Cornell Law Review

Volume 45
Issue 1 *Fall 1959*

Article 2

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INDIVIDUAL RIGHTS IN COLLECTIVE LABOR RELATIONS*

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A. INTRODUCTION

Most of us today are practicing collectivists! To be sure, it is a *private* collectivism which we largely practice. Hence, "institutionalism" may be a more palatable way of describing our system. The fact remains that much of our socio-economic process is now channeled through large-scale organizations, through large "collectives" of people and equipment. In fact, the extensive collectivization of relations in the labor market no longer does much to raise hackles in most quarters. *Collective* bargaining has become an increasingly neutral word. It is only when someone suggests that the contractual relations between, say, the steel and auto industry, are also in the nature of collective bargains (they are certainly institutional rather than individualistic ones), and are a manifestation of what Gardner Means calls collective capitalism, that some shock-reaction is still encountered. Suffice it to say that we do much of our producing through, and much of our buying from, large-scale economic units, and that collective bargaining in substantial segments of the labor market takes place among giants.

This article will deal with the problem of individual employee rights in employment relationships where collective bargaining predominates. This brings us to a paradox. The notion underlying our national labor policy for some thirty years has been that, absent *collective* bargaining, individual employee rights are trammelled on by an all-powerful employer, wielding unilateral and dictatorial controls.[1] Thus a collective institu-

* The author is indebted to Saul G. Kramer of the Class of 1959, Cornell Law School, for research assistance rendered in the preparation of this article.

† See Contributors' Section, Masthead, p. 83, for biographical data.

1 Thus, in Section 2 of the Norris-La Guardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 102 (1952):

> . . . the public policy of the United States is hereby declared as follows:
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> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

The Wagner Act, 49 Stat. 449 (1935), echoed this approach, which was also retained in the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1952):

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized

tion is expected to enhance individual rights! It is with some products of this paradox that we shall concern ourselves. In so doing, I shall proceed on the assumption that we shall not, in the foreseeable future, abolish either the large corporation or the union, and that, even if an invigorated anti-trust policy were to attempt to circumscribe oligopolistic or monopoloid price and wage fixing power here and there, the economy will continue to be characterized by large, if not gargantuan, units. The problems of enhancing individual rights in collective labor relations are substantially the same whether an industry is dominated by the Big Three or the Not-So-Big Six, and by three or four unions, rather than one or two.

We may anticipate, then, that bargaining in the labor market will continue to be *collective,* and that the employment relation is to be governed by a collective labor agreement. What can and should the law contribute toward effective protection of individual rights in this essentially collective context? Put another way, to what extent do the institutional needs of the employer, the union, and the collective bargaining relationship place limitations on the scope of protection that can and should be accorded to individual rights immersed in this complex of collectivities?

Two main avenues of exploration seem open: Individual bargaining by the employee with the large employer being an apparently illusory futility, policy protects formation of unions for the purpose of striking collective bargains. Individual rights in this context consequently must be accorded protection, *first,* under the collective contract (vis-à-vis the employer), and *second,* against (and within) the union. It will be seen that these two approaches, though separate, are intertwined, for which reason they will both be considered below.

B. Individual Employee Enforcement of the Collective Agreement[2]

Three recent decisions will serve to illustrate several aspects of our problem. They bear detailed examination.

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in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce. . . .

This was also the thrust of the so-called La Follette Committee investigation. See Hearings before a Subcommittee of the Committee on Education and Labor, United States Senate, pursuant to S. Res. 266, 74th Cong., 2d Sess. (1936)-76th Cong., 3rd Sess. (1941). A Resolution to Investigate Violations of the Right of Free Speech and Assembly and Interference with the Right of Labor to Organize and Bargain Collectively.

[2] The most comprehensive recent discussion of this and other questions concerning the enforcement of collective bargaining agreements will be found in Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601 (1956). See also, Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L.J. 850 (1957); Howlett, "Contract Rights of the Individual Employee as Against the Employer," 8 Lab. L.J. 316 (1957); "Report of

In *Parker v. Borock*,[3] the Court of Appeals of New York had occasion to consider the right of a former employee to bring action against his employer grounded upon a discharge, allegedly wrongful, under the applicable collective bargaining agreement. The plaintiff-employee, a member of the union, had been discharged for cause. He invoked the contractual grievance procedure; the ensuing union-employer discussions proved fruitless, the union declining to pursue the grievance to the arbitration stage. An attempt by plaintiff in the Federal District Court to compel the employer to arbitrate had failed.[4] Parker then sued in the state court for money damages for alleged breach of the collective agreement. The employer first moved for a stay, pending arbitration. A denial of the stay was affirmed by the Appellate Division[5] on the theory that there was no right, on the part of the *employer*, to arbitration in the absence of a dispute between it and the *union* concerning the propriety of the discharge. Subsequently, the defendant-employer moved for summary judgment, asserting that plaintiff, not being a party to the collective agreement, secured no right of action thereunder. This motion was denied. The Appellate Division reversed,[6] deciding that while plaintiff could maintain the action, he had failed to establish that his individual hiring was for a definite term rather than a hiring at will. The Court of Appeals affirmed.[7]

Committee on Improvement of Administration of Union-Management Agreements, 1954," 50 Nw. U.L. Rev. 143 (1955). Earlier literature concerning the theoretical nature of collective agreements is voluminous. E.g., Anderson, "Collective Bargaining Agreements," 15 Ore. L. Rev. 229 (1936); Christenson, "Legally Enforceable Interests in American Labor Union Working Agreements," 9 Ind. L.J. 69 (1933); Fuchs, "Collective Labor Agreements in American Law," 10 St. Louis L. Rev. 1 (1925); Fumerton, "The Collective Bargaining Agreement and its Legal Effects," 17 Wash. L. Rev. 181 (1942); Gregory, "The Collective Bargaining Agreement: Its Nature and Scope," 1949 Wash. U.L.Q. 3; Hamilton, "Individual Rights Arising from Collective Labor Contracts," 3 Mo. L. Rev. 252 (1938); Lenhoff, "The Present Status of Collective Contracts in the American Legal System," 39 Mich. L. Rev. 1109 (1941); Rice, "Collective Labor Agreements in American Law," 44 Harv. L. Rev. 572 (1931); Witmer, "Collective Labor Agreements in the Courts," 48 Yale L.J. 195 (1938).

[3] 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577 (1959), affirming 1 App. Div. 2d 969, 150 N.Y.S.2d 396 (2d Dep't 1956).

[4] United States v. Voges, 124 F. Supp. 543 (E.D.N.Y. 1954). Defendant subsequently asserted in the state action that this determination rendered plaintiff's cause res adjudicata, a contention rejected by the Court of Appeals. 5 N.Y.2d 156, 156 N.E.2d 297, 298, 182 N.Y.S.2d 577, 579. The language of the federal court was broad:

> Naturally it is the employees who may have a difference with the Company. But it is the employees in their union cloak and capacity only who may avail themselves of the "Union function," which is the possibility of an eventual arbitration. . . .
> It is patently clear that the "enforcement" of the arbitration is purely a Union right. The contract as a whole, as well as these provisions, all indicate that the arbitration is between the Union and the Company concerning an employee. The long and the short of it is that the "employee's difference with the Company" is or is not a union "cause of action" which it may or may not advance to ultimate arbitration. If the Union decides it has "no cause of action," the "employee's difference" is dissipated by the decision of the sole bargaining agent, and he is bound thereby . . . . 124 F. Sup. at 546.

[5] 286 App. Div. 851, 141 N.Y.S.2d 359 (2d Dep't 1955), affirming 136 N.Y.S.2d 588 (Sup. Ct. Queens County 1954), appeal dismissed, 4 N.Y.2d 731, 171 N.Y.S.2d 118 (1958).

[6] 1 App. Div. 2d 969, 150 N.Y.S.2d 396 (2d Dep't 1956).

[7] 5 N.Y.2d 156, 156 N.E.2d 297, 182 N.Y.S.2d 577.

Burke, J., wrote the opinion for the court. His approach was grounded on the theory that the plaintiff's individual contract of hire must be read within the framework of the collective agreement, which provides that "No regular employee shall be discharged or disciplined without good and sufficient cause," and that layoffs were to take place only in accordance with seniority. These clauses, the court concluded, inured to the direct benefit of plaintiff,[8] rejecting, by distinguishing it, an earlier approach that seniority and discharge provisions in a collective agreement were designed only to protect the interest of the union in the retention of union men in employment.[9] Noting, however, that the agreement further provided that it was to be binding upon the Union and its officers, representatives and members, the court went on to find that plaintiff's right of action was precluded by the contractual grievance and arbitration procedure which, by its terms, limited access thereto to the union itself.[10] The consequences of this analysis would appear to be that the plaintiff is treated as the beneficiary of the employer's promise not to discharge except for just cause, but that the employer has only promised to entertain a claim of want of just cause when pressed by the union. The limited character of the second of the promises hence served to defeat the employee's effort to seek redress individually. The opinion of the court concludes as follows:

> A reading of the existing agreement indicates that plaintiff has entrusted his rights to his union representative. It may be that the union failed to preserve them. As was said in *Donato v. American Locomotive Corp.*, (238 App. Div. 410, 417, 127 N.Y.S.2d 709, 716, affirmed 306 N.Y. 966, 120 N.E.2d 227): "the only conclusion which logically follows is that the employee is without any remedy, except as against his own union, if he claims that the union mishandled the arbitration proceeding or improperly failed to move to vacate the award. If this conclusion is reached upon the premise here set forth, this is not an exaltation of procedure over substance; it rests rather upon a proposition of substantive law limiting the right of the individual employee under a collective bargaining agreement."[11]

Judge Fuld, in a concurring opinion, elaborated on some of the considerations supporting the result reached:

> Discharge cases arise in the course of the administration of a collective bargaining agreement. They may raise countless questions, such as interpretation of the agreement, reasonableness of plant rules and regulations and conformity with past practices. The exclusive representative is in the best position, after investigating the truth and merits of the employee's complaint and after weighing the many factors involved, to determine whether uniformity in the administration of the agreement and protection

[8] Id. at 160, 156 N.E.2d at 299, 182 N.Y.S.2d at 579-80.
[9] See Rotnofsky v. Capital Distributors Corp., 262 App. Div. 521, 30 N.Y.S.2d 563 (1st Dep't 1941).
[10] 5 N.Y.2d 156, 161, 156 N.E.2d 297, 299, 182 N.Y.S.2d 577, 581.
[11] Id. at 161-62, 156 N.E.2d at 300, 182 N.Y.S.2d at 581.

