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Unions: Economic Institutions and Values: A Legal Survey -- Civil Liberties within the Labor Movement

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Unions

ECONOMIC INSTITUTIONS AND VALUES: A LEGAL SURVEY
CIVIL LIBERTIES WITHIN THE LABOR MOVEMENT

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I. INTRODUCTION

In December, 1896, Samuel Gompers addressed the AFL convention in Cincinnati, Ohio.¹ During the course of his address he outlined what he believed to be the aims and purposes of the trade union movement. To Gompers and the other early leaders of the labor movement of that day, the unions could be nothing but democratic. The power acquired through the mutual association of workers seeking common goals could never be exercised but in the best interests of the individual workers.

But much has transpired since 1896. In 1900, less than a million of our 29 million gainfully employed population were unionized.² By 1950 there were 15 million workers in unions, and practically every large manufacturing industry was either completely organized or almost so.³ Today, approximately 17 million men and women are members of our various labor organizations.⁴

Union funds, realized through such various sources as dues, fines, and assessments, and representing pension and welfare plans, were minimal until about 1942.⁵ By 1954, under the impact of the events attendant upon World War II and the Korean conflict, they had reached an accumulated wealth of 20 billion dollars.⁶ Estimates today place their total value near 34 billion dollars, increasing by the incredible sum of four billion dollars a year,⁷ and it has been predicted that their value will increase until they reach about 80 billion dollars, at which time an equipoise will be reached between contributions and benefit payments.⁸ The social and economic significance of union wealth, particularly welfare and pension funds, may be partially illustrated by the fact that their coverage, in terms of workers and their dependents, approaches 75 million persons, or nearly one-half of the population of the entire United States.⁹

In Gompers' day, the attitude of the law toward the labor movement was reluctant acceptance, if not active animosity. The use of the labor injunction was widespread.¹⁰ This was the era of the *Debs*¹¹ case, where the federal troops ended a railroad strike, and the *Danbury Hatters* case,¹² where a hostile Supreme Court, in obvious contradiction of legislative intent, applied the Sherman Act¹³ to a labor union.

Today much of this has changed. The union's position in society is maintained not only by its own internal strength and favorable public opinion,¹⁴ but by positive federal and state legislation. The Railway Labor Act,¹⁵ the Taft-Hartley Act,¹⁶ and similar state legislation¹⁷ provide affirmative legal protection for organizational activity and

1 GOMPERS, *LABOR AND THE COMMON WELFARE* 5 (1919).

2 Clague, *The American Worker and American Industry*, 71 MONTHLY LABOR REVIEW 11 (1950).

3 *Ibid.*

4 13 LABOR FACT BOOK 83 (1957).

5 Dubinsky, *Safeguarding Union Welfare Funds*, American Federationists, July, 1954, p. 10 (reprinted in 100 CONG. REC. 10318 (1954)).

6 U. S. News & World Report, Sept. 24, 1954, pp. 129-30.

7 Levitan, *Welfare and Pension Plans Disclosure Act*, 9 LAB. L. J. 827, 828 (1958). It is also estimated that the total annual contributions to these funds approach \$9 billion, and the benefits paid under these plans are close to \$5 billion a year.

8 *Ibid.*

9 Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare. *Final Report on Welfare and Pension Plan Investigation*, S. REP. NO. 1734, 84th Cong., 2d Sess. 6 (1956) (hereinafter cited as 1956 *Final Rep.*).

10 See generally, FRANKFURTER & GREENE, *THE LABOR INJUNCTION* (1930).

11 *In re Debs*, 158 U.S. 564 (1895).

12 *Loewe v. Lawlor*, 208 U.S. 274 (1908).

13 26 Stat. 204 (1890), 15 U.S.C. 1 (1952).

14 Despite the favorable opinion which does exist in some quarters today, it is still true that:

The leaders of industry, until the day before yesterday at most, were convinced that trade-unionism was an evil to be resisted to the bitter end. Even after years of federal legislation favoring trade-unions, the hope still survives that American public opinion will one day turn against organized labor. TANNENBAUM, *A PHILOSOPHY OF LABOR* 63 (1952).

15 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1952).

16 Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. 141 (1952).

17 See, e.g., PA. STAT. ANN. tit. 43, § 211 (1952).

collective bargaining. The Norris-LaGuardia Act,¹⁸ under the Supreme Court's decision in *United States v. Hucheson*,¹⁹ and similar state statutes,²⁰ free the union from anti-trust prosecution.

The labor movement has come a long way from its beginnings in the 1800's of Samuel Gompers. As the legally protected, exclusive bargaining agent of workers in an industrial area, the union weighs, determines, and implements policies which vitally affect the everyday lives of all those whom it represents. It negotiates a contract which, in effect, becomes the basic law of that industrial community. The union in a very real sense is the employee's industrial government, and the power it exercises over the lives of its members is of a quasi-governmental character.

To state the facts of union power is not necessarily to criticize. The existence of union power is not the subject of this survey. Our concern, rather, is with the manner in which this power is exercised. As a people we are committed to the proposition that the exercise of power within our society must be responsive to democratic processes, and must be employed at all times with a judicious concern for the individual liberties of our citizens.

Our concern, then, in this survey is with the problem of the exercise of union power in relation to the rights and dignity of the individual worker. It is, in short, a consideration of civil liberties within the labor movement.

The survey itself is divided into four broad areas: union admission policies and practices, union disciplinary procedures, union funds, and union elections. In each section, consideration is first given to the basic law of the union itself, the union constitution, with the conviction that it represents, although not the complete picture, at least the conscious embodiment of the general standards under which the average union conducts its day-to-day affairs.²¹ Following an analysis of the constitutions, each section considers in turn the applicable case law and present legislation on a federal and state level, ending with a discussion of some of the more important current legislative proposals.

With the appearance of this survey, the *Notre Dame Lawyer* is continuing a feature inaugurated in May of 1958 with the publication of a Church-State Note — *Religious Institutions and Value: A Legal Survey*. In alternative years with the Church-State Note, the *Lawyer* will publish a legal consideration of the more significant problems posed by the presence of the individual in the modern industrial community — *Economic Institutions and Value: A Legal Survey*. This particular Note is concerned basically with the problem in the context of the internal affairs of the labor union. In future years, the Note will not necessarily be confined to this area, but will attempt to consider the broad problem posed by individual freedoms and responsibilities within the context of the whole economic order. Our concern will be at all times with the position occupied by the individual person in respect to his industrial community.

II. UNION MEMBERSHIP

Today, union membership is often a prerequisite to the acquisition²² and retention²³ of employment. But even when not mandatory, union membership remains a valuable asset. Effective participation in union affairs by all workers is a necessity if human rights are to be preserved. Often the only check on the exercise of union power

¹⁸ Federal Anti-Injunction Act, 47 Stat. 70 (1932), 70 U.S.C. § 101 (1952).

¹⁹ 312 U.S. 219 (1941). Unions are, however, subject to such prosecution where the combination in question is with non-labor groups. *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797 (1945).

²⁰ See, e.g., N.J. STAT. ANN. § 2A: 15-51 (1952).

²¹ The lack of an adequate national study of union constitutions in the particular area of union election procedures necessitated a student survey of the area, which appears at some length in the beginning of section five. The survey introducing the other three sections of the Note are based on a study of 194 American labor unions by the National Industrial Conference Board, published in 1955, and supplementary student research.

is that found in the active union member. "To deny a fellow-employee membership . . . may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry. . . ." ²⁴ It amounts to industrial disfranchisement. The very purpose of the trade union movement lies in the elimination of the unilateral decision. "The individual workman cannot just 'go it alone.' Every person with an understanding of mass production . . . long ago recognized the necessity of collective bargaining. . . ." ²⁵

Such a situation inevitably poses the question: Does a worker have a legally enforceable right to join a union? It is the purpose of this initial section to explore this question and the larger area of union membership policies and practices. Our point of view will at all times be the relationship between the individual worker and the union.

A. *Union Constitutional Provisions*

Any discussion of the employee's right to participate in union activity necessarily involves a consideration of the membership policies of the unions themselves. Although by no means presenting a complete picture, a union's constitution generally indicates its attitude toward prospective members. ²⁶

Membership is normally achieved in one of four ways, or through a combination thereof. The majority of unions simply admit all applicants employed at the craft or in the industry under the union's jurisdiction. ²⁷ Most unions not only want new members, they need them. The very life's blood of a union is a continually expanding membership. Some unions, however, admit new members only by a system of "fraternal" voting. ²⁸ Others provide that members are only to be admitted through an apprentice program. ²⁹ And, finally, a few provide for a dual system of an apprentice program and fraternal voting. ³⁰ These latter three groupings, placing restrictions on the methods by which admittance may be gained, are for the most part the older craft unions which had their beginnings in fraternal societies, and these restrictions represent the vestiges of this earlier type of organization.

Although most workers are eligible for membership, the fact remains, unfortunately, that some groups are systematically excluded. Many unions provide that communists

²² Under the Labor Management Relations Act (Taft-Hartley), 61 Stat. 140 (1947), 29 U.S.C. § 158 (a)(3) (1952) the closed shop is illegal. Hence it would appear the union membership should not be a prerequisite to the acquisition of membership. But in many situations such is not the case. See, e.g., *Thorman v. International Alliance of Theatrical Stage Employees*, 49 Cal. 2d 625, 320 P.2d 494 (1958), where the court explicitly found that a closed shop existed. See also *Chicago Sun-Times*, Nov. 10, 1958, p. 5, col. 1, where it is reported that the Plumbers and Pipefitters recommended to their locals the elimination of the *traditional* closed shop. The article also notes that the practice, despite the Taft-Hartley Act, has continued to exist in some of the building trades.

²³ A recent study of 1716 collective bargaining agreements by the Bureau of Labor Statistics revealed that nearly two-thirds contained union shop provisions. Theodore, *Union-Security Provisions in Agreements, 1954*, 78 MONTHLY LABOR REVIEW 649 (1955).

²⁴ *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945).

²⁵ *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831, 839 (1946).

²⁶ In *Yeager v. International Bhd. of Teamsters, Local 313*, 39 Wash. 2d 807, 239 P.2d 318 (1951), a disabled veteran was, under the constitution, "eligible" to join the local, but because of a scarcity of work in the area the local refused to admit him. Hence, it is often the constitution *plus* local practices and conditions which determine whether a particular worker will be permitted to join the union.

²⁷ 125 unions with approximately 11,554,460 members, or 66% of all unionized labor, have this type of admittance program. *Handbook of Union Government Structure and Procedures, National Industrial Conference Board, Studies in Personnel Policy, No. 150*, p. 54 (1955) (hereinafter cited as *HANDBOOK*).

²⁸ 27 unions having approximately 1,631,342 members, or 9.3% of all unionized labor, fall into this category. *Ibid.*

²⁹ 25 unions with approximately 850,667 members, or 4.8% of all unionized labor, have this program. *Ibid.*

³⁰ 17 unions having approximately 3,477,329 members, or 19.9% of all union labor, provide for this dual system. *Ibid.*

and members of subversive groups are not eligible for membership.³¹ Such provisions are clearly understandable in light of the trouble many unions experienced during the early thirties when groups of this type attempted to subvert the trade union movement to their own ends. On the other hand, a few unions expressly provide in their constitutions that certain racial groups are to be excluded.³² Provisions of this type are without justification. Some unions also bar supervisors,³³ non-citizens,³⁴ or discriminate on the basis of sex.³⁵ In contrast to these restrictive provisions, however, many unions explicitly state that all workers, regardless of sex, race, creed, color, or nationality are eligible for membership.³⁶

The types of discrimination practiced by unions vary. The most obvious, of course, is when the prospective member is simply refused membership.³⁷ Some unions, on the other hand, accept the unwanted applicant, but relegate him to an auxiliary local.³⁸ Discrimination may also be involved in a local's refusal to accept a transfer member from a sister local of the same international union.³⁹

Perhaps the most frequently utilized method of achieving discrimination of the total exclusion type is the fraternal system of voting. The voting is usually done by means of "blackballs," and if the applicant receives more than two, his petition is rejected.⁴⁰ Discrimination of this type is obviously difficult to establish, since the precise reason for rejection is not spelled out, and consequently it presents a more difficult problem to agencies attempting to enforce anti-discrimination legislation. Normally this

³¹ 56 unions with approximately 6,190,044 members make such restrictions. Besides Communists, such groups as Nazis, Fascists, and the Ku Klux Klan are expressly excluded. Only six unions expressly exclude Communists. *Id.* at 54-55.

³² Five unions having a declared membership of 442,197 men make such restrictions. Brotherhood of Locomotive Engineers, CONST., § 28(a), p. 89 (1956), "No person shall become a member of the B of L.E., unless he is a white man . . ."; Brotherhood of Locomotive Firemen and Enginemen, CONST., art. VIII, § 29(b), p. 86 (1953), "He shall be white born . . . Mexicans, or those of Spanish-Mexican extraction are not eligible." (The paragraph does, however, further specify that the provision shall be inapplicable where contrary to local law.); Brotherhood of Railroad Trainmen, CONST., § 110, p. 76 (1954), "The applicant shall be a white male. . . ." (This constitution also contains a saving clause specifying its inapplicability where contrary to local law.); National Postal Transport Ass'n, CONST. art. III, p. 6 (1958), "Any . . . clerk . . ., who is of the Caucasian race, or a native American Indian, shall be eligible to membership. . . ." (This paragraph also contains a saving clause.); Railway Conductors, HANDBOOK p. 54.

³³ 35 constitutions covering 3,383,482 workers have such provisions. HANDBOOK p. 55.

³⁴ The form this disqualification takes is usually mitigated by requiring that the member express an intention to become a citizen. See, e.g., International Longshoremen Ass'n, CONST., art. XIV, § 2 p. 27 (1957).

³⁵ See, e.g., *Wilson v. Hacker*, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950) where several barmaids were refused membership in a bartenders' union. The court held the restriction unlawful since it was coupled with a closed shop.

³⁶ 39 union constitutions covering 4,320,551 workers have explicit anti-discrimination clauses. *Handbook*, p. 64. Such a clause, however, does not necessarily mean the union does not practice some form of discrimination. Some constitutions also provide for the establishment of dual locals "where the question of race . . . would interfere with the growth of the International Union." Cigar Makers Int'l Union, CONST., § 80, p. 44 (1957).

³⁷ See, e.g., *International Bhd. of Elec. Workers, Local 35 v. Commission on Civil Rights*, 140 Conn. 537, 102 A.2d 366 (1953), where a Negro was refused membership. The court held that under CONN. GEN. STAT. § 7405(c) (1949), such discrimination was unlawful and ordered the Negro's admission to the union.

³⁸ See, e.g., *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946) where Negroes were admitted to union, but relegated to an auxiliary where they had no rights to participate in the union's activities. The court held that such discrimination was unlawful under the Railway Labor Act, 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1952).

³⁹ See, e.g., *Byran v. International Alliance of Theatrical Stage Employees*, 306 S.W.2d 64 (Tenn. App. 1957). Here the court dismissed the complaint on the grounds the members had not exhausted their internal remedies.

⁴⁰ See, e.g., *Brotherhood of Locomotive Firemen and Enginemen, CONST.*, art. VIII, § 31, p. 88 (1953).

system is used to limit membership to relatives,⁴¹ or those of the same ethnic or racial⁴² group as the other members of the union. "Local unions consisting exclusively of Italian-Americans, for instance, are common in some of the building trades."⁴³ The apprentice program may also serve as a vehicle of exclusion. It may, as a matter of fact, be impossible for particular groups to obtain the requisite degree of proficiency for journey-⁴⁴membership.

Considered as a whole, however, it would seem that the membership policies and practices of most unions are consonant with generally accepted notions of fair play and justice. It is, for example, one of the stated objectives of AFL-CIO "to encourage all workers without regard to race, creed, color, natural origin or ancestry to share equally in the full benefits of union organization."⁴⁵ Those unions which, unfortunately, refuse to live up to this ideal constitute the exception, not the rule.

B. *Judicial Consideration of Discrimination in Admittance*

Realizing that discrimination does occur, can a prospective member who is unjustly excluded from a union obtain any judicial relief? Traditionally, labor unions have been classified as voluntary associations, placing them in the same legal category as churches and fraternal groups.⁴⁶ Following the voluntary association rationale, in 1890 a New Jersey court in *Mayer v Journeymen Stonecutters Ass'n* asserted:

. . . [N]o person has any abstract right to be admitted to [union] membership. . . . *Until so admitted*, no right exists which the courts can be called upon to protect and enforce. The body [has a] clear right to prescribe qualifications for its membership. . . . It may make the restrictions on the line of citizenship, nationality, age, creed, or profession. . . . This power is incident to its character as a voluntary association.⁴⁷

Unfortunately this view still finds limited acceptance. The Wisconsin Supreme Court, in the recent case of *Rose v. Elbert*,⁴⁸ affirmed, *inter alia*, the right of a union to exclude two Negro bricklayers from membership solely on the basis of their race. The pernicious effects of such a holding are readily evident today, however appropriate such a classification might have been when trade unions first appeared before the courts. When the union's unique social, political and economic status in today's modern society is considered, the continuing mechanical application of the voluntary association rules in the labor field becomes highly questionable.

But the courts have not been totally blind to the developments which have taken place since 1890, and a change has resulted in the judicial treatment of the excluded applicant. This change has arisen mainly from a realization of the implications of the

⁴¹ See, e.g., *Bryan v. International Alliance of Theatrical Stage Employees*, 306 S.W.2d 64 (Tenn. App. 1957) (sons given preference); *Clark v. Curtis*, 297 N.Y. 1014, 80 N.E.2d 536 (1948) (sons only).

⁴² See, e.g., *Oliphant v. Brotherhood of Locomotive Firemen*, 156 F. Supp. 89 (N.D. Ohio), *cert. denied*, 335 U.S. 893 (1957), *aff'd*, 262 F.2d 359 (6th Cir. 1958), *cert denied*, 359 U.S. 935 (1959), where two Negro firemen were denied admission. The court upheld the union's exclusion rule. See text, p. 392 *infra*, for a discussion of this case.

⁴³ HANDBOOK p. 58.

⁴⁴ Summers, *Right to Join a Union*, 47 COLUM. L. REV. 33, 35 (1947).

⁴⁵ AFL-CIO, CONST., art. II (4), p. 3 (1957).

⁴⁶ See generally, Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993 (1930).

⁴⁷ 47 N.J. Eq. 519, 20 Atl. 492, 494 (Ch. 1890) (dictum). The precise holding of this case was that the excluded applicant had not complied with the regular admission rules.

⁴⁸ 275 Wis. 523, 82 N.W.2d 315 (1957). Wisconsin, apparently as a result of the decision in *Ross*, amended the anti-discrimination statute under which the action was brought. WIS. STAT. ANN. § 111.31 (1957), as amended, WIS. STAT. ANN. § 111.36 (Supp. 1958). The court held that the statute was merely declarative of public policy, since it did not provide remedial procedures, and that the common law rule for voluntary associations controlled. The effect of the amendment seems to be to overrule this determination. For an excellent discussion of the entire statute, see 1958 Wis. L. REV. 294. See also text at p. 393 *infra*.

closed shop.⁴⁹ The California Supreme Court in *James v. Maranship Corp.*,⁵⁰ recognized a limited right to union membership, holding that a union may not maintain both an arbitrarily closed union *and* a closed shop. The court noted that in this situation the union "may no longer claim the same freedoms from legal restraint enjoyed by golf clubs or fraternal associations."⁵¹

In the *James* case, the court grounded its decision on the presence of a labor monopoly held by the union. In *Williams v. International Bhd. of Boilermakers*,⁵² however, this same court liberalized its prior decision, holding that the presence of the labor monopoly was not necessary for a cause of action, while it re-affirmed the essential incompatibility of the arbitrarily closed union and the closed shop. In both the *James* and *Williams* cases, the court's decree was stated in terms of alternatives. Either abandon the closed shop *or* the closed union. Recently however, the court has further extended the rationale of *James*. In *Thorman v. International Alliance of Theatrical Stage Employees*,⁵³ the court simply directed that the excluded applicant be admitted to membership, showing no particular concern about union monopoly, and granted damages for attorney fees and the loss of earnings sustained while he was unable to obtain work without a union card.

C. State Legislation

Recognizing, perhaps, the inadequacy of the prevailing legal attitudes, several states have enacted legislation designed to eliminate discrimination from the industrial scene. Fourteen states presently have enforceable anti-discrimination statutes.⁵⁴ Two states have statutes, similar to the one under which the *Ross*⁵⁵ case was decided, which are merely declarative of public policy and do not provide remedial procedures.⁵⁶

New York's Civil Rights Law of 1940⁵⁷ was the first passed which specifically dealt with the problem. The act was immediately challenged as being unconstitutional, but the Supreme Court in *Railway Mail Ass'n v. Corsi*⁵⁸ upheld the state's power to legislate in this field. The law proved ineffective, however, and in 1945 the state passed the nation's first Fair Employment Practices Act,⁵⁹ which has since become the prototype for other state legislation.

⁴⁹ The court in *Carroll v. Local 269*, 133 N.J. Eq. 144, 31 A.2d 223 (1943) aptly expressed this attitude when it said at page 225:

If the characterization of a labor union as a voluntary association becomes in time a mere anachronism, the mere word "voluntary" will not likely preserve the present state of the law.

Again, it is wise to foresee that a change in surrounding circumstances — such as the economic strength of competing groups — may make the existing law disjointed and an instrument of oppression if strictly adhered to.

⁵⁰ 25 Cal. 2d 586, 155 P.2d 329 (1944). For a thorough discussion of the closed union-closed shop dilemma prior to Taft-Hartley, see Annot., 160 A.L.R. 900 (1946).

⁵¹ *Id.* at 335.

⁵² 27 Cal. 2d 586, 165 P.2d 903 (1946).

⁵³ 49 Cal. 2d 625, 320 P.2d 494 (1958).

⁵⁴ ALASKA COMP. LAWS ANN. § 43-5-4(2) (Supp. 1958); Colo. Sess. Laws 1957, ch. 176, § 5 (3); CONN. GEN. STAT. § 7405(c) (1949); MASS. ANN. LAWS, ch. 151 B, § 4(2) (1957); MICH. STAT. ANN. § 17.458(3)(c) (Supp. 1957); MINN. STAT. ANN. § 363.03(1) (1957); N.J. STAT. ANN. § 18:25-12(b) (Supp. 1958); N.M. STAT. ANN. § 59-4-4(b) (1953); N.Y. EXECUTIVE LAW § 290, § 296(1)(b); ORE. REV. STAT. § 659.030 (2) (1957); PA. STAT. ANN. tit. 43, § 955(c) (Supp. 1957); R.I. GEN. LAWS ANN. tit. 28, ch. 5, § 7(c), ch. 6, §§ 1, 3 (1956); WASH. REV. CODE § 49.60.190 (1957); WIS. STAT. ANN. § 111.31, § 111.32(1)(5) (Supp. 1958). Twenty-five municipalities also have some form of Fair Employment Ordinance. S. Doc. No. 15, 83rd Cong., 1st Sess. 1 (1953).

⁵⁵ *Ross v. Elbert*, 275 Wis. 523, 82 N.W.2d 315 (1957). See n.48 *supra*, and the text at p. 393 *infra*, for a discussion of this case.

⁵⁶ IND. ANN. STAT. §§ 40-2301 (2), 40-2303 (2d) (2) (Supp. 1957); KAN. GEN. STAT. ANN. §§ 44-104, § 44-1002(d) (Supp. 1957).

⁵⁷ N.Y. CRV. RIGHTS LAWS § 43.

⁵⁸ 326 U.S. 88 (1945).

⁵⁹ N.Y. EXECUTIVE LAW §§ 290-301 (Supp.)

Discrimination within the meaning of the various acts includes unequal treatment because of race,⁶⁰ color,⁶¹ religious creed,⁶² ancestry,⁶³ national origin,⁶⁴ age,⁶⁵ and, in one case, draft eligibility.⁶⁶ The intended scope of most of these acts, however, is broader than just union membership. They have as their purpose the general elimination of discrimination in the industrial community.⁶⁷ Not only "labor organizations," but also "employers" and "employment agencies" are included within the groups affected by the statutes.⁶⁸ Normally, the acts contain a provision for the establishment of a commission for the investigation of discriminatory practices in the state and for the hearing of complaints stating particular instances of discrimination.⁶⁹ Some states limit the jurisdiction of the commission to discrimination as alleged in a specific complaint,⁷⁰ while others do not.⁷¹ The sanctions provided to enforce the acts vary. Some provide for fines.⁷² Others have provisions for the issuance of cease and desist orders.⁷³ And a few grant the commission power to order "restoration" of membership.⁷⁴ Most also provide for judicial review of the proceedings.⁷⁵

D. Federal Legislation

In the area of federal legislation, the problem of union membership practices has arisen in several contexts. Acting under the Wagner Act of 1935,⁷⁶ the National Labor Relations Board frequently threatened to revoke certification because of a union's refusal to grant equal status to all the employees in the bargaining unit for which it was the exclusive representative.⁷⁷ Although cogent arguments were made that the Board possessed no decertification power,⁷⁸ the question remained moot, since apparently the Board never attempted to decertify a union on these grounds.

The enactment of the Taft-Hartley Act in 1947⁷⁹ failed to change the picture. If anything, it strengthened the arguments running contrary to the Board's prior posi-

⁶⁰ Statutes cited *supra* note 54.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Statutes cited *supra* note 54 with the exception of New Mexico, Oregon, and Minnesota.

⁶⁴ Statutes cited *supra* note 54 with the exception of New Mexico.

⁶⁵ Three states make this provision. MASS. ANN. LAWS ch. 151 B, § 1(8) (1957) (45-65 yrs.); PA. STAT. ANN. tit. 43, § 954(h) (Supp. 1957) (40-62 yrs.); R.I. GEN. LAWS ANN. ch. 6, § 1, 3 (1956) (45-65).

⁶⁶ N.J. STAT. ANN. § 18:25-3 (Supp. 1958).

