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I. INTRODUCTION

Intensive investigations into the internal affairs of unions by the McClellan Committee[1] uncovered "racketeering, corruption, abuse of power, and other improper practices on the part of some labor organizations."[2] To remedy what some viewed as a distinct evil, the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[3] was enacted by a slim majority of Congress. Among other reforms, the LMRDA sought to counterbalance the "tyranny of the all-powerful labor boss"[4] by removing the threat of arbitrary and discriminatory treatment of union members by an entrenched leadership while guaranteeing the right of union members to participate effectively in the internal affairs of their unions. Title I of the Act (section 101(a)) specifically guarantees to every union member: (1) Equal rights and privileges

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1. The McClellan Committee was officially known as the Select Committee on Improper Activities in the Labor Management Field. For a chronicle of the activities and findings of the committee, see R. KENNEDY, THE ENEMY WITHIN (1960).

2. 105 CONG. REC. 6471 (1959) (remarks of Senator McClellan).

3. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 401 *et seq.* [hereinafter cited as LMRDA].

4. 105 CONG. REC. 6472 (1959) (remarks of Senator McClellan).

within the union to nominate candidates for union office, to vote in union elections, and to attend union meetings;[5] (2) freedom of speech and assembly;[6] (3) freedom from arbitrary increases in dues, fees, and assessments;[7] (4) freedom to utilize judicial, administrative, and legislative processes;[8] (5) procedural due process in internal union disciplinary

5. LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1) (1970), provides:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

6. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970), provides:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

7. LMRDA § 101(a)(3), 29 U.S.C. § 411(a)(3) (1970), provides:

Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

8. LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1970), provides:

No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be

proceedings.[9]

The original version of the LMRDA, introduced by Senators Kennedy (John) and Ives in 1958, contained no provisions similar to the guarantees now found in Title I.[10] In 1959 the Senate Labor Committee rejected proposals to include such protections for individual union members,[11] thus forcing Senator McClellan to introduce his "bill of rights of union members" as a floor amendment to the committee bill. The McClellan "bill of rights" was adopted by the narrowest of margins—47-46 with five abstentions. The McClellan floor amendment was set aside three days later in favor of the present version of Title I.[12]

Although desiring to provide broad and basic protections to union members vis-à-vis their union, the framers of the LMRDA made it clear that they did not intend to inject the law unnecessarily into the internal affairs of labor organizations.[13] Conceptually, the expressed aversion toward legislative encroachment into internal union affairs would seem irreconcilable with the provisions of Title I, which guarantee substantial

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required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof; *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

9. LMRDA § 101(a)(5), 29 U.S.C. § 411(a)(5) (1970), provides:

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

10. S. 3974, 85th Cong., 2d Sess. (1958).

11. S. 748, 86th Cong., 1st Sess. (1959).

12. 105 CONG. REC. 6475-76, 6718-27 (1959).

13. For an excellent discussion of the LMRDA's legislative history, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960); Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226 (1959); Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199 (1960). In reporting the bill, the Senate Labor Committee vehemently opposed "any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing . . . ." S. REP. NO. 187, 86th Cong., 1st Sess. 7 (1959). Similarly, in testifying before congressional subcommittees, impartial witnesses detailed the disadvantages of excessive federal encroachment upon internal union matters. *See, e.g., Hearings on S. 505 and Related Bills Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 112 (1959) (testimony of Prof. Archibald Cox); *Hearings On H.R. 3540 and Related Bills Before the Joint Subcomm. on Educ. and Labor*, 86th Cong., 1st Sess. 7-8 (1959) (testimony of Sec'y of Labor Mitchell).

rights to union members and impose concomitant obligations upon the union to recognize and respect those rights. Nonetheless, the underlying purpose of Title I is to equate the voice of union members in the affairs of labor organizations with the voice of the public in governmental affairs.[14] It was believed that only a democratically governed union could foster the type of industrial relationships that national labor policy favored.[15]

The aim of Congress in enacting these broad-based protections was noble indeed; however, the Act is an example of "the fine art of political compromise,"[16] and is plagued with ambiguities.[17] The courts have been faced with the paradoxical task of applying the provisions of the Act, honoring the spirit of reform implicit in such social, remedial legislation, while at the same time giving credence to the avowed congressional mandate of minimum interference in the internal affairs of labor organizations.

The judicial development of sections 101(a)(1) and 101(a)(3) was previously analyzed by one of the authors.[18] This article is designed to

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14. *See* R. SMITH, L. MERRIFIELD & T. ST. ANTOINE, LABOR RELATIONS LAW 1005 (4th ed. 1968).

15. The following remarks illustrate the divergent views concerning the role of democratic procedures in internal union affairs and the role of government in guaranteeing such procedures:

> None except a democratic union . . . can achieve the idealistic aspirations which justify labor organizations. . . . Only in a democratic union can workers, through chosen representatives, participate jointly with management in the government of their industrial lives even as all of us may participate, through elected representatives, in political government.
>
> . . . The task of assuring workers the ultimate control of the affairs of their union should be undertaken by law because it is the law which gives a union, as bargaining representative, the quasi-legislative power to bind employees in the bargaining unit without their consent.

Cox, *supra* note 13, at 830.

> [U]nion members have doubtless suffered far more from inefficient and unimaginative administration than they have ever lost through corruption and undemocratic procedures. Today, the key problem in union government is how to encourage innovation, a longer view of the union's role and interests, and greater effectiveness in carrying out the policies and programs of the organization. Democratic procedures do not ensure that union officials will be pushed to optimum levels in these respects, and efforts to strengthen democratic processes will not fill this need, but in some respects may make the problem worse.

D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 90 (1970).

16. Berchem, *Labor Democracy in America: The Impact of Title I & IV of the Landrum-Griffin Act*, 13 VILL. L. REV. 1, 2 (1967); *see* Cox, *supra* note 13, at 833; Rothman, *supra* note 13, at 205-09.

17. It has been argued that the ambiguities did not result from oversight or from excessive compromise but, rather, that they were intentional. In effect, the Congress has charged the courts with responsibility for developing a workable system of guaranteeing union democracy without unnecessary interference. *See* Cox, *supra* note 13, at 852-54.

18. Beaird, *Some Aspects of the LMRDA "Bill of Rights,"* 5 GA. L. REV. 661 (1971).

review the significant developments over the past 13 years dealing with the free speech provisions of Title I appearing in section 101(a)(2).[19] An analysis of sections 101(a)(4) and 101(a)(5) will appear in a future edition of the *Review*.

II. The Common Law Approach

Prior to the LMRDA, the rights of union members relative to their union were adjudicated by state courts, usually on the basis of contract theory. The constitution and by-laws of the union were thought to be the terms of a "contract" that the members accepted upon joining the organization; the terms of this contract governed the relationship between member and organization. "It was the dominant view that the letter of the union constitution—whatever that letter might be—controlled, so that if discipline were imposed in accordance with that letter the discipline was valid."[20]

The New York case of *Polin v. Kaplan*[21] is illustrative of the contract theory. Union members were expelled from their union for bringing charges against union officers in state court and for circulating allegedly libelous statements concerning the officers. In discussing the members' right to reinstatement and damages, Judge Kellogg stated:

> The constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members. As the contract may prescribe the precise terms upon which a membership may be gained, so may it conclusively define the conditions which will entail its loss.[22]

The plaintiff union members also urged the court to review the factual

19. 29 U.S.C. § 411(a)(2) (1970).

20. Hall, *Freedom of Speech and Union Discipline: The Implications of* Salzhandler, 17 N.Y.U. Ann. Conf. on Labor 349, 352 (1964) (footnote omitted). *See also* IAM v. Gonzales, 356 U.S. 617, 618 (1958); Summers, *Legal Limitations on Union Discipline*, 64 Harv. L. Rev. 1049 (1951). There is some authority that the relationship between a union and its members is governed under theories of property law. Heasley v. Plasterers Local 31, 324 Pa. 257, 188 A. 206 (1936). And some authority indicates that union discipline sounds in tort. Hurwitz v. Directors Guild, 364 F.2d 67 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966). *See generally* Chafee, *The International Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993, 999-1010 (1930).

21. 257 N.Y. 277, 177 N.E. 833 (1931). For similar applications of the contract theory, see DeMille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947); Porth v. Carpenters Local 201, 171 Kan. 177, 231 P.2d 252 (1951); International Printing Pressmen v. Smith, 145 Tex. 399, 198 S.W.2d 729 (1946); Bonsor v. Musicians' Union, [1956] A.C. 104.

22. 257 N.Y. at 281-82, 177 N.E. at 834.

findings made by the union tribunal, but the court refused, setting forth a very limited scope of review.