> of the group interests of the majority of employees require it to press or abandon the case. Accordingly, absent specific language giving the employee the right to act on his own behalf, it is my conclusion that, under a collective bargaining agreement such as the one before us—which contains provision for the submission of unsettled disputes to arbitration—the union alone has a right to control the prosecution of discharge cases . . . .
>
> To the contention that this may subject the individual employee to capricious or discriminatory action by the union, it is sufficient to observe, as Judge Burke has intimated, that the employee has a remedy against the union for breach of fiduciary duty if it unfairly discriminated against him.[12]

Judge VanVoorhis also concurred, but on the theory pursuant to which the Appellate Division had decided the case. He noted that the portion of the *Donato* opinion quoted had merely been dictum and that the implications of that case, if anything, pointed to the right of the individual employee to demand arbitration in the face of union neglect of the employee's rights.[13] Judge VanVoorhis asserted that ". . . a union cannot exert power over its members by attempting to provide in the contract that what the union obtains for them the union can also take away."[14]

In *Cortez v. Ford Motor Company and United Automobile Workers*,[15] the Michigan Supreme Court was confronted by a similar problem, with the added elements that the action was against the union as well as the company, and sounded in tort as well as contract. The suit was brought by three women employees of the company on their own behalf and on behalf of 105 other women employees who had claims similar to plaintiffs'. These complained of loss of wages suffered by reason of allegedly improper lay-offs. They asserted that Ford Motor Company had violated contractual obligations arising out of the seniority provisions of the collective agreement and that the union had contractual duties, arising from the same agreement, to file grievances concerning the lay-offs. The tort count alleged a conspiracy among the defendants to interfere with plaintiffs' rights under the agreement. Motions to dismiss were granted by the trial court for the following reasons: (1) the action was defective as to the union because internal union remedies had not been exhausted by plaintiffs; (2) the collective agreement sued upon did not contain promises *by the union*, inuring to the benefit of plaintiffs, to process grievances; (3) the company's promises in the collective bargaining agreement, although inuring to the benefit of plaintiffs, were ex-

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12 Id. at 162, 156 N.E.2d at 300, 182 N.Y.S.2d at 581-82.

13 See notes 63-66 infra and accompanying text.

14 5 N.Y.2d 156, 164, 156 N.E.2d 297, 301, 182 N.Y.S.2d 577, 583. The quoted statement seems extreme. Compare Mayo v. Great Lakes Greyhound Lines, 333 Mich. 205, 213, 52 N.W.2d 665, 670 (1952); Ryan v. N.Y. Cen. R.R., 267 Mich. 202, 208-09, 255 N.W. 365, 367-68 (1934).

15 349 Mich. 108, 84 N.W.2d 523 (1957).

pressly limited by the contractual grievance and arbitration procedure, control over which, after the first stage, was expressly vested in union hands; and (4) the tort count, by merely asserting that the alleged breaches of contract took place pursuant to a conspiracy, added nothing to plaintiffs' claim, no such breaches having been found to have taken place.[16] The Michigan Supreme Court, on appeal, affirmed. It adopted in substance, with one exception, the reasoning and approach of the trial judge. The exception was that the court apparently found it unnecessary to rule on the union's claim that, as to the union, plaintiffs' entire cause was fatally defective for failing to allege exhaustion of internal union remedies. It disposed of the other issues, in part, as follows:

> Plaintiffs' pleadings and the exhibits stipulated in this case make it obvious that the union and its representatives received and considered plaintiffs' grievance at great length and that the general problem with which the grievance was concerned was the subject of extensive negotiation between the union and the company, which negotiations resulted in a number of supplemental memoranda interpreting the application of the seniority provisions of the contract under the reduced working force conditions in the Dearborn stamping plant . . . .
>
> The essence of plaintiffs' complaint is really that the union failed to accept plaintiffs' position upon this grievance, namely, that each of them was, under the seniority provisions of the contract, entitled to a job at all of the times concerned, and failed to urge it upon the company through all the steps in the grievance procedure. There is no promise of this nature contained in the contract. On the contrary, the contract makes amply clear that union representatives have discretion to receive, pass upon and withdraw grievances presented by individual employees.
>
> Our Court has repeatedly held that proper exercise of such discretion over grievances and interpretation of contract terms in the interest of all its members is vested in authorized representatives of the union, subject to challenge after exhaustion of the grievance procedure only on grounds of bad faith, arbitrary action or fraud.
>
> In this regard, we are mindful of the fact that individual members of the union may under certain circumstances enforce fair and proper representation of their interests on the part of their union representatives by legal action. The union's duty of fair representation is founded upon the relationship between the union and the members as recited in the constitution and by-laws of the organization . . . or in the duty imposed upon the union of fair representation by State or Federal labor statutes . . . .[17]

With respect to the limitations upon the employer's promises the court had this to say:

> The contract currently considered provided for layoffs in order of sen-

[16] Record, pp. 63-87, Cortez v. Ford Motor Company, supra note 15. It is of interest to note that one of the three named plaintiffs and ten of their 105 assignors had taken an appeal to the International Executive Board of the Union and had apparently prevailed. None of them, however, had fully exhausted their internal remedies. Record, pp. 17, 36-37. Reply Brief for Union Defendants-Appellees, p. 5.

[17] 349 Mich. 108, 120-24, 84 N.W.2d 523, 529-30.

> iority where ability to perform a job was present. It further provided for negotiations between the company and the union in the event of any dispute over the problem of ability. It further provided a detailed grievance procedure endiug in an impartial umpire's final decision, with said procedure made available to employees either through complaint to their union district committeeman or to their foreman. We are now asked to hold that this contractual machinery for settlement of grievances should be supplanted by a court judgment as to whether each individual job in the Dearborn stamping plant was suitable for female employment, and whether each of these individual female employees was able to perform a job then held by a man with lesser seniority.
>
> It is obvious that the contracting parties, by the express language of their contract, did everything humanly possible to agree to avoid such an eventuality. It is likewise obvious that for the courts to undertake such a task would quickly bring the wheels of industry to a standstill, along with the wheels of justice. Under the third-party beneficiary statute, plaintiffs, in seeking to enforce the seniority promises of the company under exhibit 1, are limited by the express provisions of the contract upon which they rely.
>
> Further, although not essential to our decision, the record indicates a failure on the part of plaintiffs to exhaust their contractual remedy before appealing to the courts.[18]

The picture emerging from this decision is that of the employee substantially boxed in between two massive institutions. On one side is a large corporation with employees numbering in the hundreds of thousands. On the other, a labor organization with a million members and an inevitably formidable organizational structure of officialdom and appeals. Relations between the two are governed by collective "agreements" running into the hundreds of pages, looking more like complex statutory enactments than contracts, and containing a quasi-judicial enforcement machinery, access to which is denied the employee when the bargaining representative declines to act.

To some of the problems raised by this picture, the Court of Appeals of Maryland addressed itself in *Jenkins v. Wm. Schluderberg-T. J. Kurdle Co.*[19] This was a suit for damages by an employee who was a member of the union, based on her discharge, allegedly in violation of the applicable collective bargaining agreement. The plaintiff alleged that the union refused to arbitrate her grievance and had thereby acted in a "discriminatory, wilful and arbitrary manner." The action was against the employer who had refused plaintiff's request for reinstatement with back pay. The employer's demurrer, asserting that the suit was barred by the collective agreement, was sustained by the trial court. The Court of Appeals, on appeal, reversed, rendering an exhaustive

[18] Id. at 125, 126, 84 N.W.2d at 531-32. The ruling was in accord with well settled Michigan authority. Leadon v. Detroit Lumber Co., 340 Mich. 74, 64 N.W.2d 681 (1954); Zdero v. Briggs Mfg. Co., 338 Mich. 549, 61 N.W.2d 615 (1953).

[19] 217 Md. 556, 144 A.2d 88 (1958).

opinion. The court decided, at the outset, that the individual employee secures enforceable rights under those provisions of the collective contract (dealing with wages, seniority, wrongful discharge, etc.) which peculiarly affect his individual rights.[20] However, the court recognized that "the employer does not wish to be harassed with a lawsuit each time an employee has a grievance . . . . Hence the collective bargaining agreement usually provides for a detailed procedure through which all grievances are channeled."[21] The grievance procedure in *Jenkins* was not entirely clear as to where control over grievances to be processed rested in the first four stages. It is clear that arbitration was available only upon application of the Company or Union, although the results of such arbitration were to be conclusive upon employees as well.[22] The court then proceeded to consider the impact of such a grievance machinery upon the employee's right of action:

> The general rule is that before an individual employee can maintain a suit, he must show that he has exhausted his contractual remedies: "This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to courts[23] . . . is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. . . . The use of these internal remedies for the adjustment of grievances is designated not only to promote settlement thereof, but also to foster more harmonious employee-employer relations." *Cone v. Union Oil Co.*, 129 Cal. App. 2d 558, 564, 277 P.2d 464, 468 (1954). Thus, if the employee refuses to take even the initial step of requesting the processing of the grievance, he will not be granted relief in the courts. The difficulty arises when he presents his grievance to the union and he is dissatisfied with the way in which the union handles his case. There are not many cases on this issue, but the trend seems to be that he cannot sue the employer if he does not like the result of the union efforts at negotiation.[24]

This, however, the Court decided was not the case before it. No claim was made by the employer, either that the contractual grievance procedure had not been invoked, or that the allegations of willfulness, arbitrary conduct and discrimination on the part of the Union for refusing to invoke arbitration were conclusions of the pleader insufficient to support the action.[25] The narrow issue raised by the employer was that, in

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[20] Id. at 559, 144 A.2d at 90.
[21] Id. at 560, 144 A.2d at 90.
[22] Id. at 560-61, 144 A.2d at 90-91.
[23] (Author's note.) The rule is similarly analogous to that requiring exhaustion of internal remedies prior to bringing actions against a private association. See nn.110-113 infra and accompanying text.
[24] 217 Md. 556, 561-62, 144 A.2d 88, 91.
[25] Id. at 562, 144 A.2d at 92. Precisely such an attack was made on plaintiffs' pleadings in the Cortez case. Reply Brief for Union Defendants, pp. 3-4.

the face of such refusal on the part of the Union, the employee's action on the contract was nevertheless barred. This assertion the court declined to accept.[26] The order of dismissal was reversed, and the case remanded, the court withholding decision on the question of whether the union was a necessary party.[27]

Several significant observations were made by the court in the course of its opinion: (1) Regardless of the presence or absence of express language so stating, the contractual remedy for the processing of grievances was exclusive, both as to individual, group or union grievances.[28] (2) Hence, as a general rule, the employer is entitled to immunity from suits by individual employees, provided "that the union is to consider carefully and fairly the alleged grievances of its members, that it is likewise to exercise its judgment and discretion fairly on behalf of its individual members in determining upon what terms it believes any grievances of theirs should be adjusted and whether such grievances should be carried to arbitration, if negotiations for settlement or adjustment fail."[29]