⁶⁷ It should be noted, however, that the courts and the legislatures in this area are concerned primarily with the worker's right to employment, and that this concern only incidentally gives rise to the recognition of a right to join the union. Although in many situations one is tantamount to the other, the basic interests, and hence the rights being protected, still remain distinct. The courts and legislatures are only beginning, unfortunately, to recognize the importance of union membership independent of the right to equal opportunity in employment.

⁶⁸ See, e.g., N.Y. EXECUTIVE LAW § 292(5)(9).

⁶⁹ See, e.g., CONN. GEN. STAT. § 7404(f) (1949).

⁷⁰ See, e.g., WIS. STAT. ANN. § 111.36(3) (Supp. 1959).

⁷¹ See, e.g., N.Y. EXECUTIVE LAW § 297.

⁷² See, e.g., PA. STAT. ANN. tit. 43, § 961 (Supp. 1958).

⁷³ See, e.g., COLO. SESS. LAWS 1957, ch. 176, § 6(10).

⁷⁴ See, e.g., CONN. GEN. STAT. § 7407(a) (1949), as applied in *International Bhd. of Elec. Workers, Local 35 v. Commission on Civil Rights*, 140 Conn. 537, 102 A.2d 366 (1953). The court ordered the applicant admitted into the union, but the local refused to comply. Subsequently, the Commission obtained a contempt order against the local, in which a fine of \$1,000 was levied. The order also directed that the local be fined \$250 a week as long as the non-compliance continued. AARON, *THE EMPLOYMENT RELATION AND THE LAW* 73 (1957).

⁷⁵ See, e.g., WASH. REV. CODE § 49.60.270 (1957).

⁷⁶ National Labor Relations Act, 49 Stat. 499 (1935), 29 U.S.C. § 151 (1952).

⁷⁷ *Bethlehem-Alameda, Inc.*, 53 N.L.R.B. 99, 1016 (1943); *Carter Mfg. Co.*, 59 N.L.R.B. 804, 806 (1944); *Southwestern Portland Cement Co.*, 61 N.L.R.B. 1217, 1219 (1945); *Atlantic Oak Flooring Co.*, 62 N.L.R.B. 973, 975 (1945).

⁷⁸ See the dissent of Justice Jackson in *Wallace Corp. v. NLRB*, 323 U.S. 248, 257 (1944).

⁷⁹ Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1952).

tion.⁸⁰ The act's primary concern has been with the protection of the worker's right to continue or to obtain employment independent of union membership.⁸¹ "Congress apparently felt that arbitrary restrictions upon admission to union membership . . . [was a matter] of public concern only if the . . . result . . . [were] loss of employment."⁸²

Cases which have arisen under the Railway Labor Act⁸³ fail to paint a substantially different picture. Under this act, the majority in a particular work unit have the right to determine who will be the bargaining representative of the unit.⁸⁴ The Supreme Court, in the leading case of *Steele v. Louisville & N. R.R.*,⁸⁵ has interpreted this provision as imposing on the representative the duty of bargaining without discrimination for all of the members of the unit regardless of their lack of union affiliation, while still recognizing the union's right to determine eligibility for its membership.

Pursuant to the *Steele* doctrine, the courts have given protection to minorities against discriminatory bargaining in a number of cases.⁸⁶ But to date, the courts, on the basis of federal law, have not interfered with union membership policies and practices. The recent case of *Oliphant v. Brotherhood of Locomotive Firemen*⁸⁷ is illustrative. Two Negro firemen, excluded from the Brotherhood, contended, *inter alia*, that the only effective way to guarantee them equal representation was to grant them equal participation in the union. The court responded that there was no provision in the act requiring that membership in the exclusive bargaining agent be available to all. Considered in the light of the act itself,⁸⁸ and its legislative history,⁸⁹ this response seems fully justified. The conclusion is thus valid, that: "The plain fact is that the Railway Labor Act imposes . . . no regulation upon . . . the . . . matter of admission to membership."⁹⁰

E. Federal Constitutional Safeguards

An excluded worker's plea that he has been arbitrarily excluded from union membership, and thus has been deprived of a constitutional right, is by no means novel. The only possible constitutional basis, however, for compelling a union to accept all reasonably qualified applicants is the due process clause of the fifth amendment and the equal protection clause of the fourteenth amendment. And a necessary prerequisite

⁸⁰ The proviso to Section 8(b)(1) of the act states:

Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

⁸¹ Section 8(b)(2) of the act states that it is an unfair labor practice to discriminate against a worker denied union membership for reasons *other* than failure to tender dues or initiation fees. This provision goes to the protection of a worker's employment; it does not recognize any right to union membership.

⁸² Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 447 (1949).

⁸³ 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1952).

⁸⁴ 45 U.S.C. § 152 (Fourth) (1952).

⁸⁵ 323 U.S. 192, reversing *Steele v. Louisville & N.R.R.*, 245 Ala. 113, 16 So. 2d 416 (1944).

⁸⁶ See, e.g., *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Richardson v. Texas & N.O.R.R.*, 242 F.2d 230 (5th Cir. 1957); *Conley v. Gibson*, 355 U.S. 41 (1957); *Chirico v. Brotherhood of R.R. Trainmen, Lodge 1047*, 167 F. Supp. 635 (S.D.N.Y. 1958).

⁸⁷ 156 F. Supp. 89 (N.D. Ohio), *cert. denied*, 355 U.S. 893 (1957), *aff'd*, 262 F.2d 359 (6th Cir. 1958), *cert. denied*, 359 U.S. 935 (1959).

⁸⁸ See 44 Stat. 577 (1926), as amended, 45 U.S.C. § 152 (Eleventh)(a) (1952) which apparently recognizes that membership may be restricted, if it does not interfere with employment. See also *Steele v. Louisville & N.R.R.* 323 U.S. 192, 204 (1944) where Mr. Justice Stone remarks that "the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership. . . ."

⁸⁹ Senator Jenner of Indiana proposed an amendment to the act subsequent to its passage to prohibit the certification of a union which denied membership on the basis of race or color. However, the proposal was tabled and did not become a part of the act, apparently indicating that Congress was satisfied with the current interpretation of the act. 96 CONG. REC. 16377-78 (1951).

⁹⁰ Aaron & Komaroff, *supra* note 82 at 438.

for their application in a particular situation is the finding of "federal"⁹¹ or "state"⁹² action. The constitution erects no shield against mere "private" action.⁹³

The *Ross*⁹⁴ case is indicative of the attitude most courts have taken toward the plea that discrimination by a labor union partakes of "state" action within the meaning of the fourteenth amendment. These courts have flatly rejected the contention. Consistent with the voluntary association rationale, which invariably has been applied to labor unions, it is difficult to see how a contrary result could be reached.

The fifth amendment, however, has posed a somewhat more difficult problem. In the *Oliphant* case,⁹⁵ it was contended that certification, pursuant to a federal statute, as an exclusive bargaining agent transformed the nature of a union from a voluntary association into a quasi-federal agency. The court, while sympathizing with the Negroes, felt that it could not find the necessary federal action without usurping the legislative function. The Kansas Supreme Court, however, in *Betts v. Easley*,⁹⁶ reached a contrary result. There the defendant local, although certified as the exclusive bargaining agent of all the workers, refused to admit Negroes. The court found that "the acts complained of are those of an organization acting as an agency created and functioning under provisions of Federal law."⁹⁷ Consequently, the court felt itself agreeably constrained to hold that the union's actions were violative of the plaintiff's constitutional rights.

F. Conclusion

Quantitatively, the problem of discrimination in the labor movement is not large. The great majority of unions freely admit to membership all applicants regardless of race, creed, national origin, or ancestry. The fact remains, however, that some unions, particularly in the building trades and in the railway brotherhoods, do follow discriminatory practices. Viewed in the light of the democratic commitments of our society, the problem thus posed is how best to eliminate these practices.

Consistent with the voluntary association rationale, it is difficult to see how a court can compel a union to admit even an arbitrarily excluded applicant. And, where it has occurred, it is interesting to note that the court invariably is protecting the worker's right to employment, rather than attempting to guarantee him equal citizenship, through union membership, in his industrial community. Unfortunately, the courts have tended to evaluate the individual worker's needs solely on an economic basis, and have ignored the broader social and political needs of a human person maturing in an industrial society. The same criticism holds true of the state legislation passed to deal with this problem, though such criticism must be tempered by the fact "that these laws have reduced discrimination in employment and have opened up opportunities to minorities barred from certain . . . industries."⁹⁸

Perhaps the best solution to the problem would be the abandonment of the voluntary association rationale, and the development of a new body of jurisprudence, focusing primarily on the labor union as a unique institution. But realistically speaking, it is doubtful that this will take place on any large scale. Courts have demonstrated a natural reluctance to abandon the often-recited and time-honored rule.

The problem is further complicated since the labor movement is actually a nationwide phenomena. Efforts made by any one court, or single legislature, would be at best only patch work. What the situation requires is a comprehensive, national treatment.

⁹¹ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁹² *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

⁹³ *Civil Rights Cases*, 109 U.S. 3, 11 (1889).

⁹⁴ *Ross v. Elbert*, 275 Wis. 523, 82 N.W. 2d 315 (1957). See text at note 48, *supra*.

⁹⁵ *Oliphant v. Brotherhood of Locomotive Firemen*, 156 F. Supp. 89 (N.D. Ohio), *cert. denied*, 355 U.S. 893 (1957), *aff'd*, 262 F.2d 359 (6th Cir. 1958), *cert denied*, 359 U.S. 935 (1959).

⁹⁶ 161 Kan. 459, 169 P.2d 831 (1946).

⁹⁷ *Id.* at 838.

⁹⁸ S. Doc. No. 15, 83rd Cong., 1st Sess. 1 (1953).

Such a treatment could be achieved through the vehicle of constitutional interpretation. The arguments that union discrimination constitutes either state or federal action within the meaning of the constitution are extremely compelling, though they have been generally rejected. Upon closer analysis, however, one is forced to agree that: "The implications of calling labor unions governmental instrumentalities are not easy to perceive, but surely the designation would invite more and more regulation with consequent loss of independence."⁹⁹ The development of the complete person is best achieved in an atmosphere where the institutional arrangement of the society is based upon principles of individual freedom and associational autonomy. Regulation, as opposed to mere supervision, tends to weaken the vitalizing effects of these principles.

Perhaps, then, the best, and most realistic, solution to the problem would be amendments to presently existing federal legislation. Both the Taft-Hartley Act¹⁰⁰ and the Railway Labor Act¹⁰¹ should be amended to provide that no union could be certified unless it filed with appropriate authorities a copy of its constitution, containing a provision that all persons, otherwise qualified, would be eligible for membership regardless of race, color, national origin, or ancestry. The acts should also be amended to grant any aggrieved party the right to enforce the provisions in appropriate federal courts. Such amendments would thus be supervisory rather than regulatory in nature, and would eliminate discrimination in a manner specifically designed to maintain union integrity and independence — by placing the responsibility for their implementation and enforcement on the individual and the union.

III. UNION DISCIPLINE

The power needed to maintain an effective organization is also potentially the power to oppress. The modern trade union existing in our complex industrial society, however, needs the power to control its members if it is to fulfill its obligations under the collective bargaining agreement. Wildcat strikes, dissidence fostered for internal political reasons, and other divisive actions, since they undermine the very existence of the union, must be dealt with and controlled. To behave as a responsible institution in our society, the unions need the power to penalize and expel.¹⁰² Yet the exercise of this power, and its possible abuse, raises problems of the civil rights of its membership of the highest importance.¹⁰³

Quantitatively, the problem of union discipline is not large. Although it is relatively impossible to obtain precise data on the exercise of union discipline, the problem is not purely academic.¹⁰⁴ The number of cases is, however, small in proportion to the number of members, and the actual exercise of the disciplinary power is unusual in a majority of locals.¹⁰⁵ But it is important to realize that mere statistics are not the measure of justice. Each case represents a moment of crisis in a person's life, and its ultimate resolution has effects not only on the individual before the tribunal, but also on his dependents.

The question is thus posed: How does the individual union member fare under the exercise of this disciplinary power? It is the purpose of this section to investigate this problem, and to see what, if any, legal remedies are available to the unjustly disciplined member.

⁹⁹ Cox, *Union Democracy*, 72 HARV. L. REV. 609, 620 (1959).

¹⁰⁰ Labor Management Relations Act, 61 Stat. 136 (1947), 49 U.S.C. § 141 (1952).

¹⁰¹ 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1952).

¹⁰² The court in *Sanders v. International Ass'n of Bridge Workers*, 130 F. Supp. 253, 258 (W.D. Ky. 1955) aptly notes:

A labor union is a democratic institution. It is a self-governing body . . . [which] to fulfill its functions and protect the rights of its members . . . must have the authority through its governing body to classify and discipline its membership.

¹⁰³ For an excellent discussion of the relation between union power and union responsibility, see TANNENBAUM, *A PHILOSOPHY OF LABOR* 155-75 (1951).

¹⁰⁴ Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049-50 (1951).

¹⁰⁵ Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 486 (1950).

A. Union Constitutional Provisions

In any consideration of union affairs, perhaps the most important single document is the union's constitution. It represents the union's supreme law in governing its relations with its members, and normally it states the various acts which will subject its members to disciplinary action, their corresponding penalties, and procedures for trial and appeal.¹⁰⁶ The offenses enumerated in the average constitution vary with the nature of the industry organized. The Lithographers, for example, do not permit the use of chromic acid, a substance injurious to the health of those using it, which was at one time employed in many segments of the industry.¹⁰⁷ The Machinists, on the other hand, provide for fine or expulsion for a refusal to do rough or dirty work.¹⁰⁸ Despite this diversity, certain patterns or themes are discernible. Almost all constitutions make some provisions in regard to dues, and provide for penalties when the member becomes two or three months in arrears.¹⁰⁹ Many also regulate conditions of employment,¹¹⁰ and a few even attempt to regulate personal behavior.¹¹¹ Most constitutions also provide penalties for dual unionism.¹¹² One actually outlaws "racketeering."¹¹³ Almost all restrict in some form, usually under the guise of provisions against slander, intra-union criticism of union policies.¹¹⁴ And, a few have attempted to restrict the exercise of the member's rights within the society at large.¹¹⁵

By and large, however, the disciplinary provisions of most constitutions are of an all-inclusive nature. They prohibit conduct which is "disloyal," "unbecoming a union member," "causes dissension," or which is "detrimental to the best interest of the union."¹¹⁶ Most of these provisions were written years ago by men unskilled in the complexities of law, who could see little reason for specifying what was to be expected of each member. Yet, while their historical origin makes their presence understandable, their continuing existence remains objectionable. Their vague nature makes *ex post facto* justice possible,¹¹⁷ and effective and meaningful interpretation of the constitution by the member and the courts is rendered relatively impossible.¹¹⁸

The procedural provisions in union constitutions for deciding disciplinary cases very almost as much as the enumerated offenses themselves. Some unions specify a multitude of rules,¹¹⁹ while others merely require that the member receive a "fair trial."¹²⁰ Normally, the charges must be made in writing and notice served on the

¹⁰⁶ Some union constitutions do not contain disciplinary provisions. Only twenty-four unions, however, with a declared membership of 756,756, or 4.3% of all unionized labor, fit into this category. HANDBOOK p. 65.

¹⁰⁷ Amalgamated Lithographers of America, CONST., art. XXXIX, § 1-4a p. 50 (1958).

¹⁰⁸ International Ass'n of Machinists, CONST., art. J, § 4, p. 76 (1958).

¹⁰⁹ See, e.g., Granite Cutters Int'l Ass'n of America, CONST., § 67, pp. 63-67 (1956).

¹¹⁰ See, e.g., Bricklayers Int'l Union of America, CONST., art. X, § 1-4, pp. 40-41 (1956) (hours per day).

¹¹¹ See, e.g., International Ass'n of Machinists, CONST., art. J, § 9, p. 77 (1958) (intoxication).

¹¹² See, e.g., Amalgamated Meat Cutters of North America, CONST., art. U, § 3, p. L-22 (1956).

¹¹³ International Bhd. of Teamsters, CONST., art. XVIII, § 13 (a), p. 78 (1957).

¹¹⁴ See, e.g., United Hatters Int'l Union, CONST., art. XVII, § 1 (e), p. 62 (1956). For a more complete discussion of this problem, see p. 420 *infra*.

¹¹⁵ The most usual provisions under this heading are those outlawing membership in the Communist Party, International Union of Operating Eng'rs, CONST., art. XVI, § 4, p. 64 (1956); limiting access to civil courts, International Photo Engravers Union of North America, CONST., art. XXI, § 1, p. 43 (1958); and interfering with the legislative objectives of the union, Brotherhood of Railroad Trainmen, CONST., rule 27(b), (d), p. 170 (1955).

¹¹⁶ Approximately 51% of organized labor is governed by this type of provision, while only about 25% is governed by specific provisions. 11% is governed by constitutions which fail to state clearly any grounds for discipline, and 12% by constitutions which have no disciplinary provisions. HANDBOOK, p. 66. For an excellent discussion of these clauses see Summers, *supra* note 105, at 505-08.

¹¹⁷ HANDBOOK, p.67.

¹¹⁸ Summers, *Judicial Settlements of Internal Union Disputes*, 7 BUFFALO L. REV. 405, 416 (1958).

¹¹⁹ See, e.g., American Fed'n of Musicians, CONST., arts. 7-8, pp. 54-63 (1956).

¹²⁰ See, e.g., Boot & Shoe Worker's Union, CONST., § 75, p. 42 (1957).

accused.¹²¹ Approximately half of all unionized workers are subject to the disciplinary action of only their local, with the international having appellate jurisdiction, while the remainder are under the jurisdiction of either.¹²²

After the charges are filed, the case is normally referred to a trial committee composed of fellow workers, although some unions refer it to the local executive board.¹²³ Naturally, where the local and international possess concurrent jurisdiction, the charge normally determines the question of who will prosecute. A small number of unions provide for summary expulsion for particularly serious offenses.¹²⁴

Only a few unions fail to provide some appellate procedure, although very often the right to appeal is reserved for more serious offenses.¹²⁵ Several constitutions state that appeal must be taken in the form of a union-wide referendum,¹²⁶ while others make the international executive board the body of final review.¹²⁷ The majority, however, provide for the ultimate appeal to the body of the international convention.¹²⁸

While in the great majority of cases the union member receives a fair trial,¹²⁹ union disciplinary procedures are not above criticism. Laymen are very often called upon to decide emotionally-packed issues with no more concrete standard than the platitude that the accused is to receive a "fair trial." The "layman is primarily concerned with making up his mind, and the necessity for procedural techniques which will test and weigh the evidence is often not recognized."¹³⁰ This impatience with formalities is only accentuated when the case involves such personally vital issues as strikebreaking.

An appeal to a higher body within the union will sometimes remedy these defects. But most union disciplinary procedures have a more serious flaw, which, by its very nature, cannot be remedied within the union itself. Basically, this defect is the lack of an independent judiciary. The prosecuting and adjudicating functions are identified in a monolithic structure.¹³¹ This defect becomes particularly patent when the offense is of an intra-union political nature. Here, appeal to a higher body within the union will offer little chance of a more impartial trial, since often it is the policy of the international which forms the very substance of the charge.¹³²

121 See, e.g., Oil & Chemical Worker's Int'l Union, CONST., art. XII, § 2, p. 36 (1956). Failure to comply with this type of provision in disciplining a member will result in court reversal of any conviction. See, e.g., Barnhart v. UAW, 12 N.J. Super. 147, 79 A.2d 88 (Sup. Ct. 1951) where the court reversed an expulsion on grounds that since the charges made against the accused were not filed with the Recording Secretary and signed by the complaining member as specified in the constitution, the union was without power to take disciplinary action.

122 HANDBOOK p. 69.

123 *Id.*

124 *Id.* at 71-72.

125 *Id.* at 70.

126 Approximately 98,600 union members are covered by this type of provision. *Ibid.*

127 Thirty unions with approximately 3,051,797 members have this form of appeal. *Ibid.*

128 108 unions covering 11,465,718 members provide for this type of appeal. *Ibid.*

129 Summers, *supra* note 118, at 419.

130 *Ibid.* Recognizing the "Topsy" way in which union constitutions have tended to grow, a number of unions have recently adopted handbooks for local trial procedure designed to insure the member a fair trial. See, e.g., *Trial Procedure Handbook for Local Unions*, adopted by the International Executive Board of the Chemical Worker, June 8, 1958, on file in Notre Dame Law Library.

131 See generally, Niebuhr, *The Future of Labor*, *The New Leader*, August 26, 1957, pp. 3-4. This defect has not passed unnoticed among the unions. The General Executive Board of the Upholsterers Int'l Union has aptly noted:

. . . the greatest weakness in the disciplinary procedures of . . . all . . . Unions is our inability to guarantee a thoroughly unbiased objective tribunal of Union members.

Furthermore, we also recognize . . . the possibility that because the judicial machinery is so closely interlocked with the political administration by which laws are made and policies formulated . . . that discipline . . . may be influenced by political forces and considerations, even if not made a deliberate weapon of political and administrative power. *Democracy in the U.I.U.*, pp. 12-13, pamphlet on file in Notre Dame Law Library.

132 The Steel Workers Convention of 1958 offers an excellent illustration of this point.

Two unions have apparently found an answer to this problem. The UAW and the UIU have established "extra-union" appeal boards, to which impartial, prominent persons are appointed.¹³³ This system attempts to guarantee the member an unbiased trial within the union governmental structure by the establishment of a truly independent judiciary. Such a practice, where the factor of cost is not prohibitive, ought to be adopted by all unions.

Various penalties are imposed where the final decision is adverse to the member. The most common are fines, suspensions, and expulsions,¹³⁴ but in special cases other means of discipline are used. Sometimes the member is barred from attending meetings or holding office, a particularly effective discipline where its purpose is to silence internal opposition.¹³⁵ The ultimate effect of discipline, however, is not to be measured solely in terms of its severity on the individual member, but also in terms of its effect on the local as a whole. The expulsion of one person may effectively silence a group.

B. *Judicial Consideration of Union Discipline*

When a member is unjustly disciplined, does he possess any judicial remedy? As stated before, historically, labor unions were classified as voluntary associations, which placed them in the same category as churches and fraternal groups.¹³⁶ Because of long judicial experience with family fights in various religious and fraternal associations, the courts had adopted a policy of non-intervention, and this same policy was initially practiced in reference to labor organizations.¹³⁷ But soon the courts realized that labor unions were exercising extensive power, sometimes abusively, over the lives of their members. Some judicial intervention was necessary.

Justification for intervention was found in several theories which the courts were quick to develop. An English court in *Rigby v. Connal*¹³⁸ first rationalized that the intervention was necessary to protect the member's property rights. Soon this new theory found acceptance in American jurisprudence. Citing the *Rigby* case as authority, the court in *Fraelich v. Musicians Mut. Benefit Ass'n* affirmed the position that intervention finds its "sole purpose . . . [in] protecting an interest the member may have in the property of the association."¹³⁹ Although supplemented in some respect, the property theory is still followed today.¹⁴⁰

The precise nature of the union member's "property" rights, however, is not clear. He has nothing that he can sell, assign, or leave to his heirs. By traditional notions of property, it really cannot be said that the member has a "property" right. But perhaps

133 The UIU review Board was established in 1954. The first members of the board were: Archibald Cox, Harvard Law School, chairman; Nathan Feinsinger, University of Wisconsin Law School; Paul Herzog, Harvard School of Public Administration; Rev. Leo Brown, St. Louis University; J. Benton Gillingham, University of Washington Institute of Labor Economics; Rev. Dennis Comey, Institute of Industrial Relations of St. Joseph's College; Clark Kerr, University of Wisconsin; Honorable Curtis Bok, Philadelphia, Pa.; and Joseph Lohman, Illinois State Parole Commission. The UAW appeal board was established in 1957. The first members of the board were: Rabbi Morris Adler of Detroit, Michigan; Monsignor George Higgins of Washington, D.C.; Clark Kerr and Edwin Witte, University of Wisconsin; Honorable Wade H. McCree of Detroit; and Bishop G. Bromley Oxnam of Washington, D.C. Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L. J. 1349 n.113 (1958).

134 HANDBOOK p. 65.

135 See, e.g., *Miller v. International Union of Operating Eng'rs*, 118 Cal. App. 2d 66, 257 P.2d 85 (1953) where several union members were fined and suspended by the union for publishing slanderous remarks about the International President, but on the condition that if the fines were paid, the sentences would be suspended without right of the accused to attend meetings or participate in other internal affairs of the union. The court affirmed the union's conviction on the grounds it was supported by substantial evidence.

136 See generally, Chafee, *The Internal Affairs of Associations Not for Profit*, 44 HARV. L. REV. 991 (1930).

137 Summers, *supra* note 104, at 1050-51.

138 [1880] 14 Ch. D. 482.

139 93 Mo. App. 383, 390 (1902).

140 See, e.g., *Bires v. Barney*, 43 Cal. 2d 56, 277 P.2d 751 (1954).

what most courts mean by "property" right is substantially what the court in *Fleming v. Moving Picture Machine Operators* said: "the membership [itself] is the valuable property right."¹⁴¹

At any rate, the courts have also developed a supplementary rationale, realizing, perhaps, the inadequacies of the property theory. In *Lawson v. Hewell*,¹⁴² a case involving a Masonic order, the court advanced the notion that members of a voluntary association have with one another a "contractual" relation, defined by the rules of the organization, and that the member's "property" interest is only incidental to his membership. This new rationale was subsequently applied to a trade union in *Senetherban v. Laundry Washers*,¹⁴³ and is today the accepted law.¹⁴⁴ This new development assigns to each theory a special function: intervention is based on the property interest, and the contract-constitution provides a standard for adjudication.¹⁴⁵

Like the property theory, the contract rationale is susceptible to analytical criticism. The courts have attempted to fit a new situation into an old category, and the stress shows. The "contract" lacks clearly ascertainable parties. The constitution is usually thought to be a contract between the members and the association, and between the individual members themselves.¹⁴⁶ But since the union is often not considered a legal entity, its ability to contract is questionable,¹⁴⁷ and the notion of a contract between a million persons is somewhat incredible, especially when almost every convention results in a modification of its "terms." Also, most provisions, especially those concerned with discipline, hardly meet the basic requirement of definiteness. Further, where a member works in a union or closed shop, it is difficult to see any meaningful mutual assent.¹⁴⁸ One is forced to conclude that "the contract theory is but a technique for judicial intervention."¹⁴⁹ Ultimately, however, the present theories should stand or fall, not on the basis of their logical consistency, but on their ability to provide the unjustly disciplined member adequate relief.

