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JUDICIAL SETTLEMENT OF INTERNAL UNION DISPUTES

BY CLYDE W. SUMMERS*

UNREST and dissatisfaction within the New York local of the Masters, Mates and Pilots culminated in an attempt by an opposition group to defeat the incumbent officers in the 1952 election. The election committee, controlled by the opposition, demanded that the Secretary-Business Manager give equal access in the union newspaper to all candidates, make available mailing lists of the members and follow certain procedures in handling the mail ballots. When he refused, the committee sought a temporary injunction to compel him to comply. The court took no action for three months, and then after the election denied the injunction on the grounds that appeals within the union had not been exhausted.¹

Meanwhile the election campaign sank from crude sarcasm to virulent calumny. The opposition group distributed leaflets accusing President Atkins of having been a Communist, obtaining his license by fraud, stealing union funds, accepting bribes and rigging elections.² The other officers were also accused of corruption, “goon squad” activities, and betraying the members’ interests. The incumbents were not silent but countered with equally venomous attacks. The rebellious members of the election committee were replaced by the local executive board, and at the election, Atkins and the other incumbents were declared elected.

After the election some of the defeated candidates and their supporters formed a group within the local called “American Mariners Association of the National Organization of Masters, Mates and Pilots of America.” In announcing formation of the AMA, they described it as a “party” to provide a forum for free expression “within the framework of the Union” and thereby to create a “two-party system” which “will be a good and healthy thing for our Local.” They expressly declared that the AMA “cannot and will not be permitted to be a dual union” and would never “seek to cause the membership to ever disaffiliate from Local 88.” The AMA had various meetings and published a periodical called “True Course” which criticized the officers and their handling of the union's affairs.

The two-party system was not welcomed by Atkins and his cohorts. Individual charges were brought against five leaders of the AMA accusing them of slandering union officers by leaflets distributed during the election campaign, attempting to sabotage the election by bringing suit, setting up a dual union,

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²Five years later Atkins and another officer were convicted for taking a $100 bribe from a union member to get him a job. The judge, in sentencing Atkins, characterized him as “the prime power in a conspiracy to force working men to pay for the opportunity to ply their trade.” N.Y. Times, Jan. 21, 1958, p. 18.
and distributing AMA circulars. Madden, one of the defeated candidates, was the first to be tried. The trial committee, elected by the local, consisted of seven members. Three were paid employees of the union who owed their jobs to the officers who had been bitterly criticized, and a fourth was one who signed and prosecuted charges against another of the accused. The trial committee found Madden guilty of distributing "smear sheets" prior to the election and dual unionism and recommended expulsion which was approved by vote of the local. He appealed to the National Executive Board, asking for a stay which would permit him to continue working pending appeal, but received no reply. After waiting four months, he and the others who had been expelled in the meantime, sued for reinstatement and damages.

The trial court dismissed the complaint. First, the plaintiffs had failed to exhaust their remedies within the union. Second, the selection of the trial committee was proper as "the only course left open to the court is to abide by the will of the majority of the membership." Third, the formation of the AMA could be found to violate the member's implied obligation of loyal support. Whether a two-party system "is for the ultimate benefit of the organization . . . is for the organization itself to determine on facts presented from which such conclusion may be drawn." Similarly, "personal attacks upon fellow members . . . may tend to impair the confidence of the members in the union itself. If so, then the membership could well find that such conduct was detrimental to their union." The court found evidence supporting these conclusions by examining the personal history of some of the expelled members. One had once supported the Committee for Maritime Unity created by Harry Bridges, and another had once been a member of the Communist Party.