But where, as here, the union was alleged to have acted in an arbitrary and discriminatory manner, in failing to proceed, the suit is not barred. The court, in reaching this conclusion, relied heavily upon an analysis recently put forward by Professor Cox for dealing with this problem, quoting him, in part, as follows:

> Another alternative is to allow the employee to bring suit against the employer and the union as co-defendants upon analogy to the bill in equity which the beneficiary of a trust may maintain against the trustee who fails to press a claim against a third person. The suit would fail on the merits if it appeared that the collective bargaining representative had dropped the grievance for lack of merit or had negotiated a reasonable adjustment.[30]
>
> In my opinion the presumption should be against individual enforcement of a collective bargaining agreement unless the union has unfairly refused to act .... The bargaining representative would be guilty of a breach of duty if it refused to press a justifiable grievance either because of laziness, prejudice, or unwillingness to expend money on behalf of employees who were not members of the union. Individual enforcement would then become appropriate. The proper remedy would be an action against the union and employer analogous to the action maintained by the beneficiary against the debtor of a trust when the trustee refuses to bring the action. It would be a defense to show that the union and employer had made a settlement or that the union's decision not to press the claim was honest and reasonable.[31]

A more complete understanding of our problem may be gained by

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[26] Cf. Pattenge v. Wagner Iron Works, 275 Wis. 495, 82 N.W.2d 172 (1957).
[27] 217 Md. 556, 576, 144 A.2d 88, 99.
[28] Id. at 562, 144 A.2d at 92.
[29] Id. at 564, 144 A.2d at 93.
[30] Quoted at 217 Md. 565, 144 A.2d 93 from Cox, "Rights under a Labor Agreement," 69 Harv. L. Rev. 601, 652 (1956).
[31] Quoted at 217 Md. 565, 144 A.2d 93 from Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L.J. 850, 858 (1957).

a brief review of other decisions, both from New York and elsewhere, which form the background against which the cases previously discussed were decided. One of the cases referred to by the court in *Parker* was *Rotnofsky v. Capital Distributors Corp.*[32] This was an action for breach of an employment contract. The plaintiff claimed that he had been discharged in violation of rights to continuous employment derived from the collective bargaining agreement as incorporated in his individual employment contract. The collective agreement contained typical discharge and seniority provisions. The defendant employer moved for summary judgment which was granted and affirmed on appeal. The court reasoned that plaintiff was not a third party beneficiary of the promises in the collective agreement upon which his claim rested, but rather that these were included for the benefit of the union, contracting as principal, to ensure the retention in employ of union men.[33] The court, in *Parker,* distinguished the *Rotnofsky* case, and it is not clear to what extent the somewhat startling reasoning of this decision was there rejected by implication.[34]

The fact that the *Rotnofsky* approach, until fairly recently, retained some vitality, at least, is demonstrated by *Hudak v. Hornell Industries.*[35] A group of employees, as third party beneficiaries, filed suit against the employer for breach of the applicable collective bargaining agreement. The contract was for a fixed term, contained typical discharge and arbitration provisions, and also included a clause specifically providing that the company would continue to employ members of the union employed at the time of its making for the duration of the agreement. The four plaintiffs lost their employment as a result of a permanent shut-down of the employer in the middle of the contract period. The employer defended on the theory of the *Rotnofsky* decision, as well as on the basis that arbitration under the contract was a necessary condition precedent to bringing suit, and that the plaintiffs were, in any event, not the proper parties either to invoke arbitration or to bring suit. The trial court's dismissal of the complaint was reversed on appeal. It was reasoned that the collective agreement was of such a nature as to make the four individual plaintiff-employees third party beneficiaries. As they were key men for the employer's operation, the wording of the contract clause relating to continuous employment "was virtually tantamount to naming

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32 262 App. Div. 521, 30 N.Y.S.2d 563 (1st Dep't 1941).
33 Id. at 525, 30 N.Y.S.2d at 565.
34 5 N.Y.2d 156, 160, 156 N.E.2d 297, 299, 182 N.Y.S.2d 577, 580. The Rotnofsky approach was followed in Neves v. P. S. Thorsen & Co., Inc., 35 N.Y.S.2d 678 (Queens, N.Y. Munic. Ct. 1942) (employee action dismissed). The same action was stayed in P. S. Thorsen & Co. v. Neves, 179 Misc. 11, 37 N.Y.S.2d 113 (Sup. Ct. Queens County 1942).
35 304 N.Y. 207, 106 N.E.2d 609 (1952).

them."[36] This made the contract being sued upon one directly between the employees and the employer, which meant that the grievance and arbitration machinery relating to disputes between the union and the employer was not applicable. *Rotnofsky* could thus be distinguished on the theory that the contract clause relied upon inured to the *individual* interest of the employees rather than the collective interest of the union. The strained reasoning of both *Rotnofsky* and *Hudak* illustrates that the New York courts have yet to determine upon a coherent theory of the collective agreement lending itself to ready application.

The *Parker* decision was anticipated in *Ott v. Metropolitan Jockey Club*.[37] The plaintiff sued the employer on the collective agreement alleging he had been improperly discharged. The employer moved for a stay pending arbitration. The contract contained an arbitration clause, seniority provisions, and a clause limiting discharges to those for wrongful conduct. Plaintiff asserted that he had not conducted himself wrongfully and that the arbitration clause was not applicable in the absence of a dispute between the "parties" to the agreement. The Appellate Division, in a decision affirmed without opinion by the Court of Appeals, granted the employer's request for a stay. It was reasoned that the arbitration provisions of the collective agreement inured to the benefit of the plaintiff, and that he was consequently bound by them. One judge would have affirmed the trial court's summary judgment dismissing the action on the theory that arbitration was the full and exclusive remedy for breach of the agreement, and that since the time for arbitration of the contract had expired, the stay was a futile gesture. On either theory the action was barred.[38]

Di Rienzo v. Farrand Optical Company[39] most clearly foreshadows the rule crystallized in the *Parker* case. This was an action against the union and employer by an employee for recovery of wages allegedly lost as the result of a breach of the seniority provisions of a collective bargaining agreement. The defendant union moved for a stay pending arbitration. The stay was granted in spite of the employee's claim that the union had waived its right thereto by its prior action. It was reasoned that the employee could not rely for his cause of action on the seniority provisions of the contract and at the same time disregard other sections providing for the processing of grievances. The grievance procedure must be exhausted by the employee, and even where it has been, this

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[36] Id. at 212, 106 N.E.2d at 611.
[37] 307 N.Y. 696, 120 N.E.2d 862 (1954), affirming 282 App. Div. 946, 125 N.Y.S.2d 163 (2d Dep't 1953).
[38] But see Kadish v. New York Evening News, 7 L.R.R.M. 672 (N.Y. City Ct. 1940).
[39] 148 N.Y.S.2d 587 (Bx. N.Y. Munic. Ct. 1956).

does not give the employee a cause of action for damages against the employer.[40] The court noted that the employee is not without remedies, to wit, Section 9(a) of the Taft-Hartley Act,[41] and an action against the union for tortious mishandling of his grievance.[42]

A number of jurisdictions have not accepted what appears to be the general decisional trend of treating individual employee actions on the collective contract as barred by a union-controlled grievance procedure. Thus, the grievance procedure has been deemed to be exhausted where only the union may invoke it and where the union fails to do so.[43] The employee's action has been allowed on the theory that the grievance procedure embraces only collective, and not individual grievances.[44] The trading away of individual grievances in return for a collective advantage has been viewed as beyond the bargaining agent's authority.[45] In one case, pre-arbitration stages of the grievance procedure were inter-

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[40] See also Smithey v. St. Louis S. Ry. Co., 237 F.2d 637 (8th Cir. 1956) (applying Arkansas law); Anson v. Hiram Walker & Sons, Inc., 222 F.2d 100 (7th Cir. 1955) (action dismissed, applying Illinois law); Peoples v. Southern Pac. Co., 139 F. Supp. 783 (D. Oregon 1955) (applying Oregon law); Petty v. Missouri & A. Ry. Co., 205 Ark. 990, 167 S.W.2d 895 (1943), cert. denied, 320 U.S. 738 (1944); St. Louis, I.M. & S. Ry. Co. v. Mathews, 64 Ark. 398, 42 S.W. 902 (1897); Terrell v. Local Lodge 758, Int'l Ass'n of Mach., 141 Cal. App. 2d 17, 296 P.2d 100 (1956), 150 Cal. App. 2d 24, 309 P.2d 130 (1957); Williams v. Pacific Elec. Ry., 147 Cal. App. 2d 1, 304 P.2d 715 (Cal. Dist. Ct. of App. 1956); Cone v. Union Oil Co. of California, 129 Cal. App. 2d 558, 277 P.2d 464 (Cal. Dist. Ct. of App. 1954); Gambrel v. United Mine Workers of America, 249 S.W.2d 158 (Ky. 1952); Jorgenson v. Pennsylvania R.R., 25 N.J. 541, 138 A.2d 24 (1958); Berens v. Robineau, 278 App. Div. 710, 103 N.Y.S.2d 168 (2nd Dep't 1951) (employee action on collective agreement stayed pending arbitration); Rosen v. Seagram Distillers Corp., 54 N.Y.S.2d 322 (App. T. 1st Dep't 1944) (action dismissed); Johnson v. Kings County Lighting Co., 141 N.Y.S.2d 411 (Sup. Ct. Kings County 1955) (action stayed); Spilkewitz v. Pepper, 159 N.Y.S.2d 53 (N.Y. City Ct. 1957) (action stayed); Povey v. Midvale Co., 175 Pa. Super. 395, 105 A.2d 172 (1954), cert. denied, 348 U.S. 875 (1954).

[41] This was a reference to the proviso at 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1952), amending 49 Stat. 453 (1935), purporting to be a limitation upon the powers of the exclusive statutory collective bargaining representative by giving, both prior and following its amendment, individual employees or groups of employees the "right" to present grievances directly to the employer. It has been argued that the proviso should be interpreted as establishing an "enforceable" right on the part of the employee against the employer. Report of Committee on Improvement of Administration of Union-Management Agreements, 1954, 50 Nw. U.L. Rev. 143, 169-177 (1955); Howlett, "Contract Rights of the Individual Employee as Against the Employer," 8 Lab. L.J. 316, 317-319 (1957). However, the NLRB General Counsel has ruled that it is not unlawful for an employer to refuse to entertain individual grievances. Case No. 418, CCH Lab. L. Rep. para. 11913 (1952); Case No. 317, CCH Lab. L. Rep. para. 11588 (1952). The same position is taken in Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601, 624 (1956) and Duneau, "Employee Participation in the Grievance Aspects of Collective Bargaining," 50 Col. L. Rev. 731, 746 (1950). The statutory context and history of the proviso tend to support the view that it was inserted largely for the purpose of affording a defense against unfair labor practice charges for employers, willing or desiring to entertain individual grievances, in the face of an exelusive collective bargaining representative.