How then are these theories applied by the courts to particular factual situations? Following the contract rationale, the court will generally require the petitioning member to exhaust his intra-union appeals before permitting him to resort to the court.¹⁵⁰ But to this general rule the courts have grafted a variety of almost vitiating exceptions, which may be grouped under two basic headings: (1) defects in original union jurisdiction, and (2) inadequacy of intra-union appeal.¹⁵¹

¹⁴¹ 16 N.J. Misc. 502, 1 A.2d 850, 853 (Ch. 1938). *Accord*, *Lo Bianco v. Cushing*, 177 N.J. Eq. 593, 177 Atl. 102 (Ch. 1935).

¹⁴² 118 Cal. 613, 50 Pac. 763 (1897). While *Lawson* is the earlier case, *Krause v. Sanders*, 66 Misc. 601, 122 N.Y. Supp. 54 (Sup. Ct. 1910) is usually regarded as the most prominent source of the contract theory. *Stone, Wrongful Expulsion from Trade Unions: Judicial Intervention at Anglo-American Law*, 34 CAN. B. REV. 1144 at n.12 (1956).

¹⁴³ 44 Cal. App. 2d 131, 111 P.2d 948 (1941).

¹⁴⁴ Mr. Justice Frankfurter notes in *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 618 (1958) that the "contractual conception of the relation between a member and his union widely prevails in this country. . . ."

¹⁴⁵ *Summers*, *supra* note 104, at 1116.

¹⁴⁶ See, e.g., *Bush v. International Alliance of Theater Employees*, 55 Cal. App. 2d 272, 130 P.2d 788 (1942). One state also has a statute providing that a duly adopted constitution constitutes an enforceable contract, providing the member exhausts his internal remedies. IND. ANN. STAT., § 40-2803 (Supp. 1958).

¹⁴⁷ See *Williams v. United Mine Workers*, 254 Ky. 520, 172 S.W.2d 202 (1943); Annot., 149 A.L.R. 505 (1944) (liability of an unincorporated association to suit).

¹⁴⁸ *But cf. Minch v. Local 37, Int'l Union of Operating Eng'rs*, 44 Wash. 2d 15, 265 P.2d 286, 291 (1953) where the court, failing to realize the vital differences between unions and "other" voluntary associations, noted:

Undoubtedly, a union member, just as a member of any other voluntary association, consents to be bound by union rules and to be disciplined for infractions thereof.

¹⁴⁹ *Stone*, *supra* note 142, at 1116.

¹⁵⁰ See, e.g., *Way v. Patton*, 195 Ore. 36, 241 P.2d 903 (1952). See statute cited *supra* note 146.

¹⁵¹ The case law in this area is extremely difficult to synthesize. The synthesis offered here is only one of many to be found. *Compare*, *Summers*, *supra* note 104, at 1086-92 with *Stone*, *supra* note 142, at 1125-28.

The first exception seems to suggest that if the proceedings are voidable, the exhaustion rule obtains, but if the proceedings are void, there being nothing to appeal from, the courts will immediately hear the case.¹⁵² Upon a closer analysis, however, it appears that the exception is as broad as the rule.¹⁵³ Apparently the courts will intervene whenever they feel the union has acted wrongfully!¹⁵⁴

Generally if the trial body was improperly constituted,¹⁵⁵ the procedure unfair,¹⁵⁶ or the offense not reasonably punishable,¹⁵⁷ the discipline is considered beyond the union's jurisdiction, and the court will grant immediate relief.

The reasoning behind the second exception indicates that it is senseless to force a member to exhaust his intra-union appeals where they will not afford him adequate relief. Excessive delay before the appeal will be heard,¹⁵⁸ inherent futility in seeking an appeal,¹⁵⁹ and the court's power to entertain actions for damages rather than reinstatement,¹⁶⁰ all constitute situations prompting the courts to make an exception to the general exhaustion rule.

Once the court finally decides to weigh the merits of the appeal it will normally consider two aspects of the case in determining the validity of the discipline. Procedurally, the courts apply a "substantial justice" test; while substantively, the courts require that the constitutional provisions defining the offense not be contrary to "public policy."

"Substantial justice" resists precise definition, but in terms of the cases, the concept does acquire meaningful content. In *Cason v. Glass Bottle Blowers Ass'n*,¹⁶¹ the court stated that although technical court practices would not be required of union procedures, they must be such as will afford the accused member substantial justice. The court then proceeded to give meaning to "substantial justice" by including the right to be apprised of the charges, to confront and cross-examine the accuser, and to examine and refute the evidence. It would also seem that the member is entitled to have his case heard before an impartial tribunal.¹⁶²

Extending the notion of the illegal contract, substantively, certain constitutional provisions may be held void as contrary to "public policy." There is little doubt, however, as to the union's power to make and enforce reasonable rules for the regulation of its affairs.¹⁶³ And research has indicated that in recent years, reversal of union discipline

¹⁵² Summers, *supra* note 104, at 1089.

¹⁵³ *But cf.* Holderley v. International Union of Operating Eng'rs, Local 12, 45 Cal. 2d 843, 291 P.2d 463 (1955), *apparently overruled by*, Mooney v. Bartenders' Union, Local 284, 48 Cal. 2d 841, 313 P.2d 857 (1957).

¹⁵⁴ Summers, *Judicial Settlements of Internal Union Disputes*, 7 BUFFALO L. REV. 405, 410 (1958).

¹⁵⁵ See, e.g., Hopson v. National Union of Marine Cooks, 116 Cal. App. 2d 320, 253 P.2d 733 (1953) (trial body selected by lot and not by election).

¹⁵⁶ See, e.g., Garner v. Newbert, 47 Ind. App. 183, 128 N.E. 704 (1920) (no notice or opportunity to be heard).

¹⁵⁷ See, e.g., Leo v. International Union of Operating Eng'rs, Local 612, 26 Wash. 2d 498, 174 P.2d 523 (1946) (solicitation to join another union).

¹⁵⁸ See, e.g., Madden v. Atkins, 4 N.Y.2d 288, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958) (appeal not heard within six months); Gleason v. Conrad, 81 N.Y.S.2d 368 (Sup. Ct. 1940) (appeal lay to convention held only once in five years).

¹⁵⁹ See, e.g., Crossen v. Duffy, 90 Ohio App. 252, 103 N.E.2d 769 (1951) (appeal lay to executive board which originally prosecuted charges).

¹⁶⁰ See, e.g., International Printing Pressmen v. Zenith, 145 Tex. 399, 198 S.W.2d 729 (1947). *But cf.* Binkowski v. Highway Truck Drivers, Local 107, 389 Pa. 116, 132 A.2d 281 (1957).

¹⁶¹ 37 Cal. 2d 134, 231 P.2d 6 (1951); Annot., 21 A.L.R.2d 1397 (1952). *Accord*, Werner v. International Ass'n of Machinists, 11 Ill. App. 2d 258, 137 N.E.2d 100 (1956) (expulsion upheld).

¹⁶² See, e.g., Madden v. Atkins, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957), *aff'd on others grounds*, 4 N.Y.2d 288, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958).

¹⁶³ See *Taxicab Drivers, Local 889 v. Pittman*, 322 P.2d 159, 164 (Okla. 1957) where the court noted:

There can be no dispute concerning the authority of an organization such as this Union to establish rules which permit disciplinary measures against members who violate their reasonable provisions. Such associations have authority to regulate the conduct of their members.

on substantive rather than procedural grounds is a situation which seldom occurs.¹⁶⁴

In reviewing a union tribunal's finding of fact, the courts normally apply the substantial evidence rule. The courts will not re-weigh the evidence or substitute its judgment for that of the tribunal where the tribunal's finding has substantial support in the evidence.¹⁶⁵ While this rule seems theoretically sound, it is subject to practical criticism. The policy considerations which recommend it in administrative law, particularly the expertise of the tribunal, are almost totally lacking where unions are concerned.¹⁶⁶ Yet it apparently remains the general rule.

But the crucial question remains. How adequate are the remedies the unjustly disciplined member can obtain? Universally it has been held that the petitioning member can obtain reinstatement.¹⁶⁷ Damages¹⁶⁸ may also be awarded, not only for lost wages, but also for mental suffering.¹⁶⁹

Still, compelling arguments can be made on behalf of the unjustly disciplined member that damages and reinstatement are not always adequate remedies. Appeals, both within and without the union, are expensive and time-consuming, and few members have the financial reserves to carry them and their dependents through this critical period. Thus, it may be legitimately asked whether the union member can prevent the injury prior to its occurrence. Normally the member will be faced with the exhaustion rule, unless he can bring himself within some well-recognized exception.¹⁷⁰ It does seem, however, that a member ought to be able to obtain a temporary injunction as a matter of course, staying the execution of the union's judgment pending appeals both within the union and to the courts.¹⁷¹

Reinstatement is usually achieved through a mandatory injunction ordering restoration of membership.¹⁷² Some jurisdictions, however, permit the issuance of a writ of mandamus.¹⁷³ Since the action sounds in contract rather than tort, the period within which the action must be brought is governed by the contract statute of limitations.¹⁷⁴

C. State Legislation

Several states have experimented with legislation dealing with union discipline, although no state at present has any comprehensive legislation dealing with the subject. Delaware and New Hampshire passed statutes in 1947, but repealed them in 1949.¹⁷⁵ Colorado's one attempt at regulation was struck down in 1944 as unconstitutional since it required as a part of the general scheme of regulation that all unions incorporate,

¹⁶⁴ For an excellent synthesis of the cases, however, in which the courts have placed substantive limits on union discipline see Summers, *supra* note 104, at 1058-74.

¹⁶⁵ See, e.g., *Miller v. International Union of Operating Eng'rs*, 118 Cal. App. 2d 66, 257 P.2d 85 (1953).

¹⁶⁶ See text *supra* p. 396.

¹⁶⁷ See, e.g., *Madden v. Atkins*, 4 N.Y.2d 288, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958).

¹⁶⁸ See, e.g., *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). Prior to *Gonzales*, there was some doubt as to the power of a state court to award damages where there was a possibility that the wrongful expulsion might constitute an unfair labor practice under the Labor Management Relations Act (Taft-Hartley) 61 Stat. 156 (1947), 29 U.S.C. § 158(b)(2) (1952). See *Real v. Curran*, 285 App. Div. 552, 138 N.Y.S.2d 809 (1955).

¹⁶⁹ *International Ass'n of Machinists v. Gonzales*, *supra* note 168.

¹⁷⁰ See text *supra* p. 398.

¹⁷¹ In *Wilkins v. De Koning*, 152 F. Supp. 306 (E.D.N.Y. 1957) the court did grant a temporary injunction preventing the union from taking disciplinary action against a member who had consulted with his attorney about union welfare funds. The court, however, seemed to feel that if the matter were routine discipline, the injunction ought not lie, and that the member would have to exhaust his internal remedies before appealing to the courts.

¹⁷² See, e.g., *Madden v. Atkins*, 4 N.Y.2d 288, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958).

¹⁷³ *Hopson v. National Union of Marine Cooks*, 116 Cal. App. 2d 320, 253 P.2d 733 (1953).

¹⁷⁴ *Ibid.*

¹⁷⁵ Summers, *Legal Limitation on Union Discipline*, 64 HARV. L. REV. 1049, 1097 nn. 235-36 (1951).

and thus was a denial of both freedom of speech and assembly.¹⁷⁶ Texas¹⁷⁷ and Massachusetts¹⁷⁸ are the only states presently having statutes which purport to deal with the problem.

The Texas statute provides, in substance, that a union member can be expelled only for good cause, and that he must receive a fair hearing. It also provides that a wrongfully expelled member can obtain reinstatement in the union. In short, the act represents little more than a codification of existing case law.

The basic purpose behind the first Massachusetts statute,¹⁷⁹ passed in 1888, is to make incorporation possible for labor organizations, not to regulate their internal affairs. After specifying the prerequisites to incorporation, however, the act does limit the procedure under which a member can be expelled.¹⁸⁰ The act further limits the power of labor unions, incorporated or unincorporated, to fine its members.¹⁸¹ However, in 1947, Massachusetts passed a statute dealing with union discrimination against employees.¹⁸² The statute, unfortunately, is keyed to a union or closed shop situation. Review of union discipline is only permitted where the member is threatened with possible discharge from his job, and even then, the standards for review are, like the Texas statute, no more than a codification of existing case law.

D. Federal Legislation

Federal statutes do not present a substantially different picture concerning union discipline. The Railway Labor Act¹⁸³ fails to mention the question, and the Taft-Hartley Act¹⁸⁴ only mentions the problem incidentally. Section 8(b)(1)(A) of the act recognizes "the right of a labor organization to prescribe its own rules with respect to the . . . retention of membership." And, section 8(a)(2)(B) of the act attempts to give some protection to the worker's right to employment, independent of union membership, by providing that an employer cannot justify discrimination toward employees if he has reasonable grounds to believe that the membership in the union was terminated on some basis other than the failure to pay dues and initiation fees. The act does not, however, attempt to deal with union discipline itself.

Apparently then, "the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law . . ."¹⁸⁵

E. Conclusion

The exercise of the disciplinary power in most locals is unusual, and in the great majority of cases where it is exercised the member receives a fair trial. Yet the presence of the power and the possibility of its abuse, coupled with the gravity of the effect of even isolated abuses, pose problems which merit consideration. That the power is necessary to the proper functioning of the union is clearly demonstrable. Our concern, therefore, should be not with eliminating this power, but with safeguarding the rights of the individuals who are or may be affected by its exercise.

176 COLO. STAT. ANN. ch. 97, §94(20)(4)(J) (Supp 1950), *declared unconstitutional*, AFL v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944).

177 TEX. REV. CIV. STAT. ANN. §§ 5152-5154(f) (1947).

178 MASS. ANN. LAWS ch. 180, §§ 15-19 (1955); MASS. ANN. LAWS ch. 150A, §§ 4,6A (1957).

179 MASS. ANN. LAWS ch. 180, §§ 15-19 (1955).

180 MASS. ANN. LAWS ch. 180, § (1955) provides: "No member of such corporation shall be expelled by vote of less than a majority of all members thereof, nor by vote of less than three quarters of the members present and voting upon such expulsion."

181 MASS. ANN. LAWS ch. 180, § 19 (1955) (must be reasonable and for legal purpose).

182 MASS. ANN. LAWS ch. 150A, § 6 (1957).

183 44 Stat. 577 (1926), as amended, 45 U.S.C. § 151 (1952).

184 Labor Management Relations Act, 61 Stat. 146 (1947) 29 U.S.C. § 141 (1953).

185 International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1958).

Approaching the problem through the voluntary-association rationale and utilizing the property and contract theories, the courts, independent of federal or state legislation, have generally reached satisfactory results. The basic problem in the area of union discipline today, moreover, is one of procedure, not one of substance. This is demonstrated by the lack of cases in recent years in which the objection to the action of the union was based on the substantive nature of the charge brought against the accused. It seems, however, that procedural objections to union discipline will be an ever-recurring problem, since what constitutes a fair trial is ultimately keyed to a particular fact situation. It is sufficient to note, though, that general standards of "due process" or "substantial justice" as used by the courts seem adequate to cope with the situation.

The major criticism of the courts, then, in the area of union discipline, does not center around what they have done, but around the theories being used to explain their decisions. However appropriate the voluntary-association classification was when the trade union first appeared, today it is clearly an anachronism. Nor can a union constitution be considered a contract in any meaningful sense of the term. Clearly, as it was recently noted:

Legal concepts which may have been sufficient to define the relationship of a fraternal society or other mere voluntary association to its members are neither adequate nor realistic to define the relationship of a trade union to its members. Any attempt to apply such concepts serves only to restrict the courts in forming principles based upon the developing customs and *mores* of this field of human activity. Rigidity in the law is not desirable but flexibility and adaptability to new conditions are essential to its growth.¹⁸⁶

But simply to criticize and point out the obvious is not enough. It is incumbent upon one who objects to offer an alternative course of action. Such an alternative approach may be found in a recent Canadian case. The Court of Appeal of Manitoba in *Tunney v. Orchard*¹⁸⁷ was faced with a situation involving the expulsion of a milk driver from a local of the International Brotherhood of Teamsters. The court found that the local executive board flouted all rules of "justice," "fair play" and "natural decency" in expelling the driver.¹⁸⁸ Such an interference with the accused's *status* as a member of the local constituted, in the opinion of the court, an actionable *tort*.¹⁸⁹ So holding, the court aptly noted: "The judges found it possible to move from property to contract to meet the exigencies of the times. The step from contract to status is not more revolutionary."¹⁹⁰

The advantages gained from treating union membership as a "status" relationship are manifest. It offers a more flexible concept to deal with a rapidly developing area of the law. Once rid of the theoretical strait-jackets of property and contract, the courts would be free, for instance, to articulate a meaningful standard for judicial supervision. Contract law is too often tied to recognition of economic interests only. The interests a union member has in his union run the whole gamut of the human personality. Freed of the limitation of the old approach, the courts would be encouraged to show that, not only the union's constitution, but also the needs of the human personality in the industrial community as they are embodied in public policy, limit union power over the individual union member. Further, the recognition that union membership is in reality a status relationship which, if unreasonably interfered with, constitutes an actionable tort against the erring official, would better serve to deter arbitrary union action. Few union officials would risk the possibility of a suit of this nature.

¹⁸⁶ Crawford & Stone, *Comment on Orchard v. Tunney*, 36 CAN. B. REV. 107 (1958).

¹⁸⁷ (1955) 15 West. Weekly R. 49 (Man. C.A.).

¹⁸⁸ *Id.* at 70.

¹⁸⁹ However, on appeal to the Supreme Court of Canada, the Court refused to hold that union membership constitutes a status relationship, although they affirmed the Court of Appeal in its holding that the executive board's interference with the driver's membership constituted an actionable tort. It also refused to hold the union itself liable for the damages as the Court of Appeal had done. *Orchard v. Tunney*, [1957] Can. Sup. Ct. 437, 8 D.L.R.2d 273 (1957).

¹⁹⁰ *Tunney v. Orchard*, (1955) 15 West. Weekly R. 49, 76 (Man. C.A.).

Perhaps one final word is necessary. Two bills¹⁹¹ presently before Congress offer another solution to the problem of union disciplinary power. Both bills set out a multitude of rules with which union disciplinary action would be required to conform. Such federal legislation is clearly unnecessary. Even in terms of the contract and property theories presently being used, the courts are dealing with the situation in a satisfactory manner. Both bills seem to ignore the proposition that democratic unionism cannot be legislated. Government's best role in this area is one of supervision, not detailed regulation. The passage of such legislation, particularly in the face of the present state of case law, could only result in a devitalization of trade union democracy through excessive governmental interference.

IV. UNION WELFARE, PENSION, AND GENERAL FUNDS

Until approximately two decades ago the primary sources of money handled by labor organizations were initiation fees, dues, fines and assessments collected from their members. Where the local was a member of a parent labor union, portions of these funds were tendered to the parent organization,¹⁹² and any remaining amount — all in the case of an independent local — remained in the local's treasury to pay for the operation of the association. That the amount of money thus accumulated on both levels, the local and the parent, is quite considerable is readily apparent.¹⁹³ However, in recent years our economic scene has witnessed a phenomenal growth of another source of union funds: the welfare and pension plans. It is the employee's interest in these funds that provides the subject matter of this inquiry. The primary emphasis of the study will be upon the protections afforded these interests.

The economic and social significance of these accumulations is illustrated by the amount of their total reserves and the number of people protected by welfare and pension programs. Estimates place the total accumulated assets of these funds near 34 billion dollars, and indicate that they are increasing by the incredible amount of four billion dollars each year.¹⁹⁴ Additionally, the number of people covered by the intricate network of these plans, the workers and their dependents, approaches seventy-five million — or nearly one-half the population of the United States.¹⁹⁵

The remarkable growth of these funds is seen from the fact that pension and welfare plans were minimal until about 1942, those then in existence were being financed entirely by dues and assessments of union members.¹⁹⁶ By 1954 they had reached an accumulated wealth of 20 billion dollars¹⁹⁷ and one economist noted that at this time, "uninsured corporate pension funds purchased more common and preferred stock than such financial giants as the life insurance companies, property and liability insurance companies, and open-end investment companies."¹⁹⁸ In 1956 the Securities and Exchange Commission pointed out that pension fund reserves were the largest single source of equity capital.¹⁹⁹ It is predicted that these reserves will increase until

191 S. 1137, 86th Cong., 1st Sess. (1959); H.R. 4473, 86th Cong., 1st Sess. (1959).

192 This amount is determined by the number of members in the local and is generally known as a "per capita tax." See Plumbing and Pipe Fitting Ass'n, CONST. § 134, p. 64 (1956).

193 See Newsweek, April 8, 1957, pp. 33-34.

194 Levitan, *Welfare and Pension Plans Disclosure Act*, 9 LAB. L. J. 827, 828 (1958). It is estimated that the total annual contributions to these funds approach \$9 billion, and the benefits paid under these plans are close to \$5 billion a year.

195 Subcommittee on Welfare and Pension Funds of the Senate Committee on Labor and Public Welfare, *Final Report on Welfare and Pension Plan Investigation*, S. Rep. No. 1734, 84th Cong., 2d Sess. 6 (1956) [hereinafter cited as *1956 Final Rep.*]. See generally Holland, *The Pension Climate*, 10 N.Y.U. ANN. CONF. LAB. 1 (1957).

196 Dubinsky, *Safeguarding Union Welfare Funds*, American Federationist, July, 1954, p. 10 (reprinted in 100 CONG. REC. 10318 (1954)). See Note, 29 ST. JOHN'S L. REV. 106 (1954) for an excellent forecast of current legislation.

197 U.S. News & World Report, Sept. 24, 1954, pp. 129-30.

198 S. Rep. No. 1280, 84th Cong., 1st Sess. 95 (1955).

199 *1956 Final Rep.* 2.

they reach about 80 billion dollars at which time a balance will be achieved between contributions and payments to the beneficiaries.²⁰⁰

The factors causing such a rapid increase in these reserves are many. Two developments, occurring almost simultaneously during World War II, constituted the major thrust of the programs. The first of these was the freezing of wages by Executive Order No. 9250²⁰¹ which, in effect, made it illegal for an employer to offer, or an employee to bargain for, increased wages. Subsequently, the National War Labor Board decided that contributions to benefit plans would not be an illegal increase of wages.²⁰² The second major impetus was the Revenue Act of 1942,²⁰³ which provided that employer contributions to such benefit funds were tax-deductible. An additional factor developed in 1948 when the then recently amended National Labor Relations Act²⁰⁴ was interpreted by the NLRB in the *Inland Steel Co.*²⁰⁵ case to mean that the employer would be guilty of an unfair labor practice for refusing to bargain concerning pension plans if so requested by the employees or their representative. More general and subsisting forces contributing to this growth of pension funds are the natural desires to insure against the loss of income due to unemployment, sickness, accident, old age, or death, and to meet the staggering cost of proper medical care. Lastly, of course, there is the financial advantage that such protection is far more economical when secured on the group rather than individual basis.

While the amount of capital accumulated by the unions through dues and other assessments may seem minimal when compared to the accumulations in the welfare and pension funds, it is still highly significant. Attesting to this is the fact that in April, 1957, five of the largest representative unions, with a membership of nearly five million, possessed an estimated wealth, derived from operating assessments, of approximately 143 million dollars.²⁰⁶ Although the concern of the union member over the safeguards of these general funds is perhaps not as intense as his concern for the welfare and pension funds upon which he will be entirely dependent in time of sickness or old age, he still is vitally interested in protecting this fund from being used for purposes other than proper union expenditures, or from being dissipated through mismanagement.²⁰⁷

A. Problems and Abuses

Whenever great amounts of wealth are accumulated, opportunities for graft and corruption in the management of this wealth are magnified and the probability of dissipation of funds by mismanagement looms larger than ever. That both of these problems

²⁰⁰ Levitan, *supra* note 194 at 828.

²⁰¹ 7 Fed. Reg. 7871 (1942). The President was acting pursuant to authority vested in him by "An Act to Amend the Emergency Price Control Act of 1942," ch. 578, 56 Stat. 765 (1942), 5 U.S.C. § 911 (1952). See AARON, *THE EMPLOYMENT RELATION AND THE LAW* 694 (1957).

²⁰² See Neenan, *Pension Funds and the Equity Market*, 7 LAB. L.J. 552 (1956). The employers quickly availed themselves of such a procedure, as this was a means to attract and hold workers in a scarce labor market.

²⁰³ Int. Rev. Code of 1939, § 165, added by ch. 619, 56 Stat. 862 (now INT. REV. CODE OF 1954, § 401).

²⁰⁴ 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-88 (1952).

²⁰⁵ 77 N.L.R.B. 1, *aff'd*, 170 F.2d 247 (7th Cir.), *cert. denied*, 336 U.S. 960 (1949). The Board found the term "wages," over which § 9(a) requires the employer to bargain in good faith, "must be construed to include emoluments of value, like pension and insurance benefits which accrue to employees out of their employment relationship." *Accord*, *W.W. Cross & Co. v. NLRB*, 174 F.2d 875 (1st Cir. 1949).

²⁰⁶ See *Newsweek*, April 8, 1957, pp. 33-34. These five unions were the UAW, Steelworkers, Teamsters, Ladies' Garment Workers and the International Association of Machinists.

