THE LAW OF UNION DISCIPLINE: WHAT THE
COURTS DO IN FACT

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THE Labor-Management Reporting and Disclosure Act of 1959¹ marks a new era in the legal regulation of internal union affairs. Congress has clearly affirmed the public interest in protecting democratic processes in unions, and it has explicitly protected union members in the free exercise of those political rights essential for self-government. Although Congress has declared the central policy of protecting union democracy and has enunciated essential rights, it has placed on the courts the responsibility of giving body and life to those rights. The rights guaranteed by Title I, the Bill of Rights, are stated in broad terms, and are enforceable through civil suits brought by union members. The courts must give content to those rights and devise remedies to make them meaningful. Title IV, regulating union elections, though more detailed, also contains broad provisions, and again the courts are responsible for giving them meaning and making them effective.²

Although legislative regulation is new, judicial involvement is not, for state courts have been adjudicating internal union disputes for more than sixty years.³ To some degree they have been protecting many of the same rights now guaranteed by the statute. Senator Kennedy, in opposing inclusion of a Bill of Rights, argued that broader protection of these rights was already

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1. 73 Stat. 518, 29 U.S.C. §§ 153, 158-60, 187, 401-531 (Supp. 1959).

2. Sections 402-03. Section 402 provides that violations of Title IV may be remedied through filing a complaint with the Secretary of Labor. If he finds probable cause to believe a violation has occurred, he is required to bring an action in the federal district court to remedy the violation. Under § 403, this procedure is the exclusive remedy for challenging an election already conducted. This procedure obviously gives the Secretary of Labor some practical discretion in determining whether to initiate an action, but the responsibility for interpreting and applying the statute and for designing the appropriate remedy ultimately rests on the court.

Title III, on trusteeships, provides as an alternative method of enforcement the filing of a complaint with the Secretary of Labor. Again, his function is limited to investigating and bringing suit in the district court. The responsibility for interpreting and enforcing the law is on the court.

3. See, e.g., *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N.Y. 101, 23 N.E. 129 (1889) (expulsion); *Wicks v. Monihan*, 130 N.Y. 232, 29 N.E. 139 (1891) (suspension of local).

provided by state courts.⁴ The response was to add section 103 expressly preserving all existing state rights and remedies.⁵ Throughout the statute other specific provisions retained existing state law,⁶ and finally section 603(a) incorporated a broad catch-all antipreemption clause.⁷ Federal legislative protection was thus superimposed on state judicial protection, reinforcing and not supplanting it.

Careful study of the experience of state courts in handling internal union cases remains highly important. First, and most obvious, state law has continued vitality, and at certain points it may provide greater protection to the union member than the federal law. Even when federal and state rights are concurrent or overlapping, there may be procedural advantages in pursuing state remedies or in joining causes of action alleging violations of both state and federal rights.⁸ Second, the primary responsibility for giving substantive meaning to the statute will fall on the federal courts which have had little experience with internal union cases.⁹ The breadth of protection which they

4. 105 CONG. REC. 6481-87 (1959). The thrust of Senator Kennedy's argument was that enactment of a federal Bill of Rights would preempt existing state law and leave union members with less protection than before.

5. "Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and by-laws of any labor organization."

6. Section 306 in Title III, Trusteeships, provides: "The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity: *Provided*, That upon the filing of a complaint by the Secretary, the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be *res judicata*." This was clearly intended to preserve access to existing remedies in state courts. See S. REP. NO. 187, 86th Cong., 1st Sess. 19 (1959).

Section 403 gives state law more limited scope in election cases. "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive."

7. Section 603(a). "Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

8. See Summers, *The Impact of Landrum-Griffin in State Courts*, 13 ANN. CONF. ON LABOR, N.Y.U. (1960).

9. During the first year of the Labor-Management Reporting and Disclosure Act of 1959, more than thirty suits were brought claiming violations of the Act. All but two were brought in the federal district courts, and both of those were suits under § 201(c) to examine union books and records. COMMITTEE ON DEVELOPMENT OF THE LAW OF UNION ADMINISTRATION, SECTION OF LABOR RELATIONS LAW, ABA, REPORT (1960). Prior to the passage of the statute, relatively few internal union cases had been brought in the federal courts, and many of those had been dismissed for lack of jurisdiction without any con-

give to statutorily declared rights will be influenced by their view of the pre-existing protections under state law. Third, the practical value of substantive rights depends largely on the procedures and remedies available to enforce those rights. The experience of state courts, both their successes and their failures, can provide helpful guides in devising remedies to make the statutory rights effective.¹⁰

The purpose here is to try to provide a better insight into state court handling of internal union cases, the extent of protection provided to the democratic process, and the problems confronted in providing effective remedies. It is based on an intensive study of the cases of one state, New York, which has almost half of all the reported cases.¹¹ Not only were all published opinions analyzed, but in addition court records were searched for unreported cases during a ten year period; and for each case during this same ten year period the entire court file was analyzed, including pleadings, affidavits, transcripts, and all procedural steps from the beginning to the end of the litigation. Lawyers involved in many of these cases were interviewed to obtain additional information and their general evaluation of the problems involved. Studying cases in such depth often reveals that the factual picture before the judge bears remote resemblance to that reflected in his opinion and suggests unstated reasons for the particular result. It ultimately provides a new perspective of the protection actually provided by the state courts.¹²

This paper deals only with union discipline and seeks to determine the protection afforded individual members by the New York courts in this segment

sideration of the merits. See *Underwood v. Maloney*, 256 F.2d 334 (3d Cir. 1958); 68 YALE L.J. 1182 (1959).

10. The statute gives the courts wide freedom in tailoring the remedy to meet the particular needs of the case. For example, both § 102 in the Bill of Rights and § 304(a) in the Trusteeship title provide that the court shall give "such relief (including injunctions) as may be appropriate." Section 402 in the Election title specifies the remedies to be applied, but the court as a practical matter retains substantial freedom.

11. The study was initiated by the Governor's Committee on Improper Labor and Management Practices, and was continued as a part of a larger study conducted by the New York Department of Labor. The data collected in that study is used here with the generous permission of Industrial Commissioner, M. P. Catherwood. The analysis and evaluation of the data, as well as the conclusions, are solely those of the author.

For a pioneer study of the New York courts in action in internal union disputes, see *Judicial Intervention in Revolts Against Labor Union Leaders*, 51 YALE L.J. 1372 (1942). For a study subsidiary to the present one and centering around *Fitipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959), see King, *Union Democracy, A Case Study*, 10 SYR. L. REV. 311 (1959).

12. Close analysis of the documents in the case files and information provided by lawyers interviewed both confirm that critical facts influencing the court's decision are often not stated in the published opinion. Therefore, cases are cited on the basis of facts which appear as relevant from the entire record, whether those facts appear on the face of the opinions or not. For this reason, the analysis of particular cases, as well as general conclusions, differ from the author's earlier studies where he relied on the bare published opinions. See Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951).

of internal union affairs. Although discipline cases commonly arise as a part of a larger factional fight within the union and must be viewed in this context, they pose problems quite different from cases in such other areas as union elections, trusteeship of locals, or fiduciary obligations of union officers. Separate discussion helps focus more sharply on the specific problems.

A. JUDICIAL CONCERN IN UNION DISCIPLINE

Discipline is the criminal law of union government.¹³ It is the critical device for maintaining internal order, enforcing obligations of membership, and compelling adherence to union standards in employment. It strengthens the union as an effective bargaining representative, and is essential for internal democracy. Discipline may, on the other hand, be used to stifle the democratic process by punishing those who criticize and retaliating against those who oppose.¹⁴ The courts, therefore, in reviewing union discipline reach into the most sensitive area of internal union affairs. Overzealous intervention can weaken and frustrate unions; judicial timidity or indifference can leave those who exercise their democratic rights helplessly vulnerable.

The individual member feels the impact of formal discipline in two ways. First, if he is expelled, he may be discharged under a union shop contract, his seniority rights destroyed, and in some industries effectively barred from his trade. This impact is now prohibited by sections 8(a)(3) and 8(b)(2) of the Taft-Hartley Act, but it is still felt in full force outside the protective reach of the NLRB.¹⁵ Second, even though not affected in his employment, the disciplined individual loses his right to participate in union affairs. He is excluded from union meetings, barred from union office, and denied the right to vote.

Courts have not separated these two distinct interests in such discipline cases, but have declared membership to be a "property" right, an indivisible entity to be protected in its entirety. In some cases courts have emphasized the effect of discipline on the individual's employment, but this seems to be little more than verbal make-weight.¹⁶ Federal protection of employment

13. See *Bachman v. Harrington*, 52 Misc. 2d, 102 N.Y. Supp. 406 (Sup. Ct. 1906), where this analogy to penal laws was carried to its dryly logical conclusion that adoption of a new constitution by implication repealed the old one and acted as arrest of judgment for all violations committed under the old constitution where sentence had not been passed.

14. For general discussion of union disciplinary practices, see Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483 (1950); TAFT, *THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS* 117-80 (1954).

15. Even within the area of discretionary jurisdiction occupied by the Board, protection is far from perfect, for subtle discriminations in the assigning of jobs at the hiring hall or in the handling of grievances are often difficult to prove.

16. See, e.g., *MacPherson v. Green*, 72 N.Y.S.2d 790 (Sup. Ct. 1947). For the disciplined individual, however, it is a distinct and critical interest, for the member's very fear of loss of his job represses his exercise of his membership rights. When this fear is realized, the member's willingness and ability to fight back either in the union or in the courts is undermined.

rights has not reduced state judicial protection of membership rights.¹⁷ In many cases, particularly where those being disciplined were leaders of the opposition, the union has not expelled the disciplined members but has only barred them from attending meetings or holding office for a number of years. In these cases courts have not displayed any less concern or willingness to intervene, but have protected the individual's enjoyment of full membership rights.¹⁸

The limits which the courts have placed on union discipline seem to have no relation to the severity of the penalty imposed, but are instead governed by the conduct which the union has sought to punish and the procedure used for determining the member's guilt. Defining those limits requires looking to the legal theories used by the courts to rationalize their role in reviewing union disciplinary action, but more importantly, it requires looking beyond those theories to discover what the courts in fact do—what limits they actually enforce and what remedies they give to protect the disciplined member.

B. LEGAL THEORIES AND RULES FOR JUDICIAL REVIEW

The underlying legal theory defining the role of the court in internal union affairs is that the union constitution is a contract between the union and its members. The Court of Appeals in a classic statement of this rule declared in *Polin v. Kaplan*:

The constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members. As the contracts may prescribe the precise terms upon which a membership may be gained, so may it conclusively define the conditions which will entail its loss. Thus, if the contract reasonably provides that the performance of certain acts will constitute a sufficient cause for the expulsion of a member, and that charges of their performance, with notice to the member, shall be tried before a tribunal set up by the association, the provision is exclusive, and the judgment of the tribunal, rendered after a fair trial, that the member has committed the offenses charged and must be expelled, will not be reviewed by the regularly constituted courts. . . . This is not to say, however, that a court will decline to interfere, if an expulsion has been decreed for acts not constituting violations of the constitution and by-laws, and not made expellable offenses thereby, either by terms ex-

17. The New York courts have consistently rejected the argument that the existence of federal remedies precludes the states from giving protection against improper discipline. See *Bryant v. Curren*, 25 L.R.R.M. 2190 (N.Y. Sup. Ct. 1949); *Real v. Curran*, 285 App. Div. 552, 138 N.Y.S.2d 809 (1955). This position has now been confirmed by the United States Supreme Court, *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958).

18. *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959); *Blek v. Kirkman*, 242 App. Div. 815, 275 N.Y. Supp. 645 (1934), *reversing* 148 Misc. 522, 266 N.Y. Supp. 91 (Sup. Ct. 1933). When the court denies relief, it is for reasons other than lack of injury to job opportunities. For example, in *Cromwell v. Morrin*, 91 N.Y.S.2d 176 (Sup. Ct. 1949), and *Ames v. Dubinsky*, 5 Misc. 2d 380, 70 N.Y.S.2d 706 (Sup. Ct. 1947), the court mentioned the fact that the plaintiffs had not been interfered with in their employment.

pressed or implied. In such an instance, the expulsion is not within the power conferred by the contract. Accordingly, the proceedings will be set aside and the associate restored to membership.¹⁹

The union constitution defines the conduct for which the member can be punished, prescribes the procedure for trying him, and specifies the appeals available within the union. The courts' role is but to enforce the contract. This illusion of simplicity and judicial passivity, however, quickly disappears when courts confront the vague terms of discipline provisions. Whatever usefulness the constitution may have in providing a guide for deciding other internal union disputes, it gives little help in defining the limits on union discipline. In large measure, and particularly in the critical cases, the contract is what the judges say it is.

1. *Judicial Repudiation of Constitutional Provisions*

The contract theory may itself obligate courts to repudiate or rewrite constitutional provisions, for established contract doctrine requires that provisions contrary to public policy be nullified. In *Madden v. Atkins*,²⁰ union members who had issued "smear sheets" attacking the incumbent officers during an election campaign, and had organized an opposition group within the union to criticize union policies and support candidates, were expelled for "dual unionism." In holding the expulsion illegal, the Court of Appeals said:

If there be any public policy touching the government of labor unions, and there can be no doubt that there is, it is that traditionally democratic means of improving their union may be freely availed of by members without fear of harm or penalty. And this necessarily includes the right to criticize current union leadership and, within the union, to oppose such leadership and its policies. (See *Polin v. Kaplan*, 257 N.Y. 277, 284, *supra*.) The price of free expression and of political opposition within a union can not be the risk of expulsion or other disciplinary action.²¹

Regardless of how explicitly the constitution might prohibit such conduct and how clear-cut the evidence that it had been violated, the discipline would be illegal as violating public policy. The court thus uses contract logic to excise terms of the contract and to protect that which the constitution makes punishable.²²

Rewriting procedural provisions is much more direct and far-reaching. Trial procedures which deny the basic elements of fairness are "contrary to

19. 257 N.Y. 277, 281-82, 177 N.E. 833, 834 (1931).

20. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

21. *Id.* at 293, 174 N.Y.S.2d at 640, 151 N.E.2d at 78.

22. In *Schrank v. Brown*, 192 Misc. 80, 83, 80 N.Y.S.2d 452, 455 (Sup. Ct. 1948), the court declared, "Fair criticism is the right of members of a union, as it is the right of every citizen. A provision of a union constitution which would suppress protests of members against actions of their officers which such members regarded as improper or opposed to their best interests, would be illegal and unenforceable." The limits placed by the courts on conduct which can be punished is discussed in detail at notes 61-142 *infra*.

natural justice" and void, even though in accord with the constitution.²³ "[Both] good conscience and law demand, that no member shall be deprived of his rights and privileges until he has had notice of the charges and been given an opportunity to meet them."²⁴ If the constitution does not prescribe these, the courts will intervene to supply the omission.²⁵

Provisions describing appellate procedure within the union and requiring exhaustion before a member may resort to the courts do not normally receive even this verbal curtsy. They are either wholly ignored or swallowed up in the courts' own rules requiring exhaustion, and made subject to judicially created exceptions.²⁶

2. Judicial Interpretation of Constitutional Provisions

The contract theory gives the courts an additional, though more subtle role in regulating union discipline by placing in them the power to interpret discipline provisions.²⁷ Restrictive interpretations may invalidate, or liberal interpretations may affirm, union disciplinary action; the choice in each case lies largely with the court, though often the availability of choice is so obscured that the judge's role appears mechanically neutral. In *Gleeson v. Conrad*²⁸ members of the opposition political group were expelled for refusing to obey the orders of the local president. The court ordered reinstatement because the constitution prohibited only disobedience of the international president. This simple reading of the words glossed over the fact that the local union had adopted the international constitution as its own, and that the court could have as plausibly interpreted it to fit the local union.

Provisions defining punishable offenses commonly include catch-all clauses which can be stretched to reach any conduct.²⁹ Thus, obtaining admission by false representation can be punished as action which "tends to injury of the

23. *Blek v. Wilson*, 145 Misc. 373, 259 N.Y. Supp. 443 (Sup. Ct. 1932), *rev'd on other grounds*, 262 N.Y. 253, 186 N.E. 692 (1933).

24. *Bricklayers Union v. Bowen*, 183 N.Y. Supp. 855, 861 (Sup. Ct. 1920), *aff'd mem.*, 198 App. Div. 967, 189 N.Y. Supp. 938 (1921).

25. *Gilmore v. Palmer*, 109 Misc. 552, 179 N.Y. Supp. 1 (Sup. Ct. 1919); *Blek v. Kirkman*, 242 App. Div. 815, 275 N.Y. Supp. 645 (1934), *reversing* 148 Misc. 522, 266 N.Y. Supp. 91 (Sup. Ct. 1931). The procedural standards imposed by the court are discussed in detail at notes 143-91 *infra*.

26. The various exceptions and the ways in which they are used by the courts are discussed in detail at notes 192-291 *infra*.

27. *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931); *Sciveletti v. Leckie*, 4 App. Div. 2d 773, 165 N.Y.S.2d 529 (1957); *McCauly v. Hoey*, N.Y.L.J., July 26, 1957, p. 5, col. 8 (Sup. Ct.); *Robinson v. Dahm*, 94 Misc. 729, 159 N.Y. Supp. 1053 (Sup. Ct. 1916).

28. 81 N.Y.S.2d 368 (Sup. Ct. 1948), *modified*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949).

29. NATIONAL INDUSTRIAL CONFERENCE BOARD, *STUDIES IN PERSONNEL POLICY*, No. 150, *HANDBOOK OF UNION GOVERNMENT STRUCTURE AND PROCEDURES* 65-67 (1955); Summers, *supra* note 12, at 505-08. If the constitution contains no catchall clause, the courts may imply one. Thus, in *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931), the court

members";³⁰ stealing company property is "unbecoming and disgraceful conduct";³¹ and a foreman who refused to let members work unless they took less than union scale was expelled as one who endeavors "to create dissension . . . or . . . works against the interests and harmony of the United Brotherhood."³² The courts can not as easily narrow such sweeping clauses by interpretation to invalidate discipline. They have not, however, been wholly helpless. Insurgent shop stewards who held a rump meeting and refused to post notices requested by the officers were expelled for "unbecoming conduct." The court said that since the constitution did not state precisely the offense of disobeying an officer, this conduct could not be punished.³³

If a union uses a more specific charge, the court's power to regulate discipline through skillful interpretation is greatly increased. In *Polin v. Kaplan*³⁴ union members who brought suit against the officers to recover misappropriated funds were charged with resorting to the courts without exhausting internal appeals. The Court of Appeals closely construed the appeals provisions to find that no internal appeals were available, and therefore no violation. In another case a member who sought to challenge a union assessment in court was expelled for "carrying on union business outside of meeting." These words, said the court, could not be interpreted to include this offense.³⁵ Similarly, the courts have narrowed the reach of "slandering an officer," to protect those whose charges against the officer are substantially true, even though highly defamatory.³⁶

Procedural provisions give the courts flexibility in a different form, for though they tend to be much more specific, they are often incomplete.³⁷ Resolving ambiguities may occasionally be required,³⁸ but the courts are more often confronted with distinct gaps which they may fill as they choose. In *Schrank*

read in an implied power to discipline for disloyalty or acts tending to destruction of the Union. *But see* *Bricklayers Union v. Bowen*, 183 N.Y. Supp. 855 (Sup. Ct. 1920), *aff'd mem.*, 189 N.Y. Supp. 938 (App. Div. 1921).