[42] Accord, Guszkowski v. United States Trucking Corp., 162 F. Supp. 847 (D.N.J. 1958) (applying New Jersey law). Contra Patrick v. Esso Standard Oil Co., 156 F. Supp. 336 (D.N.J. 1957).

[43] Alabama Power Co. v. Haygood, 266 Ala. 194, 95 So.2d 98 (1957).

[44] Kosley v. Goldblatt Bros., Inc., 251 F.2d 558 (7th Cir. 1958) (applying Indiana law).

[45] Nichols v. National Tube Co., 122 F. Supp. 726 (N.D. Ohio 1954).

preted by the court as not binding, leaving the individual employee free to sue over grievances concerning which the union had negotiated but did not press to arbitration.[46] Invocation of the grievance procedure prior to suit has been considered unnecessary where the discharged employee sued for damages rather than reinstatement,[47] where arbitration is, as a matter of state policy[48] or contract language,[49] a concurrent rather than exclusive remedy, where there is no arbitration clause,[50] or where the facts suggest that processing the complaint through the grievance procedure would be useless.[51] Absent peculiarities in the language of the grievance clauses of the collective contract involved, it seems difficult to justify individual employee actions on any of the theories enumerated above. Where the employer has promised to entertain grievances over claimed violations of the collective agreement *when processed by the union,* it is difficult to see how, on any theory of contract, the employer may be held liable in the absence of a claim, on the part of the union, of a breach.[52] And considerations of collective bargaining policy strongly point in the same direction. The underlying function of collective bargaining, certainly, is to provide a reasonably satisfactory means for private adjustments of a complex cluster of relationships among unions, employees and employers. An answer to the contention that this approach is destructive of individual interests and rights is that the union must discharge its collective bargaining responsibilities in a fair manner. A tort action will lie against the union where this duty has been breached.

Where the breach by the union occurs under circumstances suggesting collusion with the employer, little analytical difficulty is encountered in holding the employer liable in tort as well. It seems considerably more

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[46] In re Norwalk Tire & Rubber Co., 100 F. Supp. 706 (D. Conn. 1951) (Connecticut law).

[47] Dufour v. Continental Southern Lines, 219 Miss. 296, 68 So. 2d 489 (1953). See Tri-State Transit Co. of Louisiana v. Rawls, 191 Miss. 573, 1 So. 2d 497 (1941); Moore v. Illinois Cent. R.R., 180 Miss. 276, 176 So. 593 (1937).

[48] Lainmonds v. Aleo Mfg. Co., 243 N.C. 749, 92 S.E.2d 143 (1956). See also, Flaherty v. Metal Products Corp., 83 So. 2d 9 (Fla. 1955).

[49] Pettus v. Olga Coal Co., 137 W. Va. 492, 72 S.E.2d 881 (1952).

[50] Nelson v. General Electric Co., 145 A.2d 576 (Munic. Ct. of App. D.C. 1958).

[51] United Protective Workers of America v. Ford Motor Co., 194 F.2d 997 (7th Cir. 1952).

[52] There can be even less doubt that the union is not liable to the employee for breach of the collective bargaining agreement when it improperly fails to process a grievance. That conclusion reached in Cortez supra n.15 seems beyond challenge. See also Cabral v. Molders Union, 82 R.I. 178, 106 A.2d 739 (1954). A member might conceivably bring a contract action against his union grounded upon the union's by-laws. And there were, in Cortez, allegations in the tort count of a breach by the union of its duties under its constitution. Record, p. 19. Cortez v. Ford Motor Company, supra n.16. But these were ignored in the decision. Finally, a contractual grievance machinery is conceivable in which the employer secures a union promise to process all meritorious grievances. Such a promise presumably would inure to the benefit of the employees as third-party beneficiaries. This, however, runs counter to the evolution of grievance clauses, and no such clauses appear to have been encountered.

difficult, in the case of arbitrary union refusal to process a grievance, to hold the employer liable on any *contract* theory in the absence of collusion. To that extent, the result reached in *Jenkins* may be questionable. Suppose that the grievance machinery of a collective contract requires the filing of grievances *by the union* within five days of the incident precipitating the complaint. Even if we assume the union's refusal to file the grievance to be arbitrary, it is difficult to see on what theory of contract the employer has bound himself to the individual employee. In the absence of a grievance, timely filed, two practical solutions suggest themselves for resolution of this problem. The employer would appear to be in a position least engendering sympathy where his action is a gross and plain violation of the contract, i.e., where the contract specifies $2.50 per hour, the employer pays $2.00 per hour, and the union, for no apparent reason, refuses to grieve. Possibly in such a case the employee should be free to proceed forthwith against both union and employer. Or, alternatively, perhaps in such a case collusion should be readily inferred. It is apparent, however, that there are not apt to be many such cases, and that the more typical situation is that of an individual employee genuinely feeling himself to be aggrieved, with an equally genuine dispute either between himself and the union as to which interpretation of the contract is in the interest of the majority of the employees in the unit, or between the union and the employer, with the union in the particular case accepting the employer's interpretation. This group of situations is believed to represent the overwhelming majority of the cases. And it is here that judicial second-guessing at the behest of individual employees is most likely to disturb private adjustments honestly arrived at, with consequent disruption of labor relations, clogged grievance and arbitration machinery, and an undermining of responsible private accommodation. It may not be untoward to suggest that, before any rule of law is fully crystallized to deal with this problem, research be undertaken in a variety of industrial establishments to ascertain what actual union practice and employee experience has been with regard to grievances filed, rejected, processed, or compromised.

A possible approach for dealing with this second, more typical group of situations, would be to allow the aggrieved employee to bring an action on the contract against the employer somewhat analogous to a derivative, shareholder's suit.[53] The union would have to be joined, and the issue in the case would be not only whether the employer breached the agreement but also whether the union acted improperly in not pressing the

[53] The idea of derivative actions by union-members is also contained in § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), 1959 U.S. Code Cong. & Admin. News 2953, 2975-76.

grievance. The employee would prevail upon an affirmative answer to both questions. The outcome of the litigation would, in other words, attempt to produce precisely the result which would have been achieved, had the union properly done its job in the grievance machinery. This approach, in putting the aggrieved individual in the position of enforcing the *union's* rights and duties under the grievance procedure, avoids the analytic difficulties otherwise encountered in holding the employer liable on the contract, in the absence of a grievance filed by the union pursuant to a union controlled grievance machinery. Even this approach is not wholly without its problems in situations where there are stringent time limitations for the filing of grievances under the contract. But where there are not, there is no difficulty in letting the employee sue, in effect, on behalf of the bargaining representative, and in delaying the derivative action until after the employee has exhausted such reasonably expeditious internal union remedies as might be available to him for securing proper representation on the part of the bargaining agent.[54]

The tendency in the decisions towards limiting redress for individual employees to the contractual adjustment machinery has two consequences. First, employees have attempted individually to invoke that machinery by suing to compel arbitration, or to intervene at some stage in an arbitration proceeding affecting them. Second, it is leading to a fuller exploration of the bargaining representative's duty of fair representation, and to attempts at enhancing the rights of employees as union members.[55]

A bridge between the cases barring individual enforcement of the collective agreement because of the presence of a union-controlled grievance procedure, and those involving attempts at individual intervention in the

[54] The complexities in evolving a rule to deal with these problems suggests caution in resolving inherent jurisdictional difficulties. Suits by and against labor organizations on collective contracts affecting commerce are cognizeable under federal law and in the federal courts under § 301 of Taft-Hartley. 61 Stat. 156 (1947), 29 U.S.C. § 185 (1952). Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957). But see Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955). Sec. 301 has been interpreted as not giving the federal courts jurisdiction over suits by individual employees, although the statutory language does not require this result. Schatte v. International Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950), affirming 84 F. Supp. 669 (S.D. Cal. 1949), cert. denied, 340 U.S. 827 (1950). As a result of the Lincoln Mills decision, supra, suits in state courts on collective contracts affecting interstate commerce appear to be governed by federal § 301 law. But what of suits by individual employees? It would appear desirable ultimately to have all such actions governed by a coherent and uniform code, especially as liability under the rule suggested would depend on the statutory bargaining agent's federal duty of fair representation. But the time is probably not yet ripe for resolution of these problems. Compare Cox, "The Duty of Fair Representation," 2 Vill. L. Rev. 151, 169-177 (1957); Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System," 67 Yale L.J. 1327, 1351-56 (1958).

[55] The two aspects of this second avenue of approach are discussed infra in sections C. and D.

grievance procedure is provided by two New York decisions which commenced as actions of the first category. *In re Julius Wile Sons & Company*[56] was a proceeding to vacate a stay of action pending arbitration. The employee had brought suit for violation of rights as established by a collective bargaining agreement. The State Board of Mediation had previously refused to name an arbitrator because the employee, who had requested it to act, was not a party signatory to the contract. The collective bargaining representative had refused to bring the employee's grievance to arbitration. After the employee commenced action, the latter was stayed at the request of the employer. In the proceeding to vacate the stay, the employer took the position that the plaintiff's only course was to seek redress from the union. The court decided that the stay was to be maintained *on terms*. It reasoned that the plaintiff should not have been made the victim of the impasse. The only right assured to the employer was that the dispute be arbitrated. The employer may insist on this right, by arbitrating the claim *with the employee*. But the employer could not *both* bar the individual's suit *and* insist that he was only obligated to deal with the union, when the union refused to press the employee's grievance. To a similar affect was *Tremarchi v. Sheffield Farms Company*.[57] In that case the court entertained a petition by a group of employees to compel their employer to arbitrate an overtime pay dispute, ruling that while the arbitration clause in the collective contract does not give the employees the right to *require* either the union or the employer to arbitrate, they would be free to sue the employer directly on the collective contract if (1) the union refused their demand to arbitrate the grievance for them (allowing the individuals involved to intervene in the proceeding), and (2) if the employer refused to arbitrate with the employees individually (the employees sharing the cost of the arbitration). These decisions must be contrasted with the great weight of authority in New York that individual employees can not compel the employer to arbitrate, where the arbitration clause indicates the arbitration is to be between the union and the employer.[58] Further, their vitality

[56] 199 Misc. 654, 102 N.Y.S.2d 862 (Sup. Ct. N.Y. County 1951).

[57] 26 Lab. Arb. 741 (Sup. Ct. N.Y. County 1956).