> [I]f the contract reasonably provides that the performance of certain acts will constitute a sufficient cause for the expulsion of a member, and that charges of their performance, with notice to the member, shall be tried before a tribunal set up by the association, the provision is exclusive, and the judgment of the tribunal, rendered after a fair trial, that the member has committed the offenses charged and must be expelled, will not be reviewed by the regularly constituted courts.[23]

As indicated above, occasionally the courts did review union practices to determine whether procedural due process had been followed,[24] sometimes prohibiting union discipline that, although valid under union constitutions and by-laws, directly interfered with the citizenship rights of the union member. For example, a union was prevented from expelling a member who, as a public official, refused to appoint another union member to a public post.[25] Also, unions have been compelled to reinstate members who have testified against them in court,[26] or who have testified contrary to union positions before administrative agencies.[27]

Nonetheless, prior to 1950 the courts generally adhered to the idea that citizens' rights under the United States Constitution were not guaranteed to union members in the context of intra-union affairs.[28] So long as the "contract" between union and members was not violated, the union could discipline members for exercising "free speech" and other rights that would be protected in the public arena.[29] After 1950, however, the strict contract analysis of the rights of union members began to crumble.

In *Crossen v. Duffy*,[30] union members had circulated handbills that charged incumbent officials with illegal and inefficient practices

23. *Id.* at 282, 177 N.E. at 834. The court, in fact, found that the union constitution did not proscribe the activity charged against the members and therefore ordered reinstatement.

24. B. MELTZER, LABOR LAW 1032 (1970).

25. Schneider v. Journeymen Plumbers Local 60, 116 La. 270, 40 So. 700 (1906).

26. Angrisani v. Stearn, 167 Misc. 731, 3 N.Y.S.2d 701 (Sup. Ct. 1938); Thompson v. International Bhd. of Locomotive Eng'rs, 41 Tex. Civ. App. 176, 91 S.W. 834 (Ct. Civ. App. 1905).

27. Abdon v. Wallace, 95 Ind. App. 604, 165 N.E. 68 (1929).

28. *See* State v. North Cent. Ass'n of Colleges and Secondary Schools, 23 F. Supp. 694, 700 (E.D. Ill. 1938); *cf.* Gonzalez v. Archbishop of Manila, 280 U.S. 1, 16 (1929).

29. *See, e.g.*, Polin v. Kaplin, 257 N.Y. 277, ____, 177 N.E. 833, 834 (1931).

30. 90 Ohio App. 252, 103 N.E.2d 769 (1951).

and warmly supported the challenging candidates. The union fined four of the members and placed one on probation, but the Court of Appeals of Ohio enjoined the union from enforcing the penalties,[31] relying upon the "property rights" of union membership and various provisions of the state and federal constitutions. The court held that union members retain their constitutional freedom of speech within the union and that because unions often play a pivotal role "in special relation to their members and to the state. . . . a court may well determine in a particular case that protection of their [the unions'] democratic processes is essential to the maintenance of our democratic government."[32]

A subsequent New York case[33] refused to adhere to the previously established contract analysis and held that a union member could not be expelled for his efforts to establish a two-party system within the union. Judge Fuld recognized that the government of unions was subject to the principle that

> traditionally democratic means of improving [the] union may be freely availed of by members without fear of harm or penalty. And this necessarily includes the right to criticize current union leadership. . . . The price of free expression and of political opposition within a union cannot be the risk of expulsion or other disciplinary action. In the final analysis, a labor union profits . . . more by permitting free expression and free political opposition than it may ever lose from any disunity that it may thus evidence.[34]

In a post-LMRDA case, *Mitchell v. IAM*,[35] a California appellate court abandoned contract analysis when the union discipline resulted from a member's political activities outside the union. Two members had actively supported a state "right-to-work" initiative, contrary to expressed union policy, and were expelled. The court dispelled the "illusion" that unions are purely voluntary, social organizations.

> Unions can be distinguished from other voluntary organizations in many respects. Most importantly, a large part of their power and authority is derived from government which makes it [an] exclusive bargaining agent. Further, they are not primarily social groups which require homogeneous views in order to retain smooth functioning. They are large, heterogeneous groups, whose members may agree on one thing only—they want

31. *Id.* at 272-74, 103 N.E.2d at 779-80.
32. *Id.* at 271-72, 103 N.E.2d at 778.
33. Madden v. Atkins, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958).
34. *Id.* at 293, 151 N.E.2d at 78, 174 N.Y.S.2d at 640 (citation omitted).
35. 196 Cal. App. 2d 796, 16 Cal. Rptr. 813 (2d Dist. Ct. App. 1961).

> improved working conditions and greater economic benefits. The union's power, when considered together with its source, imposes upon it reciprocal responsibilities toward its membership and the public generally that other voluntary organizations do not bear.[36]

The court then examined the political activity of the plaintiffs to determine whether the union had any valid institutional purpose in imposing the discipline and concluded that "society's interest in the debate, together with the individual's right to speak freely on political matters, outweighs the union's interest in subduing public dissent among union members."[37]

These cases demonstrate a significant departure from the long-dominant contract theory. This departure evidences a recognition that a labor union's relationship with its members should not be analyzed under concepts applicable to social organizations; because of their "public" posture, unions cannot abrogate by contract certain inherent rights possessed by citizens. And for the first time, the courts began to draw from the broader social context in an effort to bring democracy to the relatively closed system of union-member relations. These efforts were legislatively crystallized by the LMRDA bill of rights, and the early withdrawals from contract dogma were continued and extended by decisions based upon section 101(a)(2) of the LMRDA.

III. The Scope of Section 101(a)(2)

Unlike the guarantee of equal rights under section 101(a)(1), which has been restricted in the election context by its interrelationship with Title IV,[38] the free speech and assembly guarantees of section 101(a)(2) are not restricted by any other sections of the Act. Essentially, section 101(a)(2) ensures that every member of any labor organization shall have the rights of free speech and freedom of assembly.[39] Although union membership is a prerequisite to the assertion of these rights,[40] the

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36. *Id.* at 799, 16 Cal. Rptr. at 814-15.

37. *Id.* at 806, 16 Cal. Rptr. at 819.

38. LMRDA §§ 401-03, 29 U.S.C. §§ 481-83 (1970); *see* Calhoon v. Harvey, 379 U.S. 134 (1964).

39. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970).

40. *See* Beaird, *supra* note 18, at 666; *cf.* Moynahan v. Pari-Mutuel Employees Local 280, 317 F.2d 209 (9th Cir.), *cert. denied*, 375 U.S. 911 (1963); Hughes v. Ironworkers Local 11, 287 F.2d 810 (3d Cir.), *cert. denied*, 368 U.S. 829 (1961). The Act does not prescribe membership requirements; that is largely a matter of organizational self-determination. *See* Parish v. Legion, 450 F.2d 821 (9th Cir. 1971); Hughes v. Ironworkers Local 11, 287 F.2d 810, 817 (3d Cir. 1961).

provisions of Title I have generally been limited to the rights of members *qua* members—thus making most of the bill-of-rights protections inapplicable to relationships between a member and another member[41] or between a member and his employer.[42] However, with respect to the relationships between a union and its officers[43] and employees,[44] the applicability of section 101(a)(2) has received a somewhat different interpretation than the other provisions of Title I.[45]

It is apparent from section 609 of the Act[46] that a union may not "fine, suspend, expel, or otherwise discipline any of its members for exercising" free speech rights set forth in section 101(a)(2). One question presented is whether officers or employees of a union can be removed from their positions for supporting an unsuccessful candidate or cause. If removal of a member from office is "discipline" within the meaning of section 609, then removal for the exercise of a right protected by section 101(a)(2) could be enjoined.

This question was resolved in *Grand Lodge, IAM v. King*.[47] First, the Ninth Circuit analyzed the language of section 101(a)(2) and concluded that the protections of that section applied to "every member" of the union, including officer-members; a member did not forfeit protections of free expression upon becoming an official. "The guarantees of [section 101(a)(2)] were adopted to strengthen internal union democracy. To exclude officer-members from their coverage would deny protection to those best equipped to keep union government vigorously and effectively democratic."[48] Next, the court examined section 609 and determined that to remove an official from union office was to discipline

41. *See, e.g.*, Tomko v. Hilbert, 288 F.2d 625 (3d Cir. 1961).

42. *See, e.g.*, Jackson v. Martin Co., 180 F. Supp. 475 (D. Md. 1960).

43. *See, e.g.*, Hill v. ARO Corp., 275 F. Supp. 482 (N.D. Ohio 1967); Vars v. International Bhd. of Boilermakers, 204 F. Supp. 241 (D. Conn. 1962), *aff'd*, 320 F.2d 576 (2d Cir. 1963).

44. *See, e.g.*, Bennett v. Hoisting Eng'rs Local 701, 207 F. Supp. 361 (D. Ore. 1960); Strauss v. International Bhd. of Teamsters, 179 F. Supp. 297 (E.D. Pa. 1959).