30. *Krause v. Sander*, 66 Misc. 601, 603, 122 N.Y. Supp. 54, 55 (Sup. Ct. 1910), *aff'd*, 143 App. Div. 941, 127 N.Y. Supp. 1128 (1911).

31. *Austin v. Dutcher*, 56 App. Div. 393, 394-95, 67 N.Y. Supp. 819, 820 (1900).

32. *Drazen v. Curby*, 172 App. Div. 417, 421, 158 N.Y. Supp. 507, 510 (1916).

33. *Coleman v. O'Leary*, 58 N.Y.S.2d 812 (Sup. Ct.), *appeal dismissed*, 269 App. Div. 972, 58 N.Y.S.2d 358 (1945).

34. 257 N.Y. 277, 177 N.E. 833 (1931).

35. *Angrisani v. Stearn*, 167 Misc. 728, 3 N.Y.S.2d 698 (Sup. Ct.), *aff'd*; 255 App. Div. 975, 8 N.Y.S.2d 997 (1938).

36. *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y. Supp. 705, *modified*; 269 N.Y. 517, 199 N.E. 515 (1935). For other cases in which the courts have narrowly construed constitutional provisions to invalidate discipline, see *Tesoriero v. Miller*, 274 App. Div. 670, 88 N.Y.S.2d 87 (1949); *Pabon v. Curran*, 44 L.R.R.M. 2178 (N.Y. Sup. Ct. 1959); *Connell v. Stalker*, 21 Misc. 609, 48 N.Y. Supp. 77 (Sup. Ct. 1897).

37. See NATIONAL INDUSTRIAL CONFERENCE BOARD, *op. cit. supra* note 26; Summers, *Disciplinary Procedures of Unions*, 4 IND. & LAB. REL. REV. 15 (1950).

38. See, e.g., *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959); *People ex rel. Schults v. Love*, 199 App. Div. 815, 192 N.Y. Supp. 354 (1922).

*v. Brown*³⁹ the president of a local union who distributed a circular protesting the appointment of a receiver was charged with circulating false and malicious statements, tried by the convention and expelled. The court held that the trial was void because no express provision gave the convention power to hear such charges, and none would be implied even though the convention was the supreme governing and judicial body of the union. In a contrasting case a gap was filled to uphold the fining of a bandleader who cut union scale and sold jobs. His acquittal by the local trial board was appealed to the international executive board, which reversed and fixed the penalty. The court held that although the constitution was silent, the power to convict and punish was inherent in the appellate power.⁴⁰ In both of these cases the court could have as logically drawn the opposite inference from silence.⁴¹ Gaps in the constitutional provisions gave the courts an opportunity for choice.

In so far as procedural provisions are detailed and specific, the court may invalidate discipline by requiring strict compliance, or uphold it by finding that the defects were unsubstantial or were waived. In *Jose v. Savage*⁴² a member who accused the officers of misconduct was charged with slandering a union officer. The court held that the trial board had no jurisdiction because three of its eleven members had not been elected as required by the constitution, but had been appointed to fill vacancies occurring after the election. Such punctiliousness, however, is not always required. The expulsion of a local president who applied to a rival union for a charter did not need to follow the letter of the constitution; substantial compliance was enough.⁴³ Similarly, the court may excuse violations by holding that, by proceeding, the accused member waived the defect.⁴⁴

39. 194 Misc. 138, 86 N.Y.S.2d 209 (Sup. Ct. 1949).

40. *Rubens v. Weber*, 237 App. Div. 15, 260 N.Y. Supp. 701 (1932).

41. See also *Peabody v. Kaufman*, 61 N.Y.S.2d 313 (Sup. Ct.), *modified*, 270 App. Div. 1019, 62 N.Y.S.2d 368 (1946), *aff'd*, 296 N.Y. 796, 71 N.E.2d 770 (1947). The court held there was no implied power in the appellate tribunal either to find an acquitted member guilty or order a new trial for procedural defects.

42. 123 Misc. 283, 205 N.Y. Supp. 6 (Sup. Ct. 1924).

43. *Margolis v. Burke*, 53 N.Y.S.2d 157 (Sup. Ct. 1945). See also *Watson v. Victory, Walter, J.*, N.Y. Sup. Ct., N.Y. County, April 15, 1952, it was suggested that the courts in weighing union procedural defects should use as an analogy the review exercised by federal courts over state courts in habeas corpus petitions claiming denial of due process under the fourteenth amendment.

44. Waiver has been largely limited to formal defects in notice. *Strobel v. Irving*, 171 Misc. 965, 14 N.Y.S.2d 864 (N.Y. City Munic. Ct. 1939) (lack of written charges, but accused had actual notice, appeared, and plead guilty); *Belkin v. Spiegel*, 3 L.R.R.M. 800 (N.Y. Sup. Ct. 1938) (written notice did not specify the charges, but accused was informed orally and refused to accept on adjournment); *Fritz v. Knaub*, 57 Misc. 405, 103 N.Y. Supp. 1003 (Sup. Ct. 1907), *aff'd*, 124 App. Div. 915, 108 N.Y. Supp. 1133 (1908) (written notice was not served, but accused had actual notice and defended on the merits). Even in such cases, the courts have at times refused to find any waiver and have insisted on strict compliance. *Schmidt v. Rosenberg*, 49 N.Y.S.2d 364 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 685, 54 N.Y.S.2d 379 (1945) (complaining witness was not the one who signed the charges); *Soulounias v. Leondopoulos*, 2 L.R.R.M. 849 (N.Y. Sup. Ct. 1938) (written charges were not specific and the accused objected and refused to proceed).

Even the penalty provisions may give the courts room to regulate discipline by interpretation. In *Scivoletti v. Leckie*⁴⁵ members of the Bartenders Union who formed an opposition group within the union were charged with dual unionism, suspended for six months, and barred from holding union office for two years. After their suspension they asked for reinstatement of their seniority rights but were refused. This, the court said, was imposing an unauthorized penalty, for the constitution did not list loss of seniority as a penalty. The court thus found a violation of the constitution justifying judicial intervention and protection of the disciplined member.

These cases make clear that in discipline cases the contract theory, which verbally limits the courts to enforcing the union's own rules, in fact gives the court wide freedom. The union writes the constitution, but the court interprets it, and the interpretation process here is not confined by the customary limiting guides. The intent of the parties is unsought, even if discoverable; past practice is ignored or rejected; and prior court decisions interpreting similar clauses are not precedents. Within the broad range between a restrictive reading and an expansive interpretation, between literal conformity and substantial compliance, the court chooses, case by case. Its choice determines whether the discipline shall be allowed or enjoined.

One pattern of interpretation is discernable in discipline cases—a tendency toward a restrictive interpretation which limits discipline. In three-fourths of the interpretation cases the court chose a narrow construction to invalidate the discipline. This is not an articulate principle, although the analogy of discipline to criminal law might point in this direction; nor is the pattern uniform. Liberal interpretation was used to uphold discipline mainly in cases involving such offenses as stealing,⁴⁶ fraud,⁴⁷ dual unionism,⁴⁸ cutting union scale,⁴⁹ or membership in the Communist Party;⁵⁰ but in an equal number of cases the courts have applied restrictive interpretations even to such offenses.⁵¹ What seems to emerge, apart from other factors, is an unspoken judicial distaste for union discipline, and the courts' willingness to use interpretation to curb the union's power.

45. 148 N.Y.S.2d 50 (Sup. Ct. 1955), *modified*, 4 App. Div. 2d 773, 165 N.Y.S.2d 529 (1957).

46. *Austin v. Dutcher*, 56 App. Div. 393, 67 N.Y. Supp. 819 (1900).

47. *Krause v. Sander*, 66 Misc. 601, 122 N.Y. Supp. 54 (Sup. Ct. 1910), *aff'd*, 143 App. Div. 941, 127 N.Y. Supp. 1128 (1911).

48. *Margolis v. Burke*, 53 N.Y.S.2d 157 (Sup. Ct. 1945).

49. *Drazen v. Curby*, 172 App. Div. 417, 158 N.Y. Supp. 507 (1916); *Rubens v. Weber*, 237 App. Div. 15, 260 N.Y. Supp. 701 (1932).

50. *Weinstock v. Ladisky*, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950).

51. *Pabon v. Curran*, 44 L.R.R.M. 2178 (N.Y. Sup. Ct. 1959) (sale of narcotics); *Real v. Curran*, 285 App. Div. 552, 138 N.Y.S.2d 809 (1955) (narcotics); *Curatella v. Heide, Inc.*, 20 L.R.R.M. 2347 (N.Y. Sup. Ct. 1947) (failure to repay money borrowed from union); *Schmidt v. Rosenberg*, 49 N.Y.S.2d 364 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 685, 54 N.Y.S.2d 379 (1945) (hiring for less than union scale); *Connell v. Stalker*, 21 Misc. 609, 48 N.Y. Supp. 77 (Sup. Ct. 1897) (refusing to turn over union records to special investigating committee of union).

3. *Judicial Review of the Evidence*

The courts frequently declare that they will not reweigh the evidence before the union tribunal, but will look only to see if there is some evidence to support the finding of guilt. This language, however, is often but an apologetic prelude to a full re-evaluation of the evidence, justified by a holding that the findings were "totally unsustainable."⁵² Cases in which courts do not in fact re-evaluate the evidence are almost exclusively those in which there was some evidence that the disciplined members had Communist ties. Once convinced of a member's Communist taint, the courts refuse to inquire further into the union's findings.⁵³ Close examination of all other cases, however, makes clear that the courts normally reweigh the evidence, substituting their own evaluation of the facts for that of the union tribunal.

In some cases the court may narrowly view evidence or even construe it away in order to find the charges not proven. In *Fittipaldi v. Legassie*,⁵⁴ a member was charged with slandering a union officer in that during a dispute at a union meeting he said the president was a "G.D. Communist." When asked to repeat the statement, he said, "This is getting to be a communist outfit." At the union trial six witnesses stated, when asked, that they heard him say during a verbal altercation with the president that "this is getting to be a communist outfit." None was asked or testified about the other statement. The court held that the record "contains no evidence to substantiate the charge."⁵⁵ In another case, members of a local which was in receivership defied orders by calling a meeting, adopting a constitution, and electing officers. The court found that this was really not a meeting or an election, but only an attempt by the local to dramatize its desire for self-government. There was, therefore, no evidence of disobedience.⁵⁶

One of the difficulties of limiting judicial review to a determination of whether there is substantial evidence to support the union's findings is that frequently there is no adequate record of the union proceedings available.⁵⁷

52. See, e.g., *Madden v. Atkins*, 4 App. Div. 2d 1, 162 N.Y.S.2d 576, *modified*, 4 N.Y. 2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1957); *Harmon v. Matthews*, 27 N.Y.S.2d 656 (Sup. Ct. 1941); *Blek v. Wilson*, *supra* note 23; *Fritz v. Knaub*, *supra* note 44; *Watson v. Victory*, *supra* note 43. *But see MacPherson v. Green*, *supra* note 16. The Court of Appeals in *Madden v. Atkins*, *supra* note 17, did not even make this preliminary apology. Lip service was given, however, in the concurring opinion.

53. See, e.g., *Dakchoylous v. Ernst*, 203 Misc. 277, 118 N.Y.S.2d 455 (Sup. Ct. 1952); *aff'd*, 282 App. Div. 1101, 126 N.Y.S.2d 534 (1953); *Ames v. Dubinsky*, 5 Misc. 2d 380, 70 N.Y.S.2d 706 (Sup. Ct. 1947).

54. *Supra* note 18.

55. *Id.* at 526, 184 N.Y.S.2d at 230.

56. *Koukly v. Canavan*, 154 Misc. 343, 277 N.Y. Supp. 28 (Sup. Ct. 1935) (affirmative holding); *Koukly v. Weber*, 154 Misc. 659, 277 N.Y. Supp. 39 (Sup. Ct. 1935).

57. In *Scivoletti v. Leckie*, 148 N.Y.S.2d 50, 52 (Sup. Ct. 1955), *modified*, 4 App. Div. 2d 773, 165 N.Y.S.2d 529 (1957), a stenographic transcript had apparently been made but it was not introduced into evidence; in *Reilly v. Hogan*, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 423 (1942), the court observed that notes of the union trial

There may be only cryptic minutes or an obviously incomplete transcript. Attempts to reconstruct the testimony inevitably lead to hopeless confusion, and the court must hear the evidence *de novo*.⁵⁸ Although the court, after hearing the evidence *de novo* might conceivably apply a substantial evidence rule, there is little incentive and less reason for giving weight to the union's findings when the court has heard all of the evidence first hand and can not know what evidence was heard by the union tribunal.

Study of the cases indicates that judges often go far beyond hearing evidence directly relevant to the charges, and in fact learn of the whole internal problem of which the discipline is but a part. For example, in *Gleeson v. Conrad*⁵⁹ members who were disciplined for violating an order to turn in their route-books sought to show in court that they were members of the opposition group, what had been said by the president when he ordered them to turn in their books, and the political motivation of the order. The judge overruled the union's objection that this was irrelevant saying, "We might as well hear the whole story." In *Cromwell v. Morrin*⁶⁰ local officers were removed from office and barred from meetings for five years because the local called an unauthorized strike. The court hearing consisted largely of attempts by the local officers, on the one hand, to show that the international officers had "sold out" the local by agreeing to a "soft" contract; the international officers, on the other hand, sought to show that the local was controlled by Communists. The courts not only willingly hear such evidence, but it is generally accepted by almost all lawyers involved in these cases that evidence of the sources of the underlying dispute is influential, if not crucial, in the decisions of the courts.

The doctrinal structure, despite the superficial rigidity of the contract theory, is loose-jointed and flexible in the hands of the courts. The nature of discipline provisions, as well as the sensitive and vital interests involved, increase this flexibility, and the courts have used it freely to impose judicial regulation on union discipline. Within wide limits, it is not the union constitution but the court which controls. Recognition of this fact presents significant and difficult questions—What limits do the courts in fact impose on union discipline? What conduct can the unions punish? And what procedural safeguards must the union observe?

had been "curiously" destroyed; and in *Tesoriero v. Miller*, *supra* note 36, the International Executive Board had appointed a commission to investigate the appeal of an expulsion, but the commission's report misstated the facts and the appeal was denied.

58. Examination of the record in *Madden v. Atkins*, *supra* note 20, shows that the union trial minutes were hopelessly garbled and a substantial portion of the trial in the lower court was spent in trying to resolve conflicting testimony as to what evidence had been presented.

59. *Supra* note 28. The facts in this case, not contained in the reported opinion, are derived from the record on appeal.

60. *Supra* note 18. The facts in this case, not contained in the reported opinion, are derived from discussions with the principal participants.

Precise answers to these questions are impossible, for courts commonly cloak their reasons in doctrinal rationalizations. In addition, courts have concurrent concerns which may be mingled or confused. Procedural defects may be used to void discipline for conduct which the court thinks ought not be punished, or exhaustion may be required partly because the court believes the discipline is justified. On the other hand, objection to procedural defects may express a bona fide insistence on regularity and due process, and requiring exhaustion may reflect a real desire to give the union first chance to correct its own mistakes. Separating these elements and discerning a pattern is extremely difficult, involving much more intuitive judgment than statistical analysis. In addition, the pattern is at times torn by unperceptive and rule-bound judges who never escape wooden doctrinal analysis.

C. PUNISHABLE OFFENSES

The most crucial inquiry in union discipline is determining what conduct the courts consider punishable, and what conduct they feel should be beyond the reach of union discipline. Although judges seldom declare explicitly that certain conduct can or can not be punished, their opinions often carry clues which betray their attitude toward the substantive offense. By going behind the opinion one can better see the whole internal dispute as the judge saw it, and can understand more clearly what factors may have influenced his decision. With over one hundred judicial opinions in discipline cases, and with careful study of the background and entire litigation of thirty-five of these cases, some patterns begin to emerge which suggest what activities of union members the courts will shield and what they will leave unprotected.

Offenses for which union members are punished fall largely into six rather distinct categories which reflect marked differences in judicial response to union discipline. We are concerned, not with the constitutional clause invoked, but with the conduct in fact punished, for it is clear that the judges go behind the charge to the conduct itself. Thus, in *Madden v. Atkins*⁶¹ the court gave the protection it felt appropriate for internal political opposition, which was the root of the discipline, not dual unionism, for which they were charged. Determining the conduct that is in fact being punished is not always this simple. For example, in *Gleeson v. Conrad*,⁶² though the overt offense was violating an officer's order, the court may have seen in this discipline the persecution of political opponents; and in *Cromwell v. Morrin*⁶³ the offense given weight by the court may have been either the unauthorized strike or the alleged Communist activity. Although this makes precise definition of punishable offenses impossible, the cumulative effect of the cases is to provide some helpful guides and to indicate the relative degree of judicial approval or disapproval of the various categories of offenses.

61. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

62. 276 App. Div. 861, 93 N.Y.S.2d 667 (1949).

63. 91 N.Y.S.2d 176 (Sup. Ct. 1949).

1. *Financial Offenses*

The courts have freely affirmed the union's power to enforce the payment of dues and assessments, even to the extent of not using the power of interpretation to prevent the forfeiting of substantial death benefits for minor delinquencies in dues.⁶⁴ In contrast with other offenses, the delinquent member can be summarily suspended without notice or hearing, although a subsequent procedure may be required to enable him to show that he was not delinquent or that the dues were not assessed in accordance with the constitution.⁶⁵

This favorable judicial attitude toward enforcing financial obligations does not, however, prevent the courts from looking behind a union's nominal action to see if strict enforcement of these obligations is being used as a device to eliminate disliked individuals.⁶⁶ Whether the New York courts would go an additional step of reflecting in their decisions in discipline cases their attitudes toward the purpose for which union funds were used is not indicated by the cases.