The Appellate Division reversed, ordering the plaintiffs reinstated. Failure to exhaust internal remedies was excused. Appeals to the National Executive Board were futile because it was presided over by Atkins who had been the chief target of criticism, and appeals to the convention were not available within a reasonable time, especially since expulsion barred the plaintiffs from working at

3. The union represents deck officers who are "supervisors" within the meaning of the Taft-Hartley Act. Therefore, the closed shop-hiring hall arrangement which prevails in the industry is not prohibited by Sections 8(a)(3) and 8(b)(2). The effect of expulsion is to bar the expelled member from employment.
4. A sixth man who was a member of another local but who regularly shipped out of New York was not formally tried, but his name was removed from the registry at Local 88's hiring hall and he was barred from any further work assignments. He also joined in the suit, demanding damages for loss of employment opportunities.
6. Id. at 18, 147 N.Y.S.2d at 29.
7. Id. at 20, 147 N.Y.S.2d at 31.
8. Id. at 21, 147 N.Y.S. 2d at 32.
10. Atkins was not only president of Local 88, but was also National President.
The trial of Madden was unfair because "there is grave doubt that... the members of the trial committee were impartial." Organizing the AMA could not be made the grounds for expulsion, for this was an exercise of the "right and opportunity of assembly and freedom of speech." Nor could distribution of election leaflets justify expulsion. "Although the text was strong and even defamatory, that is not abnormal in such struggles for power in a... trade union. If an opposition slate of candidates is not to be granted a reasonably free hand, there would be little chance of bringing corruption to light. We can not accept the doctrine that the court is bound to accept the organization's findings to the contrary and may not protect a militant minority from recrimination for its exercise of fundamental and natural rights."

The defiant insurgency and ruthless oppression in the Masters, Mates and Pilots are not typical of labor unions; nor are the opinions of either the trial or appellate court in Madden v. Atkins: typical of decisions in New York courts. However, the very grossness of the union's conduct and the polar extremes of the two opinions lay bare the most perplexing problem confronting the courts in deciding cases involving internal union affairs.

The pivotal question facing the courts is what standards should be applied in resolving these disputes. In Madden v. Atkins, the trial court's touchstone was the majority vote of the members. The fairness of the trial committee, the value of a two-party system, and the dangers of criticism were to be judged by the members, and that judgment was adopted by the court. The appellate court found its standards in the "common requirement" of impartial judges, "natural justice," and the protection of "fundamental and natural rights." In every case, behind the curtain of legalisms about "property rights," and the union constitution as a "contract," is the unending search for applicable standards.

The purpose here is not to advocate or prescribe particular standards, but only to seek to discover what kinds of standards are in fact being applied. This requires looking beyond the verbal formulas to search out the reasons which may have moved the courts but which they have been unable or unwilling to articulate clearly. Inquiry has been limited to reported cases decided by New York courts, for cases in a single jurisdiction make a more fruitful and workable sample for forming a hypothesis as to judicial behavior.

THE INEVITABILITY OF INTERVENTION

Echoing through the cases is the litany of reluctance to intervene in internal union disputes. This is more than empty psalm-singing; it reflects a deep-seated

11. A.D.2d at 18, 162 N.Y.S.2d at 592.
12. Id. at 16, 162 N.Y.S.2d at 591.
13. Id. at 17, 162 N.Y.S.2d at 591-92.
desire to avoid involvement. There is no need here to examine its wisdom, its logic, or its questionable ancestry in the law of voluntary associations. The reality of the desire makes it relevant, for it drives the court to search for rules and cling to forms which palliate that desire.

The courts, in spite of their reluctance, can not escape involvement. The right of Madden and his supporters to attend meetings and vote on union policies must be settled by the courts or fought out with fists and clubs at the union hall. The right to office after a contested election must be decided by law or by naked force; and the rights of a seceding local union to its treasury must be adjudicated or the funds will go to those who succeed in seizing and hiding them. The court must intervene or leave unions to the law of fang and claw.

Conceivably the courts could confine themselves merely to enforcing the decisions of the officers or bodies in the union, restricting their inquiry to determining what decision was in fact made at the highest level in the hierarchy of power. Thus, Madden's expulsion would be valid simply because the local had so voted and no higher authority had reversed. The court's sole function would be to arm the union's power structure with legal sanctions. Naked force would thereby be supplanted and the court would avoid all involvement with the merits of the dispute. However, union members would have no protection against arbitrary action or oppressive measures taken by intolerant majorities or highhanded officers. The New York courts have refused to entrust union hierarchies with such unchecked power, although a few, like the trial court in Madden v. Atkins, have come perilously close to blindly ratifying official union action.

