UNION RECEIVERSHIPS UNDER RICO: A UNION DEMOCRACY PERSPECTIVE

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> [T]he question we have to discuss is not whether ideal democracy is realizable, but rather to what point and in what degree democracy is desirable, possible, and realizable . . . .[1]

INTRODUCTION

Corrupt labor unions have plagued union members, employers, and the American public since the late 1800s.[2] In the twentieth century, racketeering and corruption spread through the building trade unions in New York,[3] New Jersey,[4] and Chicago,[5] and through the needle,[6] culinary,[7] building services,[8] and theatre employees' unions.[9] During three years of Senate hearings in the 1950s, over 1500 witnesses provided more than 46,000 pages of testimony describing union acts of violence, extortion, theft, and bribery.[10] Much of this testimony was devoted to the corrupt practices of the International Brotherhood of

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[1] R. MICHELS, POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY 366 (1962).

[2] *See* Hutchinson, *The Anatomy of Corruption in Trade Unions,* 8 INDUS. REL. 135, 135 (1969).

[3] *See* J. HUTCHINSON, THE IMPERFECT UNION 28-47 (1970).

[4] *See id.* at 48-52.

[5] *See id.* at 53-61.

[6] *See id.* at 74-92.

[7] *See id.* at 118-23.

[8] *See id.* at 124-29. Most recently, the New York Court of Appeals upheld the subpoena of the names, telephone and social security numbers of 10,000 members of the carpenters' union locals in an attempt to fight corruption in the construction industry. *See* Crowne, *Subpoenas Upheld in Probe of Union,* N.Y.L.J., July 7, 1988, at 1, col. 3. The court held that release of the names to the prosecutors would allow members to be contacted directly "without exposing witnesses to possible intimidation." *Id.* col. 4; *see also* Gillespie, *A.C. Union Chief Took Bribes Prosecutor Says,* Philadelphia Inquirer, June 8, 1988, at 7B, col. 1 (alleging that the business manager of the Ironworkers accepted cash payments for favors).

[9] *See* J. HUTCHINSON, *supra* note 3, at 130-38.

[10] *See id.* at 7.

Teamsters.[11]

In 1959, Congress passed the Landrum-Griffin Act.[12] Legislators designed the Act to fight corruption by enabling union members to retake control of their unions through democratic processes.[13] Corruption, however, persisted. Senate hearings in 1981 revealed that the problem of labor racketeering in Newark and Buffalo equalled that in the 1950s[14] and that in Chicago, organized crime controlled "nearly every major local union of three international unions."[15] Strike force attorneys described the problem in the Eastern District of New York as "pervasive" and in Philadelphia as "awesome."[16] Most recently, the President's Commission on Organized Crime concluded that organized crime runs several hundred locals "embracing thousands of members in strategic cities."[17]

The Justice Department has brought suits against corrupt local union leaders[18] under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[19] as part of an effort to return control of the unions to their members. In these suits, the prosecutor seeks to remove the union's elected officials and impose a court-appointed trustee to run the union.[20] If the government prevails, the court gives a trustee sole responsibility for managing the union until the court determines that the

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[11] *See* S. ROMER, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS 101 (1962) (thirty-four of the fifty-eight volumes of testimony described corrupt Teamster practices).

[12] Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401-531 (1982).

[13] *See* 105 CONG. REC. 6471-72 (statement of Sen. McClellan), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1198-99 (1959) [hereinafter NLRB LEGISLATIVE HISTORY].

[14] *See Government's Ability to Combat Labor Management Racketeering: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs,* 97th Cong., 1st Sess. 234 (1982).

[15] *Id.* at 236.

[16] *Id.* at 242.

[17] PRESIDENT'S COMMISSION ON ORGANIZED CRIME, ORGANIZED CRIME AND LABOR-MANAGEMENT RACKETEERING IN THE UNITED STATES, RECORD OF HEARING VI, APRIL 22-24, 1985, at 7-8 (1985) (hereinafter ORGANIZED CRIME).

[18] *See, e.g.,* United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140 (1986); United States v. Local 30, United Slate, Tile & Composition Roofers, 686 F. Supp. 1139 (E.D. Pa. 1988); United States v. Local 6A, Cement and Concrete Workers, 663 F. Supp. 192 (S.D.N.Y. 1986).

[19] 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986).

[20] A receiver "is a trustee or ministerial officer representing the court, and all parties in interest in litigation, and property or fund intrusted to him." BLACK'S LAW DICTIONARY 1140 (5th ed. 1979). A court has a number of options when imposing a receiver on a union. The receiver can be given a range of responsibilities ranging from total control over the union to mere monitoring of union activities. This Comment will use "trustee" and "receiver" interchangeably.

corrupt influence has dissipated and that valid elections can once again be held. For example, the Justice Department recently filed a complaint to remove the entire Executive Board of the International Brotherhood of Teamsters and replace these Board members with a receiver who will "discharge the duties of the General President and/or General Executive Board . . . . until such time as a free and fair elections can be held."[21]

Organized labor is not enthralled with this new use of RICO and has labelled it "union busting."[22] The threatened use of trustees has transformed the Teamsters into a "one issue union."[23] In court, the union has protested that "[i]t is not the function of the United States to dictate to members of any union or any private association how they should react to convictions of past officers or whether they should spurn officers who their government condemns."[24] The claim is a sympathetic one. It is unsettling to think that in a democracy the government can, and would, take control of a private organization.

Indeed, the Teamsters' declaration reflects the underlying ideal of labor policy in the United States. Since the Norris-LaGuardia Act[25] was passed in 1932, there has been a "very clear Congressional intent to end injunctive interference in labor relations."[26] The Landrum-Grif-

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[21] Complaint, United States v. International Bhd. of Teamsters, Civ. No. 88-4486 (S.D.N.Y. filed June 28, 1988), *reprinted in* Daily Labor Report No. 125, June 29, 1988, at E-1, E-41 to E-43.

[22] *See* Power, *U.S. Court Control Imposed on Roofers,* Philadelphia Inquirer, May 24, 1988, at 1A, 8A, col. 5 (statement of Robert McKee, head of the U.S. Labor Department's Office of Labor Racketeering, referring to the views of the union hierarchy. McKee personally supported the government's action); Noble, *Vote Set to End U.S. Control of a Jersey Teamsters Local,* N.Y. Times, Feb. 15, 1988, at B3, col. 2 (stating that most of the labor movement, notably Lane Kirkland, has "condemned the trusteeship concept"); *see also* G. TYLER, THE POLITICAL IMPERATIVE 260 (1968) (noting that the "leadership is resentful" when the government attempts to regulate any aspect of union functions). At least one commentator has argued that conspiracy theories have traditionally been used as "weapons against labor unions." *See* Castegnera, *The Doctrines of Civil and Criminal Conspiracy as "Union Busting": Techniques in Labor Law Past and Present,* 8 T. MARSHALL L.J. 1, 2 n.7 (1982).

[23] *The Teamsters Rumble Back,* NEWSWEEK, Nov. 30, 1987, at 54 (quoting Barry Feinstein, director of the Teamsters' Public-Employee division, who stated that the union's only political concern is fighting the government takeover).

[24] Memorandum of Local 560, International Brotherhood of Teamsters, in Opposition to a Request for a Preliminary Injunction and the Appointment of a Receiver *Pendente Lite* at 141, United States v. Local 560, Int'l Bhd. of Teamsters, 550 F. Supp. 511 (D.N.J. 1982) (No. 82-689) [hereinafter Memo in Opposition].

[25] 29 U.S.C. §§ 101-115 (1982 & Supp. IV 1986).

[26] Texas & New Orleans R.R. v. Brotherhood of R.R. Trainmen, 307 F.2d 151, 155 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963); *cf.* Wilson & Co. v. Birl, 105 F.2d 948, 953 (3d Cir. 1939) (injunction may issue only in the case of violence or fraud).

The lessons learned from organized labor's first experiences with judicial equitable remedies illustrate the problems with judicial intervention. From the 1880s through the

fin Act took this policy one step further by applying it to the internal affairs of labor organizations. The report issued by the Senate Committee on Labor and Public Welfare recognized "the desirability of minimum interference by government" in the internal affairs of unions.[27] The bill's sponsor echoed this concern during the debate: "If we want fewer laws . . . [w]e should give union members their inherent constitutional rights, and we should make those rights apply to union membership . . . . By so doing we will be giving them the tools they can use themselves."[28]

Thus, in the area of labor racketeering, fundamental policy concerns collide. The government's need to protect both union members and the public conflicts with the legislative directive to let unions manage themselves. This Comment will focus on the tension created by these inconsistent policy goals and the role union democracy plays in harmonizing them. For despite its undesirability, intrusive government intervention is necessary to fight corrupt union leadership. Past attempts, both statutory and judicial, failed to satisfy either policy goal because they did not fully acknowledge that corrupt leadership has intimidated union members and employers so that they do not dare assert their statutory rights. This Comment concludes that intrusive intervention, particularly in the form of receivers, is the only remedy that will simultaneously protect the rights of society and union members, while

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1920s, courts issued over 1,800 injunctions against striking unions. *See* E. WITTE, THE GOVERNMENT IN LABOR DISPUTES 84 (1932). It took the passage of the Norris-LaGuardia Act, which substantially restricted the jurisdiction federal courts had to issue labor injunctions, to curb this abuse of judicial discretion. *See* C. SUMMERS, H. WELLINGTON & A. HYDE, LABOR LAW 223 (2d ed. 1982). Indeed, at the time of its passage, RICO was said to "run[] amuck. . . . [i]t employs penalties and investigative procedures which are both abusive and pregnant with the potential for abuse." Dissenting Views of Representatives John Conyers, Jr., Abner Mikva, and William F. Ryan, on the Organized Crime Control Act, H.R. REP. NO. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 4007, 4081.

The labor injunctions of the late nineteenth and early twentieth centuries can be distinguished to some extent from the current RICO suits in that they were concerned with union-management relations, not internal union affairs, and in that the primary problem with injunctions was procedural: They relied on *ex parte* hearings. *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 202 (1963). This Comment argues that the primary concern over RICO should be substantive: When, if ever, is a receiver warranted? Implicit in this question is a determination of what authority a receiver should be granted.

[27] S. REP. NO. 187, 86th Cong., 1st Sess. 7, *reprinted in* 1959 U.S. CODE CONG. & ADMIN. NEWS 2318, 2323. Some members of Congress still feel that it is inappropriate for the government to interfere in the internal affairs of labor unions. In response to the Justice Department suit against the Teamsters, Senator Orrin Hatch stated that the suit "flies in the face of democratic principles" and "smacks of totalitarianism." Daily Labor Report No. 125, June 29, 1988, at A-5.

[28] 105 CONG. REC. 6476 (1959) (statement of Sen. McClellan), *reprinted in* 2 NLRB LEGISLATIVE HISTORY, *supra* note 13, at 1103.

still preserving the union as an institution.

Part I of this Comment analyzes the model of union democracy incorporated in the Landrum-Griffin Act. It explains why union democracy is an elusive goal and why the democratic processes incorporated in the Landrum-Griffin Act are not equal to the task of cleaning up a corrupt union. Part II elucidates the statutory basis of recent Justice Department suits directed at imposing a trustee on a union and derives the theories under which the government believes it is appropriate to do so. Part III evaluates the use of trustees and receivers in light of historical experience, alternative remedies, and union democracy concerns; it concludes that the courts have not adequately weighed the interests of rank and file members when imposing a receiver on a union.

I. UNION DEMOCRACY

The Landrum-Griffin Act[29] provides a statutory basis for analyzing union democracy. Congress passed Landrum-Griffin in response to a belief that corrupt and undemocratic unions represented a threat to the country and in response to a perceived lack of democracy in American labor unions.[30] Congressional investigations supported this perception with evidence of numerous "instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct."[31] The legislation gives a broad mandate: "[A]ll unions should be run in a democratic manner regardless of the absence or presence of corruption."[32] Achieving this goal requires "vest[ing] in [the worker] . . . the power to do something to protect his rights . . . . [and] enable him to prevent usurpation by would-be exploiters."[33]

Indeed, the Landrum-Griffin Act primarily aims to encourage the "full and active participation by the rank and file in the affairs of the union."[34] To accomplish this goal, the statute provides for equal rights

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[29] Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, 29 U.S.C. §§ 401-531 (1982).