Discipline for misuse of union funds or other financial corruption is, of course, judicially accepted, if not favored. Procedural rules are not strictly construed, nor the exhaustion of remedies requirement readily relaxed, for those so accused.⁶⁷ The weight given to this factor by the courts is quite limited, for claims of corruption are staples of political debate in internal union disputes, and litigation often looks like a verbal duel between pots and kettles. Courts are willing to hear the charges and countercharges,⁶⁸ whether relevant to the case or not, but seem wary of giving them weight except where the evidence is clear and the corruption is gross.⁶⁹

2. *Collective Bargaining Offenses*

Unions frequently discipline members for conduct which directly undermines the union's economic strength or undercuts its working conditions. Courts

64. *Simson v. Bugman*, 45 N.Y.S.2d 140 (Erie County Ct. 1943); *Sammel v. Myrup*, 12 N.Y.S.2d 217 (New York Munic. Ct. 1939); *Hess v. Johnson*, 41 App. Div. 465, 58 N.Y. Supp. 983 (1899). Use of discipline to collect money borrowed from the union may not be so freely countenanced by the courts. *Curatella v. Henry Heide, Inc.*, 20 L.R.R.M. 2347 (N.Y. Supp. Ct. 1947).

65. See *Dixon v. Sheridan*, 3 App. Div. 2d 831, 161 N.Y.S.2d 473 (1957).

66. *McCauly v. Hoey*, N.Y.L.J., July 26, 1957, p. 5, col. 8, (Sup. Ct.).

67. *Rubens v. Weber*, 237 App. Div. 15, 260 N.Y. Supp. 701 (1932); *Murphy v. Milne*, N.Y. Sup. Ct., Erie County, May 7, 1950, affirming memorandum opinion of Justice Rowe, N.Y. Sup. Ct., Erie County, July 3, 1956. *Bauer v. American Federation of Grain Millers*, N.Y. Sup. Ct., Erie County, 1957. The court enjoined the union from trying a business agent charged with embezzling \$50,000, because the trial was being held before an impartial third person rather than the union tribunal prescribed by the constitution.

68. In *Kennedy v. Milk Drivers, Local 584*, File No. 5119/56, N.Y. Sup. Ct., N.Y. County, May 8, 1956, the court refused to strike affidavits claiming the expelled plaintiff was an extortioner and racketeer.

69. For a case in which the court explicitly recognized the gross corruption of union officers who were using discipline to silence the opposition, see *Dusing v. Nuzzo*, 26 N.Y.S. 2d 345 (Sup. Ct. 1941).

have shown no antagonisms to such discipline, but have upheld penalties for working during a strike⁷⁰ or in a nonunion shop,⁷¹ for working for less than the union scale,⁷² or for engaging in unauthorized strikes⁷³ or misconduct on the job.⁷⁴ The compliance with the constitution required, and the procedural standards enforced, in these cases are neither markedly strict nor noticeably liberal,⁷⁵ nor does the requirement of exhaustion vary from the average pattern.

If the union's underlying economic action is illegal, such as preventing the use of labor-saving machinery, engaging in an illegal secondary boycott, or striking in breach of contract, discipline of union members to enforce that collective action would be enjoined.⁷⁶ Conceivably, courts in discipline cases might also be influenced by their general sympathy or lack of sympathy with the union's underlying activity, even though legal, but there is little evidence of this in the cases. The nearest to it is *Tesoriero v. Miller*⁷⁷ in which the court protected a man who was disliked by his fellow workers as an "eager beaver" and a "company man." When some of them reproached him for working during a relief period he reported them to the supervisor, and this led to his expulsion.⁷⁸ The court, in voiding the expulsion, looked only to

70. *Havens v. King*, 221 App. Div. 475, 224 N.Y. Supp. 193 (1927).

71. *Schouten v. Alpine*, 215 N.Y. 225, 109 N.E. 244 (1915); *Watson v. Victory*, 127 N.Y.L.J. 307 (Sup. Ct. 1952).

72. *Rubens v. Weber*, 237 App. Div. 15, 260 N.Y. Supp. 701 (1932); *Drazen v. Curby*, 172 App. Div. 417, 158 N.Y. Supp. 507 (1916).

73. *Cromwell v. Morrin*, 91 N.Y.S.2d 176 (Sup. Ct. 1949).

74. *Perez v. Curran*, File No. 3144/57, N.Y. Sup. Ct., N.Y. County, 1957 (fighting on shipboard); *Austin v. Dutcher*, 56 App. Div. 393, 67 N.Y. Supp. 819 (1900) (stealing company property).

75. In cases in which discipline was upheld, claimed defects varied from minor irregularities to substantial defects. However, in other cases involving violation of work rules, the court ordered reinstatement because of procedural or other defects, which also varied from minor to substantial. See *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N.Y. 101, 23 N.E. 129 (1889); *Schmidt v. Rosenberg*, 49 N.Y.S.2d 364 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 685, 54 N.Y.S.2d 379 (1945); *Harmon v. Matthews*, 27 N.Y.S.2d 656 (Sup. Ct. 1941); *Bachman v. Harrington*, 52 Misc. 26, 102 N.Y. Supp. 406 (Sup. Ct. 1906); *Shernoff v. Schimel*, 112 N.Y.S.2d 333 (Sup. Ct. 1952); *Fuerst v. Musical Mut. Protective Union*, 95 N.Y. Supp. 155 (N.Y. City Ct. 1905); *Watson v. Victory*, Memorandum of Walter, J., N.Y. Sup. Ct., N.Y. County, May 16, 1952. The total body of cases shows no special pattern of judicial hostility or hospitality to discipline cases in this category. The cases are erratic, but average.

76. *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.2d 349 (1941) (enjoining union from enforcing rule prohibiting members from working where "canned music" was used); *Fritz v. Knaub*, 57 Misc. 405, 103 N.Y. Supp. 1003 (Sup. Ct. 1907) (reinstating member who was expelled for refusing to violate contract); *Republic Aviation v. Republic Lodge 1987, Int'l Ass'n of Machinists*, 38 L.R.R.M. 2667 (N.Y. Sup. Ct. 1956) (enjoining discipline of strike breakers in violation of strike settlement agreement which barred reprisals).

77. 274 App. Div. 670, 88 N.Y.S.2d 87 (1949).

78. The facts in this case, not reported in the reported opinion, are derived from the record on appeal.

the charge of working during rest time and said, "Such cause it seems to us was so trivial and unimportant as to suggest bad faith on the part of the union. . . ." ⁷⁹

3. *Dual Unionism*

The judicial attitude toward discipline for dual unionism is suggested in *Margolis v. Burke*.⁸⁰ A local president who applied for a charter in a rival union was summarily expelled without notice or hearing by an international vice-president. Objections to this procedure were brushed aside, the court stating that the union's action was in substantial compliance with the constitution; and the court declared: "By the very nature of things, such conduct cannot be denoted honorable or fair. Margolis . . . seeks the aid of equity to escape the natural consequences of his acts. To permit such escape, a Court of Equity would, in effect, enthrone in office one recreant in his trust and condone and approve disloyalty."⁸¹ The hands of Margolis were declared "unclean" and he was entitled to no equitable relief.

This oversimplifies the problem, for support of a rival union may not always be viewed with such distaste. In the campaign period immediately preceding a labor board election, support of a challenging union might be judicially sanctified as the exercise of a statutory right and protected from disciplinary curbs. The New York courts have not confronted this problem and there is no clue as to how they would respond.

The charge of dual unionism may be used to reach all forms of organized opposition to union policies and leadership, but the courts have refused to equate loyalty to the union with loyalty to the incumbent officers. Thus, in *Madden v. Atkins*⁸² the court protected the right to form an opposition group within the union, and it was reluctant to construe such conduct as advocacy of mass withdrawal from the union.⁸³ The line between internal opposition and support of another union, however, can become very indistinct. Thus, in *Lafferty v. Fremd*⁸⁴ the officer of an independent union continued to advocate affiliation with a C.I.O. union after the union had decided against affiliating. The court enjoined the disciplinary proceedings on procedural grounds.⁸⁵

79. 274 App. Div. at 674, 88 N.Y.S.2d at 91.

80. 53 N.Y.S.2d 157 (Sup. Ct. 1945).

81. *Id.* at 161-62. For a similar attitude, see *Reubel v. Lewis*, 182 Misc. 30, 43 N.Y.S.2d 540 (Sup. Ct. 1943). However, the court later relented and held that even dual unionists were entitled to compliance with the constitution and due process. *Reubel v. Lewis*, 47 N.Y.S.2d 147 (Sup. Ct.), *appeal denied*, 293 N.Y. 762, 57 N.E.2d 840 (1944). See also *Gilmore v. Palmer*, 109 Misc. 552, 179 N.Y. Supp. 1 (Sup. Ct. 1919), holding that one charged with dual unionism could not be expelled without notice and hearing.

82. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

83. For a similar case, see *Scivoletti v. Leckie*, 4 App. Div. 2d 773, 165 N.Y.S.2d 529 (1957).

84. 36 L.R.R.M. 2674 (N.Y. Sup. Ct. 1955).

85. In *Zalnerovich v. Van Ausdal*, 65 N.Y.S.2d 650 (Sup. Ct. 1946), the member charged with dual unionism claimed that the real basis was his failure to join a particular

4. *Use of the Courts*

Many unions have explicit clauses punishing resort to the courts without first exhausting internal appeals, and others will in fact punish such resort under less specific provisions. The legality of such discipline has never been squarely decided in New York, but the cases indicate a judicial hostility to such interference with access to the courts. In *Polin v. Kaplan*⁸⁶ the Court of Appeals ordered reinstatement and damages for a member who was disciplined for suing to recover funds allegedly misappropriated by the union. The court not only warped the constitution to find no violation of an explicit clause, but also said that this was not disloyalty, injurious to the union, or tending to disruption. It then declared:⁸⁷

It was the absolute right of the plaintiffs to bring the suit, whether they could successfully maintain it or not, and they might not be expelled for having so done.

In *Angrisani v. Stearn*⁸⁸ two brothers were expelled on charges of carrying on union business out of meeting, one because he sued to enjoin an assessment he claimed illegal, and the other because he agreed to testify in the suit if subpoenaed. The court reinstated both, stating that there was a right to bring the suit even though it could not be sustained, and an even clearer right to obey a subpoena.

The courts, however, have not uniformly given vigorous protection in this area.⁸⁹ One court has suggested that the right to use the courts does not

political party. The court refused to rely on this claim to enjoin the union from proceeding with the hearing.

86. 257 N.Y. 277, 177 N.E. 833 (1931).

87. *Id.* at 284, 177 N.E. at 835.

88. 167 Misc. 728, 3 N.Y.S.2d 698 (Sup. Ct.), *aff'd mem.*, 255 App. Div. 975, 8 N.Y.S.2d 997 (1938); 167 Misc. 731, 3 N.Y.S.2d 701 (Sup. Ct.), *aff'd mem.*, 255 App. Div. 975, 8 N.Y.S.2d 997 (1938).

89. In *Schrebank v. Kempter*, memorandum, Hecht, J., N.Y. Sup. Ct., N.Y. County, Dec. 28, 1949, the court ordered reinstatement of the local secretary because she had given evidence in court in a suit brought against the officers charging them with dissipating local funds, and in *Shernoff v. Schimel*, 28 L.R.R.M. 2377 (Sup. Ct. 1951), the expelled member claimed that the discipline was to retaliate for his bringing suit to recover funds he claimed belonged to the union. The court invalidated the discipline on procedural grounds without requiring exhaustion of remedies. Several members of a Teamster local who brought suit for an accounting were expelled. They sued for reinstatement. One suit was dismissed for failure to exhaust internal remedies, *Logan v. Ruehl*, memorandum, Larkin, J., N.Y. Sup. Ct., Erie County, Aug. 18, 1939 (Register 90, p. 1); but the court later upheld the complaint as stating a good cause of action. *Petrie v. Ruehl*, 22 N.Y.S.2d 549 (Sup. Ct. 1940). Ultimately all of them were reinstated.

In *Wilkins v. De Koning*, 40 L.R.R.M. 2229 (E.D.N.Y. 1957), the union brought charges against a member for showing his lawyer a copy of the welfare fund report. The court enjoined the union from trying him on this charge, saying that his consulting his lawyer was an exercise of his statutory right to see if a violation of the law had occurred. It would seem that if a violation was discovered, the member would have at least an equal right to sue to remedy the violation.

extend to assisting another financially to bring suit against the union.⁹⁰ In some cases the courts have denied relief because appeals from the discipline have not been exhausted,⁹¹ or have apparently felt that there were other grounds which more than justified the union's action.⁹²

Some unions provide a more limited penalty: assessing against the member, if he loses, costs incurred by the union in defending the suit. In *Roman v. Caputo*⁹³ a member who brought a suit that was almost totally devoid of substance was assessed \$714. When he sought temporary injunction against this assessment the union justified its action on the grounds that the suit was part of a deliberate plan of harrassment by a left wing faction to paralyze the union. The court denied the injunction for failure to exhaust internal remedies, thus avoiding both the factual and substantive issues.⁹⁴

5. *Political Activity Within the Union*

A large proportion of the litigated discipline cases have at their roots a factional fight within the union, and in many it is reasonably apparent that the discipline is directed toward curbing criticism and political opposition. The contract theory, woodenly followed, gives no protection against such discipline, for union constitutions commonly contain provisions circumscribing political activity in the union. They may prohibit "slandering an officer," "circulating leaflets without permission," "forming groups or clubs within the union," or "carrying on union business outside of meeting." Even without such clauses,

90. *Stroebel v. Irving*, 171 Misc. 965, 14 N.Y.S.2d 864 (N.Y. City Munic. Ct. 1939). In this case the accused member pleaded guilty at the union trial.

91. See cases cited notes 84-85 *supra*, and 87 *infra*.

92. Leaders of an opposition group in Local 584 of the Teamsters who went to the District Attorney with stories of corruption in the local and who had supported litigation contesting local elections were expelled. When they sued for reinstatement, the court refused to act because they were enjoying full membership rights and an appeal was pending before the international executive board. *Cunningham v. Milk Drivers & Dairy Employees*, N.Y.L.J., Dec. 12, 1955, p. 13 (Sup. Ct.). One whose expulsion was affirmed returned to court, but the court then treated as relevant allegations by the officers that he was a "crook" and had a record as a "racketeer." *Kennedy v. Milk Drivers, Local 584*, File No. 5119/56, N.Y. Sup. Ct., N.Y. County, May 8, 1956. He never won reinstatement.

93. 28 L.R.R.M. 2616 (N.Y. Sup. Ct. 1951).

94. A member who challenged the legality of a referendum and lost in *Fritsch v. Rarback*, 199 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950), was assessed \$211.50 by the union for costs incurred in defending the suit, when he sought help from the court which had dismissed the case "without" costs, his motion was denied without opinion, N.Y. Sup. Ct., N.Y. County, Jan. 30, 1951. However, when he agreed to withdraw from the opposition and cooperate with the controlling group in the union, the debt was forgotten.

In another case, *Padilla v. Curran*, File No. 4524/58, N.Y. Sup. Ct., N.Y. County, 1958, a leader of an opposition group brought criminal charges against an officer claiming a brutal assault. When the officer was acquitted, the union assessed \$1,546.92 costs of defending the suit against the complaining member. He sued to enjoin his suspension and to prevent his name from being stricken from the ballot. The court obtained an agreement from the union not to enforce the fine pending trial of the action and set it for early trial. Prior to trial, the union agreed to revoke the assessment.

political opposition may be charged with "creating dissension," "causing disruption," "bringing the union into disrepute," or "conduct detrimental to the best interests of the union."

The courts, however, have not proven themselves so wooden. Although they did not, prior to *Madden v. Atkins*,⁹⁵ explicitly declare that freedom of speech and assembly within the union could not be impaired by union discipline, they freely manipulated the flexible doctrines to achieve that end.⁹⁶ *Polin v. Kaplan*⁹⁷ is itself a classic example. While restating the contract theory and studiously avoiding any holding that free criticism was beyond the reach of union discipline, the court shriveled constitutional provisions, ignored significant portions of the charges, and refused to accept the union's findings of fact, all to the end of protecting those who dared to exercise their democratic rights. Out of forty litigated cases discernably involving discipline for internal political activity, the courts have voided the discipline in all but ten cases. Inarticulate the courts have been, insensitive they have not.

Courts' ability to protect freedom of speech and assembly by indirection is aided by the tendency of political cases to breed procedural defects.⁹⁸ Arrogant officers who crush opposition are often not scrupulous in obeying the constitution or sensitive to the standards of procedural due process,⁹⁹ and political criticism may goad thin-skinned leaders to rash action.¹⁰⁰ Thus, when a union member mounted a soap box and declared that the union was rotten to the core, that the leaders were a lot of labor fakers, and that the president was the worst dog in the heap, he was expelled without notice and hearing.¹⁰¹ Such defects were particularly prevalent in the past when lawyers were not so heavily leaned on to avoid pitfalls and to provide the form of fairness.¹⁰²

95. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

96. In some cases the courts clearly indicated the high value placed on freedom of speech and assembly within the union, but used other rationale to fit the protection granted within the contract doctrine. See, e.g., *Schrank v. Brown*, 192 Misc. 80, 80 N.Y.S.2d 452 (Sup. Ct. 1948); *Irwin v. Possehl*, 143 Misc. 855, 257 N.Y. Supp. 597 (Sup. Ct. 1932).

97. 257 N.Y. 277, 177 N.E. 833 (1931).

98. Factional fights within unions often breed bitterness which leads the dominant group to look upon the opposition as traitors undeserving of due process. Union officers may find it difficult, even if they desired to restrain the agitated members sufficiently to maintain even the form of fairness. For examples of such lynch spirit, see *Alexion v. Hollingsworth*, 289 N.Y. 91, 43 N.E.2d 825 (1942); *Ash v. Holdeman*, 13 Misc. 2d 528, 175 N.Y.S.2d 135 (Sup. Ct.), modified, 5 App. Div. 2d 1017, 174 N.Y.S.2d 215 (1958).

99. See, e.g., *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y. Supp. 336 (1931); *Dusing v. Nuzzo*, 26 N.Y.S.2d 345 (Sup. Ct. 1941); *Barry v. Franscona*, 28 L.R.R.M. 2480 (N.Y. Sup. Ct. 1951).

100. *Gallagher v. Monaghan*, 58 N.Y.S.2d 618 (Sup. Ct. 1945) (one who distributed circulars ordered to trial at international office 600 miles away and president ordered expulsion without hearing evidence); *O'Brien v. Papas*, 49 N.Y.S.2d 521 (Sup. Ct. 1944) (defeated candidate and leading supporters expelled without trial).