²⁰⁷ See *O'Connor v. Harrington*, 136 N.Y.S.2d 881 (Sup. Ct. 1954), *modified*, 285 App. Div. 900, 138 N.Y.S.2d 1 (1955), where the union resolved to spend substantially all of the \$53,000 in its treasury to defend union officials who had been indicted for extortion and coercion. Plaintiff, after successfully prosecuting an action to prevent such misapplication, made a motion for counsel fees. The supreme court found him entitled to fees of \$5,000, which was modified on appeal to \$3,500. See also *Mooney v. Bartenders' Union Local 284*, 48 Cal. 2d 841, 313 P.2d 857 (1957), where monthly statements of union showed expenses exceeded income but gave no detailed explanation as to certain large outlays. Plaintiff was given permission to examine all financial records of the union.

are of special concern not only to the union members but also the general public is evidenced by recent investigations of a special subcommittee of the Senate,²⁰⁸ and the publicity given the results of such hearings.

Cases of outright misappropriation of union funds have been found only in a small minority of the unions,²⁰⁹ although the notorious press coverage given the sub-committee findings might lead one to conclude differently. It was, however, in this small percent of the total unions that the investigations uncovered constant and flagrant abuse of union funds, resulting in severe public indignation against unions generally.

The worst abuses found were invariably the result of improper control over both the funds themselves and the trustees of the funds. The methods used to exploit these funds are many and diverse, limited only by the ingenuity of the individual manipulator. Included among these are cases of commingling operating and welfare funds,²¹⁰ use of the funds for other than welfare purposes, such as payment of the personal expenses of the party in charge,²¹¹ or favoritism in the payment of claims.²¹²

Another means favored by those who attempt to enrich themselves at the members' expense is the placing of insurance, by plan administrators, in an insured plan, as contrasted with a self-administered plan.²¹³ Since the placing of such funds with insurance companies is a multi-million dollar business, some companies offer lucrative commissions or "kick-backs" to the administrators who favor them with their business.²¹⁴ Due to the fact that insurance commissions are the greatest in the first year and diminish every year thereafter, some labor officials will change insurance companies every year to take advantage of these higher commissions. This procedure has been labeled "switching."²¹⁵ Also, some insurance companies make an allowance to the insured for performing clerical services which must otherwise be maintained by the company. This is then used as a guise for payments to the administrators for "services" which were either not performed, or are normally performed by the policy-holder without reimbursement.²¹⁶

The insidious nature of such practices becomes clear when it is realized that since the operation of any welfare or pension plan is fixed as to the amount of contributions,²¹⁷ any increased cost of the plan due to such defalcations must be borne by the workers

²⁰⁸ After a presidential recommendation, this subcommittee was appointed by the Senate Committee on Labor and Public Welfare. See generally, Levitan, *supra* note 194, at 828.

²⁰⁹ 1956 Final Rep. 17.

²¹⁰ 1956 Final Rep. 23.

²¹¹ In one particular local in Chicago, the union president had the workers pay their contributions to the welfare fund as dues; he commingled \$30,000 of insurance dividends into union coffers and used the funds for lavish gifts, personal trips to Europe, and other personal expenses. 1956 Final Rep. 23.

²¹² In a Houston local, \$95,000 was collected from union members not belonging to this local for an alleged welfare fund. From this, approximately \$37,500 was paid out in benefits but to the members of this Houston local only. The remainder was used for union business. 1956 Final Rep. 24.

²¹³ 1956 Final Rep. 25-26. The insured plan is one where the money contributed by both employer and employee is used to purchase an insurance policy from a licensed commercial carrier. The choice of the insurance company is often made by the administrators. The insurance company, in return for the premiums, assumes all responsibility for investments, undertakes the actuarial risks, and guarantees the benefit payments.

Where the plan is self-administered, the administrators receive the contributions, determine how such moneys shall be invested, make the actuarial computations, and keep all the necessary records. See Note, *Protection of Beneficiaries Under Employee Benefit Plans*, 58 COLUM. L. REV. 78 (1958).

²¹⁴ Committee on Improper Activities in the Labor or Management Field, *Interim Report*, S. REP. NO. 1417, 85th Cong., 2d Sess. 59 (1958) (hereinafter cited as 1958 *Interim Rep.*) It was disclosed that the broker for one union's health and welfare plan received in commissions for a four-year period over one million dollars.

²¹⁵ 1956 Final Rep. 36.

²¹⁶ 1956 Final Rep. 32.

²¹⁷ The amount the employer, or both employer and employee, must contribute is based on some predetermined factor such as cents-per-hour or percentage-of-payroll basis. This is to be distinguished from the level-of-benefit plan in which the employer contracts to pay certain benefits after the happening of specific contingencies. See Tilove, *The Organization of a Pension Plan*, 10 N.Y.U. ANN. CONF. LAB. 55 (1956).

through reduced benefits. In a recent New York case where a welfare fund trustee was indicted for accepting bribes given pursuant to his permitting another to place the insurance, the court estimated such activity cost the union members \$250,000.²¹⁸ The subcommittee investigations also uncovered scattered instances of abuse in the handling of the general operating funds.²¹⁹ The committee report disclosed gross misappropriation of funds,²²⁰ gifts and annuities to officials, exorbitant salaries and vacations at welfare-plan expense.²²¹

The greatest danger to the interest of the member in the funds of his union, both general and welfare, lies not in such isolated cases of wilful misappropriations, but rather, in the risk that such funds will be dissipated by incompetence and mismanagement. This is notably true in benefit plans which are self-administered,²²² and particularly in the pension programs.²²³ Examples of such dangerous ineptitude are failure to keep accurate records,²²⁴ incurring extravagant expenses,²²⁵ and failure to make sound actuarial computations.²²⁶

Lastly, it should be emphasized that the investigations of these areas disclosed that only a small minority of the unions have been infected with corruption. In the final report of the subcommittee which examined welfare and pension plans it was stated:

Perhaps too little has been said of the many sound practices found in the great majority of these plans and of the conscientious and ingenious efforts on the part of industry, labor, insurance and banking to bring benefits to scores of millions of employees at low cost.²²⁷

B. Controls

1) Union Constitutional Safeguards

The existing safeguards on the union member's interest in these funds shall be examined first as to the internal controls of the unions. The laws and regulations by which a labor organization is governed can be found in that union's constitution. The courts, in deciding a controversy arising solely within the labor union, normally will look first to the union's constitution, since the constitution has been held to be a contract between the union officers and the members,²²⁸ and should govern the rights and duties of the parties to the contract.

Almost every constitution of the unions examined contained some provision for an audit of the local's books, usually at least twice a year, with a report being submitted to the office of the international.²²⁹ Similarly, it was required of the parent union that their books be audited and in most cases either the audit report or the financial statement be sent to the individual local.²³⁰

²¹⁸ *People v. Cilento*, 1 App. Div. 2d 200, 149 N.Y.S.2d 14, 20, *modified*, 2 N.Y.2d 55, 138 N.E. 2d 137, 156 N.Y.S.2d 673 (1956).

²¹⁹ *1958 Interim Rep.* 1.

²²⁰ *1958 Interim Rep.* 159: "The funds misappropriated in one union by two top-ranking officials totaled \$178,000 or about 18 percent of the union's entire intake in any one year."

²²¹ *1958 Interim Rep.* 446.

²²² See note 213 *supra*.

²²³ These, unlike welfare plans which deal with short-term risk, deal with long-term future contingencies. Deficiencies in the planning of the former are brought to the surface early in the plan's operation when income does not meet expenses and adjustments may be made to equalize the two. Pension plans, however, do not provide for immediate payments and if there is a future inability for the funds to meet demands it will be too late, in most cases, to be corrected. See *1956 Final Rep.* 47.

²²⁴ *1958 Interim Rep.* 5.

²²⁵ *1956 Final Rep.* 23.

²²⁶ See Melnikoff, *Actuarial Bases: The Interest Rate*, 10 N.Y.U. ANN. CONF. LAB. 85 (1957).

²²⁷ *1956 Final Rep.* 17.

²²⁸ *E.g.*, *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, *petition for rehearing denied*, 357 U.S. 944 (1958). The concept of the contractual relationship between a member and his union was recently adopted in *England. Bonsor v. Musicians' Union*, [1956] A.C. 104.

²²⁹ *Textile Workers' Union, CONST.*, art. X, § 9(b), p. 15 (1958). "This committee shall examine and audit the books and records of the local union . . . at least every three months. . ."

²³⁰ *International Printing Pressmen, CONST.*, vol. 1, art. III, § 4, pp. 15-16 (1956) (financial statements); *United Steelworkers of America, CONST.*, art. IV, § 20, p. 13 (1956) (copy of the audit).

Although such a required audit might appear to be an adequate safeguard of union funds, a weakness discernible in many of the provisions is an optional procedure which allows the trustee to perform the audit himself instead of having the examination conducted by a disinterested professional third party such as a certified public accountant.²³¹ Under such an optional provision, wisely avoided in some constitutions,²³² collusion between the treasurer and the trustee is all that is required to allow for unmolested and unwarranted diversion of funds. Even if the trustee is impeccably honest, it is, in most cases, highly unlikely that he possesses adequate knowledge of accounting and auditing to uncover any discrepancies.

The internal misgivings inherent in the handling of union funds have not gone unnoticed by responsible unions and their leaders. Consequently, within the unions themselves there have arisen such counter-measures as the codes of ethical practices²³³ and the investigations and/or expulsions of corrupt unions and union officials.²³⁴ Still the remedy afforded by these procedures has been slight when compared with the seriousness of the possible harm, for many unions can afford to ignore any such threat as expulsion and public castigation. There are, however, other means by which a member's interest in the union funds can be protected, and it is in this direction that the survey now proceeds.

2) *Judicial Safeguards*

The right of the courts to intervene and protect a member's interest in welfare and pension funds has long been recognized. Generally this intervention will be based on one of two fundamental principles. A number of jurisdictions have held these funds to be in the nature of a trust, with the individual employee being the beneficiary.²³⁵ Other courts simply view the fund as a charitable trust, with the beneficiaries remaining indefinite.²³⁶ Under this theory it is felt that the state has the primary responsibility to enforce the performance of the trust, if so requested by a person with an interest therein.²³⁷ Some look upon this as a legal fiction, pointing out that the relief would be indirect since the proper party plaintiff would be the attorney general of the state.²³⁸ However, if a person can show a special interest he may elect to maintain the suit himself.²³⁹

²³¹ See *United Auto Workers, CONST.*, art. 48, § 2, p. 107 (1957): "It shall be the duty of the Trustee of each Local Union . . . to audit, or cause to be audited by a Certified Public Accountant, the books and financial affairs of their Local Union quarterly. . . ." (Emphasis added.)

²³² *Amalgamated Lithographers of America, CONST.*, art. XII, § 11, p. 818 (1958): "The Finance Committee shall have all books and financial records audited by a Certified Public Accountant at least once a year. . . ."

²³³ *AFL-CIO Code of Ethical Practices*, Pub. No. 50, Feb. 1957.

²³⁴ *N.Y. Times*, Feb. 15, 1957, p. 12, col. 3; *id.*, Feb. 6, 1957, p. 1, col. 4; *id.*, Feb. 5, 1957, p. 19, col. 1; *id.*, Feb. 4, 1957, p. 1, col. 1.

²³⁵ *Yonce v. Miners Memorial Hosp. Ass'n*, 161 F. Supp. 178 (W.D. Va. 1958); *cf. George v. Haber*, 343 Mich. 218, 72 N.W.2d 121 (1955).

²³⁶ *Lewis v. Benedict Coal Corp.*, 259 F.2d 346, 355 (6th Cir. 1958); *Van Horn v. Lewis*, 79 F. Supp. 541 (D.D.C. 1948); *In re Tarrant's Estate*, 38 Cal. 2d 42, 237 P.2d 505 (1951).

²³⁷ See 4 *SCOTT, TRUSTS* § 391 (2d ed. 1956). This enforcement has been the obligation of the state as far back as 1601, and possibly before then. It was in that year Parliament enacted the Statute of Charitable Uses. 43 Eliz., c. 4. States today have similar provisions. *E.g.*, *Wis. STAT.* §231.34 (1955).

²³⁸ See Note, 58 *COLUM. L. REV.* 78, 94 (1958); see, *e.g.*, *N.Y. PERS. PROP. LAW* § 12(3); *N.Y. REAL PROP. LAW* § 113(3).

²³⁹ See 4 *SCOTT, TRUSTS* § 391, p. 2758 (2d ed. 1956), where it is stated: "A person who has a special interest in the performance of a charitable trust can maintain a suit for its enforcement." In those cases where the court has viewed the funds in light of a charitable trust, the attorney general was not made a party in interest. See also *Lundine v. McKinney*, 183 S.W.2d 265 (Tex. Civ. App. 1944) where, although the court did not describe the funds as a charitable trust, they repudiated a contention that a suit to appoint a receiver and to allow plaintiffs to audit the local's books could be maintained only by the attorney general.

Other courts have flatly rejected the comparison of such funds to trusts and based their intervention on contract rights.²⁴⁰ Under this view, one court held the employee to have a "contractual right to this pension if and when he comes within the regulations prescribed by the trustees."²⁴¹ It has also been held that each member of a union "has a contractual right to have the assets and property of the local union used for only those purposes set forth in the constitution."²⁴²

The courts were quick to establish judicial safeguards for the welfare and pension funds, as they recognized the social and economic ramifications of the capital reserve represented therein. In *United Garment Workers v. Jacob Reed's Sons*,²⁴³ the court expressed concern over these funds when it stated: "The Court considers such funds as rather sacred and it is the purpose of the law that they be available when due under the contract."²⁴⁴ In another case this same district court clearly indicated the power of judicial intervention for misfeasance on the part of the trustees, strongly suggesting that the trustees would be held to the highest duty of care:

[W]henver the trustees use, directly or indirectly, the fund for a purpose other than the sole and exclusive benefit of the employee-members, this court, when called upon, will enjoin the trustees from making improper expenditure. The burdening of the fund with undue administrative expenses or lush salaries for union officials will not be tolerated A provision in the by-laws or regulations denying the employee-members the right to resort to the courts to protect their beneficial interest in the fund is of no legal effect.²⁴⁵

Such intervention by the judiciary has given the member of the union a potential means of protecting his interest in the funds and enforcing his rights to them. When there is a breach of the fiduciary trust, fraud, or arbitrary action on the part of the trustees, the court may insure proper administration by these trustees within the terms of the agreement, although it cannot actually administer the trust.²⁴⁶ In one case where the court found the plaintiff had met the qualifying requirements, it compelled the trustees of the fund to pay him a retirement pension.²⁴⁷ This court later denied recovery where the trust provision required employment in the anthracite mines for twenty years as a condition precedent, because though the applicant had worked twenty-five years in the mines, eight were spent in the bituminous field.²⁴⁸

²⁴⁰ *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958); *Hurd v. Illinois Bell Tel. Co.*, 136 F. Supp. 125, 133 (N.D. Ill. 1955).

²⁴¹ *Hobbs v. Lewis*, *supra* note 240, at 286.

²⁴² *Seslar v. Union Local 901 Inc.*, 87 F. Supp. 447, 450 (N.D. Ind.), *rev'd*, 186 F.2d 403 (7th Cir.) (failure to show jurisdictional amount), *cert. denied*, 341 U.S. 940 (1951); *cf. DeMille v. American Fed. of Radio Artists*, 31 Cal. 2d 139, 187 P.2d 769, 776, *cert. denied*, 333 U.S. 876 (1948), where the court noted, "Dues and assessments paid by members to an association become the property of the association and any severable or individual interest therein ceases on such payment. [Citing cases] As such property, they are subject to disbursement and expenditure by the association in pursuit of the lawful object or objects for which they were designated to be expended."

²⁴³ 83 F. Supp. 49 (E.D. Pa. 1949).

²⁴⁴ *Id.* at 52.

²⁴⁵ *Upholsterers' Int'l Union v. Leathercraft Furniture Co.*, 82 F. Supp. 570 (E.D. Pa. 1949).

²⁴⁶ *Ruth v. Lewis*, 166 F. Supp. 346 (D.D.C. 1958). The court could order proper administration despite contract provisions in the trust instrument giving the trustees absolute discretion to determine eligibility to benefits.

It is interesting to note that this court treated the plaintiff as a beneficiary of a non-charitable trust, not one possessed of a contractual right, and thus the court could not directly enforce the trust. For a case decided in the same district in the same year, involving the same trust fund, where the court treated the fund as a contract and thus ordered payment, see *Hobbs v. Lewis*, 159 F. Supp. 282 (D.D.C. 1958). That courts generally are divided as to the extent of judicial review available in this situation is aptly illustrated in *Annot.*, 42 A.L.R.2d 461 (1955).

²⁴⁷ *Forrish v. Kennedy*, 377 Pa. 370, 105 A.2d 67 (1954). The court appeared to apply the doctrine of equitable estoppel. The trustees withheld the pension because the plaintiff, for three years, had sold liquor in violation of the union constitution, but during that time his dues were accepted, and no dispute arose when he sold the business and returned to work in the mines.

²⁴⁸ *Geron v. Kennedy*, 381 Pa. 97, 112 A.2d 181 (1955).

Where the trustees of the fund reach a deadlock on an issue within their power, another court has held it had jurisdiction to appoint an impartial umpire.²⁴⁹ Other courts, when requested to intervene in the financial affairs of a union, apparently have determined their actions by a close study of the peculiar facts before them. Thus, a court might appoint a receiver until final determination of the issues;²⁵⁰ enjoin certain expenditures by unauthorized persons;²⁵¹ require the trustees to act in a specific manner in order to avoid the chance or appearance of improper activity;²⁵² or order the officers to make an accounting of the funds.²⁵³ The trustee who abuses his office may be subject to criminal prosecution,²⁵⁴ and may be held personally liable for any funds "illegally or wrongfully received."²⁵⁵ The union member taking legal action to prevent misapplication of funds is entitled to receive his counsel fees.²⁵⁶

Inevitably connected with a union member seeking affirmative relief within the judiciary is the requirement imposed upon the members of a voluntary association that they first exhaust all internal remedies afforded by the union's constitution. This consideration was discussed above in relation to the problems of discipline²⁵⁷ and the exceptions to such a defense were synthesized. An additional exception to this general rule exists in the area of union operating and welfare funds, since the union member has a property interest in the money constituting the fund. Some courts will justify intervention where this property right of a member is jeopardized,²⁵⁸ or where the court feels the internal remedies which have not been exhausted would have been futile, illusory, or in vain.²⁵⁹ Fortunately, these courts have realized the distinction between a contro-

²⁴⁹ *Barrett v. Miller*, 166 F. Supp. 929 (S.D.N.Y. 1958); *Petition of Feldman*, 165 F. Supp. 190 (S.D.N.Y. 1958); Labor Management Relations Act of 1947 (Taft-Hartley Act) § 302(c)(5), 61 Stat. 157 (1947), 29 U.S.C., § 186(c)(5) (1952).

²⁵⁰ *Robinson v. Nick*, 235 Mo. App. 461, 136 S.W.2d 374 (1940).

²⁵¹ *Philadelphia Nat'l Bank v. Employing Bricklayer's Ass'n*, 36 CCH Lab. Cas. ¶65177 (1959). *McCraive v. Severino*, 249 App. Div. 112, 291 N.Y. Supp. 303 (1936); *cf., In re Bricklayers' Local No. 1*, 159 F. Supp. 37, 42 (E.D. Pa. 1958), where, in an action to authorize the investment of a union welfare fund, the court pointed out, that,

. . . [D]espite the fact that this proceeding is before the court on a petition of the trustees to invest in real estate, rather than by a petition of union members to restrain the expenditure, [the court] will determine the issues involved, since in effect the Court will restrain the expenditure should it refuse permission to make the investment.

²⁵² *American Bakeries Co. v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958). The trustees of a union welfare fund were required to separate completely the office and files of the fund from the union headquarters.

²⁵³ *DeMonbrun v. Sheet Metal Workers Int'l Ass'n*, 140 Cal. App. 2d 546, 295 P.2d 881 (1956). *Duke v. Franklin*, 177 Ore. 297, 162 P.2d 141 (1945). The union officer has often been described as a fiduciary in respect to funds collected from members of the union. See, e.g., *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 883, *modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941).

²⁵⁴ *People v. Cilento*, 1 App. Div. 2d 200, 149 N.Y.S.2d 14, *modified*, 2 N.Y.2d 55, 138 N.E.2d 137 (1956). *People v. Williams*, 145 Cal. App. 2d 163, 302 P.2d 393 (1956).

²⁵⁵ *Duke v. Franklin*, 177 Ore. 297, 162 P.2d 141 (1945).

²⁵⁶ *O'Connor v. Harrington*, 136 N.Y.S.2d 881 (Sup. Ct. 1954), *modified*, 285 App. Div. 900, 138 N.Y.S.2d 1 (1955).

²⁵⁷ See notes 150-51 *supra* and accompanying text.

²⁵⁸ *Washington Local 104, Int'l Bhd. of Boilermakers v. International Bhd. of Boilermakers*, 28 Wash. 2d 536, 183 P.2d 504, 509 (1947), *aff'd on rehearing*, 28 Wash. 2d 536, 189 P.2d 648 (1948): "While the decisions are not entirely in harmony . . . the weight of authority appears to be . . . to the general effect that where the controversy is financial in nature, rather than wholly disciplinary, the courts make an exception to the general rule that it will not adjudicate the question presented." *Cf. Nissen v. International Bhd. of Teamsters*, 229 Iowa 1028, 295 N.W. 858, 866 (1941).

²⁵⁹ *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882, *modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941). This appears to be the leading case for such a rule. Union members were granted an accounting where evidence showed income from dues to be \$200,000, the payments made to the international to be \$40,000, and the remaining bank balance at the end of this time was \$107.93. See also *Booth v. Security Mkt. Life Ins. Co.*, 155 F. Supp. 755, 762 (D.N.J. 1957), where the court pointed out, after the objection was raised that the members had failed to exhaust their internal remedies:

To this it need only be said that after two years of inaction by the Union and its high officials in taking any steps against those primarily responsible plus

versy disciplinary in nature and one concerned with the member's interest in union funds. In *Local 104, Int'l Bhd. of Boilermakers v. International Bhd. of Boilermakers* the court pointed out:

. . . The rule which requires members of voluntary associations to exhaust their remedies within the order, before applying to the courts for relief, applies primarily to controversies concerning matters of internal discipline, and not to disputes over money or tangible property . . .²⁶⁰

In the recent case of *De Monbrun v. Sheet Metal Workers Int'l Ass'n*, the court observed "Where mishandling of finances is involved, the requirement of exhausting internal remedies is much less stringent."²⁶¹

Unfortunately, other jurisdictions, by applying the strict letter of the law pertaining to voluntary associations, will deny any recourse to the courts until all intra-organizational appeals have been exhausted.²⁶² This latter approach appears to be a vexatious example of unyielding adherence by the courts to inflexible precedent. The modern labor union, with its attendant responsibilities at our present stage of industrial development, is far removed from what historically has been described as a "voluntary association." The complex architecture of the modern union has so greatly separated it from a voluntary association that one court was prompted to say:

The labor union is a developing institution and with its tremendous growth in importance and power has come to be more akin to the corporation than the partnership or the social or fraternal order . . . the ends of justice will be more properly served if the courts apply to such organizations the rules applicable to corporations rather than the rules applicable to voluntary fraternal orders . . .²⁶³

A New York court observed: "But a labor union is not a social club. It is an economic instrumentality conceived in the necessities of making a living under the expensive influence of modern industrial concepts."²⁶⁴

What appears to give the courts the most trouble in classifying a labor union as a particular type of entity is the judicial necessity of resolving certain policy conflicts. On the one hand is the right of a union to govern its own internal affairs, and on the other, the necessity of protecting the interests of the individual members. More and more it seems the courts are relying on principles of equity to resolve the disputes.

In the recent case of *Mooney v. Bartenders' Union Local 284*,²⁶⁵ the court affirmed a writ of mandamus allowing a member to inspect certain financial records of the unincorporated association. The court said:

Among the factors to be considered in determining whether interference by the courts in the internal affairs of a union is warranted on the basis of public policy is the nature of the right asserted by the member. The inspection of the records is merely a preliminary step, and, if the manner, place and time are reasonable, the examination cannot harm any proper union activity. Only after examination of the records can it be determined whether or not conditions exist which require correction. To deny a member access to the records and require him to exhaust all internal remedies in the preliminary matter of inspection would unduly hamper the member's right and possibly defeat the purpose of the investigation. On the other hand, it is to the best interests of the union that any misuse of its funds be immediately revealed, and it would serve no useful purpose to require that the examination of the books be delayed until the member has followed the procedure required by the union in ordinary matters.²⁶⁶

the alleged participation by high-union officials in these frauds, combine to make it apparent that any such intra-Union remedy is presently without avail. Doubtless it is for that very reason that plaintiffs have filed the present suit.

See *Jennings v. Jennings*, 56 Ohio L. Abs. 258, 91 N.E.2d 899 (1949).

²⁶⁰ 158 Wash. 480, 291 Pac. 328, 330 (1930).

²⁶¹ 140 Cal. App. 2d 546, 295 P.2d 881, 890 (1956).

²⁶² *Martin v. Favell*, 344 Mich. 215, 73 N.W.2d 856 (1955); *Way v. Patton*, 195 Ore. 36, 241 P.2d 895 (1952).

²⁶³ *Oil Workers Union v. Superior Court*, 103 Cal. App. 2d 512, 230 P.2d 71, 106 (1951).

²⁶⁴ *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882, 884, modified, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941).

²⁶⁵ 48 Cal. 2d 841, 313 P.2d 857 (1957).