Protection against arbitrary exercise of power inevitably requires the courts to inquire into the merits of the dispute, upset decisions of union officers, and actively compel corrective action. Once involved, extensive intervention may be inescapable. For example, President Moreschi of the Hodcarriers summarily removed the officers of Local 147 and ordered Vice-President Bove to take complete control of the local's affairs. The court upset this arbitrarily imposed receivership as beyond the power of the international officers and compelled Bove

14. The sequel in Local 88 is instructive. When President Atkins was convicted for taking bribes for back door shipping, his faction voted him a leave of absence and named a president pro tem. The insurgent group took over a union meeting and elected a new slate of officers. Both sets of officers then attempted to occupy the union hall, but the insurgents gained control of the telephones which enabled them to make job assignments. Finally the insurgents got full possession and changed all of the locks. N.Y. Times, March 15, 1958, p. 36. The insurgents called a meeting to hear charges against the old officers, but the holding of this meeting was enjoined by court order. N.Y. Times, March 20, 1958, p. 58. The international officers appointed a trustee to take over the affairs of Local 88, but the insurgents refused to surrender and the trustee set up a rival hiring hall. Both groups claimed the right to assign men to ships. The chaos abated when the court ordered the insurgents to turn over the union hall and all books and records to the trustee. N.Y. Times, March 26, 1958, p. 73.
to relinquish control; but Moreschi then ordered contractors to refuse to deal with Local 147 and to hire men from other locals. The court again had to intervene to enjoin this order. Moreschi then called a constitutional convention, obtained amendments giving him broad powers over local unions, and brought charges against Local 147. After extended hearings before the international executive board, its charter was revoked, and it was ordered to turn over its assets to a new local. Once again, the court had to intervene, this time with a sweeping injunction extensively regulating the relations between the international and the local.

In the meantime, Moreschi was having similar problems with Local 17 which had also been put in the control of Vice-President Bove. Members complained that no elections had been held for four years, meetings were held at a night club owned by the treasurer, and that $400,000 of local funds were missing. Members who complained or raised questions were blacklisted with employers and expelled from the union. To protect against this the court issued a ten page injunction prohibiting unjustified discipline, compelling an accounting and ordering an election under supervision of the court. The insurgents won the election, but within six months Moreschi had again seized the local. When new elections were held, two balloting occurred, one sponsored by Moreschi and one by the insurgents, with two separate slates of officers elected. The court again intervened, upsetting the international's determination of which election was valid and installing the insurgents in office. These Hodcarriers cases are not typical, for few unions are so crudely defiant, but they graphically reveal the depth and breadth of judicial involvement. The felt need to protect against arbitrary action inevitably overrides the courts' reluctance to intervene.

Judicial intervention is not substantially reduced by incantations that the courts will not act until all appeals are exhausted, for ritualistic repetition of this rule serves only as penance for its transgression. Exhaustion of appeals is not

15. Gallagher v. Moreschi, unreported decisions, N.Y. Sup. Ct. Temporary injunction granted June 23, 1939; permanent injunction, July 12, 1941. For more complete description of this series of cases, see Note, Judicial Intervention in Revolts Against Union Leaders, 51 YALE L.J. 1372 (1942).


19. The court failed to fix the term for which the new officers should serve. Moreschi ruled that under the constitution their terms expired in June, four months after the election, and the court refused to intervene. Dusing v. Nuzzo, 178 Misc. 965, 37 N.Y.S.2d 750 (Sup. Ct. 1942).

required where further appeals would be futile,\textsuperscript{21} involve excessive delay,\textsuperscript{22} or impose unreasonable hardship.\textsuperscript{23} To these exceptions the courts have added the all-embracing excuse that the proceedings were "void" for lack of "jurisdiction" because of procedural or substantive defects\textsuperscript{24}—in short, in all cases where the union has acted wrongfully!\textsuperscript{25} Courts do not always take full advantage of these exceptions, for the reluctance to intervene sometimes prevails, but such cases are themselves exceptional. More than 200 New York cases involving judicial intervention in union affairs have been reported. In only twenty did the courts refuse to act because internal appeals had not been exhausted,\textsuperscript{26} and six of these were suits to enjoin the union from proceeding even before it had held a hearing or made a decision.\textsuperscript{27} The exceptions have in practice all but swallowed the rule. The validity and usefulness of the rule or its various exceptions are not now relevant. What is relevant is that the courts have, for good reasons or for bad, proven themselves unable to remain aloof but have felt compelled to intercede.