101. *Corregan v. Hay*, 94 App. Div. 71, 87 N.Y. Supp. 956 (1904).

102. In many cases the union's lawyer is either physically present during the union trial or is closely consulted in advance of every step. In some instances the lawyer acts as prosecuting attorney. If the union constitution permits only union members to act as

Political discipline is particularly vulnerable to the fatal flaw of bias, for unions lack any independent judiciary, and trial bodies are politically oriented. If the trial is before the executive board, the court can find that it includes those criticized;¹⁰³ if it is before an elected committee, the court may find it controlled by one of the factions;¹⁰⁴ if it is before the local meeting, the court may find the vote motivated by partisan politics;¹⁰⁵ and even if it is chosen by lot, the court may find traces of bias.¹⁰⁶

Even though the union avoids substantial procedural defects, the courts have demonstrated marked ability to find technical violations of the constitution¹⁰⁷ or hidden weaknesses in the evidence.¹⁰⁸ Even the union's best efforts will fail. In *Shapiro v. Gehlman*¹⁰⁹ a union member who accused officers of mishandling union funds was charged with slandering officers. The constitution required a trial before the executive committee, but because this would have included the officers whom he had accused, a special trial committee was named. The court declared that that violated the constitution and ordered him reinstated. In a later case the same court held that where a member was tried by an executive committee which included officers whom he had accused of misconduct, the proceedings were void for bias.¹¹⁰

counsel, a lawyer may be admitted to membership so as to make him available for this purpose.

103. *Coleman v. O'Leary*, 58 N.Y.S.2d 812 (Sup. Ct.), *appeal dismissed*, 269 App. Div. 972, 58 N.Y.S.2d 358 (1945); *Cohen v. Rosenberg*, 262 App. Div. 274, 27 N.Y.S.2d 834 (1941), *aff'd*, 287 N.Y. 800, 40 N.E.2d 1018 (1942).

104. In *Madden v. Atkins*, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957), the meeting at which the trial committee was elected was so confused that the court could not determine who was nominated or in what order. Of the seven who were elected, three were paid employees of the union who owed their jobs to the officers who had been bitterly criticized by the accused, and a fourth was one who signed and prosecuted charges against other members of the opposition for the same activity. This created "grave doubts" as to the impartiality of the committee and was enough to invalidate the discipline.

105. *Reilly v. Hogan*, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 423 (1942). In *Madden v. Atkins*, *supra* note 104, the report of the trial committee was submitted to the local which voted 51 to 42 for conviction.

106. In *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 528, 184 N.Y.S.2d 226, 232 (1959), the court wryly observed that the accuser was the one who drew the five names from a hat and "probably by coincidence on each of three occasions he drew his own name"

107. *Scivoletti v. Leckie*, 148 N.Y.S.2d 50 (Sup. Ct. 1955), *aff'd as modified*, 4 App. Div. 2d 773, 165 N.Y.S.2d 529 (1957); *Gleeson v. Conrad*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949); *Schrank v. Brown*, 192 Misc. 80, 80 N.Y.S.2d 452 (Sup. Ct. 1948); *Jose v. Savage*, 123 Misc. 283, 205 N.Y. Supp. 6 (Sup. Ct. 1924).

108. *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959); *Koukly v. Canavan*, 154 Misc. 343, 277 N.Y. Supp. 28 (Sup. Ct. 1935); *Koukly v. Weber*, 154 Misc. 659, 277 N.Y. Supp. 39 (Sup. Ct. 1935).

109. 244 App. Div. 238, 278 N.Y. Supp. 785, *modified*, 269 N.Y. 517, 199 N.E. 515 (1935).

110. *Cohen v. Rosenberg*, 262 App. Div. 274, 27 N.Y.S.2d 834 (1941), *aff'd*, 287 N.Y. 800, 40 N.E.2d 1018 (1942).

With the decision in *Madden v. Atkins*¹¹¹ it is no longer necessary for courts to use such devices, for the Court of Appeals has forcefully declared as public policy that "traditionally democratic means of improving their union may be freely availed of by members without fear of harm or penalty."¹¹² This does not mean that the courts will cease using procedural or other discoverable defects to cloak protection of democratic rights, for they may prefer to use these more mechanical rationalizations. However, explicit statement of this limit on union discipline will make judges more consciously aware of their responsibility for safeguarding these basic rights, and give them a firmer hand in providing protection.

The articulate recognition of these rights requires the courts to face squarely what conduct falls within the broad term "traditionally democratic means of improving their union." The opinion in *Madden v. Atkins* went no further then to say that "this necessarily includes the right to criticize current union leadership and, within the union, to oppose such leadership and its policies."¹¹³ This, however, will not solve the hard problems raised by the wide range of conduct in political activity cases. An examination of the facts before the *Madden* court suggests some of those problems, and gives more specific content to the court's decision.

The conduct for which Madden and his supporters were expelled was neither mild nor well-mannered. They brought suit to block an election and threatened President Atkins that if he resisted the suit they would publish leaflets attacking him. When the suit and threats failed, members of the election committee who supported Madden refused to proceed with the election and had to be replaced. Discipline for this "violating his obligation as a member" was not discussed by the court; but this conduct was in fact protected as a part of the whole political conflict. The "smear sheets" distributed during the campaign accused Atkins of having been a Communist, obtaining his license by fraud, stealing union funds, selling jobs, and rigging elections. This was characterized by the Appellate Division as "fair comment" to which "union officials, by offering themselves as candidates . . . subject themselves."

Although its text was strong and even defamatory, that is not abnormal in such struggles for power in a membership organization, especially a trade union. If an opposition slate of candidates is not to be granted a reasonably free hand there would be little chance to bring corruption to light."¹¹⁴

After they lost the election, Madden and his friends, with the active support of the Association of Catholic Trade Unionists, formed within the union a permanent organization which collected dues, retained a lawyer, held meetings,

111. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

112. *Madden v. Atkins*, *supra* note 111, at 293-94, 174 N.Y.S.2d at 640-41, 151 N.E.2d at 78.

113. *Ibid.*

114. *Madden v. Atkins*, 4 App. Div. 2d 1, 17, 162 N.Y.S.2d 576, 591 (1957), *aff'd as modified*, 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

and issued a periodical criticizing the officers and their handling of union affairs. The charges of holding "unauthorized meetings" and allowing strangers to attend and discuss union matters were swept aside, and the organizing of such an opposition group considered a "traditionally democratic means of improving the union."¹¹⁵

The words of the court, when viewed against the facts before it, suggest at least two significant guides. First, the protection of democratic rights is very broad, including a wide latitude for fair comment,¹¹⁶ full freedom for organized opposition,¹¹⁷ and for an extending of the debate beyond the confines of the union meeting and membership. These rights prevail even though their exercise may cause disunity and temporary disruption. Second, the court will not uphold discipline because a union member in the heat of union meetings or a political contest overstepped the bounds in some relatively minor respect.¹¹⁸ Courts will look to the total context to determine whether the impact of the discipline is to repress legitimate political debate. These are not new with *Madden v. Atkins*; this case only makes more explicit the guides which the New York courts have in fact followed.

6. Communist Activities

From 1947 to 1953 District Council No. 9 of the Brotherhood of Painters was racked by a bitter factional fight which shifted constantly from the meeting hall to the courtroom. It reached its climax with the expulsion of three opposition leaders for Communist Party membership. The constitution was clear and the facts were admitted; the court's response in *Weinstock v. Ladisky*¹¹⁹ was emphatic. The argument that discipline solely for party membership was contrary to public policy was turned bottoms up. The expulsion did not infringe on political rights, for they were not members of a political party, but of a conspiracy to "hatch plots for treason."¹²⁰ The "evils and dangers of Communism to trade unionism"¹²¹ were "notorious,"¹²² and there was "imminent necessity for action to be taken to protect trade unionism and the country against those dangers."¹²³ Expulsion for Communist Party membership was not only permissible, it was a moral duty. Procedural defenses

115. 4 App. Div. 2d at 17, 162 N.Y.S.2d at 591.

116. Compare *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931); *Jose v. Savage*, 123 Misc. 283, 205 N.Y. Supp. 6 (Sup. Ct. 1924); *Corregan v. Hay*, 94 App. Div. 71, 87 N.Y. Supp. 956 (1904). But see *Ames v. Dubinsky*, 5 Misc. 2d 380, 70 N.Y.S.2d 706 (Sup. Ct. 1947).

117. Compare *Scivoletti v. Leckie*, 4 App. Div. 2d 773, 165 N.Y.S.2d 529 (1957).

118. Compare *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959); *Reilly v. Hogan*, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 423 (1942).

119. 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950).

120. *Weinstock v. Ladisky*, *supra* note 119, at 873, 98 N.Y.S.2d at 99.

121. *Id.* at 876, 98 N.Y.S.2d at 102.

122. *Id.* at 877, 98 N.Y.S.2d at 102.

123. *Ibid.*

were swept aside; claims that the trial was before the wrong union tribunal were resolved by accepting the union's interpretation of the constitution; and allegations of double jeopardy were ignored.

Other leaders of the left-wing faction fared no better. French, the business agent of one local, was charged with improperly permitting the use of spray guns and barred from all union activities for three years. His suit for reinstatement, based on claims that his trial violated the union constitution in a number of respects and also denied due process, was dismissed for his failure to exhaust union remedies.¹²⁴ He then completed his internal appeals, and renewed his suit, only to have it dismissed on the grounds that the first decision was *res adjudicata*.¹²⁵ Davis, secretary of another local, was charged with slander because of statements he had made in opposing a referendum for a dues increase, tried by a board which included those allegedly slandered, found guilty, and barred from union activities for five years. His request for a temporary injunction was denied because he failed "to establish a clear right to relief."¹²⁶ By the time the case was called for trial a year later,¹²⁷ it was moot because he had been expelled as a Communist Party member.¹²⁸ Fritsch, another opposition leader, brought suit to invalidate a referendum, but relief was denied because of laches.¹²⁹ The union then assessed the costs of the suit, over \$200, against Fritsch, and when he moved to have the court order amended to prevent this, the motion was denied.¹³⁰ Later, when another member of the opposition challenged a referendum and lost,¹³¹ he too was assessed costs by the union. A temporary injunction was denied.¹³² By the time the case was called for trial a year and a half later the plaintiff had come to terms with the union.¹³³

In none of these cases, except *Weinstock v. Ladisky*, was the communist issue reflected in the opinions, but it was constantly raised by counsel and was a strong undercurrent in all of the affidavits and arguments.

The judicial response to such pleas is suggested by less reticent opinions. In *Ames v. Dubinsky*¹³⁴ seven left-wing candidates for local office distributed leaflets accusing the incumbent officers and their "administration" or "clique" of red-baiting, persecuting the leaders of the rank and file, rigging the election,

124. *French v. Ladisky*, 194 Misc. 549, 78 N.Y.S.2d 690 (Sup. Ct. 1947), *aff'd*, 274 App. Div. 765, 80 N.Y.S.2d 728 (1948).

125. *French v. Ladisky*, 274 App. Div. 765, 80 N.Y.S.2d 728 (1949). For a contradictory result when communists were not involved, see *Murphy v. Freeman*, N.Y. Sup. Ct., Erie County, July 3, 1956, *aff'd*, 4 App. Div. 2d 743, 164 N.Y.S.2d 981 (1957).

126. *Davis v. Ladisky*, File No. 13926/46, N.Y. Sup. Ct., N.Y. County, June 23, 1949.

127. *Davis v. Ladisky*, N.Y. Sup. Ct., N.Y. County, May 29, 1950.

128. See *Weinstock v. Ladisky*, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950).

129. *Fritsch v. Rarback*, 199 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950).

130. *Fritsch v. Rarback*, N.Y. Sup. Ct., N.Y. County, Jan. 30, 1951.

131. *Roman v. Caputo*, N.Y. Sup. Ct., N.Y. County, July 3, 1951.

132. *Roman v. Caputo*, 28 L.R.R.M. 2616 (N.Y. Sup. Ct. 1951).

133. *Roman v. Caputo*, Sup. Ct., N.Y. County, Feb. 17, 1953.

134. 5 Misc. 2d 380, 70 N.Y.S.2d 706 (Sup. Ct. 1947).

and running a profit-making testimonial dinner. Although vitriolic and potentially defamatory, the leaflets, with their communist jargon and abusive epithets, were pallid political commentary compared to the leaflets distributed by Madden and his friends. Ames and others were accused of slandering union officers, tried before the executive board, and found guilty. This was ratified by the local, and they were barred from all union activities for five years. The court, after a fervent though not judicially restrained parading of the evils of communism, insisted that the issue of communism was of "minor importance," except that the leaflets were "quite an exhibition of communist double talk." The executive board was found to be unbiased because it did not include the officers who brought the charges, and there was no evidence of probative value to show domination. The "factual question" of the truth or falsity of the leaflets and whether they came within the protection of fair comment "must be regarded as being within the exclusive province of the tribunal . . . free from review by . . . any public court."¹³⁵

Not even clear proof of Communist Party membership is required to create a judicial unwillingness to intervene. In *Dakchoylous v. Ernst*¹³⁶ a local business agent who had opposed the international officers in the last convention was removed from office and suspended from membership on charges of "associating with communists." He claimed that the charges were politically motivated and that his signature on a Communist Party card was either a forgery or obtained by trickery. The court said that since there was "some evidence" to support the union's finding, the court could not substitute its judgment of sufficiency; and even though he signed unwittingly, this did not mitigate the injury to the local and its members.

7. Summary

Courts' responses to union discipline vary markedly, depending on the conduct for which punishment is imposed. Strict enforcement of financial obligations and close regulation of conduct directly related to the union's collective bargaining function are unhesitatingly upheld, and dual unionism gains little judicial sympathy. These matters courts view as clearly within the bounds of union discipline, and policy, as well as doctrinal logic, presses courts to leave to the unions the power to regulate their own affairs. Courts, however, penetrate the veil of nominal charges and search out the sources of the underlying dispute. If they discover that discipline is disguised political repression, or is being used for some other questionable purpose, their tolerance disappears.

Restrictions on the member's access to the courts, whether directly by discipline, or indirectly by assessing the costs of suit, are of a drastically different

135. Compare the judicial reaction in *Reilly v. Hogan*, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 423 (1942), when a member was expelled for accusing the officers of diverting union funds to aid communist sponsored projects.

136. 203 Misc. 277, 118 N.Y.S.2d 455 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 1101, 126 N.Y.S.2d 534 (1953).

order. The courts do not look kindly on such private efforts to bar their doors.¹³⁷ Although the courts may turn away a member who has come prematurely or with a worthless case, they do not leave him unprotected from being lashed by the union for his mistake.

The conduct which has in fact received the broadest judicial protection is the exercise of democratic rights within the union. The courts have envisioned unions as democratic institutions, and though seldom articulate, have bent the theories, case by case, to place freedom of speech and assembly beyond the reach of union discipline. This basic pattern, long obscured by contradicting language which may have deceived even the judges who used it, is now made explicit by *Madden v. Atkins*.¹³⁸

In direct contrast, engaging in communist activities is not only unprotected, but the very taint may lead to outlawry. This judicial policy seems to prevail over all others. As the *Painters'* cases¹³⁹ and *Ames v. Dubinsky*¹⁴⁰ suggest, the right to criticize union officers suddenly shrivels when exercised by communists; and opposition groups tainted with communism may find themselves impaled on sharp points of the contract theory or the exhaustion of remedies doctrine. It is significant that even due process is less due when claimed by communists. Of the ten cases in which the courts failed to protect members disciplined for political activity, five involved alleged communists.

It is evident that in confronting discipline cases courts are caught in cross-currents of varying force which make any simple analysis impossible. In *Cromwell v. Morrin*¹⁴¹ officers of the local were disciplined for calling an authorized strike. They claimed that the international officers were being paid off to make a soft contract; and the international in turn claimed that the local was controlled by communists. The court's response to the union's limitation on striking and the charge of communism could understandably outweigh its response to the charge of corruption.

Even the weight to be given to a particular value can vary according to the court's feeling for its importance in the case. For example, the business agent of a local union in Buffalo was removed from office and barred from union meetings for five years because he had made expenditures without formal authorization. He claimed that he was tried without notice of any charges, and also hinted that the discipline was for political reasons. The court dismissed his suit for failure to exhaust his internal remedies.¹⁴² He then pursued his internal appeals, including an appeal to the Ethical Practices Committee,

137. It should be noted that the cases in which the court seemed reluctant to give full protection to the right to sue or otherwise resort to legal process were ones in which the disciplined individual was part of a left-wing faction or was accused of corruption and racketeering. See notes 92-94 *supra*.

138. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

139. See text at notes 119-36 *supra*.

140. 5 Misc. 2d 380, 70 N.Y.S.2d 706 (Sup. Ct. 1947).

141. 91 N.Y.S.2d 176 (Sup. Ct. 1949).

142. *Murphy v. Milne*, Memorandum of Marsh, J., N.Y. Sup. Ct., Erie County, May 9, 1955.

graphically describing his grievances at length. It merely referred his complaint to the international union, and shortly thereafter he was charged with "revealing union business to unauthorized persons, namely, submitting the complaint to the Ethical Practices Committee." When he was ordered to stand trial before the international officers in Washington, the same court which had earlier dismissed his suit now enjoined the union from even holding the trial.¹⁴³ The case was no longer predominantly a financial case, but was now predominantly one involving political rights; judicial neutrality was replaced by unhesitating judicial protection.

D. DISCIPLINARY PROCEDURES

In over two-thirds of the cases in which courts grant relief against discipline they find some flaw in the union's trial procedure. The New York courts are willing, if not anxious, to use procedural regularity as the ostensible area of review, for this is an area in which union constitutions provide more specific guides and in which the courts feel more familiar. Moreover, procedural defects, real or imagined, provide convenient pegs on which to hang decisions without openly regulating disciplinary offenses. It is therefore difficult to define with precision the procedural standards actually imposed, independent of the offense involved.

The most elementary articulate rule is that the union must comply with the procedure prescribed by its own constitution.¹⁴⁴ Deviations at any stage, whether as to the form or context of the notice,¹⁴⁵ make-up and jurisdiction of the trial body,¹⁴⁶ or procedures for hearing¹⁴⁷ may be termed a breach of contract and void the proceedings. Substantial fairness and good faith are no substitute for full compliance. For example, a union can not replace a trial before the local union with one before a neutral outsider, even though it would provide a more competent and impartial trial;¹⁴⁸ nor will oral notice suffice if the constitution requires written charges, even though no prejudice is

143. *Murphy v. Sullivan*, N.Y. Sup. Ct., Erie County, Feb. 12, 1958.