²⁶⁶ *Id.* at 859. Of similar effect was a prior case, *DeMonbrun v. Sheet Metal Workers Int'l Ass'n*, 140 Cal. App. 2d 546, 295 P.2d 881 (1956), where union members were granted an accounting as to

C. *A Different Problem — Withdrawal of Local or Transfer of Members*

Although the problems involving mismanagement and misappropriation of welfare and pension funds, and their suggested solutions, are of primary concern to the unions and their members, a distinct but significant area of possible disagreement is emphasized when a local union withdraws from the international, or a member is transferred from one local to another. Here the question is not one of group safeguards but of individual ownership, *i.e.*, who is entitled to the money already paid into the welfare or pension fund as between the withdrawing local or member and the remaining international or local? Some courts have been satisfied to solve this query by using the time-worn analogy of union-voluntary association, holding that where the contract between the members of the association vests all assets in the central organization upon withdrawal from or dissolution of the association, it will be given full protection by the courts.²⁶⁷

Contained in almost all of the constitutions is a clause to the effect that all property rights vest in or are forfeited to the parent or international in the event the charter of any local is revoked, or in the event any local union dissolves, disbands or secedes.²⁶⁸ Where the local union withdraws by a majority vote under such provision, the courts generally will enforce the provision and permit the parent organization to recover the forfeited property of the local.²⁶⁹ However, this same result appears tenuous when the disaffiliation is given the unanimous approval of the members of the local,²⁷⁰ or where there is a compelling reason for the local to desire disaffiliation. This latter position is strikingly illustrated by the unusual situation existing in the International Bakers and Confectionery Workers' Union. This union has a national pension plan covering 305,000 employees, 50,000 of whom seceded from the international after it was charged with unethical practices by the AFL-CIO, and refused to dismiss its president, James Cross, who had been charged with corrupt practices. A prime requisite for pension eligibility in the union is membership in good standing in the international. The immediate issue presented is the effect of secession on the pension rights of these 50,000 members. If they stand to forfeit all their rights under the plan by secession, then they might well be coerced into remaining in the international, thus perpetuating what had been conceded to be a corrupt union. And, as one author points out, the situation could well be reversed, and an ethical international could use the pension rights of the local members as a club to enforce a house-cleaning of a corrupt local, which otherwise might disaffiliate.²⁷¹ If and when this particular dispute is judicially resolved, much of the vagaries in this area should disappear in favor of a uniform principle of law. Certainly, some few jurisdictions have already begun moving in this direction.²⁷² In *International*

alleged dissipation of the funds by union officials, prior to exhausting their internal remedies. *Cf.* *Van Hook v. Southern California Waiters Alliance*, 158 Cal. App. 2d 556, 323 P.2d 212 (1958), which held that it is not imperative that a member take his appeal directly to the courts. In this case, a former officer of a local sought to recover retirement benefits promised him. He attempted first to obtain relief through union channels but without success. Upon subsequent recourse to judicial relief, the union argued he was barred by the statute of limitations, citing *DeMonbrun, supra*, and *Mooney, supra*, in support of their contention that it was not necessary for him to first exhaust his internal remedies, but could have filed his action in the courts immediately upon retirement. The court rejected the union's contention, noting it was the union itself which lulled the plaintiff into a false sense of security, which restrained him from instituting proceedings before the running of the statute.

²⁶⁷ *United Public Workers v. Fennimore*, 6 N.J. Super. 589, 70 A.2d 901 (Ch. 1950), where the court analogized to a hypothetical "Home for the Aged." See also *Harris v. Backman*, 160 Ore. 520, 86 P.2d 456 (1939); *Fidelity & Deposit Co. v. Brotherhood of Painters, Decorators and Paperhangers of America*, 120 N.J. Eq. 346, 184 Atl. 832 (Ct. Err. & App. 1936).

²⁶⁸ See, *e.g.*, *Metal Polishers Int'l Union, Laws, Art. 21, § 17*, pp. 45-46 (1956).

²⁶⁹ *E.g.*, *Brown v. Hook*, 79 Cal. App. 2d 781, 180 P.2d 982 (1947); *Low v. Harris*, 90 F.2d 783 (7th Cir. 1937).

²⁷⁰ *United Public Workers v. Fennimore*, 6 N.J. Super. 589, 70 A.2d 901 (Ch. 1950); *cf.*, *Wolchok v. Durst*, 66 N.Y.S.2d 295 (Sup. Ct. 1946).

²⁷¹ See *Cohn, The International and the Local Union*, 11 N.Y.U. ANN. CONF. LAB. 7 (1958).

²⁷² For a general discussion of a local's withdrawal affecting property rights, see *Annot.*, 23 A.L.R.2d 1209 (1952).

Union of United Bakery Workers v. Becherer,²⁷³ a local voted almost unanimously to withdraw from the parent union affiliated with the CIO, and accept a charter from the AFL (at a time prior to merger). The court held that the local was entitled to retain the funds in its treasury, stating:

The existence of the Local Union, its revenue and its functions, are not derived from or dependent upon the International On the contrary, the international union does depend for its continued existence upon affiliation with the local unions Each local union is a separate and distinct voluntary association which owes its creation and continued existence to the will of its own members. . . . [N]o direct property right in the local union's assets can or does arise in favor of the international.²⁷⁴

This doctrine of the "independence" of the local as established in *Becherer*, has been relied on and followed in Connecticut²⁷⁵ and Ohio.²⁷⁶ Adopting another consideration to alleviate the forfeiture provision, a New York court has held that where the international union is first expelled from a federation, the contract between the local and the international is abrogated and the local has a right, by the will of its members, to withdraw affiliation and retain ownership and control of its funds and property.²⁷⁷ Another factor which some courts have acknowledged is the type of funds involved. Thus, where the moneys are for purely local purposes they are not subject to the forfeiture clause.²⁷⁸

There also exists the problem of property rights where the single member or a group must transfer to another local within the same parent union. In a recent New York case certain members were required to transfer to another local when the international re-defined jurisdiction. Some trustees of their former local declined to transfer the pension moneys collected for the transferred men, claiming it was beyond their power as trustees to do so. A majority of the trustees, however, voted in favor of the transfer. The court held the trust agreement could be amended to meet such contingencies so long as the fund "is not diverted from its primary purpose as a welfare and pension plan."²⁷⁹ In a later case involving welfare, rather than pension, the court held the new local entitled to the funds previously collected for the transferred workers.²⁸⁰

In summary, the judicial protection afforded a union member's financial interests in his labor organization is potentially his greatest safeguard. It is tempered by the reluctance of certain jurisdictions to discontinue applying the law of voluntary associations, with a concomitant "hands-off" policy, to labor unions. Such reluctance should be discarded and a new branch of law — the law of labor organizations — developed to cope with their current and increasingly serious problems. Although at their inception labor unions were not unlike other voluntary associations, this similarity has disappeared as the current economic and social structure of unionism has evolved. The controversies of true voluntary associations (social fraternities, clubs, churches, etc.) are not the same as those arising in labor organizations, and cannot reasonably be controlling if just solutions are to be reached.

²⁷³ 142 N.J. Eg. 561, 61 A.2d 16, *aff'd*, 4 N.J. Super. 456, 67 A.2d 900, *cert. denied*, 3 N.J. 374, 70 A.2d 537 (1949).

²⁷⁴ 61 A.2d at 20.

²⁷⁵ *Vilella v. McGrath*, 136 Conn. 645, 74 A.2d 187 (1950).

²⁷⁶ *Local 13013, UMW v. Cikra*, 86 Ohio App. 41, 90 N.E.2d 154 (1949); *Huntsman v. McGovern*, 56 Ohio L. Abs. 170, 91 N.E.2d 717 (1949).

²⁷⁷ *Clark v. Fitzgerald*, 197 Misc. 235, 93 N.Y.S.2d 768 (Sup. Ct. 1949). The court considered the affiliation with the CIO by the parent union as "of the essence of the contract," as the local would not have joined but for the affiliation. Once the court had reached the point this continued affiliation was an implied condition subsequent, and the expulsion of the parent union terminated the contract. *Accord*, *Duris v. Iozzi*, 6 N.J. Super. 530, 70 A.2d 793 (1949).

²⁷⁸ See *Donovan v. Danielson*, 271 Mass. 267, 171 N.E. 823 (1930) (voluntary association affiliated with Foresters of America).

²⁷⁹ *Whelan v. O'Rourke*, 5 App. Div. 2d 156, 170 N.Y.S. 2d 284, 287 (1958). It has been pointed out that the issue of whether the property interest should be transferred with the members still remains as unsolved had the trustees of the former local specifically voted against the transfer of the funds. *Cohn, The International and the Local Union*, 11 N.Y.U. ANN. CONF. LAB. 7, 25 (1958).

²⁸⁰ *Nicoletti v. Essenfield*, 171 N.Y.S.2d 373 (Sup. Ct. 1958).

The members of labor unions, both as individuals and as a group, have a far greater right and a far greater need to have their funds protected by the courts, for their very livelihood depends on this protection. There is nothing "voluntary" about a member's association with his union when without this association he cannot work, and eat, and live.

It is not naive to search for a uniform rule which will define clearly the rights of international, locals, and members under the myriad factual situations that arise in this area of pension and welfare funds. Divisions have been made between voluntary and involuntary transfers, necessary and capricious secessions, but none have appeared to resolve adequately the basic issue of who has the property right in the fund. Clearly, the New York courts are developing an equitable doctrine which gives to the individual employee a vested interest in the fund that cannot be denied him except under the most extraordinary circumstances.²⁸¹ Until there is some such equitable solution to this issue, decisions as diverse as the problems to which they are addressed will continue.

D. Legislative Safeguards

1) Federal

In order to preserve the integrity of employer-employee relations, the Labor Management Relations Act of 1947²⁸² attempted to prohibit any act which could amount to bribery or extortion or any form of dishonesty between employer and employees.²⁸³ Thus the act makes it unlawful for the employer to make, or agree to make, any payment to any employee representative²⁸⁴ and for that representative to accept or agree to accept, any such "thing of value."²⁸⁵ The act, however, provides a specific exception for the employees' welfare and pension plans, provided these funds first meet certain conditions.²⁸⁶ To qualify under this exception the money paid to such trust fund must be for the exclusive benefit of the employees, their families and dependents; the administration of the trust must be shared by employer and employee representatives; the trust agreement must be in writing and make provision for an annual audit, and insure the availability of the statements of such audit for inspection by interested persons.²⁸⁷ Any person who wilfully violates one of the provisions is subject to a fine not exceeding 10,000 dollars and/or imprisonment for not more than one year.²⁸⁸ Lastly, the act extends to the federal district courts jurisdiction to restrain any violations of this section.²⁸⁹

Basically, the shortcomings of the statute are the lack of requirements necessitating efficient management of the funds.²⁹⁰ The trust agreement must be filed, but there is no prohibition against exorbitant salaries and expenses. The results of the annual audit must be "available for inspection," yet there is no specification as to what information must be included in this report and conceivably a minimal disclosure would suffice.²⁹¹ It has even been suggested that section 302(c)(5) of the act does not of itself make any act or omission a criminal offense, which accounts for the lack of criminal prosecutions in this area.²⁹² One federal district court went so far as to refuse jurisdiction of an action

²⁸¹ See notes 279 and 280, *supra*.

²⁸² 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-88 (1952).

²⁸³ See *United States v. Brennan*, 134 F. Supp. 42 (D.C. Minn.), *aff'd*, 240 F.2d 253 (8th Cir. 1955), *cert. denied*, 353 U.S. 931 (1957).

²⁸⁴ 61 Stat. 157 (1947), 29 U.S.C. § 186(a) (1952).

²⁸⁵ 61 Stat. 157 (1947), 29 U.S.C. § 186(b) (1952).

²⁸⁶ 61 Stat. 157 (1947), 29 U.S.C. § 186(c)(5) (1952).

²⁸⁷ *Ibid.*

²⁸⁸ 61 Stat. 157 (1947), 29 U.S.C. § 186(d) (1952).

²⁸⁹ 61 Stat. 157 (1947), 29 U.S.C. § 186(e) (1952).

²⁹⁰ See *American Bakeries Co. v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958), where the court recognized and lightly criticized the Taft-Hartley Act for failing to specify standards or rules of management for such trust funds on which a court could intelligently, decide the legality of a particular trust arrangement.

²⁹¹ 1956 *Final Rep.* 57-59.

²⁹² 1956 *Final Rep.* 58.

based on a violation of section 186(c)(5), despite section 186(e), stating:

[S]ince no violations of § 186 (a) or (b) are involved, there is no basis for invoking the powers of the United States courts. . . . [T]o read into this statute, as plaintiffs urge, a broad bestowal of jurisdiction over all disputes relating to union welfare funds is not consonant with the architecture of the law or with its purpose.²⁹³

However much these provisions of the Taft-Hartley Act promote the fair and efficient administration of welfare and pension funds in principle, a close scrutiny reveals various inadequacies that have greatly diluted any effective sanctions against misappropriation or mismanagement.

In an apparent attempt to rectify the weaknesses of the Taft-Hartley Act, and offer an increased form of protection to the beneficiaries of welfare and pension funds, the Welfare and Pension Plans Disclosure Act of 1958²⁹⁴ was passed. It is the avowed purpose of this act to protect, through disclosure and reporting, the rights of participants and beneficiaries in such plans.²⁹⁵ Basically, it requires the administrator or person in charge of the plan to publish a complete description of the plan's operation and have detailed annual reports certified by an independent certified or licensed public accountant.²⁹⁶ Such publication shall be made available for examination by any participant or beneficiary "in the principal office of the plan," and shall be filed with the Secretary of Labor.²⁹⁷ To provide for the enforcement of the act, a wilful violation is made a misdemeanor subject to a fine of not more than 1,000 dollars or imprisonment for not more than six months; failure to supply beneficiaries with reports may render the administrator liable to such beneficiary up to fifty dollars for each day from the date the report was due.²⁹⁸ Under existing law a false statement sworn to by the administrators of the plan and filed with the Secretary of Labor subjects them to a fine up to 10,000 dollars and/or up to five years imprisonment.²⁹⁹

It is perhaps too early to determine the effectiveness of this legislation. Criticism of it has been frequent, principally on the basis that the act is too mild a measure.³⁰⁰ Certain weaknesses appear to be inherent in the act and form the foundation for such disapprobation. President Eisenhower strongly objected to it (even though signing it into law) because court proceedings to enforce the provisions must be instigated by participants or their beneficiaries, most of whom do not possess the needed resources of legal experience to cope with the most flagrant abuses.³⁰¹ Another infirmity was pointed out by the Secretary of Labor when he expressed the view that the Department of Labor's function under this act was a purely custodial capacity and that it had no authority to investigate the accuracy of any information or statistics contained in the reports on file.³⁰² The AFL-CIO considered the act a "watered down measure."³⁰³

²⁹³ *Moses v. Ammond*, 162 F. Supp. 866 (S.D.N.Y. 1958). *But see American Bakeries Co. v. Barrick*, 162 F. Supp. 882 (N.D. Ohio 1958), where the court heard and decided a question involving the administration of a union trust fund, and was clearly prepared to grant an injunction if necessary. *Cf. In re Bricklayers' Local No. 1*, 159 F. Supp. 37 (E.D. Pa. 1958).

²⁹⁴ 72 Stat. 997 (1958), 29 U.S.C.A. §§ 301-09 (Supp. 1958).

²⁹⁵ 72 Stat. 997 (1958), 29 U.S.C.A. § 301 (Supp. 1958). The Act does not apply to a plan covering less than twenty-five employees. 72 Stat. 999 (1958), 29 U.S.C.A. § 303(b)(4) (Supp. 1958).

²⁹⁶ This certification shall be "based on a comprehensive audit conducted in accordance with accepted standards of auditing," but this is not required to be performed on "the books or records of any bank, insurance company, or other institution providing an insurance, investment or related function for the plan, if such books or records are subject to examination by any agency of the Federal Government, or of the government of any State." 72 Stat. 1000 (1958), 29 U.S.C.A. § 306 (b) (Supp. 1958).

²⁹⁷ 72 Stat. 1002, 29 U.S.C.A. § 307 (Supp. 1958).

²⁹⁸ 72 Stat. 1002, 29 U.S.C.A. §§ 308 (a), (b) (Supp. 1958).

²⁹⁹ 62 Stat. 749, 18 U.S.C. § 1001 (1950). "Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willingly falsifies . . . a material fact, or makes any false, fictitious or fraudulent statements . . . shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

³⁰⁰ Levitan, *Welfare and Pension Plans Disclosure Act*, 9 LAB. L.J. 827, 833-34 (1958).

³⁰¹ N.Y. Times, August 30, 1958, p. 16, col. 4.

³⁰² Scaife, *The Welfare and Pension Plans Disclosure Act*, 14 BUS. LAW 162, 163 (1958).

³⁰³ Levitan, *supra* note 300, at 834.

But if nothing else was accomplished by the passage of this act, it showed that congressional leaders fully realized their responsibility of adopting legislation on the federal level which will adequately protect the beneficiaries of such funds.³⁰⁴ The acceptance of this obligation is a major advance in the ultimate arrival at a satisfactory solution to a problem that has greatly troubled all concerned.

2) State

A total of ten states³⁰⁵ and the territory of Hawaii³⁰⁶ have enacted legislation dealing generally with the financial structure and responsibilities of labor unions operating within state jurisdictions. These acts generally require the union to furnish the state with financial statements or reports,³⁰⁷ or to make available to members the organization's books, records and accounts.³⁰⁸ Six states³⁰⁹ have enacted legislation specifically aimed at the management of welfare and pension funds, and chiefly patterned after the Federal Welfare and Pension Plans Disclosure Act.

The states base their authority to make such regulations on the assertion that welfare plans "vitaly affect the well-being of millions of people and are in the public interest,"³¹⁰ while regulations of the unions are an exercise of the state's "police power in the protection of public interest."³¹¹ The constitutionality of these statutes has been upheld on the ground that they are police measures, and thus not violative of freedom of speech or assembly,³¹² or freedom against unlawful search and seizure.³¹³

There are certain provisions omitted from the state statutes dealing with welfare and pension plans which mitigate their effectiveness and scope. New York, for example, by definition excludes unilateral employer-administered funds,³¹⁴ Massachusetts does not require the financial reports to be certified by a certified or licensed public account-

³⁰⁴ See remarks of Congressman Teller (sponsor of the Disclosure Act), 15 CONG. REC. 15052 (1958) and Senator Kennedy's remarks in 16 CONG. REC. 16511-12 (1958). Both indicated the real need for further congressional action in this vital area.

³⁰⁵ ALA. CODE tit. 26, § 382 (Supp. 1955); Conn. P.A. 628 L. 1957, reprinted in 4 CCH Lab. L. Rep. ¶42010, at 41704 (July 11, 1957); FLA. STAT. ANN. § 447.07 (1952); KAN. GEN. STAT. ANN. § 44-806 (1949); MASS. ANN. LAWS ch. 180, § 18 (1955); MINN. STAT. ANN. § 179.21 (1947); ORE. REV. STAT. § 661.040 (1957); S.D. CODE § 17.1105 (Supp. 1952); TEX. REV. CIV. STAT. ANN. art. 5154a (1957); WIS. STAT. § 111.08 (1955).

³⁰⁶ HAWAII REV. LAW § 90-11 (1955).

³⁰⁷ See, e.g., ALA. CODE tit. 26, § 382(6) (Supp. 1955), wherein it is provided that the labor organization must file with the Department of Labor a "complete financial statement of all fees, dues, fines or assessments levied and/or received, together with an itemized list of all disbursements with names of recipients and purpose therefor. . . ."

³⁰⁸ FLA. STAT. ANN. § 447.07 (1952). While not requiring a financial statement to be submitted to the state or the members, it is mandatory that accurate books of account be kept, and members may inspect these books at reasonable times. It seems the union member has the right to consult an attorney or an accountant regarding any statement of the union's affairs he receives. *Wilkins v. De Koning*, 152 F. Supp. 306 (E.D.N.Y. 1957).

³⁰⁹ CAL. INS. CODE §§ 10640-55 (Supp. 1958); MASS. ANN. LAWS ch. 151D, §§ 1-10 (Supp. 1958); N.Y. BANKING LAW §§ 60-75 (Supp. 1958); N.Y. INS. LAW § 37(a)-(p) (Supp. 1958); WASH. REV. CODE §§ 48.52.010-.080 (1955); WIS. STAT. ANN. §§ 211.01-17 (Supp. 1959); Conn. P.A. 594 L. 1957 (reprinted in 4 CCH Lab. L. Rep. ¶42301-12 at 41705-2 to 41705-6 (July 11, 1957)).

³¹⁰ E.g., N.Y. INS. LAW § 37 (Supp. 1958).

³¹¹ ALA. CODE tit. 26, § 376 (Supp. 1955).

³¹² *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945); *Bowe v. Secretary of Commonwealth*, 320 Mass. 230, 69 N.E.2d 115, 131 (1946); *Borden v. Sparks*, 54 F. Supp. 300 (N.D. Ala. 1944).

³¹³ *AFL v. Mann*, 188 S.W.2d 276 (Tex Civ. App. 1945).

³¹⁴ N.Y. INS. LAW § 37(a) (Supp. 1958); see Note, 58 COLUM. L. REV. 78, 104 (1958) for a criticism of such omission. In March, 1959, Governor Rockefeller introduced a bill in the New York Legislature whose principal aim is to curb abuses within the financial structure of the unions. The bill is likely to receive prompt approval because it makes no attempt to legislate in the area of internal democracy, but is directed at the fiduciary and financial obligations of union officers and agents. The bill has received highly favorable editorial comment. *N.Y. Times*, March 14, 1959, p. 1, col. 1; *Id.* p. 14, col. 2-3. See also *N.Y. Times*, March 16, 1959, p. 30, col. 1.

ant;³¹⁵ Washington fails to impose many of the prohibitions prudently enumerated by other states.³¹⁶ Nevertheless, until adequate federal legislation is enacted, and in light of the general theory upon which these acts are based, *i.e.*, that disclosure of information should deter the perpetration of further abuses and aid in uncovering present wrongdoing, these laws are necessary to provide adequate supervision in an area vitally affecting the public interest.

E. Proposed Federal Legislation

Presently pending before Congress are two labor-management reporting and disclosure bills. They are commonly known by the names of their sponsors, the Kennedy-Ervin bill³¹⁷ and the Goldwater bill.³¹⁸ Both of these are, basically, attempts to provide additional necessary safeguards against improper practices in labor organizations and labor-management relations. Regarding the provisions affecting a member's interest in union funds they are fundamentally similar, any divergence being the result of the different emphasis placed on the role of labor and management in administering the funds.

Certain requirements as to the contents of financial statements are enumerated, no longer allowing summary reports to suffice.³¹⁹ The interchange of finance between management and unions is carefully scrutinized, and in some cases prohibited.³²⁰ Every union officer must report any stock or interest held by him or his family in "an employer whose employees such labor organization represents or is seeking to represent,"³²¹ or in a business, a substantial part of which consists of dealing with that employer.³²² This provision, however, does not apply to securities traded on a national securities exchange.³²³

The Goldwater bill provides for judicial intervention upon any abuse of responsibility of a person entrusted with funds and property of a labor organization. This action may be maintained by one or more members of the organization, and nothing is said regarding exhaustion of internal remedies.³²⁴ The Kennedy bill expressly requires that the aggrieved member first request the union's governing board to act, and upon its failure the member can gain access to the federal courts.³²⁵ This bill specifically makes embezzlement or conversion of welfare or pension funds a federal offense.³²⁶

Perhaps the most important improvement of these bills on existing legislation is to vest authority in the Secretary of Labor to inspect records and accounts in order to investigate any fact or condition, including the accuracy and completeness of any re-

³¹⁵ MASS. ANN. LAWS ch. 151D, §§ 1-10 (Supp. 1958).

³¹⁶ WASH. REV. CODE §§ 48.52.010-080 (1955). An example of such a prohibition included in another state is found in MASS. ANN. LAWS ch. 151D, § 3(c) (Supp. 1958). "No trustee or employer or labor organization . . . shall receive directly or indirectly any payment, commission, loan, service or any other thing of value from any insurance company, insurance agent, insurance broker or any hospital, surgical or medical plan, in connection with . . . a contract providing benefits for such trust. . . ." Another is in N.Y. BANKING LAW § 71(3) (Supp. 1958); N.Y. INS. LAW § 37-e(3) (Supp. 1958) (All disbursements must be paid by check).

³¹⁷ S. 505, 86th Cong., 1st Sess. (1959).

³¹⁸ S. 748, 86th Cong., 1st Sess. (1959).

³¹⁹ S. 505, 86th Cong., 1st Sess. § 101 (1959); S. 748, 86th Cong., 1st Sess. §§ 202-03 (1959). Under both bills, the Secretary of Labor is authorized to specify by regulations the amount of detail and the form and manner of the report. S. 505, 86th Cong., 1st Sess. § 101(c) (1959); S. 748, 86th Cong., 1st Sess. § 203(a) (1959).

³²⁰ S. 505, 86th Cong., 1st Sess. § 107(b) (1959) (loans by management to officers or members of a union representing or seeking to represent that employer are prohibited). S. 748, 86th Cong., 1st Sess. § 205(a) (1959) requires that they must be carefully reported.

³²¹ S. 505, 86th Cong., 1st Sess. § 102(a) (1959). The Goldwater Bill has a similar provision. S. 748, 86th Cong., 1st Sess. § 205(a) (1959).

³²² S. 505, 86th Cong., 1st Sess. § 102(a)(3) (1959).

³²³ S. 505, 86th Cong., 1st Sess. § 102(a)(6) (1959).

³²⁴ S. 748, 86th Cong., 1st Sess. § 301(b) (1959).

³²⁵ S. 505, 86th Cong., 1st Sess. § 109(b) (1959).

³²⁶ S. 505, 86th Cong., 1st Sess. § 109(a) (1959).

quired report.³²⁷ The Goldwater bill further provides that the Secretary may bring an action to enjoin an actual or potential violation of the act.³²⁸

Much of the criticism directed at the Taft-Hartley and Welfare and Pension Plan Disclosure Acts³²⁹ has apparently been heeded by the authors of these two pending bills. At least a legitimate effort was made in this direction. Since there appears to be mounting sentiment³³⁰ that the problem must finally be met by federal legislation, it seems highly likely that one of these proposals, in at least a modified form, will subsequently become enacted into law. Only at that time can it be examined to conclusively determine its improvements and failings, so that additional legislation, if necessary, can be initiated.

F. Conclusion

It is clear that the management and control of union funds, the welfare, pension, and general, have ramifications extending to an immense latitude, and render a substantial impact on workers and their beneficiaries. Equally clear is the proposition that the interests possessed by such individuals should be protected. The divergence of opinion occurs in determining the means to achieve such protection. In conflict over the proposed solutions is the right of the union to self-government as opposed to federal or state intervention and regulation.