45. *Compare* Vars v. International Bhd. of Boilermakers, 204 F. Supp. 241 (D. Conn. 1962), *aff'd*, 320 F.2d 576 (2d Cir. 1963), *with* Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212 (5th Cir. 1969), *and* Cefalo v. District 50, UMW, 311 F. Supp. 946 (D.D.C. 1970).

46. LMRDA § 609, 29 U.S.C. § 529 (1970), provides:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section [102] . . . shall be applicable in the enforcement of this section.

47. 335 F.2d 340 (9th Cir. 1964).

48. *Id.* at 344 (footnote omitted).

that official.[49] Consequently, removal for reasons of political activity protected by section 101(a)(2) was held actionable.

Subsequent decisions have followed the rationale of *King*;[50] in fact, the rationale has been so closely followed that, without substantial discussion or analysis, courts have prohibited the removal of high-level union officials—officials clearly within the policy-making level of the union. These decisions raise substantial questions concerning the course of labor policy.

Perhaps the leading case dealing with the protections afforded officer-members by section 101(a)(2) is *Retail Clerks Local 648 v. Retail Clerks International*.[51] Organizing directors of the union challenged the incumbent slate for president and vice-president, expressing a substantially different philosophy regarding the organization of the union. The directors lost the election and were removed from union office. In spite of the expressed disagreement in philosophy and the high-level posts occupied by the plaintiffs, the court held that the union violated section 101(a)(2) by effecting their discharge.

A similar result was reached in *Cefalo v. District 50, UMW*.[52] Among the plaintiffs were two regional directors who, after unsuccessfully seeking national office, were demoted to less influential positions. Again, the United States District Court for the District of Columbia held that such demotion was discipline and thus violated the free speech provisions of section 101(a)(2).[53]

Few would contest the premise upon which these cases are based. Empowering an incumbent official to remove all opposition from union offices would provide him with a powerful weapon for perpetuating his regime. In many unions, those most interested in union affairs, the officers, compose the pool of talented, experienced individuals from which leaders must be drawn; yet, those occupying such responsible

49. The court reached a different interpretation of the term "discipline" within the "due process" provisions of § 101(a)(5), holding that "discipline" within the meaning of that section did not include removal from union office.

50. *See, e.g.*, DeCampli v. Greely, 293 F. Supp. 746 (D.N.J. 1968); George v. Bricklayers Union, 255 F. Supp. 239 (E.D. Wis. 1966). *But cf.* Rosen v. Painters Dist. Council 9, 57 L.R.R.M. 2401 (S.D.N.Y. 1964) (membership in the Communist party held not protected by the LMRDA).

51. 299 F. Supp. 1012 (D.D.C. 1969).

52. 311 F. Supp. 946 (D.D.C. 1970).

53. *See also* Paley v. Greenberg, 318 F. Supp. 1366 (S.D.N.Y. 1970) (prohibited the demotion of union's executive secretary); Yablonski v. UMW, 71 L.R.R.M. 3041 (D.D.C. 1969) (prohibited UMW from removing Yablonski as Director of the Labor Non-Partisan League on grounds of incompatible philosophy).

positions might be unwilling to gamble their posts against the uncertain prospect of winning an election.

But these decisions have largely ignored the opposing factors. Few would deny any elected public official the right to select his chief lieutenants; in fact, the Constitution probably permits the wholesale removal of even low-level civil servants on the basis of political disloyalty.[54] Union leadership, like political leadership, can be effective only when the elected leader has confidence in the judgment and personal allegiance of his chief policy-makers. If the leadership is prohibited from removing those who have expressed philosophical disagreement with them and have manifested a lack of personal loyalty, the leadership cannot be effective. High-level dissension and distrust will likely result, and the health and vitality of the organization will suffer.

Clearly, subordinate union officials can and should be removed for misuse of their office or for active insubordination.[55] But *Retail Clerks* and its progeny appear to ban dismissal of high-level officials, even after their philosophy and fidelity have become suspect. These decisions deny rights to labor leaders which are given as a matter of course to political leaders, thereby causing the LMRDA to go further in subordinating administrative effectiveness to free speech than even the Constitution would seem to require.[56] It is doubtful that the framers of the Act intended such a result.

Perhaps the tension between the need to ensure union democracy and the danger that union leadership will be hamstrung by dissident or disloyal lieutenants could be relieved by the courts if they would closely analyze the position, duties, and responsibilities of the demoted union official before acting. Clearly, if the position is neither sensitive, nor confidential, nor policy-making, it should not be jeopardized by open political action.[57] Union leadership should not be allowed to use the

54. Alomar v. Dwyer, 447 F.2d 482 (2d Cir. 1971), *cert. denied*, 404 U.S. 1020 (1972); American Fed'n of State, County & Mun. Employees v. Shapp, 443 Pa. 527, 280 A.2d 375 (1971). *But see* Shakman v. Democratic Organization, 435 F.2d 267 (7th Cir. 1970), *cert. denied*, 402 U.S. 909 (1971).

55. Sewell v. Grand Lodge, IAM, 445 F.2d 545 (5th Cir.), *cert. denied*, 404 U.S. 1024 (1971) (active insubordination); *cf.* Gulickson v. Forest, 290 F. Supp. 457 (E.D.N.Y. 1968) (misuse of union office during campaign).

56. *Cf.* Pickering v. Board of Educ., 391 U.S. 563 (1968). In *Pickering*, the Court indicated that a public employee might lawfully be discharged for publicly criticizing a superior if the employee's relationship to the superior was of a "personal and intimate nature." *Id.* at 570 n.3.

57. The union could, perhaps, enact a "Hatch Act" protecting workers from political removal but prohibiting their political activity. Discipline, in such cases, would be for violation of the rule, and not directly attributable to the exercise of free speech. Such discipline would probably

threat of dismissal from such jobs as a whip to secure loyalty. On the other hand, if the position is one of confidence or involves high-level policy formulation in circumstances where solidarity is necessary for institutional effectiveness, *demotion* of an officer to a less sensitive position would not seem to be discipline within the meaning of section 609. Demotion under such circumstances is, arguably, a necessary and essentially non-discriminatory action designed to ensure the effectiveness of the elected official's stewardship and the efficiency of the organization as an entity.

If the courts continue to view ad hoc removal of highly-placed union officials as discipline, then allowance should be made for properly enacted constitutional provisions that allow specifically designated upper-level union positions to be held at the pleasure of the executive. Such an authorization would greatly diminish the danger of capricious removal and, for the reasons set forth above, would not appear to be the type of discipline that sections 101(a)(2) and 609 attempt to remedy.

IV. Section 101(a)(2) and the Right to Free Speech

A. The Proviso

The most significant potential limitation on the exercise of a union member's right of free speech is contained in the proviso of section 101(a)(2):

> [N]othing [in this section] shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.[58]

Arguably, a wide range of membership activities could fall within the restrictions of this proviso and thereby lose the protection given by section 101(a)(2).

Understandably, the most common question raised in section 101(a)(2) cases has been whether the speech or expression at issue was sufficiently detrimental to the union as an institution so that its interest in prohibiting the speech outweighs the right of the union member to express himself in the industrial democracy. If the union's interest is

be upheld. *See* Grand Lodge, IAM v. King, 335 F.2d 340 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964).

58. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970).

paramount, discipline of members for criticism or libel will be upheld. Thus, the proviso could afford the courts justification for narrowly construing section 101(a)(2) so as to allow strong regulation by union leadership of the rights protected by that section. The evolution of decisions under section 101(a)(2), discussed below, demonstrates that instead of following such a narrow course the courts have pursued a liberal policy favoring the right of union members to express themselves. A second issue occasionally raised is whether a union must have a specific rule regulating this responsibility or whether general rules regarding "loyalty," "misconduct," and "libel" can be relied upon to justify disciplinary action.

B. The Salzhandler *Decision*

The leading opinion involving section 101(a)(2) was rendered by Chief Judge Lumbard in *Salzhandler v. Caputo*.[59] Solomon Salzhandler, the financial secretary of a local of the Paperhangers Union, discovered and publicized, in a highly accusatory leaflet, certain union financial transactions that he believed to be dishonest. Among other things, Salzhandler called the local president, Webman, a petty robber. Salzhandler and the incumbent officers of the local had long been at odds, and the district as a whole had an extensive history of internal dissension and bitterness.[60] Webman brought an action against Salzhandler before the union trial council, claiming that such defamation and disloyalty violated the union constitution. A trial board found Salzhandler guilty and suspended him from participation in union activities for 5 years.

The District Court for the Southern District of New York upheld the verdict of the union trial board on the ground that the leaflet was libelous and, as such, its dissemination was unprotected by section 101(a)(2).[61] The Second Circuit reversed, directing the district court to enjoin the union from punishing Salzhandler and to assess damages.[62] The court rejected the contention that the guarantees of section 101(a)(2) do not extend to libel. The union had argued that, in view of

59. 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963).