[30] *See* Note, *Title I and Union Democracy,* 12 N.Y.U. REV. L. & SOC. CHANGE 449, 449-52 (1984).

[31] 29 U.S.C. § 401(b) (1982).

[32] Note, *supra* note 30, at 452.

[33] 105 CONG. REC. 6478 (1959) (statement of Sen. McClellan), *reprinted in* 2 NLRB LEGISLATIVE HISTORY, *supra* note 13, at 1105.

[34] American Fed'n of Musicians v. Wittstein, 379 U.S. 171, 182-83 (1964) (holding that the implementation of a dues increase under a weighted voting system is not inconsistent with the legislative goal of full participation by union members).

among all members and grants rights to ensure democratic processes:[35]

> 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 . . . .[36]

The Act's underlying theory assumes that by granting equal rights and the freedom of speech to all union members, all members will be able to participate fully in running their union and thus "bring about a regeneration of union leadership."[37] If such a "regeneration" is possible, both goals of protecting the public welfare and ensuring democratically run unions could be achieved. A union run democratically by its membership does not pose a threat to public safety. Merely providing the tools of democracy, however, has not proved sufficient.[38] Congress realized it needed to go further and provide the strength to use those tools. The civil remedies of RICO provide such strength.[39]

In interpreting the Landrum-Griffin Act, the Supreme Court has stressed the democratic theory forming the foundation of the Act and compared it to the Bill of Rights: "[T]he legislators intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one's mind without fear of reprisal."[40] The efficiency of union administration, therefore, does not outweigh the members' rights to a democratic union.[41]

Because the right to speak means little without the corollary right to obtain the data to inform the speech, courts have interpreted Title I as granting a right more expansive than that granted in the first amendment. Title I does not merely prohibit union leadership from in-

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[35] *See* 29 U.S.C. § 411(a)(1) (1982) ("Every member of a labor organization shall have equal rights and privileges . . . .").

[36] *Id.* § 411(a)(2).

[37] 105 CONG. REC. 6472 (1959) (statement of Sen. McClellan), *reprinted in* 2 NLRB LEGISLATIVE HISTORY, *supra* note 13, at 1099.

[38] *See, e.g., infra* notes 105-16 and accompanying text (discussing the lack of democracy and the corrupt practices of Teamsters Local 560); *infra* notes 139-51 and accompanying text (discussing corruption in Roofers Local 30/30B).

[39] *See infra* notes 83-85 and accompanying text (discussing civil remedies under RICO).

[40] United Steelworkers v. Sadlowski, 457 U.S. 102, 111 (1982). For a full discussion of the parallels between Title I and the first amendment, see Note, *Free Speech and Union Newspapers: Internal Democracy and Title I Rights,* 20 HARV. C.R.-C.L. L. REV. 485, 504-22 (1985).

[41] *See* Navarro v. Gannon, 385 F.2d 512, 518 (2d Cir. 1967) ("The balance was struck in favor of union democracy."), *cert. denied,* 390 U.S. 989 (1968).

fringing members' rights to speak their mind freely, but also imposes "the duty to keep the membership informed on matters which they, the rank and file, must decide."[42]

A problem arises when the exercise of these statutory rights must be interpreted and evaluated. Voluntary organizations have an oligarchical tendency. In a study of political parties and unions in Germany at the beginning of the twentieth century, Robert Michels found that such a tendency emerged in organizations, even those supposedly committed to democratic principles, including socialist trade unions and the Social Democrat Party.[43] In short, Michels argued that organizations must develop hierarchical bureaucracies in order to function properly. A bureaucracy, however, concentrates the organization's power in the hands of its leaders, because the leaders have greater access to information, control formal communications within the organization, control organizational expenditures, and are, or become, experienced politicians.[44] Michels pessimistically concluded that "[i]t is organization which gives birth to the dominion of the elected over the electors, of the mandataries over the mandators, of the delegates over the delegators. Who says organization, says oligarchy."[45]

Commentators have applied Michels' analysis to labor unions.[46] In order for a large labor union to run efficiently, the union must develop a bureaucratic structure.[47] Bureaucracy consolidates power in the hands of the union officers, and it reduces "the sources of organized

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[42] Blanchard v. Johnson, 388 F. Supp. 208, 214 (N.D. Ohio 1975), *modified,* 532 F.2d 1074, 1079 (6th Cir.) ("[S]ufficient information about all proposals received by the Executive Board [must be] disseminated to the membership to allow a reasoned and informed vote . . . ."), *cert. denied,* 429 U.S. 869 (1976).

[43] *See* Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin,* 43 MD. L. REV. 93, 93 (1984).

[44] *See* Lipset, *Introduction* to R. MICHELS, *supra* note 1, at 16. Michels has been criticized for being overly deterministic. *See id.* at 27-28. In RICO litigation, however, Michels' analysis provides a strong analytical framework because the corrupt leadership has already taken control of the organization. *Cf. infra* note 46 (giving examples of when Michels' analysis has been applied to labor unions).

[45] R. MICHELS, *supra* note 1, at 365; *cf.* G. TYLER, *supra* note 22, at 260 ("Union leaders are children of the Medici and Tammany . . . . [Their] Machiavellian maneuvers . . . are on a par with those in church, state, business corporations, and academia."). Michels called this the "Iron Law of Oligarchy." R MICHELS, *supra* note 1, at 342.

[46] *See* S. LIPSET, M. TROW & J. COLEMAN, UNION DEMOCRACY 413 (1956); L. SAYLES & G. STRAUSS, THE LOCAL UNION 167 (1967); Summers, *supra* note 43, at 96-99.

[47] *See* S. LIPSET, M. TROW & J. COLEMAN, *supra* note 46, at 9 ("Bureaucracy is inherent in the sheer problem of administration . . . ."); *see also* Summers, *supra* note 43, at 95 ("[U]nion leaders will continue to . . . create a monolithic bureaucracy . . . in the name of efficiency and loyalty.").

opposition" within the union.[48] Both national and local union officers derive their power from the national union constitution.[49] In theory, the local membership has the power to approve most action taken by the local's officers.[50] This check on bureaucratic powers is, to a large extent, non-existent because of low membership attendance at union meetings.[51] In addition, the elected officers hold almost exclusive control over resources,[52] union communication,[53] and patronage positions.[54] Finally, once in power, union officials will view "opposition to union policies and union leaders . . . as disloyalty."[55] These dynamics require that labor unions, like other organizations, will inevitably fall to Michels' Iron Law of Oligarchy.

Studies bear out the conclusion that the "Iron Law" exists in American trade unions. Despite the democratic structures imposed on unions by Landrum-Griffin, the low rate of turnover in union hierarchies continues.[56] Further, attendance at meetings normally stabilizes

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[48] S. LIPSET, M. TROW & J. COLEMAN, *supra* note 46, at 9; *see also* Summers, *supra* note 43, at 95 ("Union leaders . . . will continue to dominate the political structure . . . [in order to] immobilize[ ] organized opposition."). A typical union bureaucracy will consist of a president, vice-president, secretary, treasurer, trustees or executive board members, and an individual responsible for the actions of the grievance committee, *see* W. LEISERSON, AMERICAN TRADE UNION DEMOCRACY 283 (1959), responsible for the day to day running of the union. Professor Alice Cook has further argued that, within this group, the power in a labor union will reside with the individual responsible for administering the contract. *See* Cook, *Dual Government in Unions: A Tool for Analysis,* 15 INDUS. & LAB. REL. REV. 323, 346 (1962).

[49] *See* W. LEISERSON, *supra* note 48, at 102-11, 283.

[50] *See id.* at 283 (The membership must authorize "nearly every item of the local's business.").

[51] In order to participate, a member must be comfortable with public speaking and the basics of parliamentary procedure. These factors, as well as the mundane nature of local meetings, contribute to low attendance rates. *See infra* notes 61-65 and accompanying text.

[52] *See* Summers, *supra* note 43, at 97.

[53] *See* S. LIPSET, M. TROW & J. COLEMAN, *supra* note 46, at 9; *see also* Shister, *The Locus of Union Control in Collective Bargaining,* 60 Q.J. ECON. 513, 517-18 (1946) (local union dependent on the national office for statistical information and negotiating powers).

[54] *See* Summers, *supra* note 43, at 97; *cf.* Cook, *supra* note 48, at 333 (the ability to appoint stewards adds to the power of a local president).

[55] Summers, *supra* note 43, at 96; *see also* G. TYLER, *supra* note 22, at 259 ("The unauthorized attempt of any group to oust the 'ins' is treated as heresy, as *lese majesty,* or an assault on 'the union.' "). Unions may even adopt rules prohibiting disloyal conduct by members. Members found in violation of such rules face fines or even expulsion. *See* W. LEISERSON, *supra* note 48, at 65.

[56] *See* G. TYLER, *supra* note 22, at 284 ("The sociologic base is not present for political pluralism. Hence, a union official, once elected, can be re-elected without major opposition for decades."); Applebaum & Blaine, *The "Iron Law" Revisited: Oligarchy in Trade Union Locals,* 26 LAB. L.J. 597, 599 (1975). Gus Tyler notes that low turnover is not limited to union leadership. *See* G. TYLER, *supra* note 22, at 284 (discussing Congressmen who have been elected without opposition for decades).

around a " 'hard core' of regular participants"[57] of about two to eight percent of the membership.[58] The Supreme Court recently reaffirmed these figures in a case involving the United Steelworkers.[59] The Court found that the average attendance at six representative locals was just three and one half percent.[60]

As may be expected, the larger and more diverse the union, the greater the influence of the factors that lead to oligarchy. For example, the structure of large amalgamated unions, which bargain for numerous work places, exacerbates intra-union communication problems.[61] In such a union, a dissatisfied member finds it difficult to determine whether other members perceive the same problems as she does and to discover other dissatisfied members who will join with her to voice opposition.[62] In contrast, a small local can maintain open intra-union communication channels that give "[t]he work of the local . . . a thorough going over."[63] Large multi-plant agreements, in which the "locus of control"[64] over the contract does not reside within the individual

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[57] L. SAYLES & G. STRAUSS, *supra* note 46, at 99 ("[T]he bulk of the attendance consists of 'old faithfuls.' ").

[58] *See id.* at 148; *see also* W. LEISERSON, *supra* note 48, at 285 (stating that the range of union member attendance at local meetings was from less than 1% to 84%, but concluding that average attendance for all locals was less than 10%).

[59] *See* Local 3488, United Steelworkers of Am. v. Usery, 429 U.S. 305, 310 (1977) (striking down requirement of attending local meetings for union office eligibility in order to achieve the goal of free and democratic elections).

[60] *See id.* at 307.

[61] *See* L. SAYLES & G. STRAUSS, *supra* note 46, at viii.

[62] *See* Summers, *supra* note 43, at 101 (a primary purpose of Landrum-Griffin is to permit dissatisfied members to identify other dissatisfied members so they "can take the first step toward coalescing an organized opposition").

[63] L. SAYLES & G. STRAUSS, *supra* note 46, at 146.

[64] *Id.* at 151 (when the "locus of control" has been vested in the international unions, rank-and-file participation is reduced). Members will, however, derive benefits from centralized control, *see* Shister, *supra* note 53, at 524-25 (noting that centralized control is beneficial to the local union and the international union because of the advantageous bargaining terms that "national men" can negotiate), or at least perceive that they do. *See infra* note 272-73 and accompanying text (discussing siege mentality). The Teamsters are an extreme example of centralized control. Their constitution provides a clear example of membership impotence. *See, e.g.*, INT'L BHD. OF TEAMSTERS CONST. art. VI, § 2(A) (General President interprets the constitution and bylaws and resolves all internal disputes); *id.* § 4(A) (General President approves the bylaws of all locals and subsidiary bodies); *id.* § 5(A) (General President can impose trustee on locals if he believes the action is necessary); *id.* § 9 (General President has sole discretion to spend union funds for political and lobbying purposes); *id.* art VII, § 3 (General Executive Board can change a local's jurisdiction "at any time in its sole discretion"); *id.* art IX, § 9(A) (General Executive Board has discretion to pay all legal defense expenses of any union member or officer).