[58] The leading case is Bianculli v. Brooklyn Union Gas Co., 14 Misc. 2d 297, 115 N.Y.S.2d 715 (Sup. Ct. Kings County 1952). The court, in a famous passage, there stated:

> The philosophy of the Union in retaining control over disputes and of the Company in requiring the same is sound. A contrary procedure which would allow each individual employee to overrule and supersede the governing body of a Union would create a condition of disorder and instability which would be disastrous to labor as well as industry . . . . Id. at 299, 115 N.Y.S.2d at 718.

See also Calca v. Tobin Packing Co., 12 Misc. 2d 455, 176 N.Y.S.2d 910 (Sup. Ct. Albany County 1958); Brettner v. Canada Dry Ginger Ale, Inc., 9 Misc. 2d 725, 168 N.Y.S.2d 180 (Sup. Ct. Nassau County 1957); Cox v. R. H. Macey & Co., 14 Misc. 2d 294, 152 N.Y.S.2d 858 (Sup. Ct. N.Y. County 1956); Shalgen v. Lipsett, Inc., 14 Misc. 2d 296, 116 N.Y.S.2d 165 (1952); Kaufman v. Leather Workers, 9 Lab. Arb. 1030 (Sup. Ct.

appears to have been considerably dissipated by the decision of the Court of Appeals of New York in the *Parker* case.[59]

Intervention by individual employees in union-employer arbitrations has, in some instances, been allowed. *In the Matter of Iroquois Beverage Corp.*,[60] a group of employees moved to intervene in arbitration proceedings under a collective bargaining agreement. The union had brought a grievance to arbitration which, if won by the union, would have improved the seniority of 32 employees at the expense of the petitioners. Both the employer and the union opposed the intervention, citing *Bianculli* and related decisions.[61] The court granted the motion to intervene, noting that the petitioners were not attacking the union's right to arbitrate, and apparently relying in particular upon the fact that the present dispute with the employer was the consequence of a collusive seniority arrangement of some years' standing. This rendered the union morally untrustworthy and over-rode such risks of confusion as ordinarily might be entailed in intervention of this sort.[62]

The precise sweep of the approach represented by the *Iroquois Co.* decision is not clear. The most exhaustive treatment of the problem by a New York court will be found in *Donato v. American Locomotive Co.*[63] That decision, however, must be considered in light of the treatment it subsequently received by the Court of Appeals in the *Parker* case. Hence, it seems questionable, at best, whether, absent special circum-

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N.Y. County 1948); Petition of Minasian 14 N.Y.S.2d 818 (Sup. Ct. N.Y. County 1939). See also Donato v. American Locomotive Co., 306 N.Y. 966, 120 N.E.2d 227 affirming 283 App. Div. 410, 127 N.Y.S.2d 709 (3rd Dep't 1954); Matter of New York Times Co., and Newspaper Guild of New York, Local 3, 2 App. Div. 2d 31, 152 N.Y.S.2d 884 (1st Dep't 1956). For contrary holdings, see Gilden v. Singer Mfg. Co., 145 Conn. 117, 139 A.2d 611 (1958); Arsenault v. General Electric Co., 21 Conn. Supp. 98, 145 A.2d 137 (1958). See also Fagliarone v. Consolidated Film Indus., Inc., 20 N.J. Misc. 193, 26 A.2d 425 (1942); General Cable Corp., 20 Lab. Arb. 443 (arbitration award, 1953).

[59] See nn.6-10, supra, and accompanying text.

[60] 14 Misc. 2d 290, 159 N.Y.S.2d 256 (Sup. Ct. Erie County 1955).

[61] See n.58, supra.

[62] Accord, Soto v. Lenscraft Optical Corp., 28 Lab. Arb. 278 (Sup. Ct. N.Y. County 1957), aff'd, 7 App. Div. 2d 1, 180 N.Y.S.2d 388 (1st Dep't 1958), rearg. denied and appeal granted, 7 App. Div. 2d 845, 182 N.Y.S.2d 330 (1st Dep't 1959). Cf. General Warehousemen's Union, Local 852 v. Glidden Co., 9 Misc. 2d 648, 169 N.Y.S.2d 759 (Sup. Ct. Queens County 1957) (Intervention allowed under general provisions of New York Civil Practice Act. § 193-b(1) C.P.A.); Application of American Machine & Foundry Co., 193 Misc. 990, 85 N.Y.S.2d 456 (Sup. Ct. Kings County 1948); Donnelly v. United Fruit Co., 28 Lab. Arb. 64 (Sup. Ct. N.Y. County 1957) (dictum); Busch Jewelry Co., Inc. v. United Retail Employees' Union, Local 830, 170 Misc. 482, 10 N.Y.S.2d 519 (Sup. Ct. N.Y. County 1939) (employees have standing to move to set aside arbitration award affecting them); Curtis v. New York World Telegram Corp., 282 App. Div. 183, 121 N.Y.S.2d 825 (1st Dep't 1953); Publishers' Ass'n of New York City v. New York Typographical Union, 168 Misc. 267, 5 N.Y.S.2d 847 (Sup. Ct. N.Y. County 1938). But see I. Miller & Sons, Inc. v. United Office and Professional Workers, Local 16, 195 Misc. 20, 88 N.Y.S.2d 573 (Sup. Ct. N.Y. County 1949); Darrell v. Newshaeffer, Inc., 22 Lab. Arb. 240 (Sup. Ct. N.Y. County 1954); In re Spottswood, 88 N.Y.S.2d 572 (Sup. Ct. N.Y. County 1945).

[63] 283 App. Div. 410, 127 N.Y.S.2d 709 (3rd Dep't), aff'd, 306 N.Y. 966, 120 N.E.2d 227 (1954).

stances, intervention by affected individuals either will be or should be allowed. In the *Donato* case, plaintiff claimed he had been discharged by the employer under circumstances not constituting "proper cause" within the meaning of the applicable collective agreement. He protested the discharge, and preliminary steps of the grievance procedure were invoked. Subsequently, arbitration was demanded by the union and took place, but only after a delay of over one year. A tripartite arbitration panel upheld the discharge by a vote of two to one. The impartial member of the panel who cast the deciding vote concluded, "that Donato's discharge was not originally justified," but that the union's lack of diligence amounted to acquiescence by it to the company's judgment.[64] Plaintiff's complaint originally alleged that the defendant union had "wrongfully, negligently and maliciously" failed to protect his rights. Plaintiff sued for reinstatement and damages. This complaint had been dismissed as to both the union and employer on motion for legal insufficiency. The dismissal had been affirmed,[65] but the court granted plaintiff leave to amend, suggesting that an action in equity might lie to vacate the arbitration award. Plaintiff subsequently so amended. In considering the legal sufficiency of the amended complaint, the Appellate Division concluded that decisions of the Court of Appeals handed down in the interval settled that the statutory method for vacating arbitration awards was exclusive, that plaintiff's action had been brought too late to meet the statutory time requirements, and that a plenary suit in equity could not be brought as a substitute for the statutory action. Halpern, J., writing for the Court, extensively reviewed the law bearing generally upon the problem:

> If every person who had an interest in an arbitration proceeding to which he was not a party had the right to attack it by a plenary suit in equity, the situation would be a chaotic one . . . . Thus, for example, it would be readily agreed that if the beneficiaries of a trust were represented in an arbitration proceeding by the trustee, the beneficiaries would be bound by the award and the only permissible method of attacking it would be by motion to vacate made by the trustee in the manner and within the time prescribed by law. . . .
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> The plaintiff entrusted his grievance solely to the hands of his union. . . . He obviously consented to have his union represent him in the arbitration proceeding and he is bound by its conduct of the proceeding. In this situation if the plaintiff has any grievance, it is against his own union.
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> We are not called upon to decide in this case what remedies plaintiff might have had if he had acted promptly and had pursued a different course. If that question were before us, the answer to it would depend upon the choice which we would make between conflicting views as to the rights of an indi-

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[64] 283 App. Div. 410, 412, 127 N.Y.S.2d 709, 711.
[65] 279 App. Div. 545, 111 N.Y.S.2d 434 (3rd Dep't 1952).

vidual employee under a conventional collective bargaining agreement. The law upon this subject is still in a state of flux . . . .

(1) If it is held that an employee has no right to intervene in an arbitration proceeding or to make a motion to vacate the award, this must be upon the ground that the employee's interests are wholly committed to the union's control and that the union has the sole right to conduct the arbitration proceeding and to attack an adverse award. It does not follow from this that the employee has the right to attack the arbitration award in a plenary suit in equity; on the contrary, the only conclusion which logically follows is that the employee is without any remedy, except as against his own union, if he claims that the union mishandled the arbitration proceeding or improperly failed to move to vacate the award. If this conclusion is reached upon the premise here set forth, this is not an exaltation of procedure over substance; it rests rather upon a proposition of substantive law limiting the right of the individual employee under a collective bargaining agreement.

(2) On the other hand, if it is held as a matter of substantive law that the employee has a legally enforcible right as an individual under the arbitration provisions of the collective bargaining agreement, it follows as a matter of procedural law that he has the right to intervene as an interested party in an arbitration proceeding brought by the union with respect to his grievance and to move to vacate an adverse award in such a proceeding. Thus it appears that if the employee's substantive right as an individual is recognized, there is readily available an adequate statutory remedy to protect that right. The statutory remedy is, of course, exclusive and must be exercised in the manner and within the time prescribed by statute. Upon this view of the case, the plaintiff should have intervened in the arbitration proceeding and should have moved to vacate the award within three months after the filing of the award. He had no right to bring suit in equity to attack the award long after the expiration of the three month period.[66]

It would appear that the Court of Appeals in *Parker* accepted the first of the above two approaches set forth by Judge Halpern.

C. The Right to Fair Representation[67]

I regard collective bargaining as a system for the *private* regulation of employment conditions in a complex industrial society. For the system to be effective, public intervention must be kept at a minimum. For the system to be fair, quasi-constitutional limitations must be placed upon the scope of private action. It follows that these limitations must be such as to assure fairness in private action, without unduly hampering the freedom of such action. From the development of the law governing individual enforcement of the collective agreement previously described, follows the need for channeling the effective enforcement of individual

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66 283 App. Div. 410, 414-417, 127 N.Y.S.2d 709, 713-16.

67 A comprehensive discussion will be found in Cox, "The Duty of Fair Representation," 2 Vill. L. Rev. 151 (1957). See also Gregory, "Fiduciary Standards and the Bargaining and Grievance Process," 8 Lab. L.J. 843 (1957); Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System," 67 Yale L.J. 1327, 1331-43 (1958).

rights through the instrument of collective action, namely, the union. Any other approach, it is submitted, will substantially interfere with the effective functioning of the collective bargaining process, and the benefits gained from it. To allow indiscriminate individual enforcement of rights under the collective agreement entails the risk of significantly undermining two important considerations in industrial relations. First, it makes employer operations cumbersome and inefficient. The wise employer, once obliged to deal with a union, will prefer the simplicity of *one* grievance procedure in which it deals with *one* responsible party. And the effectiveness of the union is threatened when individual action undermines its ability to compromise the frequently conflicting interests of its constituency.