The extent and frequency of judicial intervention grow out of the need to protect against the arbitrary exercise of power. This, in turn, requires some enforceable standard against which procedures and decisions can be measured. The


\textsuperscript{22} See, e.g., Browne v. Hibbets, 250 N.Y. 459, 49 N.E.2d 713 (1943) (waited one month for reply on appeal); Mainecuf v. Robinson, 41 L.R.R.M. 2493 (N.Y. Sup. Ct., 1958) (appeal of election dispute not available until after election); Willens v. Sofield, 144 N.Y.S.2d 78 (Sup. Ct. 1955) (invalid local constitution would be put in effect before appeal decided); MacPherson v. Green, 72 N.Y.S.2d 790 (Sup. Ct. 1947) (no appeal until after end of suspension); Gleeson v. Conrad, 276 App. Div. 861, 93 N.Y.S.2d 667 (2d Dep't 1949) (no convention for five years).

\textsuperscript{23} Hardship may be found not only in an expelled member being denied employment pending appeal, but also in the distance to the appeal tribunal. See, e.g., Madden v. Atkins, supra note 9; Corregan v. Hay, 94 App. Div. 71, 87 N.Y. Supp. 556 (4th Dep't 1904).


\textsuperscript{25} See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1056-93 (1951); Vorenberg, Exhaustion of Intra Union Remedies, 2 Lab. L.J. 487 (1951).

\textsuperscript{26} The only case in which the Court of Appeals has refused to give relief because action was brought prematurely is Thomas v. Musical Mutual Protective Union, 121 N.Y. 45, 24 N.E. 24 (1890), in which a member served with charges sought to enjoin the union from trying him in the first instance.

\textsuperscript{27} In thirteen other cases the courts examined the merits, found there was no substance to the suit and then used failure to exhaust as a make-weight. See, e.g., Dakchoylous v. Ernst, 282 App. Div. 1101, 126 N.Y.S.2d 534 (3d Dep't 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).
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function of the standard is not only to guide the court in settling these disputes but to insure that such disputes will be settled by established rules and not by unbounded judicial discretion.

THE UNION CONSTITUTION AS A STANDARD

In their search for a standard, the courts have turned to the union constitution, rationalizing its use by denominating it "a contract which defines the privileges secured and the duties assumed by those who have become members." Its provisions become the binding law, defining the web of rights and powers within the union structure, prescribing protective procedures, and circumscribing the authority of the officers. The rule of raw power is replaced by the rule of law. This is accomplished with a minimum of judicial interference, for the court enforces the rules made by the union itself in drawing its constitution, and the union retains its freedom to order its own affairs by amending those rules.

The significance of the contract theory is that the union's own constitution becomes the governing law in judicial settlement of internal disputes. Whether the constitution is a contract or not can best be left to humorless legal filing clerks who specialize in pigeon-hole problem solving. The crucial question is the usefulness of the constitution to guide and govern the courts in settling union disputes.

The standard at first blush has an appealing guise of simplicity and judicial detachment. The court need merely read the words of the constitution and apply them without exercising any independent value judgment or becoming otherwise embroiled in the dispute. For example, a member who had been charged with dual unionism was suspended after he refused to appear for trial. The court, without discussing the merits, ordered reinstatement on the grounds that the constitution provided for verdict by default only after three refusals to appear.