In addition, the General President and the General Executive Board control most significant negotiations. The Teamsters structure requires all locals to join area Joint Councils. *See id.* art. XVI, § 2. The Joint Councils have jurisdiction over all member locals, *see id.*, and the General President appoints the International Directors responsi-

plants, suffer from inherent problems.

> [In] such local unions there is literally no reason for most members *ever* to attend any meeting. Let a plant be covered by a large multi plant contract, let the wage rates be determined by some technical machinery instead of through "higgling and haggling," let management be assiduous in avoiding formal grievances, and it is difficult to find a local union meeting, from one year's end to the other, which an intelligent union member ought reasonably to be expected to attend.[65]

A number of factors, therefore, lead to union oligarchy. Of these, the control of the union hierarchy over communications and the unfortunate but understandable lack of union member participation in union affairs are primarily responsible for the membership's loss of power. Lack of communications prohibits a full airing of the issues and inhibits the formation of interest and opposition groups. Lack of participation removes most of the internal checks on the union officials' exercise of discretion.

Thus, few unions could be described as democratic if democracy is the "institutionalization of opposition"[66] or if it requires the existence of an "effective organized internal opposition."[67] Given the oligarchic tendency of organizations in general, it would be unrealistic to impose such high standards of democracy on labor unions. "But if by democracy one means the responsiveness of the officers to the pressures of the rank and file, an opportunity for individuals to express themselves, and a chance to decide basic issues by a majority vote,"[68] democratic unions

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ble for the Joint Councils. *See id.* § 3. Further, the General President and Executive Board control all master agreement negotiations. *See id.* art. XII, § 2(D) (General President designates negotiating committees for master agreements); *id.* § 2(F) (General President and Executive Board can supercede the master negotiating committee and call ratification or strike votes); *id.* § 10 (General Executive Board can reject any proposed collective bargaining agreement).

[65] G. BROOKS, THE SOURCES OF VITALITY IN THE AMERICAN LABOR MOVEMENT 7 (1960); *see also* W. LEISERSON, *supra* note 48, at 284-85 (noting that the "routine" nature of the meeting, combined with the requirement to speak publicly in order to have an impact on the meeting, leads to low member turnout); Cook, *supra* note 48, at 332 (noting the local union meeting is "ritualistic" and serves "no significant governmental function").

[66] S. LIPSET, M. TROW & J. COLEMAN, *supra* note 46, at 13.

[67] *Id.* at 413; *see also* G. TYLER, *supra* note 22, at 281 ("Unions lack many of the forms, traditions and practices of the American government. . . . Measured by the Constitution . . . union governments appear wanting in democratic fulfillment.").

[68] L. SAYLES & G. STRAUSS, *supra* note 46, at 106; *see also* G. TYLER, *supra* note 22, at 281-83 (arguing that few private governments, including corporations, universities, and churches, are democratic and that the primary purpose of a union is to

may be attainable. "Responsiveness" of the union power structure to membership pressure provides the best indicator of union democracy.[69] Sayles and Strauss concluded that despite oligarchical tendencies, "taken as a whole there seems to be a good deal of democracy in the union movement."[70]

Union officials will be responsive, however, only if the membership feels free to voice its concerns and discontent.[71] Even Sayles and Strauss recognized that their favorable conclusion applied only to situations in which "a member [who] attacks the officers in a meeting . . . will not be subject to retaliation, . . . regular elections are held, . . . nominations are free, . . . all are given a chance to vote, and . . . the ballots are counted fairly."[72] Thus, when fear and intimidation stifle the union local membership's freedom of expression, "the most important right" granted in the Landrum-Griffin Act,[73] no theory of union democracy would deem that local to be democratic.

The concept of union democracy forms the core of the present discussion for two reasons. First, theories proposed by the government when it seeks to impose a receiver on a union depend upon its claim that members no longer control their union.[74] These suits require the government to base its case on the democratic model incorporated in the Landrum-Griffin Act. Second, the court directs the receiver to foster democracy within the union.[75] Landrum-Griffin, therefore, establishes the government's cause of action and defines the goal it must achieve.

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democratize the workplace).

This descriptive approach to democracy is not limited to labor unions. *See* Kirkpatrick, *Democratic Elections, Democratic Government, and Democratic Theory,* in D. BUTLER, H. PENNIMAN & A. RENNEY, DEMOCRACY AT THE POLLS 330, 334-48 (1981) (arguing that the term democracy "implies nothing" about the formal structure of government and that a "constellation of values," including constituent participation and the electoral process, must be included in the definition).

[69] *See* L. SAYLES & G. STRAUSS, *supra* note 46, at 144; *see also* Summers, *supra* note 43, at 106 (Even though incumbents are rarely defeated, union elections are important because "the improbable can and does happen . . . responsiveness is encouraged by the desire for self-preservation . . . [and the tabulation of votes] measures the level of discontent among the members.").

[70] L. SAYLES & G. STRAUSS, *supra* note 46, at 168.

[71] *See* W. LEISERSON, *supra* note 48, at 286 ("One outspoken critic is often enough to hold officials to account and to prevent them from abusing their power.").

[72] L. SAYLES & G. STRAUSS, *supra* note 46, at 150; *see also* G. TYLER, *supra* note 22, at 275 (arguing that when members can freely "oust" their leadership, it is unlikely that leaders will be able to co-opt the members).

[73] Summers, *supra* note 43, at 99.

[74] *See infra* notes 117-63 and accompanying text (discussing the government's theories of trusteeships).

[75] *See infra* notes 255-70 and accompanying text (discussing the goals of receivers).

II. RICO

The Landrum-Griffin Act cannot achieve its goal of union democracy in a union captured by corrupt leadership. Criminal activities temper Michels' Iron Law into high grade steel. Union officials intent on using the union for illicit purposes and personal gain through embezzlement, fraud, and kickbacks, will not respond to members who desire to clean up their union.[76] Indeed, such leadership will do everything possible to crush any threat to its survival. For example, the secretary of a Laborers' local was murdered shortly after resigning his post of fifteen years to run against the incumbent president of the local.[77] Aware of such criminal activities, legislators recognized that they had to pass supplemental legislation to ensure that the democratic processes promised in Landrum-Griffin were available in fact, as well as in theory.

In 1970, Congress passed the Racketeer Influenced and Corrupt Organizations Act ("RICO")[78] partially in response to a congressional finding that the "money and power [of organized crime were] being increasingly used to infiltrate . . . labor unions."[79] Despite earlier legislation, this infiltration continued "in part because of the past inadequacy of remedies designed to deal with it."[80] Senator McClellan sponsored the bill[81] and declared that the growing influence of organized crime in labor unions made "a mockery of much of the promise of the social legislation of the last half century."[82] To address part of this deficiency, Congress included civil remedies in RICO.[83] These provisions empower the United States district courts to issue orders, "including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities . . . of any person . . . or ordering dissolution or reorganization of any enterprise, making due provision

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[76] *Cf.* W. LEISERSON, *supra* note 48, at 286 (noting that in order for corrupt officials to succeed in controlling a union, they must be able to suppress member participation). Members may not even know the extent of the corruption because the leaders of the union control all access to information.

[77] *See* ORGANIZED CRIME, *supra* note 17, at 11.

[78] Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986)).

[79] *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 62 (1969) [hereinafter *Measures*].

[80] *Id.*

[81] *See id.* at 61.

[82] 115 CONG. REC. 5874 (1969).

[83] *See* 18 U.S.C. § 1964 (1982 & Supp. IV 1986).

for the rights of innocent persons."[84] Congress continues to recognize that RICO primarily functions to supplement previous legislation and increase the effectiveness of anti-organized-crime measures.[85]

A. *How RICO Works*

RICO is a complex statute.[86] The Act does not make illegal any action that was previously legal.[87] The prosecution must, therefore, prove a "confusing maze of elements"[88] to show prohibited conduct, namely engaging in a pattern of racketeering,[89] in order to avoid the constitutional implications of either subjecting an individual to double jeopardy[90] or prosecuting her "based on [her] status."[91]

Section 1962[92] maps out this "confusing maze." Bolstered by the civil remedies provided by section 1964, section 1962 makes it unlawful:

> (a) for any person . . . from a pattern of racketeering activity . . . .
> (b) to acquire or maintain, directly or indirectly, any interest in or control of any enterprise . . . [or]
> (c) for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .[93]

In short, to prove a civil RICO violation, the prosecution must show

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[84] *Id.*

[85] *See* 133 CONG. REC. E3351 (daily ed. Aug. 7, 1987) (statement of Rep. Conyers that before Congress passed RICO, the remedies available were too limited in both scope and impact to deal with organized crime).

[86] *See* Shepard, Horn & Duston, *RICO and Employment Law,* 3 LAB. LAW. 267, 268 (1987).

[87] *See* Blakey & Goldstock, *"On the Waterfront": RICO and Labor Racketeering,* 17 AM. CRIM. L. REV. 341, 348 (1980).

[88] *Id.* The Supreme Court has also recognized the complexity of the statute. *See* Sedima, S.P.L.R. v. Imrex Co., 473 U.S. 479, 500 (1985).

[89] *See* Shepard, Horn & Duston, *supra* note 86, at 268.

[90] *See* United States v. Persico, 774 F.2d 30, 32 (2d Cir. 1985) (holding that double jeopardy does not prohibit a RICO trial based upon conduct resulting in prior convictions when that conduct continued for four years after the indictment).

[91] Shepard, Horn & Duston, *supra* note 86, at 268 (citing 18 U.S.C. § 1961(5) (1982)). Section 1961(5) states that a " 'pattern of racketeering activity' requires at least two acts of racketeering activity . . . ." 18 U.S.C. § 1961(5) (1982). The possible consitutional violations raised by criminal RICO provisions are not central to this discussion of civil remedies under that statute, but they do explain the intricacy of the statute.

[92] 18 U.S.C. § 1962 (1982).

[93] *Id.*

that a person participated in an enterprise through a pattern of racketeering activity.[94]

The definitional section of RICO, section 1961,[95] provides road signs for the map presented in section 1962. Under RICO, a "person" is "any individual or entity capable of holding a legal or beneficial interest in property."[96] An "enterprise" is "any individual, partnership . . . or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[97] Courts recognize labor unions as "enterprises" under the statute.[98] The last element of a RICO case requires that the "person" must have been involved with the enterprise through a "pattern of racketeering activity." To show a pattern, the prosecution must prove that the defendant committed two acts of "racketeering activity."[99] These two acts are known as "predicate acts."[100] The statute enumerates acts that constitute racketeering activity.[101] Included are threats or acts of murder, bribery, extortion,[102] and "any act which is indictable under title 29, United States Code, section 186 (dealing with restriction on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds)."[103]

In order to invoke the civil remedies provision of RICO in the labor context, the prosecutor must show that an individual or group of individuals (an entity) exists. She must also show that this group participates in or conducts[104] the affairs of the union (the enterprise) through the performance of at least two of the enumerated predicate

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[94] *See* Blakey & Goldstock, *supra* note 87, at 350.

[95] 18 U.S.C. § 1961 (1982 & Supp. IV 1986).

[96] *Id.* § 1961(3). The definition of "property" for the purposes of the statute is very broad. *See infra* notes 122-25 and accompanying text (discussing intangible property).

[97] *Id.* § 1961(4).

[98] *See* United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 270 (3d Cir. 1985) (stating that the union was "an enterprise within the meaning of RICO"), *cert. denied,* 476 U.S. 1140 (1986); *cf.* United States v. Boffa, 688 F.2d 919, 923 (3d Cir. 1982) (labor leasing business considered to be an "enterprise" under RICO), *cert. denied,* 460 U.S. 1022 (1983); United States v. Kaye, 556 F.2d 855, 861 (7th Cir.) (noting that the union was the "enterprise" in which the defendant was involved), *cert. denied,* 434 U.S. 921 (1977).