144. See, *e.g.*, *Deverell v. Musical Mut. Protective Union*, 118 N.Y. 101, 23 N.E. 129 (1889).

145. See, *e.g.*, *Simons v. Berry*, 240 N.Y. 463, 148 N.E. 636 (1925); *Tesoriero v. Miller*, 74 N.Y.S.2d 145 (Sup. Ct. 1947).

146. See, *e.g.*, *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959); *Browne v. Hibbets*, 290 N.Y. 459, 49 N.E.2d 713 (1943); *Gersh v. Ross*, 238 App. Div. 552, 265 N.Y. Supp. 459 (1933).

147. See, *e.g.*, *Reubel v. Lewis*, 47 N.Y.S.2d 147 (Sup. Ct. 1944); *Holstrom v. Independent Dock Builders*, 164 App. Div. 267, 149 N.Y. Supp. 771 (1914).

148. *Bauer v. American Fed'n of Grain Millers*, N.Y. Sup. Ct., Erie County, May 5, 1958. Similarly, in *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y. Supp. 785 (1935) the constitution required trial to be held before the local executive committee. The accused member was charged with slandering union officers, and a special committee was appointed, apparently in order to avoid bias. The court held this to be in violation of the constitution and voided the discipline.

shown.¹⁴⁹ This does not mean that the court's function is purely mechanical, for it may interpret the procedural provisions, treat deviations as insubstantial, or find a waiver of the defect. There is no pattern of strictness or liberality in enforcing the constitution, for the procedural provisions are manipulated by the courts to achieve substantive results. As has already been suggested, the deviation tolerated depends largely on the judicial tolerance of the offense punished.

Compliance with the constitution, however, is not enough; the procedure must provide the rudimentary elements of fairness. The courts early escaped the inhibiting bounds of the contract theory to declare explicitly that "in the absence of precise stipulation for notice . . . and hearing . . . public policy demands that the law intervene to supply such omission."¹⁵⁰ Consistently, and without apology or disguise, the courts have imposed a standard of fairness or "natural justice" until it has now become a fundamental principle of near-constitutional quality. In the words of a recent opinion, "the main question in this lawsuit is due process of law, which, under the Constitution of the United States, is supreme, notwithstanding the constitutions or rules of labor unions."¹⁵¹

This leaves unanswered the critical question: what minimum standards of fairness are imposed by the courts wholly apart from the procedural provisions of union constitutions. The freighted phrases bespeak a strong judicial concern, and suggest a standard akin to that imposed by due process on administrative tribunals. Although formal legal procedure is not required, and adaptations must be made for union structures, the judges look not to union practices and traditions but to the courts' own traditional notions of the essential elements of a fair hearing.

Precise definition of the various elements of fairness is difficult, for the central concern of the court is whether the procedure as a whole is substantially fair. The court may sense general unfairness, causing it uncritically to condemn every step in the procedure,¹⁵² or it may isolate and define particular defects. In spite of this, a pattern is discernible from which it is possible to identify the essential elements of fairness.

1. *Summary Procedure.* Inflicting punishment without any notice or hearing will not be tolerated by the courts,¹⁵³ regardless of the seriousness of the

149. See *Soulounis v. Leondopoulos*, 2 L.R.R.M. 849 (N.Y. Sup. Ct. 1938). In *Schmidt v. Rosenberg*, 49 N.Y.S.2d 364 (Sup. Ct. 1944), the court found a fatal defect in the failure of the one who made the charges to appear as a witness as required by the constitution.

150. *Bricklayers Union v. Bowen*, 183 N.Y. Supp. 855, 861 (Sup. Ct. 1920).

151. *Sloan v. Braun*, 20 Misc. 2d 204, 206, 191 N.Y.S.2d 213, 215 (Sup. Ct. 1959).

152. See, e.g., *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y. Supp. 785 (1935); *Coleman v. O'Leary*, 58 N.Y.S.2d 812 (Sup. Ct. 1945); *Bartone v. Di Pietro*, 18 N.Y.S.2d 178 (Sup. Ct. 1939).

153. *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y. Supp. 336 (1931). This does not, of course, apply to suspension for nonpayment of dues, assessments, or fines. See text at notes 64-65 *supra*.

offense,¹⁵⁴ the obviousness of guilt,¹⁵⁵ or the vote of the union members.¹⁵⁶ Nor will explicit provisions in the union constitution for such "drum head courts martial" make them any more acceptable.¹⁵⁷ Such crude measures now seldom come before the courts, for as soon as they are challenged corrective measures are taken by the union to provide at least the form of fairness.

A more difficult problem is whether the union can take summary action to suspend and then provide a subsequent hearing. In discipline cases, in contrast to other union proceedings such as removal of an officer or imposition of a trusteeship, courts have been hostile to any such procedure.¹⁵⁸ There is normally no need for immediate action, as continued membership creates no pressing danger to the union and declarations of guilt can wait upon due process.

2. *Notice of Charges.* The accused is entitled to notice of the time and place of the hearing and to know the charges against him.¹⁵⁹ The courts have not specified the form or time of serving notice, required the charges to be in writing or signed, nor objected to the evidence varying from the charge, so long as there is no surprise or prejudice.¹⁶⁰ They have looked not to the form but to the substance to determine whether the accused had an adequate opportunity to prepare his defense. In some of these respects the standard imposed by the courts is less exacting than that required by many union constitutions.

3. *Right of Counsel.* Most unions permit a member on trial to choose counsel from the membership, but few permit the use of an outside lawyer. So long as neither side is represented by lawyers the courts find no unfairness.¹⁶¹ Unions, however, have increasingly relied on lawyers to guide their internal proceedings and often to act as prosecutors. Courts have recognized the dis-

154. *O'Brien v. Papas*, 49 N.Y.S.2d 521 (Sup. Ct. 1944) (work stoppages); *Gilmore v. Palmer*, 109 Misc. 552, 179 N.Y. Supp. 1 (Sup. Ct. 1919) (advocating secession of local).

155. *Reubel v. Lewis*, 182 Misc. 30, 43 N.Y.S.2d 540 (Sup. Ct. 1943) (temporary injunction denied), 47 N.Y.S.2d 147 (Sup. Ct. 1944) (permanent injunction granted; court assumes plaintiff is guilty of dual unionism).

156. *Alexion v. Hollingsworth*, 289 N.Y. 91, 43 N.E.2d 825 (1942); *Ash v. Holde-man*, 13 Misc. 2d 528, 175 N.Y.S.2d 135 (Sup. Ct. 1958).

157. *Blek v. Wilson*, 145 Misc. 373, 259 N.Y. Supp. 443 (Sup. Ct. 1932), *rev'd on other grounds*, 262 N.Y. 253, 186 N.E. 692 (1933); *Blek v. Kirkman*, 148 Misc. 522, 266 N.Y. Supp. 91 (1933); *Gilmore v. Palmer*, 109 Misc. 552, 179 N.Y. Supp. 1 (Sup. Ct. 1919).

158. *Schrank v. Brown*, 192 Misc. 80, 80 N.Y.S.2d 452 (Sup. Ct. 1948); *Gleeson v. Conrad*, 81 N.Y.S.2d 368 (Sup. Ct. 1948), *affirmed as modified*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949). *But see* *Margolis v. Burke*, 53 N.Y.S.2d 157 (Sup. Ct. 1945).

159. *Blek v. Wilson*, 145 Misc. 373, 259 N.Y. Supp. 443 (Sup. Ct. 1932), *rev'd on other grounds*, 262 N.Y. 253, 186 N.E. 692 (1933); *Corregan v. Hay*, 94 App. Div. 71, 87 N.Y. Supp. 956 (1904).

160. *Bachman v. Harrington*, 52 Misc. 26, 102 N.Y. Supp. 406 (Sup. Ct. 1906).

161. *In re Hunt*, 45 L.R.R.M. 2993 (N.Y. Sup. Ct. 1960).

advantage of the accused and have insisted that he be given equal representation.¹⁶²

4. *Right to Present Evidence.* Devices which substantially burden or prevent the accused from presenting evidence are not tolerated by the courts. When a member in New York City was ordered to stand trial in Cincinnati and refused to appear, the court voided the expulsion;¹⁶³ and when a member in Buffalo was served notice of a hearing to be held in Washington, the court enjoined the holding of the hearing.¹⁶⁴ Holding the hearing at a time when the accused or his witnesses could not attend would be equally unfair, although the fact of the burden might not be so self-evident.¹⁶⁵

5. *Right to Confront and Cross Examine Witnesses.* In *Shernoff v. Schimel*¹⁶⁶ the accused was kept outside while the prosecuting witnesses testified. He was then called in, told the evidence, and offered a chance to question them or present other evidence. "The procedure," said the officers, "is based on a long and sad experience of the past. We are waiters not lawyers."¹⁶⁷ The court rejected this argument of practical convenience, saying, "The right to a fair hearing, so basic a concept in our jurisprudence, cannot be sacrificed on the altar of pragmatism."¹⁶⁸ This right included "the rights to be confronted with one's accusers, to be present when the accusation is being made, and to have the opportunity of cross-examination with respect to the testimony so given—not on some hearsay condemnation thereof."¹⁶⁹ These same principles have been used to void discipline based on affidavits where the witnesses have not

162. In *Wesson v. Actors Equity*, N.Y. Sup. Ct., N.Y. County, Jan. 3, 1958, the same judge who decided *In re Hunt*, *supra* note 161, issued an ex parte order enjoining the holding of a trial if the accused was denied right of legal counsel when the union had a lawyer present. In *Schmidt v. Rosenberg*, 49 N.Y.S.2d 364 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 685, 54 N.Y.S.2d 379 (1945), the union was employing legal counsel and the accused sought a postponement until he could obtain counsel. He was forced to go on with the trial, but was assured that the trial board would protect his interests. The court held that under these circumstances there could be no finding of waiver of any procedural defect, and found such a defect in the failure of the one who signed the charges to appear as a prosecuting witness, even though there was substantial evidence offered by other prosecuting witnesses.

163. *Gallagher v. Monaghan*, 58 N.Y.S.2d 618 (Sup. Ct. 1945).

164. *Murphy v. Sullivan*, N.Y. Sup. Ct., Erie County, Feb. 12, 1958.

165. Unions at times reject requests for postponements and proceed with the trial in the absence of the accused. The extent to which the courts will review the reasonableness of the union's denial is unclear. Compare *Shernoff v. Schimel*, 28 L.R.R.M. 2495 (N.Y. Sup. Ct. 1951); *Reubel v. Lewis*, 47 N.Y.S.2d 147 (Sup. Ct.), *aff'd*, 268 App. Div. 764, 50 N.Y.S.2d 164, *appeal dismissed*, 293 N.Y. 762, 57 N.E.2d 840 (1944); *Austin v. Dutcher*, 56 App. Div. 393, 67 N.Y. Supp. 819 (1900).

166. 28 L.R.R.M. 2377 (N.Y. Sup. Ct. 1951).

167. *Ibid.*

168. *Id.* at 2378.

169. *Ibid.*; *accord*, *Sloan v. Braun*, 191 N.Y.S.2d 213 (Sup. Ct. 1959); *Brooks v. Engar*, 259 App. Div. 333, 19 N.Y.S.2d 114, *appeal dismissed*, 284 N.Y. 767, 31 N.E.2d 514 (1940).

been subject to cross-examination.¹⁷⁰ The court's image of a fair hearing at this point is that of a traditional judicial proceeding.¹⁷¹

6. *Right to an Unbiased Tribunal.* Whether the union trial body is the local executive board, a specially elected committee, or the local union itself, it is inevitably influenced by the political pressures within the union. Because the great majority of litigated discipline cases are rooted in internal factional struggles, courts are constantly confronted with the potentiality of bias. The more obvious forms are curiously condemned.¹⁷² Thus, a member can not be tried before an executive board which is appointed by the president who is bringing the charges,¹⁷³ nor can a member who claimed that an election was fraudulent be tried by the officers who were elected.¹⁷⁴ Much less obvious distortions created by internal political pressures have been recognized by the courts.¹⁷⁵ In *Reilly v. Hogan*¹⁷⁶ a leader of the opposition slate charged that union funds had been used to support the Lincoln Brigade in the Spanish Civil War. He was tried by the local union and expelled. The court, in ordering reinstatement, said, "the case as a whole gives me the definite impression that the plaintiff was not accorded a fair and impartial trial, and that his expulsion was animated by partisan politics."¹⁷⁷ Similarly, in *Madden v. Atkins*, the trial board included members who held positions in the union. The Appellate Division recognized that they could not fairly judge members accused of criticizing the officers to whom they owed their appointment.¹⁷⁸

Submerged political pressures which lead to prejudice can not always be traced, and subtle devices may escape detection. Courts, however, are not blind to the realities of internal union politics, and where bias is sensed but not susceptible of proof, other more visible defects may be used as grounds to invalidate the proceedings. Thus, in *Fittipaldi v. Legassie*¹⁷⁹ the court observed that in choosing the trial committee by lot, the one drawing names from the hat was one of the accusers and on three occasions drew his own

170. *Harmon v. Matthews*, 27 N.Y.S.2d 656 (Sup. Ct. 1941); *Koukly v. Weber*, 154 Misc. 659, 277 N.Y. Supp. 39 (Sup. Ct. 1935).

171. It does not include, however, the right to have witnesses sworn. *Dakchoylous v. Ernst*, 282 App. Div. 1101, 126 N.Y.S.2d 534 (1953).

172. *Coleman v. O'Leary*, 58 N.Y.S.2d 812 (Sup. Ct.), *appealed dismissed*, 269 App. Div. 972, 58 N.Y.S.2d 358 (1945); *Maltz v. Rosenberg*, 265 App. Div. 972, 38 N.Y.S.2d 940 (1942).

173. *Barry v. Franscona*, 28 L.R.R.M. 2480 (N.Y. Sup. Ct. 1951).

174. *Cohen v. Rosenberg*, 262 App. Div. 274, 27 N.Y.S.2d 834 (1941), *aff'd*, 287 N.Y. 800, 40 N.E.2d 1018 (1942).

175. In *Koukly v. Canavan*, 154 Misc. 343, 277 N.Y. Supp. 29 (Sup. Ct. 1935), the one bringing the charges was a brother of the chairman of the local governing board which tried the accused. The court recognized the danger of bias because of the chairman's position of dominance.

176. 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 423 (1942).

177. 32 N.Y.S.2d at 869.

178. 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957), *aff'd*, 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

179. 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959).

name. "While [he] did not actually serve," this "[shed] light on the impartiality" of the trial committee and the "atmosphere" in which the trials were conducted.¹⁸⁰ The court then found a violation of the procedural provisions of the constitution.

The court's sense of responsibility to protect against bias is forcefully articulated in *Madden v. Atkins*. The right to "a trial by impartial judges must be enforced by the court with particular zeal in a case such as this where the court's power to review is so circumscribed." The tribunal must not be "subject to the slightest suspicion as to its fairness."¹⁸¹ This requirement is absolute and can not be qualified by claims of practical convenience. "The fact that there were no members of the board who could qualify as disinterested judges is irrelevant. If there was a problem as to how to provide an impartial appellate tribunal for these cases the burden of its solution was the local's."¹⁸²

7. *Waiver of Defects*. There is an evident fear on the part of accused members, often shared by their lawyers, that if they participate in the hearing they waive all procedural defects.¹⁸³ This fear is apparently fed by rulings of union appeal tribunals that by proceeding a member waives all objections; the fear is not justified by the conduct of the courts.¹⁸⁴ If the accused objects to the defect and proceeds under protest, his objection is not waived.¹⁸⁵ In one case where a member was forced to proceed without his counsel the court held that it was the duty of the trial board to protect his rights, and there was no waiver of even harmless defects to which he had not objected.¹⁸⁶ Failure to object may waive defects, particularly as to the form of the notice, if there is no substantial unfairness;¹⁸⁷ but the courts have not allowed the waiver doctrine to be used to trap accused members who proceed in ignorance of their basic rights. Within these limits, waiver, like all other procedural

180. *Id.* at 528, 184 N.Y.S.2d at 232.

181. 4 App. Div. 2d. 1, 18, 162 N.Y.S.2d 576, 592-93 (1957), quoting from *Matter of Friedman*, 215 App. Div. 130, 136, 213 N.Y. Supp. 369, 376 (1926).

182. *Id.* at 19, 162 N.Y.S.2d at 593.

183. For example, in *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959), two of the accused members appeared at the trial and objected to the constitution of the trial body. When this objection was overruled, they refused to proceed, and the trial was held in their absence.

184. See *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N.Y. 101, 23 N.E. 129 (1899).

185. *Fittipaldi v. Legassie*, 7 App. Div. 521, 184 N.Y.S.2d 226 (1959); *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y. Supp. 785, *modified*, 269 N.Y. 517, 199 N.E. 515 (1935). If he refuses to proceed, his special appearance does not, of course, waive the defects. *Soulounias v. Leondopoulos*, 2 L.R.R.M. 849 (N.Y. Sup. Ct. 1938).

186. *Schmidt v. Rosenberg*, 49 N.Y.S.2d 364 (Sup. Ct. 1944), *aff'd*, 269 App. Div. 685, 54 N.Y.S.2d 379 (1945).

187. *Strobel v. Irving*, 171 Misc. 965, 14 N.Y.S.2d 864 (Sup. Ct. 1939); *Belkin v. Spiegel*, 3 L.R.R.M. 800 (N.Y. Sup. Ct. 1938); *Fritz v. Knaub*, 57 Misc. 405, 103 N.Y. Supp. 1003 (Sup. Ct. 1907), *aff'd*, 124 App. Div. 915, 108 N.Y. Supp. 1133 (1908); *Drummond v. Curran*, 27 L.R.R.M. 2488 (N.Y. Sup. Ct. 1951).

elements, is used as a manipulative device to explain results based on more substantial factors.

8. *Double Jeopardy*. The rule against double jeopardy has been broadly stated in *Lafferty v. Fremd*, "it is generally unjust to require a duly acquitted man to defend himself a second time, and generally contrary to sound public policy to permit the reopening of matters once judicially determined . . . unless there be some special circumstances making a second trial both necessary and just."¹⁸⁸ The rule as stated is not the rigid one applicable to criminal proceedings, but is made flexible by the loosely worded exception. This flexibility is suggested in *Weinstock v. Ladisky*,¹⁸⁹ in which a member was expelled for being a communist. He admitted the fact, but among other defenses claimed double jeopardy in that he had been tried on the same charge several years before and had been acquitted. The court, which did not even dignify this argument with an answer, was fully aware that at the time of his prior acquittal the trial board was controlled by the communist faction. This, along with the continuing nature of the offense, might well have made the court feel that "a second trial was both necessary and just."