60. *See* Note, *Free Speech, Fair Trials, and Factionalism in Union Discipline*, 73 YALE L.J. 472 (1964).

61. Salzhandler v. Caputo, 199 F. Supp. 554 (S.D.N.Y. 1961). The circulation of the leaflet violated a provision of the union constitution forbidding "libeling" of union members or officers. *Id.* at 556.

62. Salzhandler v. Caputo, 316 F.2d 445, 451 (2d Cir. 1963).

the Supreme Court's decision in *Beauharnais v. Illinois*[63] (the first amendment does not protect libelous utterances), the LMRDA could not be given a more liberal construction. Chief Judge Lumbard was quick to dismiss this reasoning, stating:

> The analogy to the First Amendment is not convincing. . . . [T]he union is not a political unit to whose disinterested tribunals an alleged defamer can look for an impartial review of his "crime." It is an economic action group, the success of which depends in large measure on a unity of purpose and sense of solidarity among its members.[64]

Thus, the court felt that to read the section in any manner other than an extremely broad one would allow the union to define libelous conduct. The court further determined that a union tribunal, because of its recognized lack of impartiality, "is peculiarly unsuited for drawing the fine line between criticism and defamation,"[65] and should not be entrusted with such a sophisticated task. Accordingly, in the Second Circuit's view, the only exception to, or limitation on, a union member's otherwise absolute right of free speech is the proviso to section 101(a)(2). Chief Judge Lumbard refused to recognize any other exceptions, holding that "the legislative history supports the conclusion that Congress intended only those exceptions which were expressed."[66] As long as Salzhandler's accusations did not fall within the limits of the proviso, it made no difference that they might be false and libelous.

In concluding that the charge made against Webman did not violate Salzhandler's responsibility toward the union as an institution, the court placed the first of a series of progressively narrower judicial constructions on the proviso. Inquiry and criticism by members concerning the conduct of union officials and the union's financial affairs are "clearly in the interest of proper and honest management of union affairs."[67] Such is not only permissible, but desirable, even at the cost of the inevitable dissension produced. Through this case the court limited redress for libel of an officer to a private suit for damages.[68]

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63. 343 U.S. 250 (1952).

64. 316 F.2d at 449-50 (footnote omitted).

65. *Id.* at 450.

66. *Id.* (footnote omitted).

67. *Id.*

68. *Id.* at 451. "[A]lthough libelous statements may be made the basis of civil suit between those concerned, the union may not subject a member to any disciplinary action on a finding by its governing board that such statements are libelous." *Id.*; *accord*, Johnson v. Rockhold, 293 F. Supp. 1016 (E.D.N.Y. 1968); Garfman v. Ray, 71 L.R.R.M. 2108 (N.Y. Sup. Ct. 1969).

There is scant legislative history to support the conclusion that section 101(a)(2) goes further in protecting libelous speech of union members than does the first amendment in protecting such speech when made by ordinary citizens. Yet that is the result of continued adherence to the *Salzhandler* analysis. *Salzhandler* was decided before the landmark case of *New York Times v. Sullivan*,[69] and thus predated the refined concept of free speech and qualified privilege set forth therein. In *New York Times*, the Supreme Court held that criticism of public officials was subject to a qualified privilege, and thus was not actionable by the aggrieved official unless the libel was known to be false or was made with conscious disregard of its accuracy.

The Supreme Court has applied this concept of conditional privilege in a labor relations setting, "by analogy, rather than under constitutional compulsion."[70] In *Linn v. United Plant Guard Workers*,[71] the Court was faced with the problem of reconciling state libel laws with the free speech provisions of the National Labor Relations Act.[72] It was argued that the federal statute entirely preempted the field and that the right of free speech in the labor-management context was unlimited; thus, states could not apply the law of libel to such speech. The Court rejected this argument. The National Labor Relations Act was held to protect free, uninhibited, robust, and wide-open debate that might include vehement and caustic attacks, so long as employer-union debate fell short of deliberate or reckless untruth. The Court reasoned that malicious utterances of defamatory statements have no social utility. They are thus not protected by the federal statute and, consequently, are subject to state libel laws. Quoting from an earlier decision,[73] the Court made a statement relevant to considerations under section 101(a)(2): " '[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.' "[74]

Salzhandler placed no similar qualifications upon criticism made

69. 376 U.S. 254 (1964).

70. Linn v. United Plant Guard Workers, 383 U.S. 53, 65 (1966).

71. 383 U.S. 53 (1966).

72. National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1970), provides:

The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

73. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).

74. Linn v. United Plant Guard Workers, 383 U.S. 53, 67 (1966).

by union members. Unlike criticism of public officials or the debate between union and employer over questions of labor relations, the intra-union freedom of speech under section 101(a)(2) has been absolute, subject only to statutory qualifications.

Given the obvious propositions, relied upon by the Supreme Court, that false statements maliciously made have no social utility and no role in democratic government, and given the propositions that such charges unnecessarily harm the individual attacked and potentially have a divisive effect on the labor organization and its collective bargaining obligation, it is difficult to justify the continued acceptance of *Salzhandler's* absolute privilege.

When *Salzhandler* was decided, without the benefit of the *New York Times* doctrine, Chief Judge Lumbard may have believed that he was faced with a choice between the extremes of "privilege" and "no-privilege." In that context his choice was preferable. However, now that a qualified privilege is recognized under the first amendment and has played an analogous and prominent role in the robust area of debate between union and employer under the National Labor Relations Act, it would seem both logical and desirable to recognize that the privilege established by section 101(a)(2) should be similarly qualified to protect only nonmalicious speech.

Underlying the absolutist approach of *Salzhandler* was the fear that union tribunals were unable or unwilling to make sophisticated legalistic distinctions. That assumption, although probably correct, is largely immaterial, since it ignores the fact that union discipline is subject to de novo review in federal court. After a member has been disciplined for "libel," the court is free to review the facts and determine as a matter of law whether the statement constituted libel, and if so, whether it was privileged. Simply stated, neither the courts nor the individual union member will be, as Chief Judge Lumbard assumed, at the mercy of the union tribunal.

But *Salzhandler* has been religiously followed,[75] and the courts have not adopted the *New York Times* concept of qualified privilege. Even when it has been found that the criticisms were "malicious," courts have

75. Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212 (5th Cir. 1969); International Bhd. of Boilermakers v. Rafferty, 348 F.2d 307 (9th Cir. 1965); Cole v. Hall, 339 F.2d 881 (2d Cir. 1965); Robins v. Schonfeld, 326 F. Supp. 525 (S.D.N.Y. 1971); Sheridan v. Liquor Salesmen Local 2, 303 F. Supp. 999 (S.D.N.Y. 1969); Archibald v. Operating Eng'rs Local 57, 276 F. Supp. 326 (D.R.I. 1967); Gartner v. Soloner, 220 F. Supp. 115 (E.D. Pa. 1963); Stark v. Carpenters Dist. Council, 219 F. Supp. 528 (D. Minn. 1963).

held them nonetheless protected by section 101(a)(2).[76]

It has been argued that even assuming that an absolute privilege exists inside the union hall (similar to congressional privilege in debate), section 101(a)(2) should not guarantee the union member the right to slander the union or its officials in a public forum. Such an argument was initially rejected in the companion cases of *Gartner v. Soloner*[77] and *Graham v. Soloner*.[78] In refusing to acknowledge such a restriction on section 101(a)(2), the *Graham* court drew an express parallel to constitutional guarantees:

> To say that a union member may not, without fear of reprisal, exercise a right guaranteed to all citizens by the First Amendment would impose on union democracy a boundary unwarranted both by the underlying philosophy and the plain language of the [LMRDA].[79]

If the Constitution is to provide the rationale and guidance for delineating limitations on public debate of internal union affairs, it would seem logical that the *New York Times* concept of qualified privilege should likewise be utilized. Although the courts have not yet expressly rejected the qualified privilege concept, the decisions thus far indicate that the absolute privilege in *Salzhandler* will be applied, and that libelous statements made to the public will be privileged as if made during internal union debate.[80]

C. Application of the Proviso: Speech Allegedly Harmful to the Organization as an Institution

1. Libel of the Union, Union Officers, and Other Union Members.— Unable to induce the courts to recognize a qualification of the free speech protections of section 101(a)(2) for libelous criticisms made by union members, the unions alleged that libel fell within the proviso of section 101(a)(2) that permits a union to adopt and enforce reasonable rules to ensure the responsibility of the members to the

76. Cole v. Hall, 462 F.2d 777 (2d Cir. 1972), *aff'd on other grounds*, 412 U.S. 1 (1973); Giordani v. Upholsterers Union, 403 F.2d 85 (2d Cir. 1968); Cole v. Hall, 339 F.2d 881 (2d Cir. 1965); Archibald v. Operating Eng'rs Local 57, 276 F. Supp. 326 (D.R.I. 1967).