[99] 18 U.S.C. § 1961(5) (1982).

[100] *See* Blakey & Goldstock, *supra* note 87, at 354; Shepard, Horn & Duston, *supra* note 86, at 269.

[101] *See* 18 U.S.C. § 1961(1) (1982 & Supp. IV 1986).

[102] Extortion specifically includes Hobbs Act violations. *See id.* § 1951; *id.* § 1961(1)(B).

[103] *Id.* § 1961(1)(C).

[104] *Id.* § 1962(c) ("It shall be unlawful for any person . . . associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ."). In addition, 18 U.S.C. § 1962(d) (1982) makes it a RICO violation to conspire to violate section 1962(c).

acts.

United States v. Local 560, International Brotherhood of Teamsters[105] provides an example of corrupt union practices. In that case, the court found that eleven defendants, members of the "Provenzano Group,"[106] not only conspired to acquire and maintain control of Local 560, but did so "through a pattern of racketeering activity . . . . involv[ing] murder and the systematic use of extortion."[107] The Group, intent on dominating the local, murdered a popular union trustee because he threatened its control.[108] The Executive Board then appointed the brother of the individual who ordered the murder to fill the vacant trustee position.[109] The Board also rewarded one of the murderers with money and another with a position of power in the union.[110] Two years later, someone murdered a union member on the morning after he voiced opposition to the appointment of a business agent. No one was ever convicted for the murder.[111]

Not surprisingly, "there has not been any publicly voiced opposition or dissent within Local 560 since the 1965 election,"[112] even though there were "repeated appointments to union office by the Executive Board of known or reputed criminals."[113] During that time, courts convicted members of the "Provenzano Group" of numerous union-related crimes, including practicing extortion, accepting kickbacks in connection with union loans, and receiving "labor peace"

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[105] 581 F. Supp. 279 (D.N.J. 1984), *aff'd,* 780 F.2d 267 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140 (1986).

[106] *See id.* at 283. The individuals involved were business agents, trustees, fund trustees, secretary-treasurers, and presidents of the local. *See id.* at 285.

[107] *Id.* at 283-84. These individuals demanded "labor peace" payments, *see id.* at 289, kickbacks from benefit funds, and were involved in murder, attempted grand larceny, threats to injure in order to collect a loan, *see id.* at 290, and counterfeiting, *see id.* at 291.

[108] *See id.* at 312. The murdered individual was a popular member of the local and the only candidate to run unopposed in the election in which the Provenzano Group took control. *See id.* at 306-07.

[109] *See id.* at 285.

[110] *See id.* at 307. One murderer was paid $15,000, and the other was made a business agent. *See id.*

[111] *See id.* at 308.

[112] *Id.* at 317. The court found a "pervasive climate of intimidation within Local 560." *Id.* at 313.

[113] United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 284 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140 (1986). Salvatore Provenzano was appointed business agent after the murder. Nunzio Provenzano was appointed business agent three days after being convicted of making a payoff demand. Robert Luizzi became business agent and Executive Board member despite having been convicted of felonious assault and battery. Sal Briguglio joined the Board immediately upon his release from prison, and Thomas Reynolds became business agent despite his conviction for felony robbery and arrest for armed robbery, grand larceny, and two rapes. *See id.* at 284-85.

payoffs.[114] Normally, such occurrences would "almost universally . . . bring forth an organized opposition group . . . . [and if] violations of the members' rights, the misuse of union funds or pension funds, the extortion and bribery . . . doesn't bring forth a contested election, then the only conclusion . . . is people are deadly afraid."[115]

In *Local 560,* the district court found that the "Provenzano Group" existed and was an "entity" under Section 1961(c).[116] The "Group" not only participated in, but controlled the affairs of the enterprise, Local 560, by engaging in at least two predicate acts in violation of section 1962(b). These conclusions formed the basis of the court's decision to impose RICO's civil remedies under section 1964.

B. *Receivers Under RICO Part I: Finding Liability*

The Supreme Court has directed the federal judiciary to read RICO broadly: "[It is] an aggressive initiative to supplement old remedies and develop new methods for fighting crime."[117] In the spirit of this pronouncement, and to fully effectuate the purposes of the Act, the Justice Department has initiated suits against labor union leaders who used patterns of racketeering activity to manage their union. These suits seek to exorcise the corrupt influence of these officials by removing them from office and by then imposing judicially appointed receivers on the unions.[118] As will be discussed below, these suits do not represent the first such intrusive action taken by the government with regard to the internal affairs of labor organizations, or with labor relations in general.[119] There have been two theories used to impose trustees on unions. One is based on internal union affairs, and the other is based on public safety. This Section will summarize the short history of

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[114] *See id.* at 273-74.

[115] Trial Transcript at 1609-10, United States v. Local 560, 581 F. Supp. 279, 279 (D.N.J. 1984) (No. 82-689) (testimony of Professor Clyde Summers).

[116] *See Local 560,* 581 F. Supp. at 334-35; *see also* United States v. Local 30, United Slate, Tile and Composition Roofers, 686 F. Supp. 1139, 1143-54 (E.D. Pa. 1988) (finding that there had not been a contested election in 20 years, that the union had used violence to coerce employers into unionizing and to dominate union contractors, and that the union had sabotaged and vandalized non-union contractors). The Executive Board of the Roofers Union had also spent over $1,000,000 in union funds from which the union derived no benefit. *See id.* at 1158; *infra* notes 139-63 and accompanying text (discussing the government's theory in the Roofers case).

[117] Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 498 (1985); *see also supra* notes 78-85 and accompanying text (concerning the purposes of RICO).

[118] Courts have the power to impose a receiver on a labor union under 18 U.S.C. § 1964(a) (1982), which grants district courts the power to dissolve or reorganize any enterprise. *See supra* notes 83-84 and accompanying text.

[119] *See infra* notes 164-215 and accompanying text (discussing history of intervention).

receiverships under RICO and will describe the theories, standards, and circumstances under which courts have imposed receivers.

The first case that imposed a receiver on a union under RICO was *Local 560.*[120] The court accepted the Justice Department's theory that only a receiver could remedy the extortion by the union leadership of the union members' right to a democratic union.[121] Under this theory, the rights of "freedom of speech and assembly" and "equal rights" granted union members under the Landrum-Griffin Act[122] constitute intangible property rights.[123] The union leadership can therefore extort that "intangible property" in violation of the Hobbs Act.[124] Because Hobbs Act violations are predicate acts under RICO,[125] the commission of at least two acts of extortion of union members' intangible property rights to a democratic union will permit the court to invoke the civil remedies of RICO section 1964.

In *Local 560,* the Justice Department argued that "the various forms of intimidation carried out against opponents of the Provenzanos, in violation of section 1962(b), have silenced any dissension and en-

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[120] *Local 560,* 581 F. Supp. at 337 (imposing a receiver until the union could be run democratically by the members).

[121] For the facts of this case, see *supra* notes 105-16 and accompanying text.

[122] *See supra* notes 29-42 and accompanying text (discussing Landrum-Griffin).

[123] *See Local 560,* 780 F.2d at 281-82. A member can have a property right to a democratically run union because the right is an entitlement granted by the government. The courts view Landrum-Griffin as the expression of that grant. *See infra* note 124 and accompanying text.

[124] The Hobbs Act makes it unlawful to "obstruct[] . . . commerce . . . by robbery or extortion." 18 U.S.C. § 1951(a) (1982). Extortion of intangible property has been considered a Hobbs Act violation since 1969. *See* United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969) (finding that "[t]he concept of property under the Hobbs Act . . . is not limited to physical or tangible property or things, but includes, in a broad sense, any valuable right considered as a source or element of wealth" (citation omitted)), *cert. denied,* 397 U.S. 1021 (1970); *see also* United States v. Nadaline, 471 F.2d 340, 344 (5th Cir.) (intangible property such as business accounts and unrealized profits are protected by Hobbs Act), *cert. denied,* 411 U.S. 951 (1973). The Supreme Court recently narrowed the applicability of the concept of intangible property. *See* Carpenter v. United States, 108 S. Ct. 316, 320 (1987) (holding confidential business information is property protected by mail fraud statute but the contractual right of an employer to honest and faithful service is "too ethereal" to be included under the statute); McNally v. United States, 107 S. Ct. 2875, 2879 (1987) (finding mail fraud statute "clearly protects property rights, but does not refer to the intangible right of the citizenry to good government"). Despite this narrowing, federal courts still interpret the Hobbs Act as prohibiting the extortion of intangible property. *See, e.g.,* Northeast Women's Center, Inc. v. McMonagle, 689 F. Supp. 465, 474 (E.D. Pa. 1988) (reaffirming that extortion of intangible property constitutes a violation of the Hobbs Act, even after *McNally* and *Carpenter*); *cf.* United States v. Local 560, Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1159 (D.N.J. 1988) (doubting that the Hobbs Act is as limited in scope as the mail fraud statute and distinguishing *McNally* because "it is not at all clear that that decision will be extended to the Hobbs Act").

[125] *See supra* note 124 (discussion of Hobbs Acts violations as predicate acts under RICO).

sured . . . a perpetual reign by the powerful few over the subdued rank and file."[126] The court found this argument persuasive when it held that extortion was possible not only by "direct physical assault . . . but by more sophisticated and indirect physical and economic threats."[127] The court concluded that the numerous appointments of criminals to union office,[128] the murder of a member after he openly opposed the leadership at a union meeting, the many convictions of union officers on union related charges, and their reappointment after they served their sentences, all created a "repressive atmosphere"[129] that extorted the memberships' democratic rights.[130]

To remedy this extortion, the government urged the appointment of a receiver "to serve in the capacity of the Local 560 executive board until such reasonable time as the membership can freely nominate and vote for new officers."[131] Both the district and circuit courts accepted the government's argument. Neither court accepted the union's argument that the trusteeship derogated the members' interests in their union.[132] The district court found that a "substantial likelihood" existed that conditions in the union would not improve until the atmosphere of "fear and intimidation" created by the Provenzano Group was dispelled.[133] Because future criminal activity appeared likely to cause irreparable harm,[134] the court found it "necessary . . . to remove the current members of the . . . Board in favor of the imposition of a trusteeship . . . for such time as is necessary to foster the conditions under which reasonably free supervised elections can be held."[135]

On appeal, the circuit court agreed that drastic action had to be taken in order to remove the influence of the Provenzano Group.[136]

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[126] Memorandum of the United States in Support of its Request for a Preliminary Injunction and the Appointment of a Receiver *Pendente Lite* at 6, United States v. Local 560, Int'l Bhd. of Teamsters, 550 F. Supp. 511 (D.N.J. 1982) (No. 82-689) [hereinafter Memo in Support].

[127] *Local 560,* 780 F.2d at 283. The court cited decisions concerning Hobbs Act violations to support its conclusion that extortion could take place through "the creation of indirect fear." *Id.* (citing United States v. Hedman, 630 F.2d 1184, 1194 (7th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981); United States v. Sander, 615 F.2d 215, 218 (5th Cir.), *cert. denied,* 449 U.S. 835 (1980)).

[128] *See id.* at 278, 284-86; *supra* note 113.

[129] *Local 560,* 780 F.2d at 278.

[130] *See id.* at 283.

[131] Memo in Support, *supra* note 126, at 1.

[132] *See* Memo in Opposition, *supra* note 24, at 145.

[133] *Local 560,* 581 F. Supp. at 336.

[134] *See id.* at 337.

[135] *Id.*

[136] *See Local 560,* 780 F.2d at 293 (finding that "even incarceration, much less ineligibility to hold union office, does not prevent members of the Provenzano Group from committing acts of extortion").