In practical terms, the more important question is whether acquittal by the trial body can be appealed within the union, for many union constitutions allow such appeals and even empower the appeal body to find the accused guilty.¹⁹⁰ To order a new trial because of procedural errors or mistakes of law might not shock the sense of justice, but for an appeal body to reverse an acquittal and find guilt would not only cut to the very heart of double jeopardy; it would also raise serious problems of fair hearings. The latter problem is particularly acute because the appellate tribunal frequently has nothing but an incomplete and unreliable record of the hearing before the trial board.¹⁹¹

9. *Summary*. It can be fairly said that in most respects courts closely scrutinize union disciplinary proceedings to protect against procedural unfairness. Although the strictness of the standard may vary some, depending on the nature of the offense and the obviousness of guilt, the variance is probably not greater than that practiced in criminal cases in the same courts. The weakest point in discipline proceedings, the inherent bias of union tribunals in cases arising out of factional disputes, is the weakest point in judicial protection. This is not because of the court's indifference or naivete, but rather because the political pressures may be so submerged or indirect as to defy proof in court. In spite of this, most judges sense the dangers and often make some rough compensation for that which they feel but can not find.

188. 36 L.R.R.M. 2674, 2676 (N.Y. Sup. Ct. 1955).

189. 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950).

190. In *Peabody v. Kaufman*, 61 N.Y.S.2d 313 (Sup. Ct.), *aff'd as modified*, 270 App. Div. 1019, 62 N.Y.S.2d 368 (1946), 296 N.Y. 796, 71 N.E.2d 770 (1947), the court refused to imply a power to reverse an acquittal on appeal and further declared that even to order a new trial on procedural grounds violated fundamental rights against double jeopardy. *Contra*, *Rubens v. Weber*, 237 App. Div. 15, 260 N.Y. Supp. 701 (1932).

191. See notes 57-58 *supra* and accompanying text.

E. EXHAUSTION OF REMEDIES

The doctrinal declaration that courts will not intervene in internal union disputes until all appeals within the union have been exhausted has, in theory, three underlying policies. First, union appellate tribunals may take corrective action, thus reducing the burden on the courts. Second, the benefit of the expert judgment of these tribunals might aid courts in making more responsible decisions. Third, the deep and pervading principle of preserving the autonomy of unions constrains courts to give the union full responsibility and opportunity to correct its own mistakes. Against these policies is balanced the policy of providing reasonably prompt and effective judicial protection to important legal rights.

The discipline cases present a complex pattern of adherence and rejection of these policies. From the general rule the courts have carved various exceptions, some which reflect the underlying policies and some which seem to ignore them and effectively repudiate the rule.

1. *Exceptions to the Rule*

Futility of Appeal. If the internal appeal will obviously be fruitless, the court's withholding its hand serves no policy other than temporary recognition of union autonomy, and this at the expense of postponed protection to the injured individual. The balance struck by the courts in favor of the disciplined member is clear. More important, total futility need not be proved. It is enough to show that the appeal is to an international executive board presided over by an officer who was slandered by the accused,¹⁹² or that some members of the board have prejudged the case;¹⁹³ and when one intermediate appeal is excused, all subsequent appeals are likewise excused regardless of their adequacy.¹⁹⁴

The test of the courts seems to be less one of futility than of fairness; it is not the lack of likelihood of reversal, but the lack of an impartial tribunal which excuses exhaustion.¹⁹⁵ Similarly, if the trial record is incomplete or inaccu-

192. *Madden v. Atkins*, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957); *Corregan v. Hay*, 94 App. Div. 71, 87 N.Y. Supp. 956 (1904); see *Barry v. Franscona*, 28 L.R.R.M. 2480 (N.Y. Sup. Ct. 1951).

193. *O'Brien v. Pappas*, 49 N.Y.S.2d 521 (Sup. Ct. 1944); *Reilly v. Hogan*, 32 N.Y.S. 2d 864 (Sup. Ct. 1942); *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y. Supp. 336 (1931); *Fritz v. Knaub*, 57 Misc. 405, 103 N.Y. Supp. 1003 (Sup. Ct. 1907).

194. In all of these cases further appeals were available beyond the step the court termed futile, either to the international president, the international executive board, or to the convention. The courts have not required the plaintiff to show that these further steps were futile or should be excused on some other ground.

195. In *Madden v. Atkins*, 4 App. Div. 2d 1, 18-19, 162 N.Y.S.2d 576, 593 (1957), the court, in excusing appeals because of obvious bias, said, "They were entitled to have not only their trials, but also their appeals, held and determined by impartial judges. . . . What was said in *Wilcox*, *supra*, as to the selection of judges for trials such as these may equally be applied to judges on the appeals."

rate,¹⁹⁶ or the one appealing is denied access to records necessary to prepare his appeal,¹⁹⁷ there is a fatal lack of fairness. Even hearing the appeal at such a distance as to burden the member in personally presenting it excuses him from resorting to the appeal.¹⁹⁸

Delay of Appeals. The policy of prompt protection of rights may outweigh the other policies if the time required for internal appeals is too long, but the courts do no explicit balancing. In expulsion cases delays of one year or more have been held to be too long,¹⁹⁹ but in suspension cases an appeal available only after the suspension has expired, and the member has been reinstated, may be considered too late.²⁰⁰ In *Browne v. Hibbets*²⁰¹ the failure of an appeal tribunal to give an answer for one month was held to justify judicial intervention.²⁰²

In most of the cases in which the court relied on the element of delay, the disciplined member was apparently barred from his job. In one he was suspended from his position as paid business agent,²⁰³ and in another the delay in internal appeals would have caused him to forfeit the insurance which he had acquired as a part of his membership.²⁰⁴ It is doubtful, however, whether courts give special weight to these economic factors as compared with the injury sustained by a disciplined member who is deprived of his right to participate in the union or to run for union office during a protracted appeal.²⁰⁵

196. See *Tesoriero v. Miller*, 274 App. Div. 670, 88 N.Y.S.2d 87 (1949); *Reilly v. Hogan*, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 36 N.Y.S.2d 423 (App. Div. 1942).

197. *Brooks v. Engar*, 259 App. Div. 333, 19 N.Y.S.2d 114, *appeal dismissed*, 284 N.Y. 767, 31 N.E.2d 514 (1940); *Corregan v. Hay*, 94 App. Div. 71, 87 N.Y. Supp. 956 (1904).

198. *Madden v. Atkins*, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957); *Corregan v. Hay*, *supra* note 179; *Fritz v. Knaub*, 57 Misc. 405, 103 N.Y. Supp. 1003 (Sup. Ct. 1907), *aff'd*, 124 App. Div. 915, 108 N.Y. Supp. 1133 (1908).

199. *Reilly v. Hogan*, 32 N.Y.S.2d 864 (Sup. Ct.), *aff'd*, 264 App. Div. 855, 36 N.Y.S.2d 423 (1942) (1 year); *Bricklayers Union v. Bowen*, 183 N.Y. Supp. 855 (Sup. Ct. 1920), *aff'd*, 198 App. Div. 967, 189 N.Y. Supp. 938 (1921) (15 months); *Gleeson v. Conrad*, 81 N.Y.S.2d 368 (Sup. Ct. 1948), *aff'd*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949) (5 years); *Fritz v. Knaub*, *supra* note 180 (19 months).

200. *MacPherson v. Green*, 72 N.Y.S.2d 790 (Sup. Ct. 1947); *Murphy v. Freeman*, Memorandum of Rowe, J., N.Y. Sup. Ct., Erie County, July 3, 1956, *aff'd*, 4 App. Div. 743, 164 N.Y.S.2d 981 (1957); *Shernoff v. Schimel*, 28 L.R.R.M. 2377 (N.Y. Sup. Ct. 1951).

201. 290 N.Y. 459, 49 N.E.2d 713 (1943).

202. Similarly, in *Madden v. Atkins*, 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958) the court held that the failure of the local executive board to act on appeals for six months and the failure of the national executive board to act for four months justified the member in seeking legal relief. See also *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959) (where no reply for two years).

203. *Murphy v. Freeman*, *supra* note 200.

204. *Fritz v. Knaub*, 57 Misc. 405, 103 N.Y. Supp. 1003 (Sup. Ct. 1907).

205. In discipline cases generally, and particularly those in which the courts excuse exhaustion, the elements of economic injury are commonly mentioned. See, e.g., *Suma v. Landrisina*, 36 N.Y.S.2d 279 (Sup. Ct. 1942). However, the whole body of cases does not indicate that this is a critical factor in the outcome of the cases, or that it is given special

Void Proceedings. An all-consuming exception to the exhaustion doctrine has been succinctly stated in the leading case of *Tesoriero v. Miller*.²⁰⁶

It is well settled that if the action of the union is without jurisdiction, or is without notice or authority or not in compliance with the rules or constitutional provisions, or is void for any reason, the obligation to appeal within the union is not imposed, but the complaining member may resort directly to the courts.²⁰⁷

This exception has in fact been as broadly applied as is here stated. Proceedings have been found void because they have denied due process for lack of notice or hearing,²⁰⁸ for bias of the tribunal,²⁰⁹ or for holding the hearing at a distance.²¹⁰ Any failure to comply with the constitution may likewise cause courts to find voidness. Thus, exhaustion has been excused because the offense charged was not prohibited by the constitution,²¹¹ the notice was defective as to form,²¹² the trial body was improperly constituted,²¹³ or suspension for failure to appear at a hearing was not authorized by the constitution.²¹⁴

This exception has been used even to enjoin the union from holding a trial in the first instance when the defect is clear.²¹⁵ Thus courts have enjoined unions from proceeding with hearings where they were to be held in a distant city,²¹⁶ before an improperly named tribunal,²¹⁷ without an equal right of counsel,²¹⁸ or in violation of the right against double jeopardy.²¹⁹

weight when exhaustion is excused because of delay. The cases in which exhaustion is required also contain many in which the member was barred from his job or suffered other economic injury.

206. 274 App. Div. 670, 88 N.Y.S.2d 87 (1949).

207. *Id.* at 672, 88 N.Y.S.2d at 90.

218. *Wesson v. Actors Equity*, N.Y. Sup. Ct., N.Y. County, Jan. 3, 1958. App. Div. 712, 262 N.Y. Supp. 416, *rev'd on other grounds*, 262 N.Y. 253, 186 N.E. 692 (1933); *Rodier v. Huddell*, 232 App. Div. 531, 250 N.Y. Supp. 336 (1931); *Baritone v. Di Pietro*, 18 N.Y.S.2d 178 (Sup. Ct. 1939); *Gilmore v. Palmer*, 109 Misc. 552, 179 N.Y. Supp. 1 (Sup. Ct. 1919).

209. *Coleman v. O'Leary*, 58 N.Y.S.2d 812 (Sup. Ct.), *appeal dismissed*, 269 App. Div. 972, 58 N.Y.S.2d 358 (1945).

210. *Gallagher v. Monaghan*, 58 N.Y.S.2d 618 (Sup. Ct. 1945).

211. *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931) (court gave relief without mentioning that trial court had denied relief for failure to exhaust); *Tesoriero v. Miller*, 274 App. Div. 670, 88 N.Y.S.2d 87 (1949); *Gleeson v. Conrad*, 81 N.Y.S.2d 368 (Sup. Ct. 1948), *aff'd*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949).

212. *Soulounias v. Leondopoulos*, 2 L.R.R.M. 849 (N.Y. Sup. Ct. 1938).

213. *Fittipaldi v. Legassie*, 7 App. Div. 521, 184 N.Y.S.2d 226 (1959); *Gersh v. Ross*, 238 App. Div. 552, 265 N.Y. Supp. 459 (1933); *Shapiro v. Brennan*, 269 N.Y. 517, 199 N.E. 515 (1935); *Jose v. Savage*, 123 Misc. 283, 205 N.Y. Supp. 6 (Sup. Ct. 1924).

214. *Reubel v. Lewis*, 47 N.Y.S.2d 147 (Sup. Ct. 1944).

215. *Suma v. Landriscina*, 36 N.Y.S.2d 279 (Sup. Ct. 1942); *Dusing v. Nuzzo*, 26 N.Y.S.2d 345 (Sup. Ct. 1941).

216. *Murphy v. Sullivan*, N.Y. Sup. Ct., Erie County, Feb. 12, 1958.

217. *Bauer v. American Federation of Grain Millers*, N.Y. Sup. Ct., Erie County, May 5, 1958.

218. *Wesson v. Actors Equity*, N.Y. Sup. Ct., N.Y. County, Jan. 3, 1958.

219. *Lafferty v. Fremad*, 36 L.R.R.M. 2674 (N.Y. Sup. Ct. 1955).

It is apparent that this exception is capable of completely swallowing the rule, for it is applicable to every case in which the disciplined member has a meritorious claim. Contrary to the other exceptions, it has no visible roots in any of the policies underlying the rule, but under the thin verbal disguise of "no jurisdiction" and "void" it repudiates the rule and its policies. This exception, like other exceptions, is not consistently applied, but it is used frequently and is always available for courts to use when they feel the need to grant relief.

2. *Adherence to the Rule*

These multiple exceptions have obviously removed the requirement of exhaustion as an insuperable obstacle to judicial intervention. Systematic study of the cases shows that by applying the exceptions courts have sapped the rule of almost all vitality except in random cases. Out of more than 100 discipline cases, the rule has been applied in 20, but even this may exaggerate its importance. In seven of those cases, the court's opinion makes clear on its face that the plaintiff's case had no merit or was procedurally defective, and that failure to exhaust was added only as a makeweight.²²⁰ In six, suit was brought even before the union trial body had made a decision, and in none of these was there any clear error shown in the proceedings.²²¹ The remaining seven cases might be considered common-place enforcement applications of the rule, but they are not all of one piece. For example, in one the court's responsibility was lightened by the fact that the expelled members were given full membership in the union, including the right to run for office, pending the internal appeals;²²² in another case the judge woodenly refused to excuse a failure to exhaust even though the appeal was to a tribunal which included the officers he had accused of misuse of funds;²²³ and in still another the doctrine was so manipulated as to totally frustrate the leader of a left-wing faction from getting any judicial review of his expulsion, even after he had exhausted his internal appeals.²²⁴

220. *Dakchoylous v. Ernst*, 282 App. Div. 1101, 126 N.Y.S.2d 534 (1953); *Weinstock v. Ladisky*, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950); *Cromwell v. Morrin*, 91 N.Y.S.2d 176 (Sup. Ct. 1949); *Rubin v. Greenberg*, 3 L.R.R.M. 801 (N.Y. Sup. Ct. 1939); *Belkin v. Spiegel*, 3 L.R.R.M. 800 (N.Y. Sup. Ct. 1938); *Havens v. King*, 221 App. Div. 475, 224 N.Y. Supp. 193 (1927), *aff'd sub nom. Havens v. Dodge*, 250 N.Y. 617, 166 N.E. 346 (1929); *Stroebe v. Irving*, 171 Misc. 965, 14 N.Y.S.2d 864 (N.Y. City Munic. Ct. 1939).

221. *Thomas v. Musical Mut. Protective Union*, 121 N.Y. 45, 24 N.E. 24 (1890); *Zalnerovich v. Van Ausdal*, 65 N.Y.S.2d 650 (Sup. Ct. 1946); *Bernstein v. Robinson*, 63 N.Y.S.2d 300 (Sup. Ct. 1946); *Bloom v. Nann*, 41 N.Y.S.2d 852 (Sup. Ct. 1943); *Dixon v. Sheridan*, 38 L.R.R.M. 2050 (N.Y. Sup. Ct. 1956) (suspended for nonpayment of assessment, brought suit before date of hearing on disputed question of validity of assessment); *Rutherford v. Busch*, 40 L.R.R.M. 2535 (N.Y. Sup. Ct. 1957).

222. *Cunningham v. Milk Drivers Local 584*, 148 N.Y.S.2d 114 (Sup. Ct. 1955).

223. *Podlas v. Ruehl*, N.Y. Sup. Ct., Erie County, Aug. 22, 1940.

224. See cases cited and accompanying text notes 124-25 *supra*. The other cases show further variations. In *Reubel v. Lewis*, 182 Misc. 30, 43 N.Y.S.2d 540 (Sup. Ct. 1943)

This scattered application of the rule is in sharp contrast to the thirty-six discipline cases in which courts expressly applied one or more exceptions to excuse exhaustion. Moreover, in more than thirty cases courts made no mention of exhaustion, and study of the court files indicates that this judicial silence sometimes conceals the court's deliberate overlooking of failure to exhaust.

Courts' demonstrated willingness to excuse exhaustion while giving lip service to the rule may seem incongruous, for the rule is based on policies which should be expected to carry special weight with the courts—policies which involve the work load of courts, the need for expert guidance, and the desire to preserve union autonomy. The most plausible explanation is that courts have little real confidence in union appeal procedures. Appellate tribunals are, like trial tribunals, part of the union's political structure, and litigated discipline cases are so often facets of a factional fight which have implications beyond the particular local that the courts distrust the handling of such appeals. The frequent inadequacy or unreliability of the trial record makes responsible review on appeal nearly impossible, and the decisions of the appellate body are totally unilluminating to the court. To all of this is added the courts' common impression, gained from the cases themselves, that union appeals are shunted about through unnecessarily numerous steps, finally terminating in some remote convention. All of these factors feed the judges' suspicions that when the union pleads failure to exhaust internal appeals, it seeks not an opportunity to correct errors, but an opportunity to exhaust the disciplined member. Once this suspicion is entertained, consciously or unconsciously, the policies underlying the rule are nullified and policies pressing for immediate intervention prevail.

C. *Protection Within the Rule*

Courts have shown little imagination in creating remedial orders which might preserve some of the values of the rule and yet not leave the member unprotected. The striking exception of *Shernoff v. Schimel*²²⁵ suggests at least one possibility. The plaintiff, who had been expelled after a trial which denied him the right to confront and cross-examine witnesses, immediately sought a temporary injunction. The court ordered him reinstated to membership and restored to his regular job while he pursued his appeals in the union. The appellate tribunal of the union promptly ordered a new trial with full rights of confrontation and cross-examination. The plaintiff refused to appear

(the court denied a temporary injunction for failure to exhaust, but after trial excused nonexhaustion, 47 N.Y.S.2d 147), *aff'd*, 268 App. Div. 764, 50 N.Y.S.2d 164, *appeal dismissed*, 293 N.Y. 762, 57 N.E.2d 840 (1944). But in *McCaully v. Hoey*, N.Y.L.J., July 26, 1957, p. 5, col. 8 (Sup. Ct.), the judge excused nonexhaustion and referred the matter to a referee for a hearing on the merits, but he dismissed the complaint for failure to exhaust. Two cases which represent straightforward application of the rule are *Murphy v. Milne*, N.Y. Sup. Ct., Erie County 1955, and *Bertucci v. United Cement Masons Union Local 570*, 139 Misc. 703, 249 N.Y. Supp. 635 (Sup. Ct. 1931).