Existing law has apparently predicated its safeguards on the premise that publicity is the keenest inducement to probity and a stimulus to integrity. It was felt that quantitative financial reports would force disclosure of abuses, and union members would compel prosecution of the defalcating officials. This conception proved deficient primarily due to the requirement that the impetus needed to instigate any proceeding must be from an interested party. It was pointed out in the subcommittee's report that:

As a practical matter, an employee-beneficiary will probably think twice before agreeing to undergo the cost and risk of a suit which constitutes a challenge both to the power and authority of a board of trustees (which can grant or withhold benefits) and, in most cases, to the power and authority of his own union's leadership.³³¹

Perhaps the severest limitation to such requirement is that it proceeds on the assumption that the members who are trained primarily in their particular field can critically analyze financial statements to discover possible dissipation of the funds when such a task is exceedingly difficult even for a trained accountant. That adequate federal and state legislation shall someday afford maximum safeguards to these funds crucially affecting our economy is certain that such increased protection be imminent is earnestly desired.

V. UNION GOVERNMENT

To Gompers and the other great leaders of our early labor movement, unions could be nothing but democratic. One of the first goals of the unions was to free the workers from the tyranny of the "profit-mongers" and to give them a voice as to the conditions under which they would work.³³² Unfortunately today, in some instances, the tyranny of the "profit-mongers" has been replaced by the tyranny of union "bosses." While the instances of abuse in this area are undoubtedly few,³³³ nonetheless, because some union members are being denied the right to speak, to vote, and to run for office, this area of our national life deserves serious study and attention.

This section of survey will examine the extent of the individual member's right to participate in the governmental processes of his union. An attempt will be made to

327 S. 505, 86th Cong., 1st Sess. § 106(c) (1959); S. 748, 86th Cong., 1st Sess. § 404(a) (1959).

328 S. 748, 86th Cong., 1st Sess. § 405 (1959).

329 See Levitan, *supra* note 300, at 833-34. See text at pp. 000 *supra*.

330 See note 304, *supra*; N.Y. Times, March 14, 1959, p. 1, col. 1.

331 1956 Final Rep. 66.

332 GOMPERS, LABOR AND COMMON WELFARE 5-6 (1919).

333 TAFT, STRUCTURE AND GOVERNMENT OF LABOR UNIONS, 245-46 (1954).

view the member's rights under three aspects: (A) his rights under the various union constitutions, (B) his rights as recognized by the courts of law, and (C) his rights under existing or proposed legislation.

A. Union Constitutional Provisions

The ideal of democratic unionism is stressed in the preamble of the Constitution of the AFL-CIO.

The establishment of this Federation . . . is an expression of the hopes and aspirations of the working people of America.

We seek the fulfillment of these hopes and aspirations through democratic processes within the framework of our constitutional government and consistent with our institutions and traditions.³³⁴

Again, later in this constitution it is stated that one of the objects of the Federation will be to "safeguard the democratic character of the labor movement."³³⁵

The Committee on Ethical Practices established by the AFL-CIO Constitution³³⁶ was accordingly directed by the AFL-CIO Executive Council to develop a set of ethical-practice codes to serve as a guide for the union movement.³³⁷ The sixth of the resulting series of codes deals with democratic processes³³⁸ and enunciates in detail the right of the individual union member to participate freely in the government of his union. According to its terms, union members have the right to vote in honest elections for their local and national officers. They are entitled to run for office and hold office subject to uniform, non-discriminatory qualifications, and they are entitled to voice their opinions as to the conduct of union affairs. Union elections and national conventions are to be held regularly, at least every four years. This code concludes by urging those unions which do not meet the standards set forth to amend their constitutions to comply with these requirements.³³⁹

Since the AFL-CIO has no effective way to enforce these standards,³⁴⁰ it is necessary to turn to the constitutions of the various national unions in order to understand the nature of the election procedures of each union. The vast majority of union constitutions place no substantial restrictions on the members' right to vote. In seventy-five constitutions surveyed, it was found that forty-two did not even have any explicit provisions concerning qualifications to vote in union elections. In some of these unions, it would seem that the right to vote arises as a provision of membership in good standing under the terms of a general protective clause such as that found in the Bricklayers' constitution:

Every member of the International Union shall stand equal before the law in his rights and privileges, and shall be entitled to all benefits and protection, providing he conform to the rules and form of procedure herein mentioned.³⁴¹

In those constitutions which do not contain such a blanket provision, the right to vote can be inferred from other clauses. For instance, many union constitutions contain an equality clause from which it may be inferred that no member's right to vote may be denied him on the basis of race, creed, national origin, or sex.³⁴² Again, some

³³⁴ AFL-CIO, CONST. 1 (1957).

³³⁵ *Id.* at art. II, § 11, p. 4.

³³⁶ *Id.* at art. XIII, § 1(d), p. 32.

³³⁷ AFL-CIO, Publication No. 50, CODES OF ETHICAL PRACTICES 15-16 (1958).

³³⁸ This Code was approved by the Executive Council on May 23, 1957 and, along with the five earlier codes, was adopted by the AFL-CIO convention in December, 1957.

³³⁹ AFL-CIO, Publication No. 50, *supra* n. 337, at 46-48. The provisions of this code substantially comply with the standards suggested in American Civil Liberties Union, *Labor Union "Bill of Rights,"* Feb. 13, 1958.

³⁴⁰ This does not mean that the AFL-CIO has not persuaded many unions to adopt the Ethical Practices Codes (see note 365 *infra*). Rather, it indicates that there is no constitutional authority for the Federation to intervene in the internal affairs of its affiliate unions.

³⁴¹ Bricklayers Int'l Union, CONST., art. XII, § 2, pp. 51-52 (1956). For similar provisions see Brotherhood of Maintenance of Way Employees, CONST., art. XXI, § 1, p. 65 (1955).

³⁴² "Regardless of creed, color, nationality or sex, every worker employed in cement, lime, gypsum and allied industry plants must become an integral part of the International Union." United Cement Workers, CONST., art. 2, § 2, p. 4 (1957); International Union of United Brewery Workers, CONST., *Declaration of Principles* (h), p. 2 (1956).

provide that officers shall be elected by a majority, or plurality, vote of the members of the union.³⁴³ Finally, many union constitutions contain a preamble or declaration of principles which commit the organization to the principles of free and democratic unionism.³⁴⁴

Sixteen of the remaining thirty-three constitutions contain provisions which explicitly guarantee the right to vote in elections to members in good standing.³⁴⁵ Several of these unions, while guaranteeing the right to vote, require that a person must have been a member in good standing for a specified period of time in order to vote. Thus, the United Mine Workers constitution requires that a member shall have been in good standing for the three months prior to December 1st of each election year.³⁴⁶ The Glass Bottle Blowers Association guarantees the right of members in good standing to vote,³⁴⁷ but adds the requirements that a member must have attended at least two regular meetings per year.³⁴⁸

Eight unions provide the same basic requirements as the fifteen unions just mentioned but frame their requirements as restrictions on the right to vote, rather than as guarantees of the right. For example, the American Newspaper Guild provides that: "No member not in good standing shall be permitted to vote . . ." ³⁴⁹ The constitution of the International Typographical Union, besides restricting the right to vote to members in good standing, provides that a member's card shall have been in the hands of the local secretary for at least thirty days prior to the election. At the option of the subordinate (local) union, the membership requirement may be increased in length up to ninety days.³⁵⁰

The constitutions of six unions have provisions which impose substantial restrictions on the right to vote. Three of these unions are theatrical unions restricting the right to vote to certain classes of members, such as the American Guild of Musical Artists, which divides its membership into eight classes, and allows only the members of four "active" classes to vote.³⁵¹ The Amalgamated Meat Cutters and Butchers do not permit members who are not actively working in the industry to vote except in matters of granting sick or death benefits.³⁵² In the Brotherhood of Electrical Workers, the local unions are granted the power to determine whether apprentices, helpers and groundmen may or may not be entitled to voice opinions and to vote at local meetings.³⁵³ Of these unions the one which undoubtedly places the greatest restrictions on its members' right to vote is the Operating Engineers Union. By the terms of its constitution there is established a system of locals and subordinate locals.³⁵⁴ Members of subordinate locals are under the authority of the parent local in their area. They may

³⁴³ E.g., Transport Workers, CONST., art. XVI, §§ 1-2, p. 39 (1957).

³⁴⁴ E.g., National Union United Welders, CONST., Preamble, p. 3 (1948); United Rubber Workers, CONST., Preamble, p. 2 (1956).

³⁴⁵ E.g., UAW, CONST., art. 38, § 11(a), p. 97 (1957). "Every member in good standing shall be entitled to vote at all Local Union elections."; Seafarers Int'l Union, CONST., art. III, § III, 3(a) p. 4 (1957); United Steelworkers, CONST., art. V, § 3, p. 19 (1956).

³⁴⁶ UMW, CONST., art. XI, § 3, p. 28 (1956). Elections for International officers take place on the second Tuesday of December every fourth year. *Id.* at art. XI, § 2, p. 28.

³⁴⁷ Glass Bottle Blowers Ass'n, CONST. art. II, § 4, p. 9 (1957).

³⁴⁸ *Id.* art. IX, § 1, p. 24.

³⁴⁹ American Newspaper Guild, CONST., art. X, § 4, p. 28 (1957). See also, Oil Workers Int'l Union, CONST., art. III, § 9, p. 58 (1956).

³⁵⁰ International Typographical Union, BYLAWS, art. IX, § 11, p. 44 (1958). This constitution also contains a provision explicitly guaranteeing the right to vote to all members residing at the Union Printers Home. *Id.* art. IX, § 12, p. 44.

³⁵¹ American Guild of Musical Artists, CONST., art. III, § 3, p. 7 (1954). The other two unions which restrict the right to vote to certain classes of members are Actors Equity and the Screen Actors Guild. See Actors Equity Ass'n, CONST., art. III §§ 2 & 5, p. 8 (1955); Screen Actors Guild, BY-LAWS, art. IV, § 5, p. 4 (1957).

³⁵² Amalgamated Meat Cutters, LOCAL CONST., art. I, § 3, p. L-5 (1956).

³⁵³ International Bhd. of Elec. Workers, CONST., art. XVII, § 16, p. 46 (1958).

³⁵⁴ International Union of Operating Engineers, CONST., art. XIV, § 4, p. 38 (1956).

³⁵⁵ *Id.*, art. XIV, § 5, p. 39.

vote on matters of local concern only by permission of the parent local, and in no instance may members of a subordinate local vote for officers of the parent local.³⁵⁵

There are an additional four unions which have special provisions relating to voting. The Photo Engravers Union requires that a member must have belonged to a local for six months in order to vote on a collective bargaining agreement.³⁵⁶ In locals of the Masters, Mates and Pilots, which have both in-shore and off-shore members, the local may incorporate a provision into its by-laws that forbids off-shore members to vote on in-shore matters and vice-versa.³⁵⁷ The constitution of the Street, Electric Railway and Motorcoach employees has two provisions relating to strike votes and referendums. The right of every member to vote on the acceptance of certain collective bargaining propositions is guaranteed,³⁵⁸ and where a referendum question is being voted upon at a local meeting, no member may abstain from voting.³⁵⁹ Finally, the Hosiery Workers specifically guarantee the right of apprentices and helpers to vote on all questions.³⁶⁰

1) *Right of Free Speech*

Obviously, for the right to vote to be at all meaningful the individual union members must have the right to express their views on union policies and on the qualifications of their officers. While the AFL-CIO Ethical Practice Code on Union Democratic Processes states that the member should have the right "to voice his views as to the method in which the union's affairs should be conducted,"³⁶¹ this right "to criticize the policies and personalities of his union officers does not include the right to undermine the union . . . or to carry on slander and libel."³⁶²

None of the constitutions surveyed contains a section specifically guaranteeing the rights of speech, press and petition.³⁶³ It would seem, however, that theoretical safeguards for these rights exist within a large number of union constitutions, since those unions which have adopted the AFL-CIO Ethical Practice Codes would seem to have committed themselves to a recognition of these rights.³⁶⁴ Also, a blanket provision recognizing the principles of democratic unionism might form a basis for inferring a constitutional protection of free expression.³⁶⁵

While none of the constitutions explicitly guarantees the right of free expression, several unions recognize this right in relation to specific activities within the union. Consequently, several unions have provisions according candidates for office the opportunity to have their views presented to the rank and file member. Perhaps the outstanding example of a union which encourages active campaigning and opposition in contests for union office is the International Typographical Union.³⁶⁶ This union

³⁵⁵ *Id.*, art. XIV, § 5, p. 39.

³⁵⁶ International Photo Engravers Union, CONST., art. XX, § 3, p. 43 (1958).

³⁵⁷ International Organization of Masters, CONST., art. III, § 13(b), p. 8 (1954).

³⁵⁸ Amalgamated Ass'n of Street, Electric Ry. and Motor Coach Employees, CONST., § 123, p. 44 (1957).

³⁵⁹ *Id.*, § 135, p. 47.

³⁶⁰ American Federation of Hosiery Workers, CONST., art. XIV, § 3, p. 46 (1957).

³⁶¹ AFL-CIO, CODES OF ETHICAL PRACTICES, Code VI, p. 46 (1958).

³⁶² *Id.* at 46-47.

³⁶³ However it should be noted that recognition of the members' right to criticize their officers or the policies of the union is given in several union constitutions; e.g. National Maritime Union, CONST., art. 7, § 14(c), p. 29. (1957); Oil and Chemical Workers, CONST., art. XVI, § 30 (10), p. 27 (1957).

³⁶⁴ IUE-AFL-CIO CONST., art. XXII, § D, p. 45 (1957). See also American Newspaper Guild, MANUAL, art. VI, § 3(e), p. 14 (1957).

³⁶⁵ Besides the unions mentioned in note 363 *supra*, the following unions have adopted the AFL-CIO Ethical Practices Code: (1) UAW CONST., art. 31, § 3, p. 76 (1957); Operative Potters CONST., § 166, p. 23 (1957); Distillery, Rectifying and Wine Workers Int'l Union, 81 MONTHLY LAB. REV. 653 (1958); Laundry and Dry Cleaning Int'l Union, 81 MONTHLY LAB. REV. 783 (1958); International Bhd. of Elec. Workers, 81 MONTHLY LAB. REV. 1409 (1958); Operating Eng'rs, 82 MONTHLY LAB. REV. 16 (1958). This list is by no means exhaustive of those unions which have adopted these codes. However, it would seem that the combined pressures of public opinion, dissatisfaction of the rank and file and the prodding of the AFL-CIO Executive Council are forcing even the most reluctant unions to adopt these codes.

³⁶⁶ See notes 341 and 344 *supra*.

throughout most of its history maintained a genuine two party system, featuring extremely vigorous campaigns, with no party holding control for more than twenty years.³⁶⁷ As a result of this type of campaign, rank and file participation in the elective process is very high. Since 1938, in every election for national office, over seventy percent of the membership has voted.³⁶⁸ The democratic character of this union is reflected in its constitution. Candidates for office are entitled to space in the two issues of the union newspaper immediately preceding the election for the presentation of arguments in behalf of their candidacy.³⁶⁹ The right of the parties to publish and distribute campaign literature and partisan newspapers is recognized.³⁷⁰ As Professor Taft has pointed out this union has, over a period of years, set an excellent example of democratic unionism.³⁷¹ The fact that other unions have not developed the same traditions as the ITU is undoubtedly a result of historical circumstances, for many unions do indeed theoretically protect the members' right to express their opinions freely.

Many unions provide for equal space to candidates in their various newspapers and journals.³⁷² In addition a number of union constitutions allow the members to institute referendums³⁷³ and to recall officers through petitions.³⁷⁴ And in some unions, members may submit petitions to the convention with a view toward amending the constitution or committing the union to policies which the petitioners favor.³⁷⁵ Or finally, in some unions it is possible to call a special convention of the union to consider matters which the petitioners deem important to their welfare.³⁷⁶

A potential danger to the members' right to express themselves exists in provisions punishing certain types of speech by a member. Of the seventy-five constitutions studied, sixty-six of them had provisions of this type. While the wording of these provisions vary somewhat, the offenses which are recognized are in the nature of slanderous remarks against fellow members or officers,³⁷⁷ untrue statements relative to union matters,³⁷⁸ statements which are detrimental to the best interest of the union,³⁷⁹ and abusive language.³⁸⁰ Clearly the union should have the right to punish a member who clearly has slandered or maliciously abused a fellow member. Just as the state has the right to punish sedition, so too should the union be entitled to punish a member who attempts to undermine the union. As has been pointed out, the danger in these vague tests of

367 TAFT, *STRUCTURE AND GOVERNMENT OF LABOR UNIONS* 52 (1954).

368 *Id.* at 57-59.

369 *Id.* at 58.

370 ITU BOOK OF LAWS, art. IX, § 5, p. 40 (1958).

371 TAFT, *op. cit. supra* note 367, at 41.

372 See for example, IUE-AFL-CIO, CONST., art. XXII, § D, p. 45 (1957); American Newspaper Guild, MANUAL, art. VI, § 3(e), p. 14 (1957); Operative Potters, CONST., § 59, p. 8 (1957).

373 *E.g.*, International Ass'n of Fire Fighters, CONST., art. XIX, § 1, p. 22 (1956); American Fed'n of Gov't Employees, CONST., art. XX, § 1, p. 33 (1956).

374 *E.g.*, Operating Eng'ts, CONST., art. XVIII, § 3, p. 70 (1956); International Ass'n of Machinists, CONST., art. III, § 21, p. 12 (1958); IUE-AFL-CIO, art. X, § A, p. 17 (1957).

375 *E.g.*, United Brewery Workers, CONST., art. X, § 13(b), p. 47 (1956); UMW, CONST., art. XII, § 17, p. 45 (1956).

376 *E.g.*, UAW, CONST., art. 8, § 4, p. 13 (1957); Retail, Wholesale and Department Store Union, CONST., art. III, § 18, p. 11 (1954); Brotherhood of Ry. and S.S. Clerks, CONST., art. 7, § 2(a), p. 15 (1955).

377 *E.g.*, United Steelworkers, CONST., art. XII, § 1(g), p. 51 (1956); International Chemical Workers, CONST., art. XII, § 1(5), p. 15 (1957); Teamsters Union, CONST., art. XVIII, § 6(8), p. 73 (1957); International Ass'n Machinists, CONST., art. K, § 1, p. 77 (1958).

378 *E.g.*, International Bhd. of Elec. Workers, CONST., art. XXVII, § 2(6), p. 71 (1958); UMW, CONST., art. XXI, § 3, p. 78 (1956); United Steel Workers, CONST., art. XII, § 1(e), p. 51 (1956).

379 *E.g.*, American Fed'n of Hosiery Workers, CONST., art. XVI, § 1(b), pp. 49-50 (1957); Communications Workers of America, CONST., art. XIX, § 1(k), p. 40 (1957).

380 *E.g.*, Pulp Mill Workers, CONST., § 7, p. 38 (1956); United Brewery Workers, CONST., art. XIII, § 3(8), p. 56 (1956).

381 Aaron, *Protecting Civil Liberties of Members Within Trade Unions*, 3 PROCEEDINGS INDUSTRIAL RELATIONS RESEARCH ASS'N 38 (1950). For a discussion of the procedure and administration of intra-union discipline, see pp. 398-99 *supra*.

guilt is essentially a procedural problem.³⁸¹ If these provisions are impartially and properly administered the members' right to speak will be adequately protected.

A recent example illustrates this point. At the 1956 Steelworkers' convention, monthly dues were raised from three to five dollars. Led by Donald C. Rarick and Nicholas Mamula, a dues-protest committee was formed to fight these increases. In the 1957 election, Rarick polled 233,516 votes in losing to the incumbent president, David McDonald. The dues-protest committee continued in existence and continued to fight the policies of President McDonald. The attack broadened to include protests against the appointive powers of the president, and against those provisions in the constitution dealing with slander. The dissenters felt that the staff members appointed by the president were not answerable to the membership. They maintained that the provisions in the constitution dealing with slander could be used to punish "honest members who want to present their dissenting opinions."³⁸² This disagreement came to a head at the Ninth Steelworkers Convention held last September. The dissenters attempted to secure convention action in favor of curbing the president's appointive power. They also urged the convention to remove the sections from the constitution dealing with slander, and to lower the dues. All three proposals were overwhelmingly defeated. The convention then took action against the dues-protest members in the form of a resolution which accused the dissenters of being "traitors to trade union principles."³⁸³ This resolution charged the dues-protest members of dual unionism, slander, and meeting in secret conclave to undermine the union. The resolution ended by calling on all locals to take immediate action and expel those who were guilty of these offenses.³⁸⁴

Very clearly, if the purpose of these dissenters was to establish a dual or rival union, or to undermine the Steelworkers, the union should have the right to expel them. However, if the dues-protest committee was organized for the purpose of criticizing the policies of the international president, their conduct should be protected. What is necessary then is that these men be tried by an impartial body that functions with uniform standards and procedures.³⁸⁵ From newspaper and magazine accounts³⁸⁶ it would seem that the dues-protest committee members are merely exercising their right to speech. This is partially substantiated from the fact that to date five of the leading dissenters have been acquitted by their local unions.³⁸⁷

While it thus appears that the major stumbling block in the way of the members' freedom of expression is procedural, nonetheless some unions do have substantial provisions in their constitutions which place genuine restrictions on this right. These provisions are all aimed at prohibiting, at least in some circumstances, the members' right to distribute circulars or to publicize intra-union affairs. In several union constitutions there are provisions which state that no member or constituent local in the union may distribute any circular or document dealing with union matters unless they obtain prior approval from the international officers.³⁸⁸ The Bricklayer's constitution specifies that anyone accused of violating this section will be subject to immediate suspension pending trial and determination of the case.³⁸⁹ In the Flint Glass Workers Union, the international president is vested with the discretionary power of suspending or expelling guilty parties.³⁹⁰ The Granite Cutters provide for a ten-dollar penalty and

³⁸² 81 MONTHLY LAB. REV. 1265 (1958).

³⁸³ *Id.* at 1266.

³⁸⁴ The events leading up to the convention action against the Dues-Protest Committee is set out in 81 MONTHLY LAB. REV. 1265-66 (1958).

³⁸⁵ For an elaboration of the procedural problems, see pp. 395-96 *supra*.

³⁸⁶ In addition to the article in 81 MONTHLY LAB. REV. *supra* note 384, see New York Times, Sept. 9, 1958, p. 1, col. 1; Chicago Daily News, Dec. 12, 1958, p. 11, col. 1.

³⁸⁷ 82 MONTHLY LAB. REV. iv (1959).

³⁸⁸ These include such unions as American Flint Glass Workers, CONST., art. 20, § 2, p. 78 (1957); Granite Cutters Int'l Ass'n, CONST., § 23, p. 12 (1956); Bricklayers Int'l Union, CONST., art. IV, § 3, p. 15 (1956); Brotherhood of Ry. Clerks, CONST., art. 26, § 2, p. 63 (1955).

³⁸⁹ Bricklayers Int'l Union, CONST., art. IV, § 3, p. 15 (1956).

³⁹⁰ American Flint Glass Workers, CONST., art. XX, § 2, p. 78 (1957).

publish the names of the guilty parties in the union paper.³⁹¹ In addition to broad provisions against circularizing, several unions have provisions specifically dealing with circulars used in connection with elections. In two unions there is an absolute prohibition against the use of cards, letters, or circulars in a campaign for office, and any candidate violating these provisions will be disqualified from holding office.³⁹² The Railway and Steamship Clerks require that any communication intended to influence the vote on a referendum must be approved by the international president.³⁹³ The final type of real deterrent to the members' right to speak is a general provision against publicizing the internal affairs of the union.³⁹⁴

Undoubtedly such provisions are rooted in the histories of these unions. As a matter of self-preservation, early unions did not wish their internal affairs divulged since the possibility of retaliation by management was present. The attempts of management to dominate and influence unions may have necessitated provisions against circularizing the union without first clearing the matter with the international officers. These reasons no longer exist and such provisions seem to be a wholly unwarranted interference with the right of union members to express themselves freely.

2) *Local Meetings and Elections: Formal Procedures*

The right to vote and the right to free expression do not exist in a vacuum. They are meaningful only in the terms of the actual operation of the union. For the right to vote to be effective there must be regular and democratic elections. Similarly the right to speech is rather ephemeral without regular meetings at which the members' views may be aired. The formal provisions which were studied in respect to this problem deal with requirements as to the time of meetings, and procedure for elections.

Nearly two-thirds of the international constitutions set forth requirements compelling local unions to hold meetings at certain definite times. (*See Table 1*)

TABLE 1

75 INTERNATIONAL CONSTITUTIONS CLASSIFIED ACCORDING TO PROVISIONS FOR HOLDING LOCAL MEETINGS

<i>Provisions</i>	<i>No. Unions</i>
No Provision	27
Every Two Weeks	6
Monthly	29
Every Two Months	1
Quarterly	3
Semi-annually	1
At Discretion of Local	5
No Local Unions	3

Many of these constitutional provisions are minimum requirements and the locals may meet more often than specified in the constitution.³⁹⁵ For though the constitution of the Printing Pressman calls for semi-annual meetings, regular meetings are undoubtedly held more often than every six months.³⁹⁶ It would seem that in those unions which set regular periods for meetings, the members should have able opportunity to air their views.³⁹⁷

³⁹¹ Granite Cutters Int'l Ass'n, CONST., § 23, p. 12 (1957).

³⁹² These two unions are the International Union of United Brewery Workers, CONST., art VIII, § 3(a), (b), pp. 42-43 (1956); and Granite Cutters Int'l Ass'n, CONST., § 23, p. 12 (1956).

³⁹³ Brotherhood of Ry. Clerks, CONST., art. 26, § 1, p. 63 (1955).

³⁹⁴ See Hotel Employees Int'l Union, CONST., art. XX, § 1(d), p. 56 (1957); American Fed'n of Govt. Employees, CONST., art XII, § 3(f), p. 24 (1956).