The court applied the "abuse of discretion" standard to review the remedy; it found that the imposition of a trustee fell within the broad remedial scope of section 1964.[137] The circuit court affirmed the district court finding that the members had lost control of their union and that the imposition of a trustee "protect[ed] rather than forfeit[ed] the members' rights."[138]

The above approach contemplates five separate considerations. First the government must show the union leadership extorted its members' democratic rights. Then, the court must find that restoration of union democracy is possible only if the current officers sever all ties with the union. The court must also conclude that the members alone will be unable to restore a democratic order and that a trustee will succeed in returning control of the union to the membership. Finally, the court must find that the decree will not adversely affect members' interests.

Protection of the public also provides an important motivation for government suits to impose a receiver on a union. The case brought against Local 30/30B of the Roofers Union in Philadelphia illustrates this type of RICO suit.[139] In this case, the court convicted thirteen union officers of 152 counts of racketeering, RICO conspiracy, and other predicate criminal acts.[140] The union officers committed these acts in order to embezzle from the union's pre-paid legal services plan;[141] bribe various public officials, including municipal and state judges;[142] extort payments from contractors;[143] make collections for organized crime;[144] and defraud an insurance company through the mail.[145] Because these charges were proved at a criminal trial, the defendants were estopped from denying the allegations in the RICO suit.[146]

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[137] *See id.* at 295.

[138] *Id.* at 296 n.39.

[139] United States v. Local 30, United Slate, Tile & Composition Roofers, 686 F. Supp. 1139 (E.D. Pa. 1988). This is not to say that the Justice Department was not concerned about protecting the public in *Local 560*. The observation only highlights the two distinct theories of liability being put forth.

[140] *See* Memorandum of Law in Support of the Motion of the United States for a Preliminary Injunction at 2-7, United States v. Local 30, United Slate, Tile & Composition Roofers, 686 F. Supp. 1139 (E.D. Pa. 1988) [hereinafter Motion for Injunction] (citing United States v. Traitz, 646 F. Supp. 1086, 1087-88 (E.D. Pa. 1986) (grand jury indictment of Stephen Traitz, Jr., business manager of Local 30/30B)).

[141] *See id.* at 10.

[142] *See id.* at 11.

[143] *See id.* at 13.

[144] *See id.*

[145] *See id.* at 14.

[146] *See* 18 U.S.C. § 1964(d) (1982) ("A final judgment . . . rendered in favor of the United States in any criminal proceeding . . . shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding .

The government constructed its case in *Local 30* in three parts.[147] In the first segment, the government showed that the defendants, while carrying out their illegal activities, "terrorized the construction industry through countless acts of violence and intimidation . . . ."[148] The government made this showing through the testimony of thirty to forty victims of, or witnesses to, the criminal acts committed by the defendants. For example:

> A: [W]hat he [the business manager] did was he explained what he would do to you if you were . . . not a union shop.
> Q. What did he say?
> A. He ran down the procedure of what would happen. Number one, they would take your ladder down off the job and just stand you up on the roof.
> Q. Were these things expressed at this meeting?
> A. Yes, right over the Mike phone [sic] in front of a hundred people . . . I don't know if this was the second or third — he said "We would beat you with a baseball bat.". . . I remember those very clearly.[149]

The government used this testimony to demonstrate that the union, under this leadership, posed a considerable threat to public safety. Based upon such evidence, the government asked the court to enjoin permanently the recently removed leadership from future associations with the union.

The second segment of the government's case argued that a clear connection existed between the union and organized crime. Federal Bureau of Investigation recordings of conversations in the union offices provided the primary evidentiary source for this assertion. One statement by the business manager, Stephen Traitz, Jr., to a collector of gambling debts for the "Scarfo organized crime group"[150] is particularly revealing: "Make sure everybody knows I'm you're fuckin[']' guy.

. . .").

[147] *See* Transcript of Trial at 3, United States V. Local 30, United Slate, Tile & Composition Roofers, 686 F. Supp. 1139 (E.D. Pa. 1988) [hereinafter Local 30 Transcript].

[148] Motion for Injunction, *supra* note 140, at 9. The trial court accepted this claim. *See Local 30,* 686 F. Supp. at 1143-50 (findings of fact).

[149] Local 30 Transcript, *supra* note 147, at 144-45.

[150] *See id.* at 977. Nicodemo Scarfo took over the Philadelphia mafia in 1981. Since then, there have been more than 30 mob-related killings. *See* Salholz & Sandza, *The Mob's 'Me' Generation,* NEWSWEEK, May 9, 1988, at 25. Scarfo was recently convicted of racketeering charges for mob-related activities that could send him to prison for 55 years. *See* Lansberry, Clark & Cipriano, *Scarfo and Associates Convicted,* Philadelphia Inquirer, Nov. 20, 1988, at 22A, col. 1.

Because I'm a little power around here . . . . But yo, if they know you're in back of me, I'm unfuckin[']' beatable. Do you know what I'm sayin[']' . . . ?"[151] Revealing a link to organized crime bolstered the Justice Department's case in two ways. First, a Mafia connection underscores the dangerousness of the union under its present leadership. Second, the involvement of organized crime in the union makes it "highly unlikely" that the union will "stop violating the law merely upon the conviction of [the] union leader."[152]

The third segment of the government's case showed that "it is extremely unlikely, if not impossible, for the union to remedy itself absent government action in the form of a trusteeship."[153] Proof in this portion of the case depended primarily on expert testimony.[154]

The government's suit in the *Local 30* case sought the appointment of a trustee to administer the affairs of the union.[155] This trustee would "supervise the affairs of the union and act to rid the union of corruption."[156] The government asked for imposition of the trustee "until such time as the Court is satisfied that free elections are possible."[157] Therefore, the government implicitly argued that the union leaders failed to run the union in a democratic manner and that only drastic governmental action could restore union democracy.

The court compared the union leadership's reign to terrorism[158] and found that the defendants had violated section 1962(c) and (d).[159] Three alternative remedies were considered and rejected. The court refused to dissolve the union, "at least for now."[160] Additionally, the court rejected the government's request for a trustee by reasoning that in order to succeed, the union must change its ways voluntarily.[161] Fi-

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[151] Transcript of Federal Bureau Investigation Tape 52 at 4, PH 183A-1934, Oct. 10, 1985.

[152] Motion for Injunction, *supra* note 140, at 27. The district court specifically found that Scarfo, acting as the head of La Cosa Nostra in Philadelphia and Southern New Jersey, put Traitz into power in the Roofers Union and authorized Traitz's use of violence. *See Local 30,* 686 F. Supp. at 1157.

[153] Local 30 Transcript, *supra* note 147, at 6.

[154] *See id.*

[155] *See* Motion for Injunction, *supra* note 140, at 30.

[156] *Id.*

[157] *Id.*

[158] *See Local 30,* 686 F. Supp. at 1166.

[159] *See id.* at 1165 (the defendants "have conspired to conduct, and have succeeded in conducting, the affairs of the Roofers Union through a pattern of racketeering activity"). Section 1962(c) makes it "unlawful for any person . . . associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c) (1982). Subsection (d) makes it a RICO violation to conspire to violate subsection (c). *See id.* § 1962(d).

[160] *Local 30,* 686 F. Supp. at 1167.

[161] *See id.* The court noted that union members are required to be loyal to their

nally, the court rejected the alternative of a monitorship because it would not sufficiently alter the union's method of operation. Instead, the court imposed a "decreeship"[162] to protect the democratic rights of the union members.[163]

This discussion elucidates the two theories currently proposed to justify the imposition of receivers on unions under RICO. The first theory relies explicitly on a concept of union democracy by making the members' loss of a democratic union the harm to be remedied. In this framework, a receiver is necessary when union officers have extorted union members' right to a democratic union through fear and intimidation. The second theory focuses on the harm the public suffers at the hands of corrupt unions and seeks to impose a receiver until the members can effectively run the union themselves. This second theory implicitly relies on effective union democracy as a means to protect the public, and the *Local 30* court recognized this theory in its decision. Thus in both theories, union democracy is the fundamental reason for imposing receivers on unions.

III. The Remedy

The above discussion focused on the problem of labor racketeering and explained the underlying principles of the solution, namely the use of receivers to restore union democracy. Two questions, however, remain. Will imposition of a receiver accomplish the desired goal, and, if it can, under what circumstances should courts use the device of a receiver? This Part will address these questions in light of past uses of receivers, the shortcomings and advantages of other possible remedies, and the underlying union democracy concerns.

A. *A History of Intrusive Intervention*

Both federal and state courts in the United States have a history of becoming deeply involved in the employment relationship, particularly at the remedy stage of litigation. This Section discusses three examples of this involvement to show under what circumstances courts have deemed it necessary to become embroiled in the work place and to show

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leadership and that a court imposed trustee would not command that loyalty. Further, the court noted that "history" showed that such solutions "rarely worked in the political world"; therefore, it was not proper to expect that it would work in a union. *Id.* The court did not state the basis for this assertion.

[162] *See infra* notes 235-41 and accompanying text (discussing the details of the "decreeship").

[163] *See Local 30*, 686 F. Supp. at 1173.

what factors have contributed to the success or failure of judicial intervention.

1. The First Union Receiverships

In the 1930s, state courts decided the first suits attempting to place unions in receivership.[164] Even before the Landrum-Griffin Act[165] and RICO,[166] therefore, courts were willing to employ equitable powers in recognition of the union members' interest in participating in and influencing their union's affairs.

When the New York Supreme Court handed down *Kaplan v. Elliott* in 1932, the "[p]recedents for placing labor unions under any such sweeping control of receivers [were] very meager."[167] The suits arose in an effort to counter the corruption then prevalent in some local unions. For example, in *Kaplan,* more than twelve members had been expelled from the union because they had not only opposed Kaplan's leadership, but had also tried to forge a coalition of opposition.[168] The imposition of a receiver was considered a "drastic form" of judicial intervention.[169] In general, courts hesitated "to interfere in the internal affairs of trade union[s]"[170] through the use of receivers because of the perception that a union could not properly function while in receivership.[171] Courts

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[164] *See* Collins v. I.A.T.S.E., 119 N.J. Eq. 230, 182 A. 37 (Ch. 1935); Local 11, Int'l Ass'n of Ironworkers v. McKee, 114 N.J. Eq. 555, 169 A. 351 (Ch. 1933); Chalghian v. Local 617, Int'l Bhd. of Teamsters, 114 N.J. Eq. 77, 169 A. 327 (Ch. 1933); *cf.* Mullins v. Local 641, Merchandise Drivers, 120 N.J. Eq. 307, 185 A. 51 (Ch. 1936) (supporting the equitable action brought by a court-appointed custodial receiver); Kaplan v. Elliot, 145 Misc. 863, 261 N.Y.S. 112 (Sup. Ct. 1932) (dictum expressing a willingness to appoint a temporary receiver of local union funds if the local had made such a request).

[165] The Landrum-Griffin Act was passed in 1959. *See supra* note 29 and accompanying text (discussing Landrum-Griffin).

[166] Congress adopted RICO in 1970. *See supra* note 78 and accompanying text.

[167] Pressman, *Appointment of Receivers for Labor Unions,* 42 YALE L.J. 1244, 1248 (1933).

[168] *See id.* at 1244. For other examples of union misconduct, see Robinson v. Nick, 235 Mo. App. 461, 467, 136 S.W.2d 374, 377 (1940) (noting that after charges were brought against business manager, dissenters were threatened with expulsion); Sibilia v. Western Elec. Employees Ass'n, 142 N.J. Eq. 77, 78, 59 A.2d 251, 252 (1948) (election set aside by incumbent officers); *Collins,* 119 N.J. Eq. at 233-45, 182 A. at 40-45 (excluding members from equal participation in affairs of unions, requiring kickbacks to retain jobs, and a finding that the officers stayed in power through the use of fear and intimidation); *Chalghian,* 114 N.J. Eq. at 498, 169 A. at 328 (fraud related to a "paper local"); Mursener v. Forte, 186 Or. 253, 261, 270, 205 P.2d 568, 571, 575 (1949) (elections suspended and financial malfeasance).

[169] Pressman, *supra* note 167, at 1244.

[170] *Id.* at 1247 (citing Chafee, *The Internal Affairs of Associations Not for Profit,* 43 HARV. L. REV. 993, 1000 (1930)).