77. 220 F. Supp. 115 (E.D. Pa. 1963).

78. 220 F. Supp. 711 (E.D. Pa. 1963).

79. *Id.* at 714.

80. Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212 (5th Cir. 1969); Giordani v. Upholsterers Union, 403 F.2d 85 (2d Cir. 1968); Deacon v. Operating Eng'rs Local 12, 273 F. Supp. 169 (C.D. Cal. 1967).

organization as an institution. As mentioned above, the *Salzhandler* court reasoned that even libelous statements were intended by Congress to be protected free speech.[81] For this reason, the court held that the proviso does not authorize discipline for libelous allegations made in an intra-union debate. The court stated further that free and open debate was not harmful to the institution but, on the contrary, produced positive benefits far beyond the superficial dissension caused by the discussion.

Generally, the courts have followed the lead of *Salzhandler* in holding that the constitutional requirements of the union should be construed as narrowly as possible when weighed against the free speech rights of union members.[82] As one district court stated: "[O]nly if overwhelming evidence were presented that comments adversely affected the union, would such comments and criticisms of union officials come within the ambit of the exceptions of section 101(a)(2)."[83] Consequently, because the free speech protections found in the body of section 101(a)(2) are not substantially diluted by the institutional considerations found in the proviso, reliance on the proviso has not produced a reliable ground upon which a union can validly discipline a member who engages in libelous speech.[84]

Unions have attempted to distinguish criticism of individuals from criticism of the union itself. In *Giordani v. Upholsterers Union*,[85] the union pointed out that the libelous attack was upon the integrity of the union and, because this was an attack upon the organization as an institution, the proviso authorized discipline. The court neatly parried the argument by observing that only officials can misappropriate funds; therefore the speech, in reality, accused only officials of the union and not the union itself. Accusations against individuals are protected by section 101(a)(2) and are clearly outside the application of the proviso.

A similar observation was made in *Deacon v. Operating Engineers Local 12*,[86] in which a federal district court in California noted that attacks upon the administration of the union may compromise the dig-

81. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir.), *cert. denied*, 375 U.S. 946 (1963). *See* notes 59-68 *supra* and accompanying text.

82. *See, e.g.*, Giordani v. Upholsterers Union, 403 F.2d 85 (2d Cir. 1968); Sheridan v. Liquor Salesmen Local 2, 303 F. Supp. 999 (S.D.N.Y. 1969).

83. Archibald v. Operating Eng'rs Local 57, 276 F. Supp. 326, 330 (D.R.I. 1967).

84. *See* Cole v. Hall, 339 F.2d 881 (2d Cir. 1965); Robins v. Schonfeld, 326 F. Supp. 525 (S.D.N.Y. 1971).

85. 403 F.2d 85 (2d Cir. 1968).

86. 273 F. Supp. 169 (C.D. Cal. 1967).

nity of the individual union members but do not damage the institution. In *Robins v. Schonfeld*,[87] an attack upon the union's election procedure resulted in discipline. Without commenting upon the distinction between individual and institution, the court held that the criticism was protected by section 101(a)(2) and outside the proviso, finding no distinction between the allegation of misappropriation of funds in *Salzhandler* and the allegation of dishonest management of an election.

The unions have also asserted that needless dissemination of criticism to the public-at-large constitutes disloyalty to the union. In *International Brotherhood of Boilermakers v. Rafferty*,[88] the Ninth Circuit avoided the argument by holding that this new element was not relied upon by the union trial committee in imposing the discipline. Consequently, the court would not consider whether it was a possible justification for the attempts to draw a distinction between intra-union attacks and libel disseminated in a public forum.[89]

The Fifth Circuit, in particular, has viewed the entire area of free speech in unions as one of balancing individual rights against institutional interests to determine what, if any, restrictions on speech are reasonable.[90] In applying such a balancing test, however, it would appear that libelous attacks made in public, without attempts to utilize internal union processes, and attacks made directly against the actions of the union as an entity would weigh more heavily in favor of discipline than would attacks against an individual's stewardship narrowly published to those in the union. As of now, however, the courts do not appear to be making any such distinctions.

Deacon v. Operating Engineers Local 12[91] raised the issue of actual damage. The court observed that the plaintiff attempted to rectify any damaging impression left by his publication and thereby removed the possibility of a detrimental reflection upon the union as an institution. But, the court's observation leaves the negative implication that had the plaintiff failed to correct patently false accusations, his expulsion from the union might have been permitted by the proviso. Other courts, too, have indicated that the absence of any actual damage to the union

87. 326 F. Supp. 525 (S.D.N.Y. 1971).

88. 348 F.2d 307 (9th Cir. 1965).

89. *See* Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212 (5th Cir. 1969); Gartner v. Soloner, 220 F. Supp. 115 (E.D. Pa. 1963); Graham v. Soloner, 220 F. Supp. 711 (E.D. Pa. 1963); Beaird & Sutter, *Labor Law and Related Social Legislation*, 21 MERCER L. REV. 617, 628-30 (1970).

90. *See* Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212, 218 (5th Cir. 1969).

91. 273 F. Supp. 169 (C.D. Cal. 1967).

influenced the finding of inapplicability of the proviso.[92] These cases raise the possibility that libelous comments directed toward the union as an institution will not result in discipline of the attackers without proof of actual damage.

Finally, it would seem that the union can adopt reasonable rules relating to the conduct of union meetings.[93] Although the content of speech cannot be made subject to discipline, rules of procedure and decorum at union meetings could be enacted and enforced.[94] Arbitrary or unreasonable rules cannot be utilized to silence criticism, however.

2. Threatening Physical Harm.—In *Kelsey v. Stage Employees Local 8*,[95] the vice-president of a local was suspended for threatening the president with physical violence. The district court[96] found no evidence in the record to support the union's charges and implied that even had such threats been made, the conduct would have been protected[97] by section 101(a)(2). The Third Circuit affirmed, finding no evidence to support the union's contention that threats were made and, therefore, found "no need or use" to discuss whether such threats were privileged.[98]

A decision from the District of New Mexico, *Reyes v. Laborers Local 16*,[99] indicates that section 101(a)(2) goes further in protecting the free speech of union members than does the Constitution; nonetheless, the court held that threats of physical harm were not protected, thereby upholding union discipline of a member who made such threats. The *Reyes* decision was followed recently by a New York district court that also held threats of physical violence to be unprotected.[100]

These decisions might be considered a retreat from the absolute view expressed in *Salzhandler* that any speech is privileged. Certainly, some faith must be placed in the ability of a union tribunal to distinguish between an unprotected threat and permissible, vigorous advocacy of

92. *See* Archibald v. Operating Eng'rs Local 57, 276 F. Supp. 326 (D.R.I. 1967); Gartner v. Soloner, 220 F. Supp. 115 (E.D. Pa. 1963); Graham v. Soloner, 220 F. Supp. 711 (E.D. Pa. 1963).

93. *See* Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212 (5th Cir. 1969).

94. Patterson v. Motion Picture Operators Local 513, 446 F.2d 205 (10th Cir.), *cert. denied*, 405 U.S. 976 (1971).

95. 419 F.2d 491 (3d Cir.), *cert. denied*, 397 U.S. 1064 (1969).

96. 294 F. Supp. 1368 (E.D. Pa. 1968).

97. *Id.* at 1374-75.

98. 419 F.2d at 493.

99. 327 F. Supp. 978 (D.N.M. 1971).

100. Hoyt v. Carpenters Local 1292, 80 L.R.R.M. 2188 (E.D.N.Y. 1972). A subsequent decision of the Third Circuit, interpreting *Kelsey*, indicated that § 101(a)(2) provided protection to "loosely-worded threats." Semancik v. District 5, UMW, 466 F.2d 144, 153 (3d Cir. 1972).

one's views. It must be understood that union members do not express their opinions with the delicacy one might find in a civic or religious organization. Thus, union tribunals, as well as courts, might easily find "loosely-worded threats" in relatively commonplace criticisms.

Section 101(a)(2) protects only the right to express "views, arguments, or opinions"; threats of physical violence, obviously, do not fall within this category. Furthermore, threats of harm have a negative social utility since they tend to silence the timid and aggravate the intrepid. The Supreme Court has indicated that threats are not protected by the first amendment;[101] as well, the NLRB and the courts have held that a provision in the National Labor Relations Act[102] similar to section 101(a)(2) does not permit one to make threats or to engage in coercive conduct.[103] Although courts will have to analyze union charges carefully to determine whether clear and substantial threats were made, it remains difficult to conclude that obvious threats of physical abuse were intended by Congress to be protected, privileged speech.