³⁹⁵ E.g., International Bhd. of Elec. Workers, CONST., art XVII, §§ 2-4, pp. 43-44 (1958).

³⁹⁶ This constitutional provision of the International Printing Pressmen Union reads as follows: "If any subordinate union shall fail to hold regular meetings for a period of six months its charter shall be thereby automatically forfeited." CONST., art XXVIII, § 43, p. 84 (1956).

The real problem arises where there is no requirement that the local union hold regular meetings, or where the matter is left to the discretion of the local. Of the twenty-seven unions which do not provide for local meetings, all but one have provisions in their constitution allowing the locals to adopt their own by-laws,³⁹⁸ and with the exception of two, all of these constitutions require that the proposed local by-laws be submitted to the international for approval before they can take effect.³⁹⁹ The international office therefore has the opportunity to insist on provisions in the local by-laws requiring regular meetings.⁴⁰⁰ Similarly, the five unions which explicitly leave the matter of setting meeting dates to the local union, require that the locals adopt by-laws which must meet the approval of the international.⁴⁰¹ The election procedures to be followed by local unions are regulated in most union constitutions. If union democracy is to function properly, elections should be held at definite and reasonably frequent intervals, the opportunity to vote and assurances of secrecy in balloting should be accorded all members, and to deter any possible tampering with election results, the ballots should be counted by an impartial election committee.

Eighteen of the international constitutions surveyed contained no provisions establishing a set term for union officers. (See Table 2).

TABLE 2
PROVISIONS IN 75 INTERNATIONAL CONSTITUTIONS CLASSIFIED ACCORDING TO
TERM OF OFFICE FOR OFFICERS

<i>Provisions</i>	<i>No. Unions</i>
No provision	18
6 Months - 1 Year	1
1 Year	8
Eighteen Months	1
One Year - Two Years	5
One Year - Three Years	1
One Year - Four Years	3
Two Years	15
Two Years - Three Years	1
Two Years - Four Years	2
Three Years	2
Three Years - Four Years	1
Four Years	3
At Discretion of Local Union	3
Minimum Term One Year - No Maximum	1
Minimum Term Two Years - No Maximum	2
No Local Unions	3
Others Whose Provisions Are Too Ambiguous or Uncertain to Reasonably Classify	5

³⁹⁷ A large number of these unions provide a penalty for locals which do not hold their regular meetings; e.g., International Bhd. of Elec. Workers, CONST., art XVII, § 4, pp. 44 (1958); Brotherhood of Painters, CONST., § 162(a), p. 63 (1955); United Bhd. of Carpenters, CONST AND LAWS, Standing Decision, Feb. 15, 1887, p. 60 (1957).

³⁹⁸ This union is the Cigar Makers Int'l Union.

³⁹⁹ These two unions are the National Fed'n of Post Office Clerks and the Seafarers Int'l Union. While there is no requirement that local by-laws be submitted for approval by the International, both of these unions require that the local by-laws not conflict with the constitution or laws of the International Union. National Fed'n of Post Office Clerks, CONST., art. VIII, § 4, pp. 17-18 (1954); Seafarers' Int'l Union CONST., art. III, § 11, pp. 2-3 (1957).

⁴⁰⁰ See, e.g., United Elec. Workers, CONST., art. 21, § A, pp. 31-32 (1957); Retail Clerks Int'l Ass'n., CONST., § 22(a), pp. 38-39 (1955); Int'l Moulders Union, CONST., § 94, pp. 47-48 (1956);

All of the first eighteen unions with the exception of the Cigar Makers provide for adoption of local by-laws subject to the approval of the international officers.⁴⁰² Of those unions allowing the locals to elect officers for longer than two year terms, two of them provide for the recall of officers,⁴⁰³ but only if two-thirds of the members voting vote for the recall. In the remaining unions the only way that the local members may remove an officer is through the procedure of trying and convicting the officer of an offense against the union. Obviously this is no substitute for frequent elections.

The procedures to be followed in local elections are treated in detail in less than half of the constitutions. (See *Tables 3A, 3B, and 3C*).

TABLE 3

75 INTERNATIONAL CONSTITUTIONS CLASSIFIED ACCORDING TO PROVISIONS
FOR METHODS OF SELECTING LOCAL OFFICERS, SECRET
BALLOT, AND IMPARTIAL ELECTION COMMITTEES.

A. <i>Provision For Method of Electing Local Officers</i>	
No Provision	34
Members voting at meeting	12
Referendum	6
Voting by mail	4
At local discretion	10
No local unions	3
Other	6
B. <i>Provision for Secret Ballot</i>	
Mandatory	25
No Provision	40
At local discretion	5
No local unions	3
Other	2
C. <i>Provision for Impartial Election Committee</i>	
Mandatory	23
No Provision	48
At local discretion	1
No local unions	3

Several factors undoubtedly account for the omission of detailed provisions regulating the conduct of local union elections. Since conditions within a union will vary to a great extent from one locality to another, it is perhaps more practical for the international to allow the locals to establish their own procedures in their local by-laws. Secondly, a large number of unions are committed to a principle of localism from a belief that centralization within the union would be dangerous.⁴⁰⁴ Finally, it is to be remembered that the international passes on the local by-laws and may always step in to assure democracy, or the members themselves can appeal election irregularities to the international.⁴⁰⁵

Glass Bottle Blowers Ass'n, CONST., art XI, § 2, p. 24 (1957); International Woodworkers, CONST., art. VI, § 15, p. 20 (1957).

⁴⁰¹ These five unions and the applicable constitutional provisions are: Communication Workers of America, CONST., art. III, § 8(d),(i), p. 24 (1957); Bakery Workers Int'l Union, CONST., art. XIV, §§ 3, 5, pp. 27-28 (1956); International Ladies' Garment Workers, CONST., art. 5, §§ 4 (a),6, pp. 23-24 (1956); Boot Workers, CONST., §§ 36,38, pp. 26-27 (1957); International Longshoremen's Ass'n, CONST., art. XII, § 6, p. 22, art. XIII, § 11(6), p. 26 (1957).

⁴⁰² See the discussion *infra* p. 424, concerning the adoption and approval of local by-laws.

⁴⁰³ International Union of Operating Eng'rs, CONST., art. XXIII(8), p. 104 (1956); Brotherhood of Locomotive Firemen, CONST., art. 8, § 42(c), p. 106 (1953).

⁴⁰⁴ An example of a union which is strongly committed to localism is the UAW. See TAFT *op. cit. supra*, note 367 at 213.

3) *National Elections: Formal Procedures*

Union constitutions generally set forth in detail the procedures for the nomination and election of national officers. A recent study by the Bureau of Labor Statistics analyzes the constitutional provisions governing the election of national officers.⁴⁰⁶ As this study shows, (*see Table 4*), the vast majority of unions nominate and elect their international officers at their conventions.

TABLE 4⁴⁰⁷

<i>Nomination and Election Procedure</i>	<i>No. Unions</i>
Nominated and elected by convention	80
Nominated at convention; elected by membership	9
Nominated at local meetings; elected by convention	2
Nominated at local meetings; elected by membership	16
Nominated both at locals and conventions; elected by convention	1
Nomination procedure not given; elected by convention	3

TABLE 5⁴⁰⁸

<i>Voting</i>	<i>No. Unions</i>
Elected at convention	86
A. Roll call vote	23
B. Secret ballot	15
C. Ballot (no reference to secrecy)	17
D. No Provision	31
Elected by membership referendum	25
A. Secret ballot	16
B. Ballot (no reference to secrecy)	9

It appears that the procedures set forth in the vast majority of union constitutions as to be nomination and election of national officers are democratic. Perhaps the only real weakness is in those constitutions which do not specify that a secret ballot is guaranteed in a membership referendum. However, the term "ballot" as used in these constitutions would seem to imply some type of secrecy in voting.

Terms of office for the international officers are established in all but two of the union constitutions surveyed. (*See Table 6*)

TABLE 6⁴⁰⁹

PROVISIONS IN 111 INTERNATIONAL CONSTITUTIONS CLASSIFIED ACCORDING TO
TERM OF OFFICE FOR INTERNATIONAL OFFICERS

<i>Provisions</i>	<i>No. Unions</i>
1 Year	6
2 Years	42
3 Years	14
4 Years	34
5 Years	10
Other	3
No Provision	2

⁴⁰⁵ It is an offense in most unions to commit any type of election fraud. See for example; National Maritime Union, CONST., art. 12, § 18, p. 50 (1957); International Union of United Steelworkers, CONST., art. V, § 24 (1956). Other unions have a procedure for filing an election protest with the International. See United Ass'n of Journeymen of the Plumbing Industry, CONST., § 125, p. 60 (1956).

⁴⁰⁶ Cohany and Phillips, *Election and Tenure of International Union Officers*, 81 MONTHLY LAB. REV. 1221 (1958).

⁴⁰⁷ *Id.* at 1222.

⁴⁰⁸ *Id.* at 1225.

⁴⁰⁹ *Ibid.*

As has already been observed, those unions which elect officers for longer than four-year terms are being urged by the AFL-CIO Ethical Practice Commission to amend their constitutions by setting a maximum term of four years for officers.

4) Conclusion

To attempt to draw any conclusions as to the efficacy of the various union constitutions in securing the rights of the members or to evaluate the wisdom of the provisions in their constitutions is exceptionally difficult. Each union has its own peculiar problems. Differences in jurisdiction, traditions, membership composition and geographical location of locals require different treatment. The UAW, which has a deep-rooted democratic tradition, has no provision for the recall of officers. Yet the Operating Engineers, which is hardly a model of democracy,⁴¹⁰ has just such a provision.⁴¹¹ Even in view of these difficulties it nonetheless appears that the provisions surrounding this area of internal democracy are generally fair and adequate.

In the era of modern industrial enterprise unions must be strong. Consequently they must have the authority to maintain internal discipline by punishing those members who would disrupt or undermine the union. Thus, as indicated, the broad provisions against slander are not essentially limitations on inter-union democracy. Perhaps the major flaw in union constitutions is the failure to provide sufficient standards for the conduct of local elections. While localism may be a value well worth preserving, there is little virtue in failing to set at least minimum standards for local elections. Leaving too much authority in the hands of the local in these matters has proven to be a real source of abuse. Perhaps the outstanding example of this can be found in the case of the International Longshoremen's Association. "[T]he constitutional structure of the ILA is such that the various locals chartered by the International have a large degree of autonomy."⁴¹² As a result of this extreme local autonomy, several large New York locals became dominated by corrupt leaders and the International was powerless to deal with the situation.⁴¹³

To be sure there are provisions in some union constitutions which seem to present a serious threat to the freedom of the individual members. The subordinate local setup of the Operating Engineers and the provisions in some union constitutions against circulars are examples of unduly restrictive provisions. There can be no justification for the wholesale disenfranchisement of members resulting from the subordinate local system of the Operating Engineers.⁴¹⁴ Since unions do provide penalties for actions which are truly inimical to the best interests of organization, there would also seem to be no sound reason for the ban against circulars. It would seem to be far better to allow the members the right to circulate petitions, statements or campaign literature freely. If any member were to abuse this right by circulating slanderous or malicious matters or by advocating policies which would destroy the union, he could be tried and punished for such an offense.

Unions themselves are quite aware of this problem. The extensive educational programs carried on in many unions in an attempt to encourage fuller participation by the members represents a genuine attempt to get at the underlying problem of apathy on the part of the vast majority of union members.⁴¹⁵ The insistence by the AFL-CIO on the adoption of the Ethical Practices Codes and their determined efforts to remove

⁴¹⁰ S. REP. No. 1417, 85th Cong. 2d Sess. 437-43 (1958). The Ethical Practices Committee AFL-CIO proceeded immediately to investigate this union and substantial improvements have been made. See 81 MONTHLY LAB. REV. 301, 422-23 1155 (1958).

⁴¹¹ International Union of Operating Eng'rs, CONST., art. XVIII, § 3, pp. 70-71 (1956).

⁴¹² Board of Inquiry on Longshore Industry Work Stoppage, Oct.-Nov., 1951, Port of New York, *Final Rep. to Industrial Comm'r*, p. 72 (N.Y. 1952), cited in TAFT, *op. cit. supra*, note 367 at 134.

⁴¹³ Cf. TAFT, *op. cit. supra* note 367, at 134; Bell, *Some Aspects of the New York Longshore Situation*, 7 PROCEEDINGS OF INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 298 (1954).

⁴¹⁴ The McClellan committee report states that only 46% of the membership are allowed to vote under the provision. S. REP. No. 1417, 437.

⁴¹⁵ Hays, *The Union and its Members*, 11 N.Y.U. ANN. CONF. LAB. 35, 37 (1958).

corruption from the union movement has been meeting with a great deal of success. As was indicated earlier, a large number of unions have adopted these codes and even a union like the Operating Engineers has taken real steps toward complying with them. In addition, two major unions, the UAW and the Upholsterers' Union, have established independent review boards to handle inter-union problems.⁴¹⁶

The encroachment of hoodlums and racketeers on some areas of the labor movement does not seem to be the result of constitutional weaknesses in the unions except in rare instances. Rather, it would seem that the problem of organized crime pervades all parts of the national scene. As the McClellan hearings have demonstrated, criminals have moved into some areas of business as well as labor and have even made their influence felt in state and local governments. The American labor unions as viewed through their constitutions, rules and policies seem to have developed an organizational structure which permits the average member to participate quite freely in the governmental process of his union.

B. *The Judicial Role*

The growth of labor unions is a relatively recent development in our history. As a result of this, comparatively few cases involving issues of internal union democracy have been presented to the courts.⁴¹⁷ Thus, there has been no real opportunity for the courts to evolve an articulate body of law governing the relationship between the individual and his union. When the courts are confronted by a controversy involving an internal dispute, they generally will refer to the union as a voluntary association,⁴¹⁸ and will at least purport to decide cases in terms of the law of voluntary associations.

1) *The Right to Vote*

There are apparently no reported cases where an individual member sought to have his personal right to vote in a union election enforced by the courts. However, there are a number of cases where the right to vote was indirectly involved in suits by members to compel the holding of an election. Perhaps the leading case of this nature is *Dusing v. Nuzzo*.⁴¹⁹ The plaintiffs in *Nuzzo* were individual members of Local 17 of the Hodcarriers. They brought an action to compel the holding of an election in their local and to obtain an accounting of the union funds. Contrary to the local constitution, which specified that officers should be elected annually, the local had held no election for four years. The court, before granting the relief sought for, set forth three essential requirements for judicial intervention in such a case. First, there had to be a property right or its equivalent involved. Secondly, a breach of the union constitution or laws had to be shown. And finally, possible internal remedies must have been exhausted or shown to be futile.⁴²⁰ The court found that the local constitution had clearly been violated in not holding annual elections. Further, the court reasoned that in as much as the officers of the union were responsible for bargaining on behalf of the members, the members had a property right in the selection of men who would best represent their economic interests. Finally, the court found that all attempts to obtain relief from the International had been singularly unsuccessful. On appeal to the appellate division, the order for the holding of an election was affirmed with a modification which compelled the use of voting machines.⁴²¹

The approach taken by the New York courts in the *Dusing* case is illustrative of the approach which most courts have taken in this area. While some ground their

⁴¹⁶ See pp. 396-97 *supra*, for a discussion of the operation of these review boards.

⁴¹⁷ Writing in 1951, Professor Summers found but 218 opinions in the area of union discipline. Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1050 (1951).

⁴¹⁸ *E.g.*, State *ex rel.* Givens v. Superior Court, 233 Ind. 235, 117 N.E.2d 553 (1954); Armstrong v. Duffy, 90 Ohio App. 233, 103 N.E.2d 760 (1951); Way v. Patton, 195 Ore. 36, 241 P.2d 895 (1952).

⁴¹⁹ 177 Misc. 35, 29 N.Y.S.2d 882, *modified*, 23 App. Div. 59, 31 N.Y.S.2d 849 (1941).

⁴²⁰ *Id.* at 883.

⁴²¹ *Dusing v. Nuzzo*, 23 App. Div. 59, 31 N.Y.S.2d 849 (1941).

decision on a contractual right of the members to a new election,⁴²² instead of the usual property-interest theory, the terms of the union constitution regulating elections will normally be enforced.⁴²³ Thus, where the union constitution provides that an election or referendum be held by secret ballot, and at least part of the balloting was not secret, there is authority that the election will be declared null and void and a new election required.⁴²⁴

It does not appear, however, that the courts will compel a literal compliance with the provisions of the constitution if there has been substantial compliance and the election was fairly administered. In *Kennedy v. Doyle*,⁴²⁵ the plaintiffs sought to vacate an election and to obtain an order for a new election, alleging, *inter alia*, that the nominations were held two months earlier than specified in the union constitution. The court found that at the nomination meeting in September, 2,000 of the 2,800 members of the local were present, including the plaintiff, and no one protested the early nominations. On these facts the court held that there had been substantial compliance with the constitution, and since the elections had been conducted fairly, the judgment was for the defendant union. Additionally, any action to compel a new election would seem to be subject to the usual equitable defenses. Thus, in one case the plaintiffs who waited two years to bring an action were barred by the doctrine of laches.⁴²⁶

Where there is an irregularity in an election conducted among delegates from several locals, the courts will apply the same rules as they apply to the conduct of local elections. In *Lacey v. O'Rourke*,⁴²⁷ where the incumbent president showed that illegal votes had been cast against him in the election for president of Joint Council 16 of the Teamsters, the court found that certain disputed votes, allowed by the International, were clearly invalid. Since further appeal to the International would be futile, the court granted a temporary injunction restraining the union from removing the plaintiff from office.

However, not every court will compel the holding of an election, even if the three elements of the *Dusing*⁴²⁸ case are present. Perhaps the outstanding example of a refusal of the courts to compel the holding of an election can be found in *State ex rel. Givens v. Superior Court*.⁴²⁹ The plaintiffs in this case had shown that the executive board of the union did not contemplate holding an election for officers as required by the constitution. They succeeded in getting the trial court to issue a mandatory injunction to compel the holding of an election and to place the plaintiffs' names on the ballot. The Supreme Court of Indiana granted a permanent writ of prohibition against the enforcement of the order entered by the trial court. The court reasoned that a voluntary association has the right to adopt its own rules and regulations and that the courts should not control the administration of the association's constitution, or enforce rights springing therefrom.⁴³⁰ While the court gave additional reasons for the decision,⁴³¹ the heart of the decision lay in the court's literal acceptance of the voluntary association doctrine.⁴³²

⁴²² *E.g.*, *O'Neill v. United Ass'n of Journeymen Plumbers*, 358 Pa. 531, 36 A.2d 325 (1944); *Ash v. Holdeman*, 13 Misc. 2d 528, 175 N.Y.S.2d 135 (Sup. Ct. 1958), *modified*, 5 App. Div. 2d 1017, 174 N.Y.S.2d 215 (1958).

⁴²³ While the cases discussed in the text deal with the enforcement of specific provisions in the constitutions, there is authority for allowing a union to adopt provisions of the state election laws when the union constitution is silent regarding a specific dispute within the union. *Zacharias v. Siegal*, 7 Misc. 2d 58, 165 N.Y.S.2d (Sup. Ct. 1956), *aff'd*, 5 App. Div. 2d 887, 173 N.Y.S.2d 1003 (1958).

⁴²⁴ *Waldman v. Ladiskey*, 101 N.Y.S.2d 87 (Sup. Ct. 1950).

⁴²⁵ 140 N.Y.S.2d 899 (Sup. Ct. 1955).

⁴²⁶ *Fritsch v. Rarback*, 199 Misc. 356, 98 N.Y.S.2d 748 (1950). The court seemed to feel that the delay in bringing the action was essentially a tactical maneuver to upset the administration of the district council.

⁴²⁷ 147 F. Supp. 922 (S.D.N.Y. 1956).

⁴²⁸ 177 Misc. 35, 29 N.Y.S.2d 882, *modified*, 23 App. Div. 59, 31 N.Y.S.2d 849 (1941).

⁴²⁹ 233 Ind. 235, 117 N.E.2d 553 (1954).

⁴³⁰ The two cases which the court relied on were: *Plemenik v. Prickett*, 97 N.J. Eq. 340, 127 Atl. 342 (Ct. Err. & App. 1925), which involved alleged irregularities in the adoption of by-laws by the

Obviously, if a union is to be viewed as nothing but a social association, a court might legitimately refuse to interfere with an election for the want of a property right.⁴³³ However, when most of the courts refer to a union as a voluntary association, they are not treating unions as a fraternal or social society.⁴³⁴ Rather, by calling unions voluntary, courts seem to be committing themselves, at least implicitly, to a belief in the desirability of pluralism.⁴³⁵

Since unions are subject to regulation both by statutes and by courts, the problem of elections is thus a matter of degree of regulation. Most courts wish to avoid interfering with the internal affairs of unions unless such interference is absolutely necessary to preserve some overriding right of the individual members. Thus, in election cases, as in other areas of intra-union activity, the courts will require that the aggrieved party exhaust the internal remedies which are available within the union.⁴³⁶ The underlying reason for this requirement was set forth by Justice Frankfurter in a dissenting opinion in *Elgin, J. & F. R. Co. v. Burley*:⁴³⁷

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 interests and by which they bind themselves to be governed. . . . 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 unions instead of fostering these unions as stabilizing forces.

While the courts are reluctant to intervene in union disputes until all available remedies have been pursued within the union, courts generally will intervene without any actual finding of a property right,⁴³⁸ or will readily find either a property⁴³⁹ or a contractual⁴⁴⁰ right in the election of officers. However, if an appeal within the union will be clearly futile, the courts will probably intervene.⁴⁴¹

Grand Lodge of Free and Accepted Masons of New Jersey, and *Kearns v. Howley*, 188 Pa. 116, 41 Atl. 273 (1898), which involved irregularities in the elections of a county political organization.

⁴³¹ The court also indicated that union election matters were political questions beyond the jurisdiction of the court and that the right to vote was a privilege rather than a property or civil right.

⁴³² A few older cases can be found where the courts refused to take action in regard to union elections since they were "voluntary associations." *E.g.* *Bennett v. Kearns*, 88 Atl. 806 (R.I. Sup. Ct. 1913). However, even among the older cases there is precedent for judicial interference where the constitution or laws of the union are being violated. See *Williams v. District Executive Board, UMW*, 1 Pa. D. & C. 31 (1921).

⁴³³ *Cf.* *State ex rel. Givens v. Superior Court*, 233 Ind. 235, 117 N.E.2d 553, 555 (1954). A number of recent cases may be found where the court has declined to intervene, alluding to a lack of a property right. But upon closer examination they essentially involve exhaustion of remedies. See *Leahigh v. Beyer*, 52 Ohio Op. 63, 116 N.E.2d 458 (C.P. 1953), *Way v. Patton*, 195 Ore. 36, 241 P.2d 895 (1952).

⁴³⁴ "But a labor union is not a social club. It is an economic instrumentality conceived in the necessities of making a living under the expansive influence of modern industrial concepts." *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882, 884, *modified*, 23 App. Div. 59, 31 N.Y.S.2d 849 (1941).

⁴³⁵ *Cf.* *Nash, The Union and Its Members*, 11 N.Y.U. ANN. CONF. LAB. 35 (1958).

⁴³⁶ *Way v. Patton*, 195 Ore. 36, 241 P.2d 895 (1952); *Leahigh v. Beyer*, 52 Ohio Op. 63, 116 N.E.2d 458 (C.P. 1953); *Stanton v. Harris*, 152 Fla. 736, 12 So. 2d 17 (1943).

⁴³⁷ 325 U.S. 711, 757 (1945) (dissenting opinion).

⁴³⁸ *Sibilia v. Western Elec. Employees Ass'n*, 142 N.J. Eq. 77, 59 A.2d 251 (Ct. Err. & App. 1948); see *O'Hara v. Teamsters*, 63 Pa. D. & C. 573 (1948).

⁴³⁹ *Cf.* *Dusing v. Nuzzo* 177 Misc. 35, 29 N.Y.S.2d 882, *modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941); see also, *Raevsky v. Upholsterers' Int'l Union*, 38 Pa. D. & C. 187, 195 (1940).

⁴⁴⁰ *Cf.* *O'Neill v. United Ass'n of Journeymen Plumbers*, 348 Pa. 531, 36 A.2d 325 (1944).

⁴⁴¹ *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882, *modified*, 23 App. Div. 59, 31 N.Y.S.2d 849 (1941). This exception and the several other exceptions which courts have grafted on the exhaustion of remedies rules has been subjected to criticism. *Witmer, Civil Liberties and the Trade Union*, 50 YALE L. J. 621 (1940). The author of this article maintains that the overriding considerations behind the exhaustion of remedies doctrine makes these exceptions unwise. Instead of entering a final court order where an exception such as futility of appeal within the union is pleaded, it is suggested that the court enter a temporary order in the nature of a supersedeas device until the internal remedies have been exhausted. *Witmer, supra* at 631. See *Powell v. United Ass'n. of Plumbers and Pipefitters*, 240 N.Y. 616, 148 N.E. 728 (1925).