[171] *See Mursener,* 186 Or. at 276, 205 P.2d at 577.

therefore avoided the "harsh remedy" of a receivership and would "resort to [it] . . . only in extreme cases."[172]

The high standards the courts placed on plaintiffs seeking this intrusive remedy reflect this reluctance. Courts imposed a receiver only if the "ends of justice" so *required*[173] or if there existed no remedy at law.[174] Courts applied these standards less stringently, however, if they determined that restoration of "self-government" to the membership required a receiver.[175] This formulation of the standard was particularly relevant in cases in which strong evidence existed that union officers coerced or intimidated union members[176] or in which officials suspended union meetings so that the members lost the opportunity to voice their discontent.[177]

It is unlikely, however, that courts would have imposed a receiver simply in response to a terrified membership. At least one court saw the function of a receiver as merely protecting union funds and not becoming involved with the internal running of the union.[178] In that case, the plaintiffs specifically claimed the loss of "valuable property rights in and to their respective memberships,"[179] but the court made its award only to protect against "future dissipation of the funds and property of the local union."[180] This conclusion indicates that the members' rights were not the courts' primary concern.

Although a factor in the court's calculus, a person's rights incident to union membership did not rise to the level of a property right. The cases are significant, however, because they demonstrate the existence of a common law doctrine adopted to protect a union member's democratic rights by intruding upon the internal affairs of unions.

2. The Teamsters Monitorship[181]

The Teamsters Monitorship represents a second common law ap-

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[172] *Id.*

[173] *See* Local 11, Int'l Ass'n of Ironworkers v. McKee, 169 A. 351, 353 (N.J. Ch. 1933).

[174] *See* Robinson v. Nick, 235 Mo. App. 461, 480, 136 S.W.2d 374, 385 (1940).

[175] *See Mursener,* 186 Or. at 276, 205 P.2d at 577.

[176] *See* Collins v. I.A.T.S.E., 119 N.J. Eq. 230, 247, 182 A. 37, 46 (Ch. 1935); *Robinson,* 235 Mo. App. at 481, 136 S.W.2d at 386.

[177] *See Local 11,* 169 A. at 353-54.

[178] *See Robinson,* 235 Mo. App. at 482, 136 S.W.2d at 386-87.

[179] *Id.* at 466, 138 S.W.2d at 376.

[180] *Id.* at 484, 138 S.W.2d at 388. Note that the Landrum-Griffin Act had not yet been passed, and there was, therefore, no statutory entitlement on which the plaintiffs could rely. *See supra* notes 122-24 (discussing intangible property).

[181] *See generally* Cunningham v. English, 41 L.R.R.M. (BNA) 49 (D.D.C. 1958) (reprinting the text of a consent order in which the court established a monitoring

proach to the problem of vindicating union members' rights. The monitorship resulted from a suit initially brought by a small group of Teamsters members to enjoin the union from holding its 1957 International Convention.[182] The plaintiffs claimed the injunction was necessary to correct violations of the union's constitution and other illicit practices.[183] The court denied the preliminary injunction, and the convention took place on time. A subsequent suit succeeded in enjoining the newly elected officials from taking office, pending the outcome of the litigation.[184]

The second suit resulted in a consent decree establishing a Board of Monitors.[185] The decree instructed the Monitors to make recommendations, including constitutional amendments,[186] the union could adopt to improve internal union democracy, and to propose a model for local bylaws.[187] The Monitors, however, lacked the power to impose any of their suggestions without either the consent of the Teamster's General Executive Board or of the court.[188] The Board of Monitors was not a success. It "neither dealt effectively with corruption, instituted democratic procedures, amended the International constitution, nor implemented a model code of local by-laws."[189]

The broad, nonspecific provisions of the decree,[190] which were necessary in order to reach an agreement between the parties, combined with the non-binding nature of the Board of Monitor's recommendations, made it possible for the Teamster Executive Board to resist the implementation of reform at almost every turn.[191] Although some reform succeeded,[192] the voluntary approach of the decree limited its ef-

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committee to supervise the affairs of the Teamsters Union).

[182] *See* Comment, *Monitors: A New Equitable Remedy?*, 70 YALE L.J. 103, 103 (1960). For a complete history and explanation of the monitorship, see M. Goldberg, The Teamsters Board of Monitors: An Experiment in Union Reform Litigation, 30 LAB. HIST. (1989) (forthcoming).

[183] *See* Comment, *supra* note 182, at 103.

[184] *See* Cunningham v. English, 41 L.R.R.M. (BNA) 2022, 2029 (D.D.C.), *modified sub nom.*, International Bhd. of Teamsters v. Cunningham, 41 L.R.R.M. (BNA) 2044 (D.C. Cir. 1957).

[185] *See Cunningham*, 41 L.R.R.M. (BNA) at 50.

[186] *See id.* at 50-51.

[187] *See id.* at 50.

[188] *See* English v. Cunningham, 269 F.2d 517, 522, 523 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 905 (1959).

[189] Comment, *supra* note 182, at 119.

[190] The full text of the January 23, 1988 Consent Decree is reprinted in *Cunningham*, 41 L.R.R.M. (BNA) at 49-52.

[191] *See* Comment, *supra* note 182, at 119 ("[A] nightmarish deluge of procedural motions has complicated the basic dispute over the interpretation of the consent decree. There [were] thirty five appeals from the district court and several petitions to the Supreme Court.").

[192] *See id.* (noting that successes were seen in the adoption of rules for elections,

fectiveness and made the decree insufficient to overcome the defendant's resistance to change.[193]

3. Administrators Under Title VII

In contrast to the Teamsters Board of Monitors, court-appointed administrators under Title VII of the Civil Rights Act of 1964[194] have enjoyed some marked successes. This experience under Title VII pertains to the present discussion because it involves judicial involvement in the administration of the work place similar to that in the receiver cases and the Board of Monitors.[195] In all three areas, the court-appointed official must disseminate information to the affected parties, handle the day-to-day requirements of administering a decree, the fundamental purpose of which is to restructure the work environment, and provide feedback and recommendations to the court.[196] The lessons learned in restructuring a work place under Title VII can be readily applied to restructuring a union.

The first Title VII administrator case,[197] *United States v. Wood Lathers Local 46,*[198] concerned the discriminatory membership practices of a local with exclusive jurisdiction over all metallic lathing and certain other aspects of construction work in New York City, Nassau, Suffolk, and Westchester counties.[199] When plaintiffs brought the suit, total union membership exceeded 1450, of which only four members were black.[200] The case resembles the Teamsters Board of Monitors in that the administrator was adopted by consent decree.[201] Unlike the Board of Monitors, however, the administrator exercised authority that the parties could not frustrate: "The Administrator *shall* decide any

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the reinstatement of members who were expelled from the union, and the filing of charges against some corrupt officials).

[193] *Cf.* Gewirtz, *Remedies and Resistance,* 92 YALE L.J. 585, 589 (1983) (When discussing desegregation, "remedial approaches require courts to recognize that resistance [to the proposed remedy] can weaken victims' rights and to consider strong measures to prevent or defeat that resistance.").

[194] Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241, 253 (codified at 42 U.S.C. § 2000e (1982 & Supp. IV 1986)).

[195] *See supra* notes 164-93 and accompanying text; *see also* M. Goldberg, Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement, 1989 DUKE L.J. (forthcoming) (analogizing union institutional reform to Title VII litigation).

[196] *See* Harris, *The Title VII Administrator,* 60 CORNELL L. REV. 53, 55 (1974).

[197] *See id.* at 58.

[198] 328 F. Supp. 429 (S.D.N.Y. 1971), *aff'd,* 471 F.2d 408 (2d Cir.), *cert denied,* 412 U.S. 939 (1973).

[199] *See id.* at 431-32.

[200] *See id.* at 432.

[201] *See* Harris, *supra* note 196, at 58.

questions or disputes . . . arising under this Agreement . . . decisions of the Administrator shall be . . . final."[202] After a slow start, and with a little encouragement from the court, the administrator implemented nondiscriminatory referral practices,[203] issued new work permits,[204] and resolved numerous disputes concerning the interpretation and implementation of the decree.[205]

The court in *United States v. Local 638, Enterprise Association of Steam Pipefitters*[206] imposed a second successful administrator. The court probably modeled its order in that case on the *Local 46* decree,[207] and thus provided that "the Administrator shall be empowered to take all action[] . . . he deems necessary to implement the provisions and ensure the performance of this decree."[208] Further, the decree gave the administrator specific goals and time targets for implementation.[209] Within one year, the administrator increased the number of minority workers from thirty-one, when the parties filed suit,[210] to almost 900.[211] Thus the parties did not have "to return to the district court for guidance."[212]

When the court fails to grant sufficient power to its appointed officials, the results have been less favorable. In *United States v. Local 638, Enterprise Association of Steam Pipefitters,*[213] the court gave its appointed board a narrower mandate than that awarded to earlier administrators. With only the power to "validate and administer a job-related test to applicants,"[214] the board made no significant progress in

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[202] *Id.* (emphasis added) (quoting the consent decree, United States v. Wood, Wire & Metal Lathers Local 46, 2 Empl. Prac. Dec. (CCH) ¶ 10,226 (S.D.N.Y. 1970)).

[203] *See id.* at 65. As a result of the union's failure to adopt equal employment opportunity procedures in accordance with the requirements of the consent decree, the court established a 47 day deadline for the Administrator to present revised rules and procedures. *See Local 46,* 328 F. Supp. at 440-41. The Administrator responded by implementing new rules and a computer system that would produce periodic printouts to allow him to monitor union hiring activity. *See* Harris, *supra* note 196, at 65.

[204] *See* Harris, *supra* note 196, at 66.

[205] *See id.* at 67.

[206] 360 F. Supp. 979 (S.D.N.Y. 1973).

[207] *See* Harris, *supra* note 196, at 62 n.44.

[208] *Id.* (quoting the consent decree, United States v. Local 638, Enter. Ass'n of Steam Pipefitters, 6 Empl. Prac. Dec. (CCH) ¶ 8176 at 5173 (S.D.N.Y. 1973)).

[209] *See id.* at 62, 68.

[210] *See id.* at 68 n.82.

[211] *See id.* at 68.

[212] *Id.* (footnote omitted).

[213] 347 F. Supp. 169 (S.D.N.Y. 1972). This case is related to the case of the same name mentioned above, *see supra* note 206 and accompanying text, but it actually involves Local 40 of the Bridge, Structural and Ornamental Iron Workers Union.

[214] Harris, *supra* note 196, at 61.

two years of work.[215]

The above discussion demonstrates that courts have not been reluctant to devise broad intrusive remedies in the employment context. The early receiver cases, however, show that a court will impose this type of remedy only when it is determined that such measures are the sole antidote to a serious harm. As the failed Teamster Monitor experiment and the experiences under Title VII administrators illustrate, the court must grant its appointees sufficient authority and provide appropriate guidance for a decree to succeed. If the court refuses to vest an administrator or receiver with the minimum power necessary to achieve the ends of the decree, the court's intrusion will be for nought.

B. *Receivers Under RICO Part II: An Appraisal*

Current experience under RICO shows that the federal courts have learned some lessons from the past but have ignored others. As will be seen below, courts have not fully accepted that trustees appointed under RICO must be endowed with sufficient authority to carry out their mandate successfully. Courts have also failed to articulate a clear standard of appropriateness for imposing a trusteeship.

The imposition of a receiver or trustee is one type of equitable remedy. Courts normally prefer another type of equitable remedy, the negative injunction.[216] A negative injunction will not always "secur[e] complete justice,"[217] however, and the court should not be inhibited by judicial preference in cases in which a positive injunction is necessary. On the other hand, intrusive remedies such as receivers and trustees implicate many concerns. The court should, therefore, safeguard the interests of as many of the affected parties as possible when it formulates its decree.[218] This is particularly true in RICO cases because the court will not simply make the union democratic by judicial fiat. The relief ordered must look to the future and attempt to satisfy a broad range of interests. Among the most important of these interests is that

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[215] *See id.* at 63-64.

[216] A negative injunction is an order prohibiting a specific action of the defendant. *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy,* 91 YALE L.J. 635, 649-50 (1982).