3. Criticism During Collective Bargaining Negotiations. Although the courts have given extensive protection to the content of speech and criticism both within and without the union, there is some indication that the timing of the speech might be subject to valid union regulation. *Leonard v. M.I.T. Employees' Union*[104] involved the expulsion of a member for making charges against union officials and for participating in other allegedly detrimental activities during collective bargaining negotiations. The Massachusetts district court refused to uphold the discipline imposed, but skirted the important issue.

> Assuming that the union would have the right to adopt and enforce a rule temporarily limiting free expression by members of their views, arguments and opinions at the time of contract negotiations, the union here never purported to adopt any such rule, and the proviso relied upon has no application.[105]

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101. *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941). "[C]onduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion . . . ." *Id.* at 477. *See also* cases cited in note 103 *infra*.

102. National Labor Relations Act § 8(c), 29 U.S.C. § 158(c) (1970), provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.

103. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); NLRB v. Neuhoff Bros. Packers, Inc., 375 F.2d 372 (5th Cir. 1967).

104. 225 F. Supp. 937 (D. Mass. 1964).

105. *Id.* at 940.

Judge Ford held, in essence, that before the proviso can be relied upon to punish otherwise protected speech, the union must have a specific provision in its constitution or by-laws setting forth the parameter of the limitations; in other words, speech could not be punished under a general rule condemning "disloyalty." By negative implication, the decision suggests that if a union properly adopted a "reasonable" rule temporarily restraining a member's speech during contract negotiations, the union might be able to impose the type of discipline that this court invalidated.

In *Falcone v. Dantinne*,[106] a union member had urged other members to strike while local officers were simultaneously urging them to work in the face of a tentative contract agreement. The union had previously agreed with the employer that there would be no work stoppage during contract negotiations. For urging violation of the union promise, Falcone was found guilty of disloyalty. The issue before the trial court was whether the actions of Falcone were protected under section 101(a)(2) or whether they amounted to an unjustified interference with the union's performance of its legal or contractual obligations within the scope of the proviso. The lower court failed, however, to confront this issue directly and held that when union tribunals reach such decisions they should not be disturbed unless "manifestly unreasonable."[107] The court did not pursue the question whether the conduct actually hindered performance of the union's contractual obligations. It found that the discipline was "merely the enforcement by the Union of reasonable rules dealing with the responsibility of each member to the Union, and was not an interference with the plaintiff's right of free speech."[108] The Third Circuit[109] reversed on the ground that the union tribunal was biased. Thus, the lower court's holding concerning the inapplicability of the free speech protections was not disturbed.

In *Farnum v. Kurtz*,[110] a California appellate court refused to enforce a union fine imposed on a member who, in a letter to the employer and a newspaper, had criticized the settlement reached between employer and union. The criticism was made before the formal contract had been signed. The union argued that the fine was valid because the criticism, after agreement but before formalization, interfered with the

106. 288 F. Supp. 719 (E.D. Pa. 1968).
107. *Id.* at 726.
108. *Id.* at 728.
109. 420 F.2d 1157 (3d Cir. 1969).
110. 72 L.R.R.M. 2794 (Cal. App. 1969).

union's legal and contractual obligations. After holding that neither the letter to the employer nor the one to the press "violated his responsibility to the union 'as an institution,'" the court also stated that the criticism did not interfere with any legal obligation of the union. In addition, the court hinted, as had the court in *Leonard v. M.I.T. Employees' Union*,[111] that the union could adopt specific rules regulating the timing of critical speech but that broadly drafted rules could not be used as a basis for punishing such speech—a variation on the constitutional doctrine of overbreadth.[112] A recent Third Circuit decision[113] specifically held that a union could not call the proviso into play by general constitutional prohibitions against "corrupt conduct" and the like. If one was being prosecuted by the union under such vague prohibitions, members could enjoin the proceedings under section 101(a)(2) said the court. For the union to claim the benefit of the proviso, the union rules would have to specify the type of speech proscribed.

4. Urging Members Not to Pay Their Dues.—Nothing strikes at the heart of a union quite so directly as urging members to abandon their financial support; yet, in such instances, the right of free speech has been given broad protection. The landmark case is *Farowitz v. Musicians Local 802*,[114] decided by the Second Circuit less than one year after *Salzhandler*. Farowitz had urged his fellow members to refuse to pay a tax levied on musicians who worked regularly, because the collection of this tax by orchestra leaders had been ruled unlawful in an earlier decision.[115] Since the union constitution and by-laws provided no other method of collection, he argued that any collection would be improper. Farowitz was found guilty of seeking "to undermine the very existence of the Local"[116] and expelled from the union. The court ordered Farowitz reinstated, finding that the *Salzhandler* case controlled. Although recognizing that adequate funding is crucial to a union and implying that in theory there may be "some situations in which a union member would not be protected against disciplinary measures if he were to urge other members to forego paying their dues,"[117] the court left little room

111. 225 F. Supp. 937 (D. Mass. 1964); see text accompanying note 104 *supra*.

112. *See* Cox v. Louisiana, 379 U.S. 536 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940).

113. Semancik v. District 5, UMW, 466 F.2d 144 (3d Cir. 1972).

114. 330 F.2d 999 (2d Cir. 1964).

115. Carroll v. Associated Musicians, 206 F. Supp. 462 (S.D.N.Y. 1962), *aff'd*, 316 F.2d 574 (2d Cir. 1963).

116. 330 F.2d at 1001.

117. *Id.* at 1002.

for the application of this "theory," stating:

> [A] member having . . . good reasons . . . to believe that the collection of taxes or dues runs afoul of the law has the right to call this to the attention of the membership and to urge that they refrain from paying such assessments.
>
> . . . A rule which subjects a member to expulsion for complaining of a tax which he reasonably believes to be illegal is not a reasonable rule.[118]

It would appear that regardless of the impact on the union, if a member holds a good-faith, reasonable belief that a tax, assessment, or other dues payment is illegal his advocacy of nonpayment will be protected. This leaves a wide range of permissible speech.

5. Dual Unionism.—There is no greater treachery, from a union standpoint, than for a member to advocate and campaign for a rival union. For a long time it was thought that if there was any activity which was not protected by section 101(a)(2), it was this "heinous crime" of disloyalty known as "dual unionism." An early case confirmed that view. In *Sawyers v. Grand Lodge, IAM*,[119] plaintiffs were found guilty of dual unionism by a union tribunal and expelled; the District Court for the Eastern District of Missouri refused to accept the argument that the advocacy of dual unionism was protected free speech. The court, in finding the proviso applicable, reasoned:

> When local officers encourage local members to break away from the national organization and form an independent union, it clearly undermines the responsibility of local members to the national organization, and threatens the enforcement of contractual obligations. Therefore, the advocation of dual unionism is not protected . . . under Title I.[120]

In a 1971 case, *Airline Maintenance Lodge 702, IAM v. Loudermilk*,[121] the Fifth Circuit refused to apply the *Sawyers* decision. The facts in *Loudermilk* are distinguishable, however. Loudermilk had been required to join the IAM because of a union shop agreement, but afterwards he also joined a rival union and became its president. In 1967 Loudermilk actively supported the rival organization in a representation election which the IAM won by a narrow margin. Loudermilk was tried

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118. *Id.*

119. 279 F. Supp. 747 (E.D. Mo. 1967); *accord*, Ballas v. McKiernan, 74 L.R.R.M. 2647 (N.Y. City Civ. Ct. 1970) (fine enforced for "dual unionism").

120. 279 F. Supp. at 756.

121. 444 F.2d 719 (5th Cir. 1971).

by the IAM trial committee, found guilty of dual unionism, and was fined, instead of being expelled from the union. The IAM then filed an action in federal district court to collect the fine. The district court granted Loudermilk's motion for summary judgment, holding that although the union could successfully bring suit to enforce validly imposed fines, the penalty invoked in Loudermilk's case was invalid because the charges "arose out of activities protected by the free speech provision"[122] of section 101(a)(2).

On appeal to the Fifth Circuit, Judge Bell reiterated the standards for testing speech under section 101(a)(2) as set forth in *Fulton Lodge No. 2, IAM v. Nix.*[123] Freedom of speech has been *broadly construed* to guarantee union democracy; however, the prerogatives of free speech must be balanced against the institutional responsibilities of unions.[124] The *Loudermilk* court then considered the facts, particularly noting that the "IAM did not choose to expel him or to bar him from meetings and the like, defensive actions which would have protected IAM. Rather, IAM sought to compel his allegiance by the imposition of a fine."[125] The court then discussed cases arising under section 8(b)(1)(A) of the National Labor Relations Act.[126] In short, those decisions indicated that a union may, as a reasonable defensive measure, validly expel a union member who advocates dual unionism, but that the union has no justification for the imposition of a fine for such conduct.[127] The court decided that the discipline imposed upon Loudermilk went too far:

> We think this exceeded the authority of the union under the circumstances here which involve compulsory membership under a union shop agreement coupled with the free speech overtones which are inherent in

122. *Id.* at 721.