Such simplicity, however, is largely illusory. Union constitutions are seldom tightly integrated and precisely worded documents, but are a patchwork of provisions with a medley of details and vague generalities. The courts, in applying the standard must fill gaps, resolve ambiguities, and read content into meaningless clauses. Thus, when Captain Bradley of the ILA removed two candidates from

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the ballot in a local union election because they had supported the AFL and had testified in criminal cases against union members, the court could find no specific guide in the constitution. It had to fill the gap, and did so by requiring the same notice and hearing prescribed for disciplinary proceedings. Similarly, when the Farm Equipment Workers, after being expelled from the CIO, sought to merge with the United Electrical Workers, the court had to determine how such merger could be effected in the face of ambiguous constitutional provisions which said that "amendments" could be made only by the convention but also said that "any question" could be submitted to referendum. In another case the court had to decide whether refusal to obey an order of the local president constituted disobedience to "regulations, rules, mandates or decrees of the Union." and in numerous cases the courts have had to give meaning to such vague clauses as "causing dissension," and "conduct detrimental to the union." The courts' function in such cases is in form simply one of interpretation, but in fact it is much more, for they have no clear guides either in the words of the constitution, intent of the parties or past practice. They are compelled to supplement with self-made standards.

The constitution is not only an incomplete standard but its guide lines are loose and insecure, for the courts are confined only within the extremes of restrictive reading of the bare words and expansive implying of unwritten provisions. For example, the Court of Appeals in one case implied a broad obligation of "loyal support" binding on all members, but in another case refused to imply a power in the union to require a member found guilty of an offense to make prompt payment of the fine imposed. The General Executive Board has been held in one case to have implied power to try local officers even though the constitution provided for trial by the local union, but in another case the General Executive Board was held to lack power to take over a local

34. Polin v. Kaplan, supra note 28. The court refused to say what this meant and specifically avoided deciding whether it prohibited maliciously slandering an officer; but Madden v. Atkins, supra, note 9, held that such attacks on officers during an election campaign did not violate any inherent obligation.
35. Browne v. Hibbets, supra note 22. In Bricklayers v. Bowen, 183 N.Y. Supp. 855 (Sup. Ct. 1920), aff'd, 198 App. Div. 967, 189 N.Y. Supp. 938 (4th Dep't 1921), the court refused to imply any power to punish for refusal to obey orders of the international executive board, but implied an obligation on the union to provide notice and hearing before suspending members.
union because the constitution provided that the President could take over locals.37

The breadth of the spectrum between a literal interpretation and the adding of implied terms is suggested by the secession cases. The constitution of the Retail Clerks provided that on dissolution of a local, its funds should go to the International to be held for the clerks in the area when they were reorganized. The court, reading the constitution literally, found no clause expressly requiring that only affiliated locals were entitled to such funds. It therefore awarded the funds to the seceding local which had "reorganized" the clerks in the area.38 At the other extreme, express provisions in the constitution of the United Electrical Workers were nullified by the court on the grounds that the union's ouster from the CIO constituted the failure of an "implied condition" in the contract between the parent and local union.39 Other cases have rejected such an implied condition and enforced the clause forfeiting the assets to the international.40 Between these extremes lies a range of alternatives from which the courts must choose, and their choice is governed not by union-made standards but by judge-made standards.

Uncertainty and flexibility exist even when the constitution is admittedly clear, for the courts may strictly enforce its terms or require only substantial performance. In discipline proceedings, minor deviations from the constitution may be condemned as fatal defects41 or condoned as mere irregularities.42 Elections may be voided for failure to follow strictly the constitutional procedures,43 or confirmed on the grounds of substantial compliance.44 Even substantial defects may be found to be waived by appearing for a disciplinary hearing45 or by failure to object vigorously enough prior to the election,46 but readiness to find such

37. Spitzer v. Ernst, 190 Misc. 47, 72 N.Y.S.2d 570 (Sup. Ct. 1947). Similarly, in Coleman v. O'Leary, 58 N.Y.S.2d 612 (Sup. Ct. 1945), the court was unable to find any provision in the constitution making it an offense to disobey orders of an officer.
38. Suffridge v. O'Grady, 84 N.Y.S.2d 211 (Sup. Ct. 1948).

