances.[82] The decisions involving the duty of fair representation have been strongly reinforced by the passage of Title VII of the Civil Rights Act of 1964.[83] This new statute broadly prohibits union discrimination in employment practices because of race or religion. Moreover, it is the policy of the NLRB to refuse to enforce a contract-bar where there is found to be racial discrimination on the part of the certified union.[84]

The duty of fair representation relates to reverters as much as do the policies of free choice and industrial stability. Thus, for example, if an international union was found to be discriminating against locals with predominantly Negro memberships, and those locals disaffiliated through the means of an NLRB-conducted representation election (assuming the contract was ended or the bar was dropped by the Board because of discrimination), would the locals involved have to surrender their property in order to enforce their rights? It seems quite clear that to enforce a reverter clause under such circumstances would be to reward the international for its discriminatory actions and thus to undermine a host of statutes and decisions which condemn such behavior.

D. *Reverters and the Fiduciary Obligations of Union Officers*

Section 501(a) of the 1959 Labor-Management Reporting and Disclosure Act[85] established a fiduciary relationship between the union leadership and the rest of the members. While the section deals largely with financial responsibility of union officers, this is by no means its exclusive concern. The provisions of the section dealing with non-financial matters read:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization . . . to refrain from dealing with such organization as an adverse party . . . in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization . . . .[86]

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81. Id. at 203.

82. Local 12, Rubber Workers, 150 N.L.R.B. 312, 315 (1964), enforced, 368 F.2d 12 (5th Cir. 1966), cert. denied, 389 U.S. 837 (1967).

83. 42 U.S.C. § 2000e (1964). Section 703(c) of the Act, 42 U.S.C. § 2000e-2(c) (1964), reads in part: "It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

. . . .

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

84. See Pioneer Bus Co., 140 N.L.R.B. 54 (1962); Carter Mfg. Co., 59 N.L.R.B. 804 (1944).

85. 29 U.S.C. § 501(a) (1964); see A. Cox, Law and National Labor Policy 92 (1960)

86. 29 U.S.C. § 501(a) (1964).

The leading cases of *Teamsters Local 107 v. Cohen*[87] and *Nelson v. Johnson*,[88] as well as the legislative history of the Act, establish that section 501(a) is to be broadly interpreted,[89] that it is not limited to solely pecuniary applications,[90] and that common law fiduciary principles apply.[91] Nevertheless, in considering problems arising under this section, the courts must remain sensitive to "the special problems and functions of a labor organization."[92]

While the courts have yet to recognize the relationship between reverters and other areas of public policy, the same result has not occurred when a question concerning breach of fiduciary obligations has been raised. At least two appellate courts have taken note of the recent development of fiduciary responsibility within the union and have applied it in reverter cases. Thus in

87. 182 F. Supp. 608 (E.D. Pa.), aff'd, 284 F.2d 162 (3d Cir. 1960), cert. denied, 365 U.S. 833 (1961).

88. 212 F. Supp. 233 (D. Minn. 1962), aff'd, 325 F.2d 646 (8th Cir. 1963).

89. "[Section 501(a)] attempts to define in the broadest terms possible the duty which the new federal law imposes upon a union official." Teamsters Local 107 v. Cohen, 182 F. Supp. 608, 617 (E.D. Pa. 1960). "Careful analysis . . . refutes the notion that the statute is narrow in its terms and scope and that it is limited solely to pecuniary responsibilities or the proper or improper use of union funds." Nelson v. Johnson, 325 F.2d 646, 649 (8th Cir. 1963).