123. 415 F.2d 212 (5th Cir. 1969).

124. Lodge 702, IAM v. Loudermilk, 444 F.2d 719, 723 (5th Cir. 1971).

125. 444 F.2d at 723 (footnote omitted).

126. National Labor Relations Act § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A). The pertinent portion of § 158(b) states:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title. . . .

National Labor Relations Act § 7, 29 U.S.C. § 157 (1970), 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 . . . .

127. NLRB v. Molders Local 125, 442 F.2d 92 (7th Cir. 1971); Price v. NLRB, 373 F.2d 443 (9th Cir. 1967); Tri-Rivers Marine Eng'rs Union, 189 N.L.R.B. No. 108 (1971).

> undertaking[s] stemming from dissatisfaction with one union and action seeking to displace that union with another.[128]

Quoting the district court, the Fifth Circuit concluded:

> If the [union] could impose a judicially collectible fine upon a union member who had become satisfied [*sic*] with the union's representation and sought to replace it with a rival, it could effectively eliminate all criticism of its policies and foreclose any challenge of its right to represent its members.[129]

Following the *Loudermilk* case, it is not entirely clear whether advocacy of dual unionism is absolutely protected by section 101(a)(2) or whether dual unionism falls within the proviso allowing the union to ensure the responsibility of the members to the organization. An examination of the existing authority indicates that a union could discipline a member who advocates dual unionism by expulsion, but not by the imposition of a fine. Such discipline is institutionally "reasonable" when balanced against the free speech rights of the member. He can continue to advocate the rival union, but not as an insider or spokesman for the incumbent union. On the other hand, it is institutionally "unreasonable" for the union to retain a member, yet attempt to silence him by imposition of fines. This rationale indicates that the speech itself is not privileged or absolutely protected; it is merely a question whether the union actions fall within the "reasonable rules" of the proviso. As indicated by the Fifth Circuit, reasonableness is determined primarily by balancing the individual right of free speech, which is given broad protection, with the institutional needs of the union.[130]

A strong argument can be made that rank-and-file advocacy of a rival union should be absolutely protected.[131] To allow expulsion places a union man in an untenable position. Although he believes that a rival union might better represent the interests of the employees, he must keep his beliefs silent or risk expulsion, thus being denied, perhaps forever, the right to participate in and influence the affairs of the cur-

128. 444 F.2d at 723-24.

129. *Id.* at 724.

130. *Id.* at 723.

131. In Sawyers v. Grand Lodge, IAM, 279 F. Supp. 747 (E.D. Mo. 1967), the expelled members were officers of the local. One could argue that discipline of officers seeking to *lead* the union out of an international is reasonable, whereas discipline of a rank-and-file member seeking to *persuade* fellow members to follow a different leader might be unreasonable. The status of the speaker might well be a more reliable guide for distinguishing the cases than the nature of the discipline imposed.

rently certified representative. One tenet underlying the National Labor Relations Act is that representative capacity should be determined by the free and unencumbered will of the majority.[132] A union rule that substantially inhibits the members of the current representative in their support for a rival representative deprives the rival of perhaps its only source of support, thereby frustrating the NLRA's policy of free choice. Furthermore, a rule that demands "loyalty" from members to the extent that they cannot state that another union might better represent the employees assumes that institutional concerns are more important than the interests of the majority of the members. Such an assumption runs counter to the philosophy of freedom of expression and majority self-determination[133] underlying the entire LMRDA.

This is not to say that a union cannot take defensive measures to protect its campaign strategy or other inside information from espionage. But such legitimate ends can perhaps be secured without imposing upon the members an artificial "loyalty" that infringes upon their rights to freely express their views on the entire spectrum of union issues.

The distinction drawn between fines and expulsion as reasonable rules is, at best, strained. The National Labor Relations Act clearly states that "[n]othing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."[134] But the Act does authorize agreements that compel employees to support the exclusive representative financially.[135] Thus, the Fifth Circuit in *Loudermilk* was not entirely correct when it assumed that the union security clause required Loudermilk to be a member of the union. Furthermore, the Supreme Court has recently indicated that even when one is a member of the union he may freely resign when the union's course of conduct is contrary to his personal beliefs, and thereby escape union discipline.[136]

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132. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964). *See also* Sewell Mfg. Co., 138 N.L.R.B. 66 (1962); Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

133. Even speech deemed by some to be "disloyal" to our current system of government may, in certain circumstances, be protected by the first amendment. *See* Dennis v. United States, 341 U.S. 494 (1951).

134. 29 U.S.C. § 164(b) (1970).

135. NLRB v. General Motors Corp., 373 U.S. 734 (1963); Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963).

136. NLRB v. Textile Workers Local 1029, 409 U.S. 213 (1972).

When an individual elects to become a union member, submits himself to the rules of the organization (including the loyalty provisions), and remains a member even while planning to violate those rules, there is perhaps little difference between the reasonableness of fining that member and expelling him.[137] If it is unreasonable for the organization to fine an individual who willingly accepts and retains membership while campaigning for a rival organization, it would seem to be equally unreasonable for that organization to expel him. Conversely, if it is reasonable for the organization to expel a member for disloyal speech, it would appear reasonable for the organization to fine a member who willingly accepted and retained membership while engaging in such disloyal conduct.

6. Insubordination.—Members of a labor organization who are also officers or employees of the organization are protected by the free speech provisions of section 101(a)(2).[138] Notwithstanding that protection, union officers may validly be punished for misuse of their office.[139] It becomes difficult, however, to determine the extent to which an officer may be disciplined for lesser forms of insubordination without infringing upon the recognized right of free speech.

In *Sewell v. Grand Lodge, IAM*,[140] the plaintiff alleged that he had been wrongfully discharged from his office of union representative because he opposed certain proposals of the union executive council. The Union claimed that Sewell, as a representative, was responsible for the execution of the policies of the executive council, and thus his expressed opposition amounted to insubordination. The Fifth Circuit first addressed itself to the question of the statute of limitations. Concluding that the action was "essentially in the nature of a tort for the alleged violation of rights claimed under the [LMRDA]," the court held that the action was barred by the Alabama statute of limitations (one year) on actions *ex delicto*.[141] The opinion added, however, that apart from the statutory bar, the plaintiff had no right to relief. The court agreed that free speech and freedom to participate in union affairs were rights

137. *Compare* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967) (expulsion), *with* Scofield v. NLRB, 394 U.S. 423 (1969) (fine).

138. *E.g.*, Grand Lodge, IAM v. King, 335 F.2d 340, 343 (9th Cir.), *cert. denied*, 379 U.S. 920 (1964).

139. Barbour v. Sheet Metal Workers, 401 F.2d 152 (6th Cir. 1968); Gulickson v. Forest, 290 F. Supp. 457 (S.D.N.Y. 1968).

140. 445 F.2d 545 (5th Cir.), *cert. denied*, 404 U.S. 1024 (1971).

141. *Id.* at 550.

guaranteed to every member, but because of plaintiff's position as an officer, the court placed some limits on that right. The court stated:

> This conclusion [that each member is entitled to the right of free speech] . . . does not permit an employee who accepts employment for the performance of certain specified duties to take the largesse and pay of the union, on the one hand, and, on the other, to completely subvert the purposes of his employment by engaging in activities diametrically opposed to the performance of his specified duties. . . . If a conflict of interest arises between an individual's desire to oppose the plans and policies of his employer and the discharge of the duties of the position in which he is employed, fundamental considerations of fair play would require him to remove himself from such a position.
>
> To hold that a union has no right to discharge an employee for insubordination under the facts of his [*sic*] case would, we believe, seriously detract from effective, cohesive union leadership. The result might well be weak, ineffective and fragmented unions which would be paralyzed in bargaining for the rights and welfare of union members against the monolithic front of large commercial corporations in the modern commercial world.[142]

This decision is consistent with the Supreme Court's analysis of the first amendment rights of public employees. In *Pickering v. Board of Education*,[143] the Court upheld the right of a school teacher to criticize policies of the school system where he was employed, but apparently reserved to the public employer the right to discipline conduct that interfered with confidential relationships and performance of duties, or that constituted insubordination. The *Sewell* court found, as a fact, that the plaintiff had been insubordinate and thus was subject to discipline, but it did not attempt to establish a test by which future courts could factually distinguish protected free speech and unprotected insubordination. Making such distinctions will, no doubt, prove a difficult task. The test likely to be applied will be the balancing test enunciated in *Pickering* and in a number of Fifth Circuit decisions:[144] The free speech of the individual will be weighed against the institutional needs of the union.

The *Sewell* decision is significant for a number of reasons. First, the employer-employee relationship is used as a basis for denying, at

142. *Id.* at 550-52 (footnotes omitted).