225. 28 L.R.R.M. 2377 (N.Y. Sup. Ct. 1951).

or participate in the second trial and was again found guilty. In the absence of any clear showing of unfairness in the second trial, or efforts by the plaintiff to appeal within the union, the court refused to give further protection.²²⁶ The significant point is that the court escaped the dilemma of either superseding the union's appellate procedures or leaving the member wholly unprotected during protracted appeals. It did this by the simple device of protecting his membership rights pending internal appeals conditioned on his reasonable pursuit of those appeals. The responsibility for taking corrective action was left on the union, and the incentive was placed on the union not to delay, but to expedite, appeals. The court, in turn, because it gave only interim relief, did not need to make the close inquiry required for making the ultimate decision. The member was, in the meantime, given full protection.²²⁷

The device of staying execution of the union's action pending internal appeals was first used by the Cardozo Court,²²⁸ but has been overlooked by subsequent courts: The single exception was in the *Sherhoff v. Schimel* case.²²⁹ In spite of the lack of confidence which courts have manifested in union appellate procedures, unions' tribunals should not be denied the opportunity to prove themselves, particularly when this can be so easily allowed without any substantial loss of protection to the individual.²³⁰

F. EFFECTIVENESS OF JUDICIAL REMEDIES

Judicial protection against oppressive union discipline is meaningful only to the extent that effective remedies are practically available. Measuring the effectiveness of remedies in practical terms requires close scrutiny of at least three factors: first, the forms of remedies available; second, the delay involved in obtaining judicial protection; and third, the costs of litigation. The ultimate concern is the impact of the judicial action on the democratic processes of the unions. Little understanding of the effectiveness of remedies can be gained from the published opinions, and self-evident assumptions often prove empty upon closer scrutiny of the litigation. The material here is based largely on a detailed study of court files and interviews with lawyers who handled these cases.

226. 28 L.R.R.M. 2495 (N.Y. Sup. Ct. 1951).

227. Substantially the same device was used by the Teamsters to avoid judicial intervention in *Cunningham v. Milk Drivers, Local 584*, 148 N.Y.S.2d 114 (Sup. Ct. 1955).

228. *Powell v. United Ass'n of Plumbers*, 240 N.Y. 616, 148 N.E. 728 (1925) (enjoin consolidation of locals pending appeal to convention).

229. See 106 N.Y.S.2d 505 (Sup. Ct. 1951). It has also been overlooked by the lawyers who have not requested or even suggested such a device, but who have sought either to enforce or escape the exhaustion rule entirely.

230. Such an order would handicap the union in effecting an immediate ouster of those found unfit, but the delay will be only that produced by the union's own appellate proceedings. In special cases the court could tailor the interim order to balance the interests of the union and the disciplined member.

1. *Forms of Remedies*

Suits for wrongful discipline are almost always equitable proceedings seeking two remedies—reinstatement in the union and damages.²³¹ Proceedings in the nature of mandamus²³² have fared badly,²³³ are generally unfamiliar to lawyers, and offer no advantages. Even though the disciplined member has no desire for reinstatement, but only for damages, such equitable relief as reinstatement may be sought as a method of avoiding the delays which are commonly involved in obtaining a jury trial.²³⁴

Reinstatement

If the court finds the discipline wrongful it orders full reinstatement to membership rights, and this is enforceable with the full panoply of equitable powers, including contempt.²³⁵ Circumvention by concocting new charges for some other offense will not hoodwink judges who customarily in these cases look behind the form to the substance,²³⁶ and there is no evidence that such devices are often attempted. On the contrary, even though the discipline is voided for procedural reasons and the union might retry the member, such action is seldom taken. In almost every case the order of reinstatement is in fact final.²³⁷

Judicial orders can not restore a member to full union fellowship, and reinstatement may be blighted by traditional union hostility to courts. In practice, however, this seems to be less important than might be at first imagined. In some unions, such as the National Maritime Union, resort to the courts has become an accepted part of internal union disputes. Moreover, the fact that the litigated case is commonly championed by one political group within the

231. Equitable relief is not barred by the Anti-Injunction Act, N.Y. CIV. PRAC. ACT § 876(a). Internal union disputes have been held not to be a "labor dispute" within the definition of the act. *LaRose v. Possehl*, 156 Misc. 476, 282 N.Y. Supp. 332 (1935).

232. N.Y. CIV. PRAC. ACT §§ 1283-1306.

233. *Solomon v. Brotherhood of Painters*, 218 N.Y. 115, 112 N.E. 752 (1916); *In re Sabella*, 37 L.R.R.M. 2003 (N.Y. Sup. Ct. 1955). But see *Petrie v. Ruehl*, 22 N.Y.S.2d 549 (Sup. Ct. 1940).

234. For example, the plaintiff in *Tesoriero v. Miller*, 274 App. Div. 670, 88 N.Y.S.2d 87 (1949) went into business for himself after his discharge, and though he won an order of reinstatement never sought to return.

235. See *Madden v. Atkins*, 8 App. Div. 2d 974, 190 N.Y.S.2d 749 (1959), *appeal dismissed*, 7 N.Y.2d 922, 197 N.Y.S.2d 724, 165 N.E.2d 750 (1960), holding the union liable in contempt for damages for failure to comply with the court's order. These were ultimately assessed at more than \$42,000. See *Madden v. Atkins*, 19 Misc. 2d 138, 191 N.Y.S.2d 709 (Sup. Ct. 1959). A similar contempt order was issued in *Schrebank v. Kempter*, Memorandum, Cavagan, J., N.Y. Sup. Ct., N.Y. County, Feb. 7, 1950.

236. See *Browne v. Hibbets*, 25 N.Y.S.2d 573 (Sup. Ct. 1941), *aff'd*, 290 N.Y. 459, 49 N.E.2d 713 (1943); *Murphy v. Sullivan*, N.Y. Sup. Ct., Erie County, Feb. 12, 1958.

237. If the court orders reinstatement pending further internal union proceedings, the union is much more likely to order a retrial. See *Shernoff v. Schimel*, 28 L.R.R.M. 2495 (N.Y. Sup. Ct. 1951). This might be one reason that plaintiffs' lawyers have not requested such relief.

union as resistance to alleged oppression makes the individual involved a martyr and often converts a favorable court opinion into an effective political document. Thus, in *Madden v. Atkins*²³⁸ the legal triumph of the opposition was the prelude to its political triumph in the local union.²³⁹

If expulsion or suspension affects the member's job right, full protection is much more difficult. In *Gleeson v. Conrad*²⁴⁰ the court said it could not order the union to demand his reemployment, as this was under the control of the employer. All that the union could be required to do was notify the employer of his reinstatement and "request" his employment.²⁴¹ The National Maritime Union, after failing in the expulsion of those who had been convicted of narcotic offenses prior to becoming members, simply refused to refer them to jobs from the hiring hall on the grounds that they were unfit.²⁴² The federal remedies under the Taft-Hartley Act could reach a problem like *Gleeson v. Conrad*, for the order could run against both the union and the employer. It could not reach the N.M.U. cases, if denial of referral to narcotics offenders is solely on the basis of their criminal record and not their union status.²⁴³

Damages

Although the New York courts commonly awarded damages against unions in expulsion cases,²⁴⁴ a cloud was cast by several decisions which denied the

238. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

239. Three of the plaintiffs became leaders in the opposition group, The Party for Union Democracy. In a court supervised election in February, 1960, this group won four places on the seven man executive committee, President, Vice-President, Secretary-Business Manager, and one trustee. One of the plaintiffs has been appointed to the critical post of Chief Dispatcher of the local. The success of the opposition group in New York seems to have sparked opposition groups in other locals of the union.

In *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959), the insurgent group, of which the plaintiffs were a part, won an election ousting Legassie and other incumbents even before the plaintiffs won reinstatement; and in *Murphy v. Freeman*, 4 App. Div. 743, 164 N.Y.S.2d 981 (1957), a consideration motivating the union officials in seeking to prevent Murphy from getting reinstated prior to the next election may have been their fear that he would win.

240. 276 App. Div. 861, 93 N.Y.S.2d 667 (1949).

241. 93 N.Y.S.2d at 669. The court indicated that under the contract the employer was not obligated to rehire as seniority terminated after two years. The plaintiffs suffered additional loss in that their group insurance with the employer was cancelled. The court was also unable to reinstate this as it was not within the control of the union.

242. *Pabon v. Curran*, 44 L.R.R.M. 2178 (N.Y. Sup. Ct. 1959).

243. Much more subtle forms of job discrimination may be used, with or without any formal disciplinary action. The hiring hall is a convenient device, but cooperative employers may also aid in eliminating employees objectionable to the union leaders. Any such discrimination which has as its purpose the enforcing of a union membership rule is a violation of § 8(a)(3) and 8(b)(2), but proving the discrimination and its purpose may be impossible.

244. See, e.g., *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N.Y. 101, 23 N.E. 129 (1889); *Blek v. Wilson*, 262 N.Y. 253, 186 N.E. 692 (1933); *Polin v.*

liability of the unions. They held that, as unincorporated associations, unions could be held liable only if actions had been authorized or ratified by all of the members; the expelled members could only sue those individuals who had acted in bad faith.²⁴⁵ This cloud was partly dispelled by *Madden v. Atkins*.²⁴⁶ After wrestling with the precedents, the Court of Appeals stated the principle to be deduced in expulsion cases in elliptical terms:

Where it is brought about by action on the part of the membership, at a meeting or otherwise, in accordance with the union constitution, the act of expulsion will be regarded as the act of the union for which damages may be recovered from union funds. Where, however, proof of such union action is lacking, the claim for damages against the organization must fail.²⁴⁷

The verbal formula of the court seems to be that where the constitution delegates the power of expulsion to a trial committee or a regular meeting, every member, by joining the union, authorizes the action and thereby subjects the funds of the union to liability for abuse of that power.

The language of delegation rationalizes judicial undermining of the anachronistic rule which gave unincorporated associations almost total immunity from tort and contract liability. However, it provides no useful test of the limits of liability for it can be manipulated to deny liability entirely. Thus, if the offense charged were not provided in the constitution, or if the notice did not conform to the constitutional requirements, the union might argue that no authority had been delegated by the members to try that case, and that therefore no liability could be found. If the trial body were improperly constituted (a common defect) a court might hold that there was no delegation whatsoever to that body and deny damages.²⁴⁸

Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931); *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y. Supp. 785, *modified sub nom.* *Shapiro v. Brennan*, 269 N.Y. 517, 199 N.E. 515 (1935); *Brooks v. Engar*, 259 App. Div. 333, 19 N.Y.S.2d 114, *appeal dismissed*, 284 N.Y. 767, 31 N.E.2d 514 (1940); *Reubel v. Lewis*, 47 N.Y.S.2d 147 (Sup. Ct.), *aff'd*, 268 App. Div. 764, 50 N.Y.S.2d 164, *appeal dismissed*, 284 N.Y. 767, 57 N.E.2d 840 (1944); *O'Brien v. Papas*, 49 N.Y.S.2d 521 (Sup. Ct. 1944).

245. *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951); *Glauber v. Patof*, 294 N.Y. 583, 63 N.E.2d 181 (1945); *Browne v. Hibbets*, 290 N.Y. 459, 49 N.E.2d 713 (1943); *Havens v. King*, 221 App. Div. 475, 224 N.Y. Supp. 193 (1927), *aff'd sub nom.*, *Havens v. Dodge*, 250 N.Y. 617, 166 N.E. 346 (1929); *Gleeson v. Conrad*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949). The courts, however, were at times liberal in finding ratification by silence. *O'Brien v. Papas*, 49 N.Y.S.2d 521 (Sup. Ct. 1944).

246. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

247. *Id.* at 296, 174 N.Y.S.2d at 642, 151 N.E.2d at 79.

248. In such cases, the courts often declare that the trial body had "no valid existence" and that the proceedings are "totally void." This language is used to justify excusing exhaustion, but having used such language to find that the plaintiff had a cause of action, the court would make transparent its dissembling metaphor to find "delegation." This embarrassment was nearly avoided in *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959) by ordering retrial on the issue of damages. This verbal inconsistency will be softened by separation.

Such wooden logic would defeat the more basic policy which motivated the Court of Appeals in awarding damages, for the member's need for protection is the same regardless of the defect which made his expulsion wrongful. As the court said:

If one wrongfully expelled has no redress for damage suffered, little more is needed to stifle all criticism within the union. Few are martyrs enough to suffer the anguish, the risk and the expense of the suit itself; fewer, if any, to suffer in addition, the loss of wages for the usually lengthy period before reinstatement and restoration of union employment.²⁴⁹

The union's liability, however, is not unlimited, for courts are reluctant to make union funds liable for every act of misconduct of the officers. In *Madden v. Atkins* one of the plaintiffs was a member of another local. He was not served with charges or tried, but when he sought to ship out of the local hiring hall President Atkins tore up his shipping permit. The court, without any helpful discussion, held that he could not recover against the local union, but only against Atkins personally. He was not wronged "by any act of the membership."²⁵⁰ This leaves indistinct the limits of liability. The test would seem to be whether those who imposed the discipline had some substantial color of authority to act either under the constitution or some other formal action by a governing body of the union.²⁵¹

The amount of damages is usually based on the loss of earnings due to the discipline, including loss of fringe items such as health and welfare benefits and pension rights.²⁵² Calculating these may be complicated, but creates no serious stumbling block.²⁵³ However, if the discipline results in a loss of seniority rights, the problem of measuring damages is not one of mathematics but of fortune telling, and courts can at best make informed guesses. Presumably, added damages might be awarded for emotional distress caused by the discipline, but this seems never to be sought.

The amount recovered in these cases can be substantial if several members have been disciplined and the proceedings are prolonged. In two cases, the

249. *Madden v. Atkins*, 4 N.Y.2d 283, 296-97, 174 N.Y.S.2d 633, 643, 151 N.E.2d 73, 80 (1958).

250. *Id.* at 297, 174 N.Y.S.2d at 643, 151 N.E.2d at 80.

251. Some light on the extent of the union's liability may be shed by the earlier cases awarding damages which were relied on by the court as precedents. These included: *Blek v. Wilson*, 262 N.Y. 253, 186 N.E. 692 (1933) (no notice of charges and no substantial evidence to support the charge); *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931) (Conduct did not violate offense provision of constitution); *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y. Supp. 785 (1935) (tried before the wrong trial tribunal); *Brooks v. Engar*, 250 App. Div. 333, 19 N.Y.S.2d 114 (1940) (denied fair trial).

252. The expelled member is, of course, under a duty to mitigate damages by seeking other employment, or, as the court observed, the union itself might mitigate by permitting him to work pending appeals within the union. *Ibid.*

253. For some of the complexities in calculating damages, see *Madden v. Atkins*, 199 N.Y.S.2d 1009 (Sup. Ct. 1959), *modified*, 203 N.Y.S.2d 33 (App. Div. 1960).

damages awarded were more than \$3,000,²⁵⁴ and one case was settled for \$8,000. Far overshadowing all others is *Madden v. Atkins*, in which five members were awarded a total of nearly \$250,000 against the local union.²⁵⁵ Judgments against the local union, even large ones, are normally collectible, for local treasuries have usually proven to be adequate.²⁵⁶

The damage remedy helps supplement the remedy of reinstatement, but its practical value is subject to substantial discount. First, since the enactment of sections 8(a) (3) and 8(b) (2) of Taft-Hartley, unions have tended to avoid infringing on the disciplined member's employment opportunities in any provable fashion.²⁵⁷ Second, the awarding of damages tends to make settlement more difficult and protracts litigation, for the slate can not be wiped clean by restoring the man to membership. In *Madden v. Atkins* the litigation over damages continued for more than two years, with a multitude of motions, hearings, and appeals after the decision on the merits. Third, and probably most important, there are serious political obstacles to collecting damages. Union members tend to accept in good grace judicial orders of reinstatement, but they rebel against any attempt to appropriate a part of their dues money. The one who collects damages finds himself politically discredited.²⁵⁸ Investigation has shown that only in exceptional cases are the damages in fact collected, for the reinstated member does not wish to risk this ostracism.²⁵⁹ Because of these limitations on the damage remedy, it is apparent that damages are no substitute for prompt reinstatement in the union.

254. *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931); *Shapiro v. Gehlman*, 244 App. Div. 238, 278 N.Y. Supp. 785 (1935), *modified, sub nom.*, *Shapiro v. Brennan*, 269 N.Y. 517, 199 N.E. 515 (1935).

255. The damages for the seven months that the union was in contempt for failure to reinstate after the order by the Appellate Division was \$42,887, including \$7,000 attorney's fees. See *Madden v. Atkins*, 19 Misc. 2d 138, 191 N.Y.S.2d 709 (Sup. Ct. 1959). The damages for the four and one-half years of expulsion prior to this were assessed at \$199,477. *Madden v. Atkins*, 199 N.Y.S.2d 1009 (Sup. Ct. 1959), *modified*, 203 N.Y.S.2d 33 (App. Div. 1960). For a period of over seven months, this remained unpaid and was accruing interest at more than \$1,000 a month.

The sixth plaintiff, who was not expelled but whose shipping permit was torn up by *Atkins*, recovered a judgment against him individually for \$42,817. *Id.* at 1020.

256. The \$250,000 judgment in *Madden v. Atkins*, for example, was collectible. However, the judgment against *Atkins* individually appeared to be largely uncollectible.

257. This restraint does not apply where the employer is outside the discretionary jurisdictional limits of the NLRB, or if the employment is not subject to the act. For example, *Madden v. Atkins* involved the Master Mates and Pilots, a union of licensed deck officers who under § 2(11) were "supervisors" and therefore not subject to the act.

258. In the election in Local 88, following *Madden v. Atkins*, the one candidate who had a judgment for damages was defeated and it was generally felt that his damage claim contributed substantially to his defeat.

259. *Madden v. Atkins* was exceptional, for the local's assets had been impounded for two years. The local had been under trusteeship in the meantime and had accumulated a new treasury. Collection out of the impounded assets created relatively little resentment, but collection out of the active treasury was a political impossibility.

2. Delay in Legal Relief

The effectiveness of legal remedies depends almost entirely on the promptness with which reinstatement is achieved. The test is not the time required to get a final adjudication on appeal, but the time required to obtain an order of reinstatement. Long delays in litigation impose little hardship if the members' rights are protected in the interim. The critical stage, therefore, is not the appeal but the motion for a temporary injunction.