[217] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (quoting Brown v. Swann, 35 U.S. (10 Pet.) 497, 503 (1836)); *see also* Goldstein, *A* Swann *Song for Remedies: Equitable Relief in the Burger Court,* 13 HARV. C.R.-C.L. L. REV. 1, 62 (1978) (arguing that the intrusiveness of a remedy must be understood in the context of the actions of the parties and should not be judged solely by looking at the substance of the decree).

[218] *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1293 (1976); Fiss, *Foreward: The Forms of Justice,* 93 HARV. L. REV. 1, 48-49 (1979); Fletcher, *supra* note 216, at 654-55.

of the union membership in running its own union.[219] As discussed above, the goal of a receivership is to restore union democracy when corruption has undermined it.

From the earlier discussion of the cases in which parties sought receiverships and courts appointed receivers under RICO,[220] the conclusion that a receiver or trustee will be necessary in some instances is unavoidable. When considering a decree including a receiver, courts should keep in mind that "[i]n drafting Titles II through VI [of the Landrum-Griffin Act], Congress was guided by the general principle that unions should be left free to 'operate their own affairs, as far as possible.' "[221] This principle can best be described as balancing the public interest in fair and democratic union government against the minimization of government intrusion on union autonomy.[222] In a RICO suit, when it has been shown that the members have lost control over their union, this balance can best be achieved by imposing the *least intrusive* remedy necessary to restore union democracy. The court must then undertake an analysis of the current state of the labor organization and issue a decree that will provide sufficient guidance to ensure a democratic union in the future.

The process of weighing interests to correct ongoing wrongs and guide future behavior closely resembles both the legislative process[223] and quasi-administrative action.[224] Merely because such behavior is "non-judicial," however, does not make it presumptively improper for the court to undertake such action.[225] Action perceived as adversely affecting organized labor's station, even in the name of protecting union

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[219] *See* Letter From Eric Neisser, Legal Director, ACLU-NJ, to Judge Harold A. Ackerman (Dec. 16, 1987) (on file with the *University of Pennsylvania Law Review*) (discussing the Local 560 trusteeship); *see also* Hinckle, *Appellate Supervision of Remedies in Public Law Adjudication,* 4 FLA. ST. U.L. REV. 411, 434 (1976) (The remedy should "reach[] the most desirable accommodation of all the interests involved."). Indeed, when courts impose a trustee, they emphasize the strong interests of the members. *See supra* notes 121-25 and accompanying text (discussing property rights to democracy in unions).

[220] *See supra* notes 105-63 and accompanying text (discussing current RICO cases).

[221] United Steelworkers v. Sadlowski, 457 U.S. 102, 117 (1982) (citing S. REP. No. 1684, 85th Cong., 2d Sess. 4-5 (1958)).

[222] *See* Brennan v. Local 122, Amalgamated Clothing Workers, 564 F.2d 657, 660 (3d Cir. 1977) (describing how Title IV should be construed).

[223] *See* Chayes, *supra* note 218, at 1297 (noting that "[f]act evaluation" of this nature by courts recalls the traditional description of legislation).

[224] *See* Harris, *supra* note 196, at 63 (describing functions and attributes possessed by quasi-administrative agencies similar to those of courts engaging in this process).

[225] *See generally* Chayes, *supra* note 218 (concluding that the involvement of the court and judge in public law litigation is workable, and inevitable if justice is to be done in an increasingly regulated society).

members or society, would probably bring political pressures to bear in the legislative or administrative arena. Such pressures could consequently prevent the passage of a law or inhibit agency action and leave the wrong unremedied. Judges are not so constrained.[226] Furthermore, judges can tailor the scope of the remedy to the specific union and defendants before them, and they can be more responsive than either a legislative body or agency bureaucracy to the criticisms and grievances of the union members and other interested parties.[227]

Though the judiciary has several advantages over the legislative and administrative processes in correcting these wrongs, it also has some handicaps. The court's primary problem is access to information.[228] Admittedly, the court can utilize amicus briefs and expert witnesses, open the courtroom to all interested parties, and partially rely on the adversary process to overcome this infirmity.[229] One cannot assume, however, that the court will be exposed to all concerns, particularly in the labor racketeering context. The fear of reprisal will deter victims, witnesses, and other concerned parties, including union members, from coming forward,[230] thus creating a Catch-22 situation. In order to formulate a remedy that will return control of the union to the members, the court should consider the interests, concerns, and views of the members; however, the factors causing the loss of union member control make it virtually impossible for the court to gain the members' input.

Despite this difficult situation, the court must attempt to fashion a remedy. If there is extortion of union members' democratic rights, or a significant threat to the public's safety, a court can take any number of possible steps.[231] Initially, the court could simply enjoin the extortion and other illicit activity and order supervised elections to replace those union officers with criminal records. In such an election, unfortunately, the agents of those responsible for the RICO violations probably would again take control of the union.[232] A further drawback arises if it is

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[226] *See id.* at 1308. *But cf. id.* at 1307-08 (despite the appointed judge's theoretical insulation from political pressures, the reality of our legal system makes it unlikely that any judge is completely isolated from the political process).

[227] *See id.* at 1308.

[228] *See id.* at 1310-12 (discussing the endemic incompleteness of the representation of affected parties in public law litigation).

[229] *See* Fletcher, *supra* note 216, at 655-57; Goldstein, *supra* note 217, at 46-48.

[230] *See Measures, supra* note 79, at 112, 161; *infra* note 241 and accompanying text (discussing fear of a union contractor and his failure to report threats to police).

[231] *See* Goldstein, *supra* note 217, at 64-68 (describing the increasingly intrusive steps generally available to the court).

[232] *See supra* notes 105-15 and accompanying text (noting the ongoing appointments in Local 560); *see also* Memorandum in Support, *supra* note 126, at 4-6 ("When the person is convicted of a crime and completes his sentence, then he begins

suspected that the criminal activity continued after the issuance of the order, and a new trial must take place on the issue of contempt.

Another possible remedy consists of a court order requiring the government and the union to negotiate a remedial plan. This measure also raises difficulties, however, because problems in interpreting and implementing such a plan would probably reduce if not vitiate its effectiveness.[233] A master appointed by the court to formulate a plan, with no other authority or responsibility, would be at the same disadvantage as the court in acquiring information. Furthermore, court decrees without delegation of sufficient authority to judicially appointed officers have historically failed.[234]

Under this analysis, the decree imposed by the court in the Roofers case will probably be ineffective. A court liaison officer whose authority at this point is vague and undefined will administer the decreeship.[235] In addition, although the decree states that no face-to-face bargaining can take place unless the officer is present, it also prohibits the officer from participating in the bargaining.[236] Finally, union members cannot outnumber employer bargaining representatives at any bargaining session,[237] and employers may refuse to negotiate over the phone.[238] A limit on the number of union representatives in a bargaining session would not have helped the over one hundred contractors present at the Rifle Club meeting when a small group of union leaders imposed collective bargaining on a vast majority of the residential roofers in the Philadelphia area.[239] The court does not address in its decreeship the problem of enabling the "terrorized"[240] victims of the

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the process anew.").

[233] *See supra* notes 192, 203 and accompanying text (discussing monitors and court encouragement under first Title VII administrator).

[234] *See supra* notes 193, 213-15 and accompanying text (discussing monitors and Title VII failure).

[235] Catherine Votaw, an Assistant United States Attorney, stated that the liaison officer would probably have to return to court to define "the scope of decreeship authority." Daily Labor Report (BNA) No. 101, May 25, 1988, at A-10. The officer does have explicit authority to set the location of bargaining and must countersign any collective bargaining agreement in order for it to be valid. Decree, United States v. Local 30, United Slate, Tile & Composition Roofers, No. 87-7718 at 5-6 (E.D. Pa. May 23, 1988) [hereinafter Decree]. The officer will also have access to all union records. *See id.* at 7.

[236] *See* Decree, *supra* note 235, at 6.

[237] *See id.* at 7.

[238] *See id.* at 6.

[239] *See supra* note 149 and accompanying text (giving an excerpt of testimony describing the Rifle Club meeting); *see also* United States v. Local 30, United Slate, Tile & Composition Roofers, 686 F. Supp. 1139, 1144 (E.D. Pa. 1988) (findings of fact concerning this meeting).

[240] *See Local 30,* 686 F. Supp. at 1166 ("[T]he court found that the Union, through the policies and practices employed by its leaders, engaged in terrorism.").

union leadership to exercise the rights they had prior to the decree.[241] Why will individuals report incidents to the liaison officer that they would not report to the police?

The only effective options, therefore, are greatly intrusive. Because of their intrusiveness, it is of paramount importance that the court adopt an appropriate analytical framework. The framework must address not only the racketeering concerns embodied in RICO and the union democracy concerns embodied in Landrum-Griffin, but also the problems inherent in intrusive judicial intervention.[242] The analysis should consist of three distinct parts: 1) a determination of whether RICO has been violated; 2) a determination of whether the union members have lost control of their union to such an extent that they will be unable to regain control without judicial assistance; and 3) a formulation of the best remedy by determining whether a receiver should be imposed.[243] Each step requires a different balancing of the interests involved. As the court proceeds from the first step in the analysis to the last, the importance of the public interest will decrease in relation to the interests of the union membership. Whether RICO has been violated is almost strictly a matter of public concern. The democratic state of a particular union is both a concern to the government and to the individual members. Whether a receiver should be imposed implicates the rights of the union members to a significantly greater extent, as compared with the public interest at that stage.

Particularly disturbing is the use of the "preponderance of the evidence" standard at the third stage of the analysis. The government should have to prove the necessity of a receiver by more than the preponderance of the evidence. Unfortunately, the district court in *Local 560* used,[244] and the circuit court adopted,[245] the less stringent standard. Both courts focused only on the defendants before them[246] and did not weigh the interests of those not present in the courtroom. If the court had applied the proposed framework, it would have first used the accepted "preponderance of the evidence" standard of proof to determine whether the defendants had actually violated RICO. The second

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[241] The court heard testimony from a union contractor who was beaten but did not report the incident to the police "out of fear of the Roofers Union." *Id.* at 1152.

[242] *See supra* note 26 and accompanying text.

[243] Owen Fiss argues that it is the courts' duty to effectuate the societal value before it and that the remedy is "an integral part of that process." *See* Fiss, *supra* note 218, at 52-53.

[244] *See* United States v. Local 560, Int'l Bhd. of Teamsters, 581 F. Supp. 279, 327 (D.N.J. 1984), *aff'd,* 780 F.2d 267 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140 (1986).

[245] *See* United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267, 279 n.12 (3d Cir. 1985), *cert. denied,* 476 U.S. 1140 (1986).

[246] *See infra* notes 249-51 and accompanying text.

step would have consisted of determining whether the membership had lost control of the union. The proper source for evidence on this point is neither the defendants nor the government: It is the union membership. The union should, therefore, have independent representation at this stage of the trial.[247] The third step, using a higher standard of proof that recognizes the union members' strong interest in running their own union, should be to determine if the imposition of a trustee or a receiver is the best method for restoring democracy to the union in question.[248]

In its affirmance in the *Local 560* case, the circuit court employed a three factor balancing test to derive the appropriate standard of proof for the imposition of the receiver.[249] The stated purpose of this test was to balance the private interest involved, the risk of error, and the government's interest in retaining the challenged procedure. The application of this test included the weighing of the defendants', but not the union members', interests.[250] That the members have an important stake in the outcome is evident from the court's analysis. The most significant predicate act in the *Local 560* case was the extortion of the union members' intangible property rights to a democratic union. RICO litigation in this area, including the *Roofers* case, attempts to return control of the union to the members. The members' interests, therefore, must be factored into the court's construction of the standard of proof to ensure a just outcome. Of course, the court will still face the problem of obtaining relevant information concerning the member's interests, but the information problem in this context cannot be avoided under any approach. The members' interest in running their own union demands that a strict standard[251] be met before a trustee, or some other equally intrusive remedy, is instituted. Only by imposing this

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[247] *See* Chayes, *supra* note 218, at 1310-13 (discussing getting all interested parties involved). In structural litigation, the judge should "make certain that he is fully informed and that a just result will be reached." Fiss, *supra* note 218, at 24. This can be accomplished by having the court appoint an attorney to represent the members.