How, then, can individual interests be adequately protected in the context of these institutional interests? Two avenues of approach must be simultaneously employed. The first is an enhancement and more detailed elaboration of the scope of the duty of fair representation.[68] This approach would apply whether the duty is invoked in actions (on a tort or trust theory) against the representative only, or in derivative actions against the representative and (on the collective contract) against the employer.

Two sources of the duty of the representative appear to have emerged, both independently and simultaneously. It has been imposed as an obligation concomitant to the power of exclusive representation in the bargaining unit under the two major federal labor relations statutes.[69] It also has been imposed under state common law of voluntary associations[70] (being an amalgam of the law of torts, agency, and contracts, with the suggestion now that the law of trusts be added). The scope of the duty under federal law, while embracing both the negotiation and administration of the collective agreement,[71] has not gone significantly beyond prohibiting discriminations on account of race and union membership.[72] The

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[68] The second approach will be outlined in nn.96-109 infra and accompanying text.

[69] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

[70] E.g., Hartley v. Brotherhood of Ry. Station Employees, 283 Mich. 201, 207, 277 N.W. 885, 887 (1938). The duty under state law is ordinarily enunciated in the context of litigation asserting infringements on rights under collective agreements. The courts appear, nevertheless, to have it quite clearly in mind. See Jenkins v. Wm. Schluderberg–T. J. Kurdle Co., 217 Md. 556, 144 A.2d 88 (1958), and authorities there cited at 217 Md. 566-571, 144 A.2d 94-97.

[71] Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).

[72] Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38 (1953); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944); Hughes Tool Co., 104 NLRB 318 (1953); but see Williams v. Yellow Cab Co. of Pittsburg, Pa., 200 F.2d 302 (3rd Cir. 1952).

scope of the duty under state law is harder to define. Most of the cases involve claimed infringements of seniority rights, in a context of union-employer negotiations over changes of seniority arrangements favoring some employees over others (as is inevitably inherent in such situations). The trend in the decisions has been to uphold any negotiated arrangement for which a plausible rationalization can be advanced.[73] Federally prohibited discriminations presumably would be struck down. On the other hand, discrimination against women married to gainfully employed husbands has been allowed during periods of high unemployment.[74] Presumably, the general economic circumstance rendered such an arrangement plausible, even though it entailed the *taking away* of seniority rights previously enjoyed. There is a troublesome element present when benefits earlier relied upon and expected to be continued in the future, are obliterated by collective bargaining. Such benefits assume the characteristics of "vesting," irrespective of contractual silence or even express contractual language to the contrary. Yet the intricacies of particular seniority systems are frequently so confusing and the variations (departmental, plant-wide, work-classification-wide, etc.) so numerous that sporadic judicial intervention is so difficult as to be more apt to be disruptive rather than corrective.

The hardest problems are presented by contract modifications directly detrimental to money benefits already "earned." Suppose, for instance, a majority of young employees authorize the bargaining representative to negotiate a change in a vacation pay plan, which benefits them at the expense of a minority of older workers. Suppose further, that the change is made immediately prior to the vacation period due under the old plan. May the plan be modified for the year already past—in a sense retroactively? May it be changed prospectively? Should express provisions regarding vesting be deemed controlling? Should vesting of rights be readily implied? Is it possible to draw limits which are sufficiently specific to afford guidance, without significantly hampering the evolution of the collective bargaining process which, of necessity, must be kept flexible to keep pace with changing conditions in a dynamic economy? Since collective bargaining is private socio-economic legislation, must we not give the bargainers *at least* the flexibility of a legislature functioning under a constitution? I find it exceedingly difficult to formulate a stand-

[73] E.g., Capra v. Brotherhood of Firemen & Enginemen, Local Lodge No. 273, 102 Colo. 63, 76 P.2d 738 (1938); Donovan v. Travers, 285 Mass. 167, 188 N.E. 705 (1934); Mayo v. Great Lakes Greyhound Lines, 333 Mich. 205, 52 N.W.2d 665 (1952); Ryan v. N.Y. Central R.R. Co., 267 Mich. 202, 255 N.W. 365 (1934); Belanger v. Amalgamated Ass'n of Street Employees Local 1128, 254 Wisc. 344, 36 N.W.2d 414 (1949), 256 Wisc. 479, 41 N.W.2d 607 (1950). See Holman v. Industrial Stamping and Manufacturing Co., 344 Mich. 235, 74 N.W.2d 322 (1955).

[74] Hartley v. Brotherhood of Ry. Station Employees, 283 Mich. 201, 277 N.W. 885 (1938).

ard going beyond the general injunction that the arrangements reached must be rationally and plausibly defensible. They need not be, to the outsider, the best, the most sensible, nor even the fairest possible solution. But a plausible explanation must be possible for the arrangement settled upon.[75] Any more stringent limitation, on the other hand, runs the grave risk of allowing uninformed judicial second-guessing regarding what are usually detailed and complicated problems, solved by parties familiar with them, often in a context of considerable conflict, with delicate balances of mutual acceptability achieved in a vortex of power, reason, and persuasion.[76]

Thus far we have considered what may be termed the quasi-legislative aspect of collective bargaining. Although not recognized with any degree of clarity in the decisions, there conceivably are some differences in the duty of fair representation as applied to grievance handling. This function, in that it deals with claims of violation of existing collective contracts, may be viewed as more analogous to adjudication, as contrasted with legislation. It is argnable that, whatever the needs for flexibility and wide discretion in the negotiation of new or modification of existing collective contracts, no such flexibility is either needed or appropriate, when rights under a contract are involved. The standards for judgment in this area have been less than perfectly formulated. In general terms they are frequently stated as follows: The union's conduct must not be wilful, arbitrary, capricious or discriminatory. The union must not have declined to press the grievance out of laziness or prejudice, or out of unwillingness to expend money on behalf of non-members. Its decisions with respect to individual grievances must have been honest and reasonable. The rejection of a grievance by the union must have been *on the merits,* in the exercise of honest discretion and/or sound judgment, following a complete and fair investigation. The rejection must not have been unjust in any

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[75] The decision going farthest, to my knowledge, and possibly going beyond the standard suggested above, in according freedom of action to the union is Jennings v. Jennings, 91 N.E.2d 899 (Ohio App. 1949). There a majority of employees was allowed to distribute, on a uniform lump sum rather than an individual inequity basis, a fund contributed by the employer for adjustment of intra-plant wage inequities.

No very satisfactory standards for judicial review of the results of the bargaining process have been formulated. See Note, "Employee Challenges to Collective Bargaining Contracts: The Scope of Judicial Review," 62 Yale L.J. 282 (1953), suggesting a "policy" test; Note, "Duty of Union to Minority Groups in Bargaining Unit," 65 Harv. L. Rev. 490 (1952), suggesting somewhat more sweeping review under a "reasonableness" test; Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System," 67 Yale L.J. 1327, 1357-61 (1958). Professor Wellington suggests that the NLRB be given authority to enforce the duty of fair representation. The same question is explored in Cox, "The Duty of Fair Representation," 2 Vill. L. Rev. 151, 169-75 (1957).

[76] This was substantially the conclusion reached, in a somewhat different context, by so experienced an observer of labor relations as Harry Shulman in his "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1001-02, 1024 (1955). He also had no doubt concerning the wisdom of union control over the grievance process. Matter of Ford Motor Co., Opinion A-69 (1944), reprinted in Cox, Cases on Labor Law 724 (4th ed. 1958).

respect. There must not have been bad faith or fraud. The bargaining agent must not have acted in a negligent manner.[77]

Two observations seem appropriate. The concepts derive largely from the law of torts and trusts. And the concepts, except in "raw cases," are not easily applied. Presumably that conduct will be characterized as arbitrary and capricious which does not strike one as reasonable. That gets us little further. The easiest cases would appear to be those involving dishonesty, fraud, and union-employer collusion. Yet, even taking a seemingly obvious concept such as collusion, difficulties are encountered. Any agreement is "collusive," in the sense that two parties come together. The grievance process necessarily entails "negotiational" overtones; it partakes of "higgling" as well as adjudication. Nor can we have it otherwise, if we want unions and employers to adjust their own disputes—if, in other words, we want collective bargaining to function as a system of industrial *self*-government. Take the case of three contested grievances, equally important to the aggrieved individuals, objectively ranked in merit, assuming this is possible, One, Two and Three, with Number One of great importance to the union because of the breadth of its implications. What discretion should we give the union to accept a satisfactory settlement on Number One, in return for dropping Numbers Two and Three? What discretion for accepting a satisfactory settlement on Numbers One and Two, in return for dropping Number Three? Conversely, take the doubtful minor seniority grievance, involving speculative damages, which looms large to the individual employee, but would cost the employer and the union each $250.00 to arbitrate. Should the union be required to take it up? Should the employer, in the face of union refusal, be required to arbitrate with the individual involved, even assuming the latter is willing to pay half the cost? Consider, finally, the application of a proposed "negligence" standard. What tests apply? The "reasonable man" test? Should we devise a test for a "professional" collective bargaining representative? For this is, after all, what unions hold themselves out to be: large, experienced, well-staffed and successful. Should the test, perhaps, be different for the inarticulate, newly elected local union official from that applied to the experienced business agent, or the highly trained research director of a large national union? Suppose the situation of a newly elected, inexperienced shop steward, being the immediate bargaining representative of some 100 employees. An employee leaves a grievance slip with him. The steward puts it into his overall pocket, honestly and with good intentions. The overalls are washed, the slip is lost, memory

[77] The standards are paraphrased from the decisions cited by the Court of Appeals of Maryland in Jenkins v. Wm. Schluderberg-T. J. Kurdle Co., 217 Md. 556, 566-571, 144 A.2d 88, 94-97 (1958). They are typical of those found in scores of decisions.

lapses, and the contractual time limitations for the filing of the grievance go by. Such cases happen.[78] Who is liable? Not the employer, even though he breached the contract, for no timely grievance was filed. The union? The steward? But he was inexperienced, perhaps excited by the weight of his new responsibilities, *and the people's choice!* Perhaps the grievant voted for him, made him his agent, even campaigned for him! Perhaps the grievant opposed him, even ran against him, and now sues him! Where, in such cases should the law's sympathies fall?