Courts can and do give temporary injunctions protecting disciplined members' rights pending trial of the issues, and such relief can be given with whatever speed the situation demands.²⁶⁰ In one recent case a temporary injunction was issued in time to block a hearing scheduled to be held in a distant city,²⁶¹ and in two other recent cases *ex parte* restraining orders were granted to interrupt hearings already begun.²⁶² Although obtaining a temporary injunction after discipline has been imposed takes somewhat longer, study of court files reveals that such motions are usually decided in less than two months from the time the plaintiff brings suit.

Courts do not always issue temporary injunctions to protect the disciplined members pending trial. Their refusal is excused with obscuring language that "the facts are in dispute," or that there is "no clear showing of a right to relief," which is indeed true, just as it is in those cases in which they do grant temporary injunctions. Close study of the cases leads to the conclusion that when interim relief is denied, it is not because the particular remedy is inappropriate, but because the court is not convinced of the substantive merits of the plaintiff's case.²⁶³ The judges weigh the conflicting affidavits, hear the oral argument, and try to judge the underlying merits. The standard applied is substantially the same as that used for granting permanent injunctions. This conclusion is borne out by the fact that almost invariably the result after trial is the same as that on the motion for temporary injunction.²⁶⁴

260. For older cases in which temporary injunctions were granted, see *Koukly v. Canavan*, 154 Misc. 343, 277 N.Y. Supp. 28 (Sup. Ct. 1935); *La Rose v. Possehl*, 156 Misc. 476, 282 N.Y. Supp. 332 (Sup. Ct. 1935); *Licameli v. Weinstock*, 3 L.R.R.M. 799 (N.Y. Sup. Ct. 1938); *Dusing v. Nuzzo*, 26 N.Y.S.2d 345 (Sup. Ct. 1941); *Browne v. Hibbets*, 263 App. Div. 827, 31 N.Y.S.2d 541 (1941), *modified*, 290 N.Y. 459, 49 N.E.2d 713 (1943).

261. *Murphy v. Sullivan*, N.Y. Sup. Ct., Erie County, Feb. 12, 1958.

262. *Wesson v. Actors Equity*, N.Y. Sup. Ct., N.Y. County, Jan. 3, 1958; *Bauer v. American Fed'n of Grain Millers*, N.Y. Sup. Ct., Erie County, May 5, 1958.

263. See, e.g., *Dakchoulous v. Ernst*, N.Y. Sup. Ct., Albany County, Nov. 16, 1951, *later proceeding in same case*, 203 Misc. 277, 118 N.Y.S.2d 455 (Sup. Ct. 1953), *aff'd*, 282 App. Div. 1101, 126 N.Y.S.2d 534 (1953); *Weinstock v. Ladisky*, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950); *French v. Ladisky*, 194 Misc. 549, 78 N.Y.S.2d 690 (Sup. Ct. 1947); *Roman v. Caputo*, 28 L.R.R.M. 2616 (N.Y. Sup. Ct. 1951). All of these cases involved plaintiffs accused of communist taint who had been uniformly unsuccessful in the courts. See text accompanying notes 110-15 *supra*. See also *Perez v. Curran*, N.Y. Sup. Ct., N.Y. County, April 4, 1957 (expelled for admittedly stabbing a crewmate).

264. The only two exceptions found were cases in which plaintiff won at trial after losing motion for temporary injunction are *Reubal v. Lewis*, 182 Misc. 30, 43 N.Y.S.2d

Experience would suggest that courts should err on the side of liberality in granting temporary injunctions in discipline cases. Interim protection of the disciplined member normally places no substantial hardship on the union, for it only delays the impact of the penalty; but lack of protection may seriously injure the member, depriving him of his rights of participation in the democratic process in the union or even his livelihood. *Madden v. Atkins*²⁶⁵ dramatically demonstrates the danger not only to the individual, but also to the union and to the courts themselves of the denial of interim relief. The leaders of the opposition party were expelled in the spring of 1953, and after some futile efforts to appeal moved for a temporary injunction in October, 1953. This was denied one month later, and the denial was affirmed in January, 1954, three months after the suit was begun. Obtaining a decision after trial, again unfavorable, took 18 more months, and the plaintiffs who had been out of work for two years were faced with raising money to print the voluminous record for appeal. This caused additional delay, and it was not until May, 1957, that a reversal was obtained in the appellate division and they were ordered reinstated. During the four intervening years the opposition group in the union was strangled and the ruling clique held unchallenged control. In addition, the union was saddled with a monumental financial liability, and the courts were burdened for two more years with a multiplicity of complex proceedings to determine the amount of the damages and to collect them. Hindsight makes doubly clear that the interests of both parties and the interests of the court would have been served by granting a temporary injunction at the outset.²⁶⁶ A plaintiff's temptation to abuse this remedy by deliberate delay in pressing his suit can be curbed by the court's continuing power to revoke the injunction.

In over half of the cases the plaintiff does not even seek interim relief, and relief is then necessarily postponed until after trial.²⁶⁷ The very failure to seek a temporary injunction removes the badge of urgency, obtaining preference for trial becomes more difficult, and the court feels no need for speed.²⁶⁸ The

540 (Sup. Ct. 1943) (temporary injunction denied), 47 N.Y.S.2d 147 (Sup. Ct. 1944) (reinstatement and damages granted); *Watson v. Victory*, 29 L.R.R.M. 2354 (N.Y. Sup. Ct. 1952) (temporary injunction denied), N.Y. Sup. Ct., N.Y. County, April 15, 1952 (reinstatement granted).

265. 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958).

266. *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 N.Y.S.2d 226 (1959), has somewhat the same history. The plaintiffs moved for a temporary injunction, but after seven months this was denied, N.Y. Sup. Ct., Onondago County, Oct. 5, 1957. A year after suit was begun, the case was tried and plaintiffs were denied relief, and thirteen months later the appellate division ordered reinstatement and then remanded the case for trial on the question of damages.

267. In the average discipline case, getting a case to trial takes more than a year. However, a substantial number may never reach trial but are effectively disposed of on motions to the pleadings or are settled by the parties.

268. In *Lafferty v. Fremd*, Aurelio, J., N.Y. Sup. Ct., N.Y. County, March 1, 1955, the plaintiff sought and obtained a temporary injunction, this was appealed and affirmed,

reason for failure to seek interim relief is not clear, but apparently many lawyers are so misled by judicial language as to the extraordinary character of such relief that they mistakenly consider the request futile.

Complete litigation of these cases is time consuming, but exceptional cases such as *Madden v. Atkins* create an exaggerated impression of delay. In half of the discipline cases studied, the last legal step, including appeals, was completed within six months of the commencement of the suit. Less than one-fourth took more than two years.

Some instances of delay seem inexcusable. One judge delayed five months, and another seven, in deciding motions for temporary injunctions,²⁶⁹ although many such motions are disposed of in a matter of days. In several cases, appeals to the appellate division took from one to two years, while some were handled in less than six months. Responsibility for delay does not rest solely on the courts or on the union lawyer's use of dilatory tactics. A substantial portion rests on the disciplined member and his lawyer. In one case the plaintiff seemed hesitant to go to trial for two years,²⁷⁰ and in another the plaintiff's lawyer refused to move for trial, causing a three year delay before he was removed.²⁷¹ The fact that litigation is often used as a political instrument in a factional fight may lead to delaying tactics, first by one side and then the other, to get the maximum political advantage.

Study of the cases suggests that delay in judicial proceedings is not an insuperable obstacle to effective legal remedies. By giving interim relief courts can and do give the disciplined member substantial protection against the inevitable slowness of litigation. Furthermore, the equitable proceedings through which these cases are handled normally move relatively rapidly through the courts, even in those areas where delays in jury trials are notorious.

3. *Costs of Litigation*

The danger that the legal rights of a disciplined member will go by default because of the cost of asserting them in court is obvious, but the source and size of that danger is not so apparent.

tried and the injunction made permanent, 36 L.R.R.M. 2674 (N.Y. Sup. Ct. 1955), all within eight months of the beginning of the suit. In *Watson v. Victory*, 29 L.R.R.M. 2354 (N.Y. Sup. Ct. 1952), the court denied a temporary injunction, set the case for an early trial, and after trial ordered reinstatement, all within four months of the beginning of the suit, *Watson v. Victory*, Walter, J., N.Y. Sup. Ct., N.Y. County, April 15, 1952.

269. See *Dakehohylous v. Ernst*, 203 Misc. 277, 118 N.Y.S.2d 455 (Sup. Ct. 1952); *Fittipaldi v. Legassie*, N.Y. Sup. Ct., Onondaga County, Oct. 5, 1957.

270. *Cromwell v. Morrin*, 91 N.Y.S.2d 176 (Sup. Ct. 1949). The fact noted in the text, not contained in the opinion, was derived from discussions with principal parties in the case.

271. *Gleeson v. Conrad*, 276 App. Div. 861, 93 N.Y.S.2d 667 (1949). The fact noted in the text, not contained in the reported opinion, was derived from discussions with principal participants in the case.

The most critical factor is the inequality of the resources of the parties. The plaintiffs are wage earners who must finance the litigation out of small savings and current income. If the court fails to protect the member's earning power during the litigation, he is quickly left without any resources to continue the fight. The union has available its treasury to finance costly procedural maneuvers and extended appeals. If the disciplined member is given no interim protection, the union has a double incentive to delay, complicate, and otherwise protract the litigation. Due to the disparity of financial resources the legal struggle is inherently unequal, but without interim protection, the individual is nearly helpless.

The availability of the damage remedy is but small help. The plaintiff's lawyer may continue the fight with the hope of ultimately winning an award from which he can collect a fee, but the uncertainty of victory and the political obstacles to collecting from the union treasury may make this a poor risk.²⁷² The plaintiff may be confronted with demands for cash outlay for transcripts, printed records, and briefs. His anticipated damage award is seldom useful collateral to finance these outlays.²⁷³

These obstacles are nearly insuperable when a lone individual is pitted against the union. Most of the litigated cases, however, are not of this type, but are in fact part of a factional fight. The plaintiff is, for practical purposes, not an individual but an opposition group.

When the litigation is sponsored by a faction or group, the problem of costs is significantly altered. First, the group can raise money. Contributions are commonly solicited, and the group may even create a formal organization with dues. Although it cannot match the resources of the union, it can usually obtain enough money for necessary expenses.²⁷⁴ In a number of cases opposition groups have demonstrated their ability to carry through extended litigation. Second, obtaining legal services becomes much easier. The plaintiffs' lawyer knows that if the opposition group wins control of the union he will

272. The courts have uniformly refused to award lawyers fees. *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931); *Metzler v. Conrad*, 276 App. Div. 861, 93 N.Y.S.2d 670 (1949). Even where suit was brought against those who had maliciously instigated the expulsion proceedings, the plaintiff's verdict for recovery of attorney's fees was upset on the grounds that some of the money had been donated by other members of the union and the plaintiff failed to show how much he was obligated to repay. *Coleman v. Engeling*, 272 App. Div. 805, 70 N.Y.S.2d 585 (1947).

273. The cost of appeal is often prohibitive, especially if it is after a trial. Obtaining a transcript and printing the record can cost not only hundreds, but thousands of dollars. This requires cash, not a self-sacrificing or optimistic lawyer. Because of these costs, the outcome in the trial is crucial. If the plaintiffs win, the costs fall on the appealing union.

274. Even for a substantial organized group, costs of appeal can create severe difficulties. In *Madden v. Atkins*, 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73 (1958), the filing of the appeal was delayed nearly a year while the plaintiffs sought to raise the funds necessary to obtain the transcript and print the record. The fact that the appellate divisions ultimately awarded costs, 4 App. Div. 2d 1, 162 N.Y.S.2d 576 (1957), assessed at \$3,338 by the trial court, N.Y. Sup. Ct., N.Y. County, July 3, 1957, did not give the plaintiffs cash when it was critically needed.

almost certainly become the union's counsel. This is a contingency worth his time and effort. Even if the group does not win control, his representing the group gives the lawyer an opportunity to make himself known to each member of the group, demonstrate his ability, and act as friend and champion. This widens his circle of potential clients for negligence, divorce, and other general practice.²⁷⁵

This study, including interviews with lawyers, indicates that the problem of costs is predominantly one of the isolated individual. Yet, if there is an active opposition group within the union, even he may gain protection, for any substantial injustice will be seized by the opposition as political ammunition. The group then provides the financial base for carrying through the litigation. The very fact that so few cases involve individuals unsupported by factional groups suggests that the lone member's rights go by default, and many lawyers frankly admitted that they would not take a case unless it was backed by a substantial group.²⁷⁶

The extent to which individuals and small groups have been able to enforce their rights in court is a tribute to those lawyers who, fired by a sense of injustice, have contributed unlimited time and energy with no anticipation of even meagre compensation. The burden falls heavily on the lawyer who fulfills his professional responsibility, but even that sacrifice is often inadequate.

CONCLUSION

Judicial doctrines do not decide concrete discipline cases—this is apparent from the face of the published opinions. The contract theory which purports to confine the court to applying the union constitution is at most a rough guide, for ambiguous and incomplete discipline provisions leave courts free to draw their own boundaries. The exhaustion of remedies rule, disarmed by multiple exceptions, is little more than an admonition against judicial haste. The threadbare cloak of language in the opinions cannot conceal that these doctrines do not bind the court, nor do they explain the decisions.

Close study of the cases, and particularly examination of all of the facts before the judge, emphasizes not only the emptiness of the doctrines, but a

275. The lawyer's willingness to take these cases for the purpose of obtaining clients in nonlabor cases plays a far greater role in internal union litigation than is commonly recognized. Members of railroad or seamen's unions have less difficulty in obtaining counsel than members of other unions because their claims for work injuries are not restricted by workmen's compensation and hold promise of substantial contingent fees. The lawyer who handled two cases involving lone individuals indicated that he took the cases because the individuals whom he represented had personal injury claims which assured the lawyer that his fee for the discipline case would be paid.

276. If the real defendant is the international, even a large group within the local is faced with the greatest difficulties. Lawyers for the international need spare no expense, delay, or diversionary tactic, and these may be supplemented by imposing a trusteeship on the local and thereby vastly enlarging the litigation as well as frustrating the opposition in gaining control.

willingness of the New York courts to create a body of law regulating union discipline. The pattern which emerges contains at least five marked elements, which at times coalesce and at times clash. First, a recognition of the value of union membership as a right to participate in union affairs, wholly apart from its importance in obtaining employment. Second, a strong concern for protecting free play of the democratic process in the political life of the union, including virulent criticism of union officers and organized opposition groups within the union. Third, an overriding hostility to communists or communist tainted factions within the union. Fourth, a stern insistence on the essential elements of procedural due process in union trials, including freedom of union tribunals from discernable bias. Fifth, a limited confidence in union appellate procedures and small reluctance to delay intervention while they work their way. These are the principal elements which, applied to the facts actually before the court, guide the decision.

This pattern, though clearly discernible, is neither boldly nor cleanly etched. Incantation of traditional doctrines dominates judicial opinions, even though the premises of those doctrines are contradicted by the pattern pricked by the decisions. Random cases violate the pattern, for unperceptive judges are deceived by language which obscures the result, and these vagrant decisions in turn blur the prevailing pattern. The insistence on procedural due process has not been disguised by doctrine, but has been boldly declared by the courts. In this area the lines have been drawn in greater detail and followed with greater consistency. Protecting political freedoms within the union has long been achieved by manipulating the contract theory, and this subterfuge has led to uneven protection. *Madden v. Atkins*, however, has now stripped away the veil of language and forthrightly protected these rights. Judges can now see clearly their responsibility and face squarely the difficult task of marking out the details. The degree of deference given to union appellate tribunals is almost wholly obscured by the consuming exceptions to the exhaustion rule, and it is here that the results have been most erratic.

The active role assumed by the courts in protecting individual rights and democratic processes within the union raises inevitably the critical question of the courts' competence to fill this role. This study provides no definitive answer, but close examination of what courts do, in contrast to what they say, tends strongly to dispel many doubts.

First, the court can and does obtain a full picture of the facts, including the underlying internal union conflict which gave rise to the discipline. Affidavits supporting motions for an injunction paint the picture in vivid terms, lawyers' arguments on those motions emphasize the facts rather than the law, and the nonjury trials are not, in practice, inhibited by restrictive rules of evidence. The judicial process thus permits, if not encourages, full development of the facts.

Second, many judges have shown substantial competence in understanding the internal workings of unions. Some of the most puzzling cases reveal, upon closer scrutiny of the full factual picture, remarkable judicial insight. Disci-

pline cases grow largely out of contests for political power, and the judge's own political experience often develops in him a special sensitivity to the problems involved. He knows the devices available, can see through disguised manipulation, and understands the needs for protection. The political process is in his area of expertness.

Third, judicial remedies are as effective as any the law knows. Temporary injunctions can be obtained without delay, even in a matter of hours where necessary. With interim protection, delay in trials and appeals becomes relatively unimportant. The cases examined show that judicial remedies are in fact much faster than most administrative remedies. The critical factor in judicial remedies is the willingness of the court to give interim protection with a temporary injunction, and at this point most courts have not displayed undue caution. The one inherent weakness is the cost of litigation and this becomes a serious problem for the isolated individual who can find no faction to champion his cause.

This study has focused solely on the handling of union discipline cases in the New York courts, and the conclusions drawn here may not be entirely valid in other states. The New York cases, however, are of first importance for they represent almost half of the reported opinions, and New York has historically provided many of the leading cases in the area of internal union affairs. The courts of other states have used the same doctrinal logic and have at times transparently manipulated it in the same way to reach the many of the same results. A similar study in other states might well reveal similar variance between the language of published opinions and actual disposition of the cases.

The willingness of New York courts to intervene in unions is not rooted in any special judicial hostility to unions. On the contrary, the legal climate in New York has long been relatively favorable to unions, and unions wield considerable political power even in the selection of judges. The study does not show that judges in highly unionized areas are more reluctant to intervene in internal union disputes than judges in nonunion areas, or that there is any parallel between willingness to issue labor injunctions and the willingness to enjoin union discipline.

New York is unusual only in the amount of experience which its judges have had in internal union cases—probably more than judges in any other state. Moreover, this is heavily concentrated, for over half of all the cases in the entire state are handled by the Supreme Court of Manhattan County. The judges of this court have had an opportunity to acquire a special expertise. Insofar as this concentration of experience affects the overall pattern, it may give added weight to the New York cases as guides to other states and to the federal courts who must give body and vigor to the skeletal provisions of the federal statute.