143. 391 U.S. 563 (1968).

144. *E.g.*, Lodge 702, IAM v. Loudermilk, 444 F.2d 719, 723 (5th Cir. 1971); Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212, 218 (5th Cir. 1969).

least to a degree, full rights of free speech to a member-officer, a concept contrary to earlier decisions in the area. Second, it indicates that each case of free speech is to be judged on its particular facts, as proposed by Professor Kroner.[145] Third, the court states that the union has certain prerogatives as a result of its need to preserve its solidarity as an institutional warrior in the labor-management struggle, even at the cost of internal democracy, as advocated by Professors Bok and Dunlop.[146] It is probably too early to ascertain the impact this decision will have upon the *Salzhandler-King* line of decisions which recognize an absolute freedom of speech, even at the expense of internal solidarity.

V. Section 101(a)(2) and the Right of Assembly

In addition to freedom of speech, section 101(a)(2) provides that "[e]very member of any labor organization shall have the right to meet and assemble freely with other members . . . ."[147] This clause has been interpreted in two ways. The first is that the union cannot interfere with the right of the members to meet and assemble informally, but it has no obligation to provide meetings for the members.[148] This is a negative restraint only, similar to that imposed upon governmental bodies by the first amendment. The second interpretation is that this section imposes a positive duty upon the union as an institution to order meetings required by the union constitution and by-laws, a duty which can be affirmatively enforced by aggrieved union members.

The conflicting interpretations of the section received consideration in the case of *Yanity v. Benware*.[149] Plaintiffs, who had been discharged from their jobs, submitted their grievances to arbitration, only to be denied relief. Judicial review of the arbitrator's decision was sought, but under New York law the union was required to be a party litigant in order to obtain such review, and Benware, president of the local, refused to institute such a suit. Plaintiffs then obtained the number of signatures required by the union constitution to authorize a special meeting, but Benware refused to call the meeting. Suit was brought under the LMRDA; the plaintiffs claimed that the refusal to call a lawful meeting

145. Kroner, *Title I of the LMRDA: Some Problems of Legal Method and Mythology*, 43 N.Y.U.L. Rev. 280 (1968).

146. *See* note 15 *supra*.

147. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970).

148. *See* Yanity v. Benware, 376 F.2d 197 (2d Cir.), *cert. denied*, 389 U.S. 874 (1967).

149. 376 F.2d 197 (2d Cir. 1967).

violated their right of assembly protected by section 101(a)(2).

Speaking for a majority of the Second Circuit panel, Judge Hays read the statute as securing only the right of members to meet in informal sessions without interference from the union. The court, concluding that the statute did not grant the privilege of demanding full-blown membership meetings, based its decision upon the absence of express congressional intent to require full membership meetings, an intent that could have easily been expressed.

Chief Judge Lumbard dissented, arguing that the majority opinion ignored the underlying purpose of the Act—the promotion of union democracy. The Chief Judge asserted that section 101(a)(2), although guaranteeing the right of free speech, could easily be emasculated by the refusal of union officials to provide a realistic forum for the expression of differing views. "A union leadership can stifle attempts by members to influence union policy as effectively by refusing to hold required meetings as by refusing the floor to members of opposing views."[150] The dissent also argued that granting the right to speak freely at union meetings implied a statutory requirement that meetings be held.

Professor Atleson, in an excellent discussion of the issue,[151] supports the need for court enforcement of union laws governing special meetings by arguing that such enforcement is "critical to guarantee democratic rights and procedures."[152] Atleson states, "Since the court would merely be requiring the union to abide by its own constitution, there is no problem of over extending the act [to internal union affairs]."[153]

If the LMRDA preempted any resort to state law and remedies, the result of *Yanity* would perhaps be indefensible. But section 103[154] specifically provides:

> Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

Applying the predominant contract theory of the relationship between the union and its members, a union member who desires to call

150. *Id.* at 203 (dissenting opinion).

151. Atleson, *A Union Member's Right to Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 MINN. L. REV. 403 (1967).

152. *Id.* at 438.

153. *Id.* at 439.

154. LMRDA § 103, 29 U.S.C. § 413 (1970).

a meeting could probably secure specific performance of the union constitution or by-laws requiring the holding of such meetings. Rather than federal courts having power under the LMRDA to order meetings, state courts would possess that authority under section 103 and state contract laws. The free speech provisions of section 101(a)(2) would, of course, be applicable at any union meeting and, therefore, enforceable by the federal courts.

Chief Judge Lumbard's dissenting views in *Yanity* have found expression in a majority opinion concerning a somewhat different issue in *Navarro v. Gannon*.[155] In that case, the Second Circuit affirmed the issuance of a preliminary injunction that prevented a parent union from taking control of a meeting of one of its locals. Because of certain administrative problems, the international sought to have national officers henceforth preside over the local's meetings. The international argued that such a procedure was not a violation of any right protected by section 101(a)(2), but Chief Judge Lumbard disagreed. After analyzing the union constitution, he determined that the president had not acted according to the constitutional requisites for the imposition of a trusteeship. Moreover, he found that nothing in the legislative history of section 101(a)(2) indicated any consideration of what he felt was the issue in the case: "the right of local members to run the affairs of their union without interference from the international union with which they are affiliated."[156] Using the same reasoning as in his dissent in *Yanity*, Lumbard stated:

> [T]he guaranty in Section 101(a)(2) of the equal right to participate in the deliberations and voting at union meetings, and the guaranty in Section 101(a)(2) of the right to express views upon business before the meeting necessarily encompass the right to assemble, consult and decide matters of concern to the local union without the inhibiting presence and control by international officials.[157]

Accordingly, the court concluded that members of locals are protected from national reprisals that attempt to restrain their criticisms, opposition, or recalcitrance. To allow hostile officers to control union meetings would abuse the democratic scheme encouraged by the Act. Such a position, the court reasoned, was not at odds with the decision

155. 385 F.2d 512 (2d Cir.), *cert. denied*, 390 U.S. 989 (1967).

156. *Id.* at 517.

157. *Id.* at 518. *See also* Williams v. Typographical Union, 423 F.2d 1295 (10th Cir.), *cert. denied*, 400 U.S. 824 (1970).

in *Yanity*, since the right to meet and assemble was not at issue in the *Navarro* case, which involved only the right to discuss matters at validly called meetings without the inhibition caused by outside interference.

Navarro could be read as merely another "discipline" case in which free speech and dissension were squelched by imposing new leadership on the dissenters. However, an expansive interpretation of the decision indicates that section 101(a)(2) grants an affirmative right to each defined "labor organization" to be presided over by local officers selected by the members of that "organization." Wholly apart from Title IV election procedures, and except for validly imposed trusteeships, each organization has a Title I right to demand its "own" officers.

Under *Yanity*, the right-to-assembly provision of section 101(a)(2) has received a more narrow interpretation than the free speech provision. The *Navarro* case, however, suggests that a close relationship exists between the "speech" and "assembly" provisions of section 101(a)(2), and also evidences a perceptible retreat in philosophy from the rather narrow interpretation afforded the right of assembly by *Yanity*. *Navarro* further indicates that when assembly encompasses elements of free speech extensive protection will be provided; whether *Navarro* goes beyond this and provides an additional affirmative right to hold meetings chaired by locally selected officers remains to be decided.

VI. Conclusion

The evolution of judicial interpretation under section 101(a)(2) of the LMRDA has forcefully demonstrated that the courts, in the overwhelming majority of situations, are prepared to allow union members to engage in a wide variety of expressive activity, in a judicial effort to carry out the legislative purpose of the Act—assuring "to union members a basically democratic union organization with the concomitant protections against arbitrary and despotic control by union leaders."[158]

In pursuing that objective, the courts have placed an extremely narrow interpretation upon the proviso to section 101(a)(2), so that it authorizes union discipline for speech and assembly related activity only if extreme misconduct is involved. Otherwise, the proviso has been rendered powerless as a means of curbing free speech and assembly among union members.

158. Schuchardt v. Millwrights Local 2834, 380 F.2d 795, 797 (10th Cir. 1967).

As expected, the expanding liberal construction of the guarantees of section 101(a)(2) has caused some internal dissension and insurgency in the unions, but the courts, as well as most legal scholars, have felt that it is in the best interest of both workers and society to encourage participatory democracy in the labor movement rather than attempting to protect, through enforced loyalty, the union's solidarity as the exclusive bargaining representative for its members. In the area of free assembly, however, some official prerogatives, such as the refusal to call union meetings, have been recognized.

Finally, the idea of a relatively unfettered right to free speech and assembly in an industrial democracy has been based upon, and has also influenced, the growth and scope of first amendment rights and issues in the larger social context. This dialogue between the two structures has been the result of a conscious desire to protect individual free expression as a means of both placing moral strictures on all types of social institutions and strengthening the identity and involvement of each member of those institutions.

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