90. A House Report on the Elliot Bill is noteworthy at this point. While the Elliot Bill was not enacted, it contained provisions relating to fiduciaries which were preserved as § 501(a) of the LMRDA. The Report states: "We affirm that the committee bill is broader and stronger than the provisions of S. 1555 which relate to fiduciary responsibilities. S. 1555 applied the fiduciary principle to union officials only in their handling of 'money or other property' (see S. 1555, sec. 610), apparently leaving other questions to the common law of the several States. Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into Federal labor legislation. Accordingly the committee bill extends the fiduciary principle to all the activities of union officials and other union agents or representatives." Supplementary Views to H.R. Rep. No. 741, 86th Cong., 1st Sess. 81 (1959). The legislative history of § 501(a) is thoroughly reviewed in Nelson v. Johnson, 212 F. Supp. 233, 284-96 (D. Minn. 1962), where the court concluded that the section established a general fiduciary relationship between officers and members. See also Nelson v. Johnson, 325 F.2d 646, 649-50 (8th Cir. 1963); Bradley v. O'Hare, 11 App. Div. 2d 15, 202 N.Y.S.2d 141 (1st Dep't 1960).

91. "The general principles stated in the bill are familiar to the courts, both State and Federal, and therefore incorporate a large body of existing law applicable to trustees, and a wide variety of agents." 105 Cong. Rec. 17,900 (1959) (remarks of Senator John F. Kennedy). See H.R. Rep. No. 741, 86th Cong., 1st Sess. 10-11 (1959). See also Nelson v. Johnson, 212 F. Supp. 233, 288-89 (D. Minn. 1962), aff'd, 325 F.2d 646 (8th Cir. 1963); Crocker v. Weil, 227 Ore. 260, 361 P.2d 1014 (1961).

While any application of the fiduciary doctrine under § 501(a) will have to be tempered by a consideration of the special problems of labor organizations, the thrust of the fiduciary principle is best described in the classic statement of Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928): "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

92. 105 Cong. Rec. 17,900 (1959).

Bradley v. O'Hare,[93] a case noted earlier for its precedent setting character, the court stated:

> [T]he entire union structure in its several layers is viewed as a fiduciary one. Each layer may retain assets held by it in accordance with the internal constitutional provisions, provided such retention does not violate but rather implements the fiduciary obligation and the trade-union function. On the same reasoning, the beneficial use of the assets is in the worker members, not in the organizational entity which exists solely for their benefit. A general breach of fiduciary obligations . . . forfeits the right of the guilty entity to perform its fiduciary role. In that situation, the assets do not "revert" to the wrongdoers, but to the beneficial owners.[94]

The decision in *Bradley* was supported in the case of *Crocker v. Weil*.[95] In *Crocker*, the international union was seeking to recover the assets of a seceding local union pursuant to its reverter clause. The court, citing *Bradley* and the 1959 LMRDA, ruled that a "material breach of that fiduciary duty can nullify the otherwise enforceable obligations of the intra-union compact."[96]

The recognition by the courts that a breach of fiduciary obligations can void an "otherwise enforceable" reverter clause could have a major impact in this area of law. It seems fair to assume that a great many of the disaffiliation actions which arise have their genesis in a breach of trust by the union leadership.[97] That the nullification of reverters must extend to those other instances when public policy and private law clash, however, is a concept which has yet to find acceptance by the judiciary.[98]

IV. Conclusion

The National Labor Relations Act guarantees workers certain rights and protections. A free choice of labor representatives and an honest and responsive union leadership have been represented to workingmen as public policies of this nation. Yet the continued subversion of these guarantees by judicial enforcement of reverter clauses has resulted in a diminution of workers' rights under the Act. Ameliorative attempts by the courts in regard to the problems raised by reverters have thus far served only to confound the issues. A frank recognition by the courts of the critical role which public policy should play in regard to reverters is a necessary prerequisite to the achievement of the industrial relations goals established in the Act.

93. 11 App. Div. 2d 15, 202 N.Y.S.2d 141 (1st Dep't 1960). The Bradley decision rested in part on the fiduciary responsibilities placed on labor organizations by the 1959 Labor and Management Improper Practices Act, N.Y. Labor Law § 720, an act quite similar to the federal LMRDA.

94. 11 App. Div. 2d at 28-29, 202 N.Y.S.2d at 154.

95. 227 Ore. 260, 361 P.2d 1014 (1961).

96. Id. at 284, 361 P.2d at 1025.

97. See text accompanying notes 25-26 supra.

98. Cf. Huntsman v. McGovern, 56 Ohio L. Abs. 170, 91 N.E.2d 717 (C.P. 1949).