Whenever a clear showing of facts demanding judicial intervention has been presented to the courts, they have been practical and imaginative in insuring that their orders are carried out. Thus, in one case where an attempt was made to tamper with the ballots, the court impounded the ballots and appointed a master to tabulate and certify the results. A custodial receiver appointed by the court insured that the duly elected officers were able to exercise their offices without interference.⁴⁴² Where a new election is required, the court may appoint a master or other such officials to supervise the election,⁴⁴³ or the court may allow the local to conduct its own election with appropriate safeguards, such as requiring the election of an impartial election committee and the use of voting machines, coupled with an injunction against any interference with the election.⁴⁴⁴

A recent example of the flexibility of a court of equity in handling internal disputes in the union can be found in *Cunningham v. English*.⁴⁴⁵ The plaintiffs in this case previously had brought an action to restrain the officers who were elected at the 1957 Teamster convention from taking office on a claim that the convention had been rigged. At the end of the plaintiff's case, the parties entered into a consent order. By the terms of this order, the officers elected at the Miami convention were to assume office provisionally. In addition, a three member Board of Monitors was appointed (a member was appointed by both the plaintiff and the defendant, and the third member by the court), for the purpose of establishing procedures for a new election of officers in accordance with the international constitution. The instant case involved an interpretation of this consent order. Judge Letts ruled that the powers of the Board of Monitors:

[I]ncluded all proper efforts on the part of the Board to assure the rank and file membership . . . that a new convention would be conducted according to the provisions of the International constitution and assuring the membership that their democratic processes would not be violated.⁴⁴⁶

If the defendants are aggrieved by any recommendations of the monitors, they always have recourse to the court to settle the controversy. While this case involved an original consent order, there seems to be no reason why a court of equity cannot appoint such an officer to supervise the union until such time as a democratic election can be held.⁴⁴⁷

2) Conclusion

Although the courts have not attempted to define the nature or extent of the members' right to vote, nonetheless some pattern emerges from the cases in this area. The voluntary association theory, while still causing difficulty in an isolated case, has become almost a legal fiction in the judicial treatment of unions' voting policies and practices. The approach the courts seem to take when confronted with a dispute concerning a union election is to allow the union to adjust or settle the dispute within its own framework of remedial procedures. But if the union refuses or neglects to provide for an adequate disposition of the grievance, or violates the provisions of its constitution in resolving the controversy, the vast majority of courts stand ready to afford complete relief to the aggrieved members.

3) Right of Free Speech

Cases involving the members' right to speech often come to the courts in the form of an action for reinstatement to membership on behalf of a member who was ex-

⁴⁴² *Sibilia v. Western Elec. Employees Ass'n*, 142 N.J. Eq. 77, 59 A.2d 251 (Ct. Err. & App. 1948).

⁴⁴³ *O'Neill v. United Ass'n of Journeymen Plumbers*, 348 Pa. 531, 36 A.2d 325 (1944); See *Wilson v. Miller*, 194 Tenn. 390, 250 S.W.2d 575 (1952).

⁴⁴⁴ *Dusing v. Nuzzo*, 177 Misc. 35, 29 N.Y.S.2d 882, *modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (1941).

⁴⁴⁵ Civil No. 2361-57, D.D.C., Dec. 11, 1958.

⁴⁴⁶ *Id.* at 3.

⁴⁴⁷ The power of the chancellor to appoint such monitors would seem to be closely analogous to the power of appointing a receiver, which the chancellors developed.

pelled for slander. Before the substantive questions of the members' right to speech will be considered by the court, the plaintiff must meet the various procedural requirements for reinstatement.⁴⁴⁸ The problem of free speech is not limited to cases of expulsion but may also be involved in libel or slander actions among union members themselves.

Statements made in the course of a union meeting or printed in handbills during an election campaign within the unions have been the cause of a number of libel or slander actions. Generally these actions fail, thus enabling a member to discuss relevant matters without fear of being rendered personally liable. The reason assigned by the courts in denying relief to the party alleging the libel is that a qualified privilege attaches to statements made within the ranks of the union concerning union policies and administration.⁴⁴⁹ In a recent California case, the defendant had distributed a pamphlet in the course of a campaign for union office, charging his opponent with being a Communist. The appellate court upheld the judgment for the defendant since the statements were made in good faith within the union ranks and were thus privileged. The court went on to point out that: "There could scarcely be more appropriate occasions for the exercise of uninhibited free speech."⁴⁵⁰ This qualified privilege may be vitiated, however, by the showing of malice⁴⁵¹ or publication to those outside the common interest group.⁴⁵²

While the law shields statements made by a member within the union itself against libel or slander actions, of far greater importance is the protection that the courts will give to a member who has been disciplined by the union as a result of such statements. Two avenues of approach have been taken by the judiciary in regard to this problem. The courts may look to the substance of the alleged offense and to the nature of the hearing accorded the member within the union, and decide whether the hearings were fairly conducted.⁴⁵³ Or, the court may seek to extend either the Bill of Rights or the state constitution to cover and protect speech within the unions.⁴⁵⁴

While there has been some authority in legal articles urging the application of the Bill of Rights⁴⁵⁵ to unions, there appears to be only one recent case which has applied the first amendment to protect members from union discipline.⁴⁵⁶ The plaintiffs in this case had printed and distributed handbills in favor of a slate of candidates for national offices in the union. The slate of officers whom they supported lost the election, and they were brought before the national convention the following summer and were convicted and fined for making malicious misrepresentations in the course of a campaign. The court found that the statements in the handbill were not libelous. The judge went on to declare that both the Ohio Constitution⁴⁵⁷ and the First Amendment of the U.S. Constitution protected the members' right to criticize their officers. An injunction was granted against the enforcement of the fines by the union.

⁴⁴⁸ See the discussion of union discipline, *supra* at 398.

⁴⁴⁹ See, *Ward v. Painters' Local*, 41 Wash. 2d 859, 252 P.2d 253 (1953); *Garriga v. Townsend*, 130 N.Y.S.2d 581 (Sup. Ct. 1954), *modified*, 285 App. Div. 199, 136 N.Y.S.2d 295 (1954); *Krause v. Bertrand*, 323 P.2d 784 (Cal. 1958). There is a difference of opinion as to whether the privilege must be pleaded in order that it be available for the defendant. *Compare Spangler v. Glooer*, 50 Wash. 2d 473, 313 P.2d 354 (1957), *with De Mott v. Amalgamated Meat Cutters and Butchers*, 157 Cal. App. 2d 13, 320 P.2d 50 (1958).

⁴⁵⁰ *Krause v. Bertrand*, *supra* note 449, at 787.

⁴⁵¹ *Garriga v. Townsend*, 285 App. Div. 199, 136 N.Y.S.2d 295 (1954), *modifying* 130 N.Y.S.2d 581 (Sup. Ct. 1954).

⁴⁵² *Ward v. Painters' Local*, 45 Wash. 2d 533, 276 P.2d 576 (1954). See PROSSER, TORTS, 614-29 (2d ed. 1955).

⁴⁵³ *E.g.*, *Ames v. Dubinsky*, 5 Misc. 2d 380, 70 N.Y.S.2d 706, 732 (Sup. Ct. 1947); *Mahoney v. Sailor's Union of the Pacific*, 43 Wash. 2d 846, 264 P.2d 1095 (1953).

⁴⁵⁴ *Crossen v. Duffy*, 90 Ohio App. 252, 103 N.E.2d 769 (1951).

⁴⁵⁵ Aaron, *Protecting Civil Liberties of Members in Unions*, 2 PROCEEDINGS OF INDUSTRIAL RELATIONS RESEARCH ASSOCIATION 28, 35 (1949).

⁴⁵⁶ *Crossen v. Duffy*, 90 Ohio App. 252, 103 N.E.2d 769 (1951).

⁴⁵⁷ Ohio CONST. art. I, § 11.

Though this decision probably was warranted, it nonetheless presents real conceptual difficulties. The broad language of the Ohio Constitution⁴⁵⁸ undoubtedly protects members who criticize their officers from disciplinary action by the union, but there is certainly some doubt as to whether the first amendment serves as a restriction on the union's action.⁴⁵⁹

This is not to say that everytime the members' right to speech is before the court, the decision will be couched in constitutional language. For instance, in *Ames v. Dubinsky*⁴⁶⁰ the suspension of four members of Local 10 of the International Ladies' Garment Workers' Union was questioned. The plaintiffs were suspended for issuing defamatory circulars during a local election campaign. The court found that the statements were indeed defamatory and constituted a violation of the union constitution. Since the hearings before the union tribunal were shown to be fair and impartial, the suspensions were upheld, and no first amendment violation was alleged by the plaintiffs nor discussed by the court. Although the judiciary has given the right to speech maximum protection, still there is an occasional and recognized competing interest in the union's power to punish for dual unionism. This was recently considered in two cases involving maritime unions. In the past few years, the militant seamen's unions in this country have been engaged in a determined fight to remove communist influences from the maritime and waterfront unions. It was out of this struggle that these two cases developed.

The first arose out of the dispute between the Seamen's International Union of North America and the Canadian Seamen's Union. The Canadian Seamen's Union was communist-dominated almost from its inception in 1936.⁴⁶¹ In 1949, the SIU attempted to wrest control of the unlicensed seamen from the hands of the CSU. The fight between these two unions became extremely bitter and physical violence was widespread.

When the S.S. Agojohn, manned by members of the Sailor's Union of the Pacific, a west-coast affiliate of the SIU, docked in Seattle in early May, 1949, members of the CSU immediately threw a picket line around the ship. Members of the SUP and the various AFL metal trades unions refused to honor the picket line thrown up by the communist CSU.⁴⁶² At the next meeting of the Seattle Branch of the SUP, John Mahoney, a former official in the SUP, and a long-time member of the union, arose and asked, "Who gave the pie-cards the authority to engage in strike-breaking activities and how come the membership of the organization was not informed of this?" This was viewed as a direct attack on the officers and policies of the SUP, and charges of slander, violation of the union oath and dual unionism were preferred against Mahoney.

⁴⁵⁸ "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Ohio CONST. art. I, § 11.

⁴⁵⁹ The first amendment does not apply to individuals. *Public Util. Comm'n v. Pollock*, 343 U.S. 451, 461 (1952) (dictum). The right of a private association like a housing development to restrict the entry of Jehovah's Witnesses was held not to violate the first amendment. *Watchtower Bible & Tract Soc. v. Metropolitan Life Ins. Co.* 297 N.Y. 339, 79 N.E.2d 433, cert. denied, 335 U.S. 886 (1948), rehearing denied, 335 U.S. 912 (1949). Similarly, the first amendment has been held not to apply to private corporations. *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497 (1st Cir. 1950) (per curiam). However, the decision in this case might be sustained under the notion that the union is an agent of the government by virtue of the authority it exercised under federal statutes. *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946). See Note, 56 YALE L.J. 731 (1947). Perhaps the court might even have reasoned that refusal to grant judicial relief to the plaintiffs would somehow constitute "state action" within the terms of *Shelley v. Kraemer*, 334 U.S. 1 (1948). See Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 CALIF. L. REV. 718 (1956).

⁴⁶⁰ 5 Misc. 2d 380, 70 N.Y.S.2d 706 (Sup. Ct. 1947).

⁴⁶¹ For the history of these events see TAFT, *THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS* 205-12 (1954); GOLDBERG, *THE MARITIME STORY* 255-61 (1958); Wollett and Lampman, *The Law of Union Factionalism—The Case of the Sailors*, 4 STAN. L. REV. 177 (1952).

⁴⁶² Seafarer's Int'l Union, *PROCEEDINGS FIFTH BIENNIAL CONVENTION*, 86-87 (1951).

Almost immediately Mahoney rallied support in Seattle, including a great deal of support from various left-wing groups. A Mahoney Defense Committee was formed, which published its own paper, *Defender*, which carried on a broad scale attack on the SUP. Mahoney and at least thirty of his supporters were expelled for dual unionism. Mahoney brought an action against the SUP, asking for reinstatement to membership and damages for loss of work. The superior court granted the relief requested by the plaintiff. On appeal to the Supreme Court of Washington, the judgment was affirmed.⁴⁶³ The court decided that:

The conduct of respondent, either as charged or proved, was not a violation of the union constitution, for which he can be expelled from the union. Whether it be said that he asked a question or made a statement, he did so in the union meeting. He spoke there upon union policies, as a member of the union, to the other members present. This he should be able to do freely, without fear of expulsion. The union constitution does not provide to the contrary. The trial court was correct in holding, in effect, that speech *per se* is not rebellion. . . . The charge being insufficient, the proceeding based upon it was a nullity and plaintiff's expulsion was void.⁴⁶⁴

Few can quarrel with the holding that speech *per se* is not rebellion. However, two serious defects manifest themselves in this decision. First of all, the court seems to be holding the union to a requirement that charges⁴⁶⁵ be drafted with an almost legal formality. More importantly, as the dissenting opinion pointed out, the essential problem of this case was not freedom of speech, but:

. . . the right of the majority rank-and-file, dues-paying members to determine upon union policy, and to discipline a dissenting minority member, not merely for debating or voicing opposition to such union policy in a closed union meeting, but for overt acts

⁴⁶³ Mahoney v. Sailors' Union of the Pacific, 43 Wash. 2d 846, 264 P.2d 1095 (1953).

⁴⁶⁴ *Id.* at 1097.

⁴⁶⁵ The written charge which was presented to Mahoney read as follows:

We, the undersigned book members and officials of the Sailors' Union of the Pacific, hereby prefer charges against John Mahoney, Book No. 4344, for the following reason:

Mahoney's scurrilous and defamatory remarks entered in the minutes of the Seattle meeting May 23, 1949, when John Mahoney 'wanted to know who gave the pie-cards the authority to engage in strike-breaking activities and how come the membership of the organization were not kept advised of this' and also because of his remarks entered in the minutes of the Seattle meeting June 6, 1949, when Mahoney reiterated the same statement.

The above are definite violations of the Constitution of the Sailors' Union of the Pacific which are listed as follows:

1. Violation of the Obligation.
2. Violation of Article III, Section 4.
3. Violation of Article V, Section 1.

The constitutional Provisions referred to in the charge are:

Obligation, I pledge my honor as a man, that I will be faithful to this Union, and that I will work for its interest and will look upon every member as my brother; that I will not work for less than Union wages, and that I will obey all orders of the Union, I promise that I will never reveal the proceedings of the Union to its injury or to persons not entitled to know them. And if I break this promise, I ask every member to treat me as unworthy of friendship and acquaintance, So Help Me God!

Art. III, § 4.

Any member who advocates and/or gives aid to the principles and policies of any hostile or dual organization or gives aid or comfort to such, shall be denied further membership in this Union.

Art. V, § 1.

It shall be the duty of each member to be true and loyal to the Union and the labor cause, and to endeavor to put into practice the principles laid down in the Preamble. Members shall treat the officers of the Union while discharging their duties with due respect and consideration, and yield strict obedience to such rules as the Union may see fit to adopt.

While the body of the charge may not be drawn with precision, nonetheless, when considered with the sections of the Constitution referred to, it would seem that Mahoney was fully aware of what he was being charged with. (Cited in Mahoney v. Sailors' Union of the Pacific, 43 Wash. 2d 846, 264 P.2d 1095, 1096 (1953).)

(a) *obstructing the policy* of his union, (b) *defying orders* of the officials of his union, and (c) *aiding and supporting a rival Canadian union*. . . . (Emphasis in original.)⁴⁶⁶

What the majority so blithely overlooked is that no freedom of speech can be exercised absolutely. Instead of riveting its attention on the property right of the expelled member in his job, the court should have at least weighed the charge of "dual-unionism" and realized that if the charge was well-founded it could vitally effect the property rights of the entire union membership. It is in this context, as the dissent recognized, that this right of speech must be viewed, and regardless of the ultimate decision, dual-unionism cannot be ignored.

A similar case arose in *Madden v. Atkins*.⁴⁶⁷ The plaintiffs in this case had supported a slate of officers in opposition to the incumbent officers of Local 88 of the Masters, Mates and Pilots of America. During the course of the campaign they published a number of leaflets attacking the incumbent officers. After the defeat of plaintiffs' slate of officers, they formed an association known as the American Mariner's Association of the National Organization Masters, Mates & Pilots of America and published their own newspaper, *True Course*. In addition to continuing to continuing their attack on the officers of the local, they advocated merger of the Masters, Mates and Pilots (AFL) with the Marine Engineers Beneficial Association (CIO). Beyond this, they pressed for many of the ideas advocated by the Committee for Maritime Unity which had been founded by Harry Bridges.

The plaintiffs were all charged with dual unionism and were tried and expelled from the union. In their action for reinstatement, the court found first that the plaintiffs had failed to exhaust their remedies within the union. The court further observed that it was up to the union to determine whether the acts of the plaintiffs were inimical to the best interests of the union. Since it is up to the union to make this decision, the court held that they could not legitimately interfere in the internal processes of the union so long as there was "any evidence whatsoever"⁴⁶⁸ to sustain the conclusion of the union trial board. Finding that evidence did exist to support the action by the union the complaint was dismissed.

The appellate division modified the judgment by directing the reinstatement of the plaintiffs, although refusing to allow damages.⁴⁶⁹ The Court of Appeals sustained the order for reinstatement and modified the judgment of the appellate division by granting damages.⁴⁷⁰ The court found that additional appeals within the union would be futile. Further, they found that the campaign literature which had been distributed by the plaintiffs was "nothing more than ardent and hard-hitting campaign literature."⁴⁷¹ On the issue of dual unionism, the court observed that at no time had the plaintiffs advocated withdrawal from Local 88. Rather, their efforts were of the nature of a partisan political group working in the interest of the union. Weighing and considering the conflicting values of union solidarity and the individual's right to speech, the court said:

The price of free expression and of political opposition within a union cannot be the risk of expulsion or other disciplinary action. In the final analysis, a labor union profits, as does any democratic body, more by permitting free expression and free political opposition than it may ever lose from any disunity that it may thus evidence.⁴⁷²

⁴⁶⁶ *Mahoney v. Sailors' Union of the Pacific*, 43 Wash. 2d 846, 264 P.2d 1095, 1106 (1953). The reasoning of the dissenting judge in the *Mahoney* case is similar to that found in *Miller v. International Union of Operating Eng'rs*, 118 Cal. App. 2d 752, 257 P.2d 85 (1953).

⁴⁶⁷ 1 Misc. 2d 17, 147 N.Y.S.2d 19 (Sup. Ct. 1955).

⁴⁶⁸ *Id.* at 31.

⁴⁶⁹ *Madden v. Atkins*, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957).

⁴⁷⁰ *Madden v. Atkins*, 4 N.Y.2d 283, 151 N.E.2d 73, 174 N.Y.S.2d 633 (1958).

⁴⁷¹ *Id.* at 639.

⁴⁷² *Id.* at 640.

4) Conclusion

Regardless of the decision and contrary to *Mahoney*, the Court of Appeals was fully aware of, and gave serious consideration to, the real problem of dual unionism. While there are a small number of cases in the area of free speech, it seems safe to assume that a member who has voiced legitimate opposition within a union will be afforded protection by the courts in any case coming before them. Statements made within a union have been accorded a qualified privilege. More importantly, the individual member will be protected from disciplinary action by the union as a result of his opposition. For when the courts are presented with a problem involving a conflict between the union solidarity and the members' right to speech, the courts have cast their lot with the individual member.

C. Legislation

Existing legislation prescribing democratic standards for unions is sparse and ineffective. Some five states have adopted statutes regulating union elections.⁴⁷³ There seems to have been no effort to enforce the statutes, at least in the areas of union elections and free speech.⁴⁷⁴ However, a rash of proposed legislation has been proffered in the present term of Congress. The most important bills of the ones introduced are those of Senator Kennedy,⁴⁷⁵ Senator Goldwater,⁴⁷⁶ Senator McClellan⁴⁷⁷ and Representative Barden.⁴⁷⁸ All of these bills contain provisions relating to the conduct of union elections.

Perhaps the bill which has received the most publicity is the Kennedy bill. This bill would require that national officers be elected at least every four years, either at a convention of delegates chosen by secret ballot, or by secret ballot among the members in good standing.⁴⁷⁹ Local officers would have to be elected at least every three years by secret ballot.⁴⁸⁰ Unless the elections are held at the regular time provided for in the union constitution, notice must be given every member of the union by mail at his last known address at least fifteen days before the election.⁴⁸¹

Several protective devices are included in the statute. It is provided that no member may be denied his right to vote because his employer has delayed or defaulted in submitting his dues pursuant to a valid check-off authorization.⁴⁸² All minutes and records and the credentials of all delegates to a convention where officers are elected must be preserved for one year and all ballots from any required secret election must be preserved for one year.⁴⁸³ Dues money or employer contributions may not be used to promote the candidacy of any person.⁴⁸⁴ Nor may any person who has been convicted of any enumerated felony be eligible for election to office unless he receives the approval of the Secretary of Labor.⁴⁸⁵ Where the union constitution does not provide adequate procedures for the removal of officers guilty of serious misconduct, upon complaint by any member the Secretary may permit the removal of such officer by members of good standing, following a hearing and secret ballot of the membership.⁴⁸⁶ Finally, the Secretary shall also have the authority to prescribe minimum

⁴⁷³ COLO. REV. STAT. ANN. § 80-5-1 (1953); FLA. STAT. § 447.09 (1952); KAN. GEN. STAT. ANN. § 44-809 (1949); MINN. STAT. § 179.19 (1953); TEX. REV. CIV. STAT., art. 5154 (1948).

⁴⁷⁴ None of the annotations following these statutes contain references to any reported cases involving an attempt to regulate union elections or to protect the members' right to speech.

⁴⁷⁵ S. 505, 86th Cong., 1st Sess., §§ 301-05 (1959).

⁴⁷⁶ S. 748, 86th Cong., 1st Sess., §§ 302-03 (1959).

⁴⁷⁷ S. 1137, 86th Cong., 1st Sess., §§ 101-04 (1959).

⁴⁷⁸ H.R. 4473, 86th Cong., 1st Sess., §§ 101-03 (1959).

⁴⁷⁹ S. 505, 86th Cong., 1st Sess., § 301(a) (1959).

⁴⁸⁰ *Id.* § 301 (b).

⁴⁸¹ *Id.* § 301 (c).

⁴⁸² *Ibid.*

⁴⁸³ *Id.* §§ 301 (c), (d).

⁴⁸⁴ *Id.* § 301 (e).

⁴⁸⁵ *Id.* § 305 (a).

⁴⁸⁶ *Id.* § 301 (f).

standards relating to the removal of any local officer who is guilty of serious misconduct,⁴⁸⁷ on similar conditions of a hearing and a secret ballot.

The provisions of this bill would ultimately be enforced by the Secretary. Whenever an individual member has exhausted his remedies within the union, or has received no final decision within four months following his initial action, he may file a complaint with the Secretary alleging the violation of this act, including a violation of the union constitution and by-laws. The Secretary would then investigate the complaint and upon a determination that there is "probable cause to believe"⁴⁸⁸ that a violation has been committed and not been remedied, he would institute a civil action in a federal district court against the union. If the court finds by a preponderance of the evidence that a violation occurred which affected the outcome of the election, the election will be voided, and a new election held under the supervision of the Secretary.⁴⁸⁹

The Administration bill,⁴⁹⁰ which was introduced by Senator Goldwater, is not at great variance with the Kennedy bill in the provisions regulating union elections. There are slight differences in that it allows a five-year term for national officers⁴⁹¹ and includes a requirement that every union establish recall procedures to remove elected officers from office.⁴⁹² Additionally, individual members may maintain an action to enforce the provisions of this bill.⁴⁹³ The Secretary may, according to the terms of this bill, proceed directly against a union without a formal charge being made by a member.⁴⁹⁴

The bills introduced by Senator McClellan⁴⁹⁵ and Rep. Barden⁴⁹⁶ are quite similar to each other. Both of them include the same basic safeguards contained in the Kennedy and the Goldwater bills, but they both differ from these bills in two major respects. In addition to the safeguards in the Kennedy and Goldwater measures, both the McClellan and the Barden bills require that every union shall incorporate into their constitutions and by-laws, provisions guaranteeing such basic rights as freedom of speech and assembly.⁴⁹⁷ In addition, they set up elaborate requirements as to the holding of local meetings and calling of conventions. The second major area of difference involves the means of enforcing the bills. Both bills require that unions file proof of compliance with the Secretary of Labor. Upon filing these documents, the Secretary shall issue a certificate of compliance to the union. These certificates may be withdrawn if the unions breach the provisions of these laws. Without such a certificate, no union may be certified by the NLRB, nor may they file unfair labor charges. In addition, a non-complying union would lose its tax exemption under §501(c) of the Internal Revenue Code of 1954.⁴⁹⁸

Conclusion

Any conclusion as to the actual rights of the individual union members to participate in the governmental processes of their union must of necessity be tentative. As has been indicated the majority of unions seem to be democratic. Labor itself is aware of the problems in this area and the leaders of the AFL-CIO are making a conscious effort to correct the abuses which exist.

The case law relating to the right of speech and the right to vote, while sometimes mesmerized by the older concepts of voluntary associations, seems to afford real pro-

⁴⁸⁷ *Id.* § 301 (g).

⁴⁸⁸ *Id.* § 302 (b).

⁴⁸⁹ *Id.* § 302 (a-c).

⁴⁹⁰ S. 748, 86th Cong., 1st Sess. (1959).

⁴⁹¹ *Id.* § 302 (a).

⁴⁹² *Id.* § 302 (c).

⁴⁹³ *Id.* § 302 (d).

⁴⁹⁴ *Id.* §§ 404-05.

⁴⁹⁵ S. 1137, 86th Cong., 1st Sess. (1959).

⁴⁹⁶ H.R. 4473, 86th Cong., 1st Sess. (1959).

⁴⁹⁷ S. 1137, 86th Cong., 1st Sess. §§ 101-04 (1959); H.R. 4473, 86th Cong., 1st Sess., §§ 101-02 (1959).

⁴⁹⁸ INT. REV. CODE OF 1954, § 501(c)(5)(9).

tection to these rights. The high cost of court litigation, which at times prohibits suit by the individual member might be solved by awarding attorneys' fees and costs to an individual member who successfully maintains an action compelling an election.⁴⁹⁹

Certainly before any legislation is passed in this area, Congress should pay heed to the pluralistic necessities of a democratic society. The excessive sanctions imposed by the McClellan and Barden bills would perhaps not only weaken unions themselves, but would ultimately injure the individual member of the union who would be denied access to the NLRB. While the Kennedy and the Goldwater bills present a more reasonable approach to the problem of union elections, it would seem that the courts are protecting these rights adequately. Thus in this area of internal union procedures, extensive legislative control of unions appears unnecessary.

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⁴⁹⁹ See *O'Connor v. Harrington*, 136 N.Y.S.2d 881 (Sup. Ct. 1954), *modified*, 285 App. Div. 900, 138 N.Y.S.2d 1 (1955). Such procedure would be similar to costs awarded stockholders after successfully maintaining a corporate derivative action.