[248] This is not to say that *Local 560* was wrongly decided. The point is to avoid potential future abuses of RICO by utilizing an analysis that protects to the greatest extent *all* interests involved in the proceeding before the court. *Cf. supra* note 26 (discussing abuses of labor injunctions).

[249] *See Local 560,* 780 F.2d at 279 n.12.

[250] Both courts did find that the union members would not be harmed by a trustee. *See supra* notes 134-38 and accompanying text. This post hoc finding, made in response to the defendant's argument, does not constitute a consideration of the members' interest in the formulation of the burden of proof the government must meet in order to have its requested order granted. The circuit court's omission of the members' interests in its three part test indicates the actual formulation.

[251] *Cf. supra* notes 164-80 and accompanying text (discussing the standard of proof state courts imposed in the early receiver cases).

high standard of proof on the prosecution can the court be sure that the remedy is truly appropriate.

Once the court has determined that in order to protect the union members' interests an intrusive remedy is warranted, it has a number of options from which to choose. If the court must deal with a large amalgamated union, such as Local 560,[252] the court could divide the union into smaller locals, based on contracts currently in effect. This approach offers the advantage that democracy within the new unions will be easier to achieve because there will be fewer members and a smaller bureaucracy. The influence of all the factors leading to oligarchical control will be reduced.[253] In addition, smaller unions will be less likely to attract external corrupting forces because there will not be as large an aggregation of funds.[254] The disadvantage of this approach is that it reduces the bargaining power of the members. Even though the number of employees covered by each collective bargaining agreement remains the same, the members lose power because the strike funds and other support, such as the supply of picketers, become splintered. A determination of the harm members would experience under such a plan could be done on a case-by-case basis to determine whether or not it is appropriate.

As implied by the discussion of Title VII administrators,[255] a court-appointed official, such as a trustee or receiver, can avoid many of the drawbacks of less intrusive methods. If given sufficient and unambiguous authority, the receiver will be able to effect a change within the union. A receiver or trustee can directly counteract a union's inherent oligarchic tendencies by establishing new lines of communication with members, diluting the strength of bureaucratic hierarchies, and reinvigorating member interest and participation.[256] To this end, trustees have employed methods including institution of procedures to guard against misuse of funds, commencement of craft meetings, and publication of union newspapers. Receivers should also contemplate a gradual

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[252] Local 560 has collective bargaining agreements with over 400 companies. *See* Memorandum in Opposition, *supra* note 24, at 12. It negotiates on both a single- and multi-employer basis. *See id.* at 1.

[253] *See supra* notes 61-65 and accompanying text (discussing effect of size on union democracy).

[254] *See, e.g., Measures, supra* note 79, at 2 (noting that the enormous union wealth tempts La Cosa Nostra).

[255] *See supra* notes 194-215 and accompanying text (discussing successes under Title VII).

[256] Professor Alice Cook has argued that an increase in member participation and interest could reinvigorate the viability of local unions by overcoming concentrations of power. *See* Cook, *supra* note 48, at 348-49; *cf. supra* notes 57-60 and accompanying text (discussing average attendance at union meetings as an indicator of member participation).

return to democracy. The first elections under a receiver should not be for positions at the head of the union. Instead, the receiver should hold local steward elections first, and then gradually move up the union heirarchy. In this way, members will become reaccustomed to participating in union politics. Without one large election as a focus, corrupt elements will find it more difficult to take control. Further, a number of competing political power bases may develop, thus increasing the possibility of a free exchange of ideas among union members. Because member participation and freedom of communication provide essential counterbalances to oligarchic tendencies, a trustee's ability to implement measures encouraging both, coupled with her interest in doing so, leads to the empowerment of union membership. This, after all, is the purpose of RICO trusteeship litigation.[257] Senator McClellan expressed the theory behind this remedy when he said, "if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves."[258] And by implication, keep it clean.

Furthermore, the receiver will not only be deeply involved in the union, but also be responsible for it. Thus the receiver will be able to limit the Catch-22 of unobtainable information and can provide the court with further guidance concerning the ability of the members to control their union. Receiverships can be imposed in varying degrees of intrusiveness. In a small union, or in a union that the court determines is just beyond control of its members, the court could impose a trustee solely to administer and reform the various union funds. Once a trustee removed the monetary incentive for organized crime to infiltrate the union, the court could order a supervised election. Then, after a waiting period sufficient to determine whether the corrupt influences have been removed through the democratic process, the court could either order the trustee removed or increase the trustee's responsibility to managing the entire union, as in *Local 560.*

The experience of the Local 560 trusteeship shows that a union can operate effectively under a court's order. The first trustee increased membership in the union by twenty-eight percent in less than one year.[259] The second trustee successfully supervised two strikes[260] and

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[257] *See supra* notes 131, 138, 162-63 and accompanying text.

[258] 105 CONG. REC. 6476 (1959), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY, *supra* note 13, at 1102; *see* G. TYLER, *supra* note 22, at 275 ("The more democratically run the union is, the more is the leader bound to reflect the opinions of his constituency.").

[259] *See* United States v. Local 560, Int'l Bhd. of Teamsters, 126 L.R.R.M. (BNA) 2190, 2191 (D.N.J. 1987).

[260] *See* Status Report from E. Stier, Trustee, to Judge Harold A. Ackerman at 5

filed claims for $1.5 million in employer underpayments to union funds.[261]

Nevertheless, the trustees do not merely serve to run the union; they ultimately aim to return control of the union back to the members. At the present time, there has been no demonstrated success in this endeavor. The first Local 560 trustee's status report makes no mention of either a plan or progress.[262] His successor has instituted procedures to guard against misuse of funds,[263] commenced craft meetings,[264] and instituted a union newspaper,[265] all of which will probably promote member participation. The trustee notes, though, that members remain "[un]willing to become actively involved . . . if it means challenging someone who has [previously] been in power in the Union."[266] In addition, complications arise because the only politically active group in the union backs the former president and has allegedly undertaken a campaign to suppress any criticism of the last administration.[267] The current trustee would not propose a "long-term" plan to return control of the union back to the membership until January 31, 1988,[268] nearly twenty months after the trusteeship was established.

The current problems within Local 560 may be the result of the informational Catch-22 described above: If the court had more available information when it issued its order, it could have enjoined a greater number of individuals from participation in the union's affairs. If this is true, and the trustee can initiate further investigations that will remedy the situation,[269] there is definite value in the imposition of

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(Dec. 4, 1987), 581 F. Supp. 279 (D.N.J. 1984), *aff'd,* 780 F.2d 267 (3d Cir. 1985) (No. 84-5333, 84-5334), *cert. denied,* 476 U.S. 1140 (1986) [hereinafter Status Report].

[261] *See id.* at 7.

[262] *See* Letter from J. Jacobson, Trustee, to Judge Harold A. Ackerman (Oct. 23, 1986), 581 F. Supp. 279 (D.N.J. 1984), *aff'd,* 780 F.2d 267 (3d Cir. 1985) (No. 84-5333, 84-5334), *cert. denied,* 476 U.S. 1140 (1986).

[263] *See* Status Report, *supra* note 260, at 6-9.

[264] *See id.* at 12.

[265] *See id.* at 11.

[266] *Id.* at 13.

[267] *See id.* at 15.

[268] *See* Letter-Opinion and Order at 3, United States v. Local 560, Civ. Action No. 86-0689 (D.N.J. Dec. 17, 1987). An election has been set for December 6, 1988, but it is unclear how the election of union officers will affect the trustee. *See* Noble, *Vote Set to End U.S. Control of a Jersey Teamsters Local,* N.Y. Times, Feb. 15, 1988, at B3, col. 1. The trustee will continue in, at least, an oversight capacity, *See* Raskin, *Teamster Local, Once Run By The Mob, Tries The Ballot Box,* N.Y. Times, Nov. 20, 1988, at E6, col. 4.

[269] *See* Status Report, *supra* note 259, at 9-11; *see also* United States v. Local 560, Int'l Bhd. of Teamsters, 694 F. Supp. 1158, 1191-92 (D.N.J. 1988) (granting injunction prohibiting Sciarra and Sheridan from running for union office because of continued association with the Genovese Crime Family).

a trusteeship. This observation does not determine, however, when the trustee's task is complete. As noted above, the best measure of union democracy, and therefore membership control, is the responsiveness of leadership to members' concerns. Given the absence of an elected union leadership, the court will be unable to gauge "responsiveness" while the trustee remains in place. The trustee will, however, be able to inform the court of when members are willing to speak out about their concerns.[270] In particular, members can voice their concerns about how their union was run in the past in order to avoid these mistakes in the future. When the union membership is willing to engage in this critical self-examination, the trustee's job will be finished.

CONCLUSION

Corruption in the labor movement has existed for at least a century. In that time, it has affected numerous industries, cities, unions, and individuals. While studies estimate that organized crime controls only three to four hundred locals out of the approximately 50,000 labor organizations in the United States,[271] the problem is serious, particularly for those union members who live and work under the cloud of its control.

Despite statutory protection, affected unions are incapable of self-regulation. The assumption that a democratic process alone will sufficiently empower union members to retake control of their union from dictatorial and corrupt leadership has proved to be untenable. Democracy can work in a one party system, but only when those who question and challenge the leadership do so free from the fears of violence and severe economic retaliation.

How can corrupt unions best be returned to their rightful owners—the rank and file members? The Justice Department's intrusive answer employs the civil remedies of RICO to impose a trustee. This response conflicts with the traditional principles of labor relations in the United States, and it is unsettling to think that the power of the federal government is being used to take over private organizations.

Furthermore, it can be argued that the long-term effect of this type of RICO suit may be to decrease the overall level of democracy in the labor movement. A proliferation of RICO trusteeships could foster a

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[270] One commentator observed that the openness of the trustee-supervised campaign helped to encourage opposition factions within Local 560. *See* Raskin, *supra* note 268, at E6, col. 3.

[271] *See* ORGANIZED CRIME, *supra* note 17, at 7-8.

siege mentality among members of organized labor.[272] William Leiserson argues that the union movement's tenuous existence provides an incentive for members to grant their leaders greater power in order to protect their union.[273] The government's continuing attempts to place unions in receivership may increase this perception. RICO's requirement that the prosecution name an enterprise, invariably the union, exacerbates the problem because it fosters the impression of government attacking organized labor. This "siege mentality" phenomena underscores the importance of the judiciary clearly articulating the reasons and standards for imposing a trustee. Only by making it clear to union members that corruption, and not organized labor, is the target of RICO litigation can the government and the courts avoid exacerbating the very problem they seek to correct.

Despite its unattractiveness and its dangers, however, a receiver, or other similarly intrusive remedy, is the only solution to corrupt unions. Because of the potential dangers, the courts must take care to impose such a remedy sparingly and only after the prosecution has met the highest standard of proof. Receivers must only be used to correct a serious wrong, not to wage an undeclared war on the labor movement.

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[272] *See* G. TYLER, *supra* note 22, at 283 (noting that the primary purpose of a union is to engage in conflict and therefore is akin to a "garrison state").

[273] *See* W. LEISERSON, *supra* note 48, at 75 ("The deep-rooted feeling of insecurity which pervades the unions keeps them on a war basis, and it would be surprising if their governments were continuing to grow more democratic in spite of the militancy engendered by fears for the safety of the organizations."). Gus Tyler argues that autocracy fulfills a societal demand for responsible union leadership that controls the members to ensure orderly labor relation. *See* G. TYLER, *supra* note 22, at 285; *see also* J. HARDMAN, AMERICAN LABOR DYNAMICS 111 (1928) ("Any method that points toward a possible increase in the power of the [union] is the right method . . . ."), *cited in* G. TYLER, *supra* note 22, at 272; *cf.* R. MICHELS, *supra* note 1, at 357-63 (arguing that war stifles democracy).