It is at this point that it may again be urged to allow individual enforcement of contract rights as an alternative. Attention can be drawn to the system, used in Europe, allowing for individual *or* union enforcement of rights under the labor contract before a complex system of special labor courts established for that purpose.[79] In other words, one is tempted to encourage by-passing the inexperienced shop steward, the private grievance machinery, and all its higgling, for the purpose of protecting the individual worker. Some important points may be lost sight of. *First,* absent collective bargaining, no enforceable *right* to grieve exists at all in the industrial context. There is no constitutional guarantee of the right to petition the employer. *Second,* do we not burn the barn to roast the pig? The basic values of our labor relations system are those of private rather than public, voluntary rather than governmental, self-regulation. This has allowed for *contractual,* instead of statutory regulation of employment, for flexibility, rather than rigidity. It has been accomplished through the instrument of a labor movement, which, for all its faults, has been *shop* and *job*-conscious, rather than primarily politically conscious. And *third,* by encouraging the by-passing of the inexperienced shop-steward, do we not destroy a significant link between the employee and the bargaining instrumentality? Over the undemocratic nature of this instrumentality we are already disturbed. If we reduce its in-plant function, do we not accelerate the tendency toward hierarchical bureaucratization, toward remoteness from constituency?

A leading decision dealing with the scope of the bargaining representative's authority in the handling of grievances is *Elgin, Joliet and Eastern Ry. v. Burley.*[80] Burley and nine other employees sought back pay over a number of years to which they considered themselves entitled under the applicable collective bargaining agreement. Their claim had been presented by the union's Grievance Committee, and a compromise settlement was agreed upon between the committee and the employer. The em-

[78] See Case Number 8, Glenn D. Conger v. Local Union 735, Proceedings, 16th Constitutional Convention, International Union, United Automobile Workers, pp. 405-08 (1957).

[79] See McPherson, "Basic Issues in German Labor Court Structure," 5 Lab. L.J. 439 (1954); Braun, "Labor Disputes and Their Settlement," Pt. IV (1955).

[80] 325 U.S. 711 (1945).

ployees were dissatisfied, and asserted that they had not authorized the compromise. Their claim was then taken before the Railroad Adjustment Board. The Board accepted the settlement as conclusive, and denied the claim. The employees then commenced suit in Federal District Court, alleging a violation of the collective agreement. The District Court rendered summary judgment for the employer. The Circuit Court of Appeals reversed,[81] holding that it was error not to have decided, as an issue of fact, the question of the union's authority to compromise the grievance.

The Supreme Court granted certiorari,[82] and affirmed, five to four. The majority of the Court agreed that the question of the union's authority was one which needed to be determined upon the facts.[83] But beyond this, Justice Rutledge devoted a considerable portion of his opinion to the distinction between a union's authority to negotiate contracts establishing rights of employees *in futuro,* and its authority to negotiate with the employer concerning "accrued" rights under existing agreements.[84] This approach precipitated a sharp dissent from Justice Frankfurter:

> This is not a simple little case about an agent's authority. Demands of the employee's representative imply not only authority from those for whom he speaks but the duty of respect from those to whom he speaks .... We do not have the ordinary case where a third person dealing with an ostensible agent must at his peril ascertain the agent's authority. In such a situation a person may protect himself by refusing to deal. Here petitioner has a duty to deal. If petitioner refuses to deal with the officials of the employees' union by challenging their authority, it does so under pain of penalty. If it deals with them on the reasonable belief that the grievance officials of the Brotherhood are acting in accordance with customary union procedure, settlements thus made ought not to be at the hazard of being jettisoned by future litigation. To allow such settlements to be thus set aside is to obstruct the smooth working of the Act. It undermines the confidence so indispensable to adjustment by negotiation, which is the vital object of the Act. . . .[85]

Justice Frankfurter then discussed, somewhat unnecessarily (as the action was only against the employer, and not against the union) but persuasively, the considerations mitigating against allowing suits by employee-members over employment disputes, without prior exhaustion of remedies available within the union:

> Union membership generates complicated relations. Policy counsels against judicial intrusion upon these relations. If resort to courts is at all available, it certainly should not disregard and displace the arrangements which the members of the organization voluntarily establish for their reciprocal

81 140 F.2d 488 (7th Cir. 1943).
82 323 U.S. 690 (1944).
83 325 U.S. at 748-49.
84 Id. at 722-41.
85 Id. at 755-56.

interests and by which they bound themselves to be governed. The rights and duties of membership are governed by the rules of the Brotherhood. . . . To ask courts to adjudicate the meaning of the Brotherhood rules and customs without preliminary resort to remedial proceedings within the Brotherhood is to encourage influences of disruption within the union instead of fostering these unions as stabilizing forces. Rules of fraternal organizations, with all the customs and assumptions that give them life, cannot be treated as though they were ordinary legal documents of settled meaning. "Freedom of litigation, for instance, is hardly so essential a part of the democratic process that the courts should be asked to strike down all hindrances to its pursuit. The courts are as wise, to take an example of this, in adhering to the general requirement that all available remedies within the union be exhausted before redress is sought before them as they are unwise in many of the exceptions they have grafted upon this rule." Witmer, Civil Liberties and the Trade Union (1941) 50 Yale L.J. 621, 630 . . .

If, when a dispute arises over the meaning of a collective agreement, the legally designated railroad bargaining unit cannot negotiate with the carrier without first obtaining the specific authorization of every individual member of the union who may be financially involved in the dispute, it not only weakens the union by encouraging divisive elements. It gravely handicaps the union in its power to bargain responsibly. That is not all. Not to allow the duly elected officers of an accredited union to speak for its membership in accordance with the terms of the internal government of the union and to permit any member of the union to pursue his own interest under a collective agreement undermines the very conception of a collective agreement . . . . To allow every individual worker to base individual claims on his private notions of the scope and meaning of a collective agreement intended to lay down uniform standards for all those covered by the collective agreement, is to permit juries and courts to make varying findings and give varying constructions to an agreement inevitably couched in words or phrases reflecting the habits, usage and understanding of the railroad industry. Thus will be introduced those dislocating differentiations for workers in the same craft which have always been among the most fertile provocations to friction, strife, and strike . . . .[86]

The decision engendered considerable protest from interested parties, and the Court granted a petition for rehearing.[87] Upon reargument, the earlier decision was affirmed.[88] Justice Rutledge, in another opinion, included language, however, which came close to taking the heart out of the plaintiff's case. He suggested that where the settlement was reached by the union representatives in accordance with custom and usage, this may be an adequate basis of authority.[89] Further, if the individual employee has knowledge or notice of what is transpiring with reference to his claim, he may not stand by and attack a settlement, after it has been reached, because he is dissatisfied with the outcome of the negotiations.[90] Justice Frankfurter, in another dissent, charged that the

86 Id. at 757-59.
87 326 U.S. 801 (1945).
88 327 U.S. 661 (1946).
89 Id. at 663.
90 Id. at 665-66.

majority, although in form adhering to the earlier result, had so modified the decision as to extract "from it almost all of its vitality."[91] Justice Rutledge, prophetically, included the following footnote in his opinion: "Furthermore, so far as union members are concerned, and they are the only persons involved as respondents in this cause, it is altogether possible for the union to secure authority in these respects within well established rules relating to unincorporated organizations and their relations with their members, by appropriate provisions in their by-laws, constitution or other governing regulations, as well as by usage or custom."[92] The suggestion appears to have been taken to heart. In 1955, Justice Frankfurter was able to write as follows: "[Unions] were quick to secure amendment to their constitutions or statutes in order to avoid the decision of this Court in [the Burley case]."[93]

> The Brotherhood of Locomotive Engineers amended their Standing Rules to provide for automatic consent of all members to the Brotherhood's prosecution of grievances at their Tenth Triennial Convention in March and April 1947. The Brotherhood of Locomotive Firemen and Enginemen added a similar provision to their Constitution at their 35th Convention in 1947. The Order of Railway Conductors and Brakemen amended their "statute" in a similar fashion in 1946. The Brotherhood of Railroad Trainmen at their 1946 Convention adopted a new General Rule which empowered the Brotherhood to prosecute grievances "Except in individual cases where the member or members involved serve seasonable written notice on the Brotherhood to the contrary."[94]

The result of the *Burley* case is, thus, to place control over individual grievances into the representative's hands in any instance where the union in its by-laws sets forth its bargaining authority with sufficient breadth.[95] In consequence, the individual member-employee remains in the position of having his employment rights both protected and controlled by the collective bargaining representative.

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[91] Id. at 668.

[92] Id. at 663 n.2.

[93] Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 458 (1955).

[94] Id. at 458 n.28.

[95] Typical provisions were added to the constitution of the United Auto Workers' Union in 1946, and retained since:

> The International Union and the Local Union to which the member belongs shall be his exclusive representative for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and for the negotiation and execution of contracts with employers covering all such matters, including contracts requiring his membership or the continuance of his membership in the union as a condition of his employment or continued employment, and contracts requiring the employer to deduct, collect, or assist in collecting from his wages any dues, fees, assessments, fines or other contributions payable to the International Union or his Local Union.
>
> The International Union and the Local Union to which the member belongs, and each of them, are by him irrevocably designated, authorized and empowered exclusively to appear and act for him and in his behalf before any board, court, committee or other tribunal in any matter affecting his status as an employee or as a member of his Local Union or the International Union, and exclusively to act as his agent to

D. Membership Rights Within the Union[96]

If the basis of our policy is to be one of channeling enforcement of and control over individual rights into and through the collective bargaining relationship, the collective bargaining agent must not only be obliged to act fairly and honestly, but the union must also contain within itself channels for expression and participation through which the individual's voice can make itself felt. Only thus can it be legitimately asserted that *collective* representation should be given priority. Only thus do we have assurance that collective representation will be fair, honest, and effective. The price, then, of any concession in the direction of union control over individual interests is union responsibility. What this entails, in my judgment, beyond meeting strictest requirements of honesty and performance at a level of at least reasonable efficiency, is as high a degree of democratic self-government as is consistent with the functions which we expect unions to perform in our economy.[97]

It is for this reason that recent legislative concern with union finances, conflicts of interest of union officials, fair and open elections, control of local unions by national officers through the trusteeship device, and with rights of union members generally, seems to me to be the most fruitful area of exploration for dealing with the problem of individual rights in collective labor relations.[98] Our policy, we noted at the outset, is confronted with a paradox. We support collective bargaining because it *enhances* employee rights in an industrial economy of large-scale enterprise. Yet by doing so, we also submerge the individual in collective insti-

represent and bind him in the presentation, prosecution, adjustment and settlement of all grievances, complaints or disputes of any kind or character arising out of the employer-employee relationship, as fully and to all intents and purposes as he might or could do if personally present.

Compare also the following provision in the grievance procedure set forth in the UAW-Ford Motor Company Agreement (Art. VII):

The National Ford Department [of the Union] is authorized to withdraw or settle with the Company any grievance appealed by the Union to the Umpire at any time before it is heard by the Umpire.

[96] For some comprehensive and path-breaking works in the field, see generally Summers, "Disciplinary Powers of Unions," 3 Ind. & Lab. Rel. Rev. 483 (1950); "Disciplinary Procedures of Unions," 4 id. 15 (1950); "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951); "The Right to Join a Union," 47 Colum. L. Rev. 33 (1947). See also Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609 (1959); Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System," 67 Yale L.J. 1327 (1958).

[97] Undemocratic practices of unions are sometimes defended on grounds that they are necessary to enable unions to deal with centrally controlled employers, that the tactics and strategy of collective bargaining require the efficiency of a quasi-military operation, and that "delivering the economic goods" is more important than democratic membership rights. All these elements do place limits on the degree of possible membership participation in varying situations. But the limits should be imposed only insofar as necessary to enable unions effectively to discharge their bargaining function, and not be used as an excuse for going beyond the point of necessity. Of course, this point is not always easy to find. The position that this point is impossible to locate is maintained in Magrath, "Democracy in Overalls: The Futile Quest for Union Democracy," 12 Ind. & Lab. Rel. Rev. 503 (1959).

[98] See Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), 1959 U.S. Code Cong. & Admin. News 2953 et seq. For relevant state legislation, see N.Y.

tutions. The union makes the place of work a more democratic one by substituting bilateral bargaining for unilateral control and dictation. We must now make the union more democratic to assure that it will be more responsive to individual and minority interests, by giving holders of these interests adequate means of making their voice felt *within* the union. This is not a perfect solution. Such solutions are rare in an imperfect world. Instances still will occur that outrage the civil-libertarian purist. But a considerable forward step will thereby be taken, nevertheless, and I am not certain that it is possible at this juncture to go much beyond, without seriously jeopardizing collective bargaining itself, which necessarily remains the cornerstone of our labor policy.

One point seems to me to be elemental. The right *to* union membership needs to be enhanced. For the individual employee to make his voice felt in the union requires that he be allowed to join and to participate. The law has done an appalling amount of pussy-footing in failing to recognize that the union is a sufficiently significant instrument in the working lives of people so as to require modification of the general rule that a voluntary association is free to reject for membership anyone it pleases.[99] Beginnings have been made, in some jurisdictions, along three lines: (1) in the form of anti-discrimination legislation;[100] (2) by decisions, holding that where the union controls the right to employment by the closed-shop device, the union may not also be a closed union;[101] and (3) by holding unions, acting under governmental protection, to be quasi-public instrumentalities which may not practice unconstitutional discriminations.[102]

Labor and Management Improper Practices Act, Ch. 451, L. 1959, McKinney's Session Laws 558-568 (1959). Simultaneous legislative activity on the federal and state level is apt to precipitate some confusion but current Congressional thinking seems to favor concurrent jurisdiction. See e.g., §§ 103, 306, 603 and 604 of the new federal Act. The wisdom of federal legislation is questioned in Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System," 67 Yale L.J. 1327, 1351-56 (1958). Compare Summers, "The Role of Legislation in Internal Union Affairs, Proceedings, Industrial Relations Research Association," 260, 267-70 (1959).

[99] E.g., Miller v. Ruehl, 166 Misc. 479, 2 N.Y.S.2d 394 (Sup. Ct. Erie County 1938); Colson v. Gelber, 192 Misc. 520, 80 N.Y.S.2d 448 (Sup. Ct. N.Y. County 1948); 87 C.J.S. Trade Unions § 33 (1954); none of the cases dealing with discriminatory representation in violation of the federal duty by unions applying discriminatory membership policies, solves the latter problem. E.g., Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192, 204 (1944); Oliphant v. Brotherhood of Locomotive Firemen & Enginemen, 156 F. Supp. 89 (E.D. Ohio 1957), aff'd, 262 Fed. 2d 359 (6th Cir. 1958), cert. denied, 355 U.S. 893 (1957). Summers, The Right to Join a Union, 47 Colum. L. Rev. 33 (1947).

[100] E.g., N.Y. Civil Rights Law, N.Y. Session Laws 1940, Ch. 9, § 43, para. 1.

[101] James v. Marineship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1946); Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 629, 320 P.2d 494 (1958), modifying and affirming 307 P.2d 1026 (1st Dist. Ct. App.). See Clark v. Curtis, 297 N.Y. 1014, 80 N.E.2d 536 (1948), affirming 273 App. Div. 797, 76 N.Y.S.2d 3 (1947); cf. Wilson v. Newspaper and Mail Deliverers' Union of New York, 123 N.J. Eq. 347, 197 Atl. 720 (1938); Carroll v. Local 269, International Brotherhood of Electrical Workers, 133 N.J. Eq. 144, 31 A.2d 223 (1943); but see Walter v. McCarvel, 309 Mass. 260, 34 N.E.2d 677 (1941); Kelly v. Simons, 87 N.Y.S.2d 767 (1949).

[102] Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).

Federal prohibition of the closed shop[103] makes the second of these approaches relatively less useful. Yet, this prohibition does *not* deal with the problem of enabling anyone bargained for by a union to wield influence *within* the union by a right to membership. Yet not even the somewhat free-wheeling "Bill of Rights of Members of Labor Organizations," sponsored by Senator McClellan,[104] dealt with this problem. Both this, and the toned-down version passed by the Congress,[105] dealt only with rights of individuals already in labor organizations. It would appear a modest enough suggestion that legislation is needed to protect the right of any employee in a unit represented by an exclusive collective bargaining representative to join and freely participate in the union, subject only to the union's right to exclude individuals whom it could expel from membership under existing legal limitations on unions' disciplinary powers over *present* members.[106] For, paradoxically, the law has considerably matured in protecting members of unions against arbitrary expulsions and fines. It did this in a context now largely irrelevant. When loss of union membership for *any* reason meant loss of employment under a closed shop agreement, the courts were not reluctant to intervene.[107] But now, under Taft-Hartley, loss of employment may follow only where there is a refusal to pay regular dues.[108] Much larger now looms the need for a right *to* union membership, for the purpose of influencing union policy. It is here that improvements must be made.

It is beyond the scope of this paper to consider in detail the areas of internal union government where improvements are needed, or how current legislation proposes to deal with these. I shall limit myself to a few concluding observations. First, I disagree with those who suggest that making unions more open and democratic will *not* go far toward correcting the problems we have been considering.[109] To deny that there are great benefits to be derived from a free and open exchange within

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103 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952); 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1952).

104 The McClellan amendment, which was first accepted and then rejected by the Senate, was taken from Title I of S. 1137, 86th Cong., 1st Sess. (1959), deleting an eligibility for membership provision of the original bill. See 105 Cong. Rec. 5795-5827.

105 Labor-Management Reporting and Disclosure Act of 1959, conference report on S. 1555, 86th Cong., 1st Sess. (1959), Title I.

106 The suggestion is advanced in Cox, "The Role of Law in Preserving Union Democracy," 72 Harv. L. Rev. 609, 621-24 (1959). This approach is followed in the Massachusetts Labor Relations Act, §§ 4, 6A, Annotated Laws of Massachusetts, Ch. 150A, §§ 4 and 6A, as amended by laws 1947, Ch. 657. See generally Cox, op. cit. supra, 612-624; Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1062-1083 (1951).

107 See Dorrington v. Manning, 135 Pa. Super. 194, 4 A.2d 886 (1939); Thompson v. Grand International Brotherhood of Locomotive Engineers, 41 Tex. Civ. App. 176, 91 S.W. 834 (1905).

108 See n.103 supra.

109 Compare Wellington, "Union Democracy and Fair Representation: Federal Responsibility in a Federal System," 67 Yale L.J., 1327, 1342, 1356 (1958) with Rauth, "Civil Rights and Liberties and Labor Unions," 8 Lab. L.J. 874, 875 (1957).

the union, to deny that admitting a minority group to membership will serve to reduce substantially the negotiation of discriminatory contract provisions, is to question the efficacy of the democratic process itself. The active individual member, or the active minority group of members, if protected in the right to admission and participation, will certainly help to shape the direction of the union's policy. This approach is not a cure-all. But it is in keeping with the tenet that, in a democracy, the individual should be placed in a context where, acting in self-reliance, he can help himself.

Second, and largely in keeping with the preceding point, the rule requiring exhaustion of internal union remedies prior to suit seems to me to deserve preservation, even if in modified form. This rule by virtue of its many exceptions, in many states has been rendered virtually non-existent.[110] These have been grafted on it, in part, perhaps, because of suspicion as to the fairness of union tribunals and because of the time required to exhaust remedies where the highest union tribunal meets every three or four years. Recent legislation would limit the time allowed for internal proceedings to four months.[111] This approach has much to commend it, especially if coupled with a revitalization of the rule itself. For the rule is valuable in encouraging private adjustment, self-correction, and fair internal procedures.[112] These benefit not only the association, but also the members, and the courts. Finally, it might be suggested that a rule should be considered favoring *voluntary* impartial review, by according unions providing for such review in their constitutions some advantages, such as a longer period for internal determinations, or presumptions of their propriety.[113] For only by making unions more democratic and responsive, as well as responsible, can we preserve the values of individualism and voluntarism in an industrial economy which apparently can only function by means of large-scale organizations.

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110 See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1086-1092 (1951); Witmer, Civil Liberties and the Trade Union, 50 Yale L.J. 621, 630-31, n.35 (1941).

111 Labor Management Reporting and Disclosure Act of 1959, conference report on S. 1555, 86th Cong., 1st Sess. (1959), Sec. 101(a)(4).

112 See Comment, Exhaustion of Remedies in Private, Voluntary Associations, 65 Yale L.J. 369 (1956); Witmer, "Civil Liberties and the Trade Union," 50 Yale L.J. 621, 630-31 (1941).

113 A somewhat similar approach was employed in the Kennedy bill, S. 3454, 85 Cong., 2d Sess. (1958) in connection with the proposed NLRB review of trusteeships by parent bodies over local unions. It exempted unions from such review if they set up their own permanent independent review board. This provision was dropped prior to passage of the Kennedy-Ives bill by the Senate. Yet the advantages of this approach are obvious in encouragement of independent review agencies such as have been established by the Upholsterers' International Union and the United Auto Workers. It is of some interest to observe that the broad jurisdiction of the UAW Public Review Board embraces claims that a shop grievance "was improperly handled because of fraud, discrimination, or collusion with management." UAW Constitution (1957) Art. 32, § 8(b). Compare discussion, pp. 27-29, supra. Nn.77-78, supra, and accompanying text.