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The cumulative effect of these interpreting processes to widen the area of judicial choice is suggested by two interesting cases. In Kaplan v. Elliott, rumors of corruption in Local 306 of the Stagehands Union led the General Executive Board to order a sweeping investigation of the local's affairs. No charges were served on anyone, but at the end of the investigation Kaplan and the other local officers were ordered removed. The court upheld this ouster, declaring that the lack of charges was no defect as the officers knew they were being investigated, the denial of the right to cross-examination was waived because they had not objected, and the power of the General Executive Board to remove local officers need not be stated in the constitution because it was inherent in the nature of the union. Such easy-going tolerance and indifference to the constitution was not countenanced in Schrank v. Brown. Schrank, president of Local 402 of the Machinists was suspended by Brown, the international president, pending investigation of local affairs. When the local issued a circular protesting this, it too was suspended and a receiver installed. The court refused to find any express or implied power to suspend pending trial and enjoined. Brown then brought charges to expel Local 402, but the court enjoined these proceedings because the charges named the wrong section of the constitution. Finally, Brown brought charges against both Schrank and Local 402 at the international convention, but the court again intervened on the ground that the constitution gave the convention no such express power and it could not be implied. Kaplan and Local 306 were entitled only to substantial justice; Schrank and Local 402 were entitled to the last jot and tittle of punctilious performance. These results were clearly not dictated by the unions' constitutions, but were decided according to undisclosed judicial values.

Judicial rewriting of the constitution may extend beyond “interpreting” to boldly excising certain provisions and frankly replacing them with court-tailored standards. Procedural provisions allowing summary expulsion of members for serious offenses have been declared “contrary to natural justice” and requirements of notice and hearing written into the constitution by the courts. The right to

48. See note 36 supra.
49. 192 Misc. 80, 80 N.Y.S.2d 452 (Sup. Ct. 1948).
50. 192 Misc. 603, 81 N.Y.S.2d 687 (Sup. Ct. 1948).
confront one's accusers, to hear the evidence and to cross-examine witnesses can not be contracted away. The notice must be definite, the place of the hearing convenient, the tribunal disinterested, and a verdict of innocent can not be reversed on appeal. Not the union by its constitution, but the court by its opinion prescribes these minimum procedural protections. The constitution as a standard is rewritten in the court's own image.

This contract logic which empowers the judge to void provisions which conflict with his views of public policy is equally applicable to substantive union regulations. Thus, one court has said, "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 . . . would be illegal and unenforceable." In Madden v. Atkins, the court declared that prohibitions against organizing an opposition party or carrying on a vituperative campaign would be void. Although the logic has no limits other than judicial self-restraint, it has thus far been applied only to protect basic democratic rights of union members. Even so, the court bears the burden of creating its own standard. For example, in Maltese v. Dubinsky, the union constitution required that every elected officer on the union payroll submit resignations in blank before taking union office, and these resignations could be made effective any time by a two-thirds vote of the General Executive Board. The court was faced with the difficult problem whether this unlimited right in the international officers to remove local officers without notice, hearing, or even explanation was contrary to public policy. The judges had no external standards to guide them but could consult only their inarticulate scale of values.

The union constitution has proven to be a wholly inadequate standard for the courts in settling union disputes. At best, it fixes loose limits within which the courts can choose solutions, but even those limits are elastic and ill-defined. In the stubborn cases which require judicial intervention, the courts are com-

60. In Polin v. Kaplan, supra note 28, the right to sue officers of the union for an accounting was described as "an absolute right," and protected.
62. Consider also Weinstock v. Ladisly, 197 Misc. 859, 98 N.Y.S.2d 85 (Sup. Ct. 1950) in which the court had to decide whether a member could be expelled because he was a member of the Communist Party.
monly without any objective guides but are left to their own vagrant or wilful choices.

The courts are faced here with something more than the commonplace problems of interpretation. The constitution seeks to define a whole network of complex relationships in a document drawn to guide officers and members in their daily dealings rather than lawyers and judges in litigation. Search for intent is fruitless, for the origin of the contested clauses is usually buried in cryptic minutes of forgotten conventions. Search for purpose is equally unhelpful, for the purposes are seldom single or capable of clear statement. Rarely do the courts even attempt to go beyond the words to the legislative history or manifest purpose.

Compelled to create their own standards to supplement those provided by the union constitution, the courts have tended to mould the constitution itself to enforce judicial and not union value judgment. Their fear of involvement soothed by solemn genuflections to the contract theory, they have used the interpretation process less as a method of search for meaning than as a device for the insertion of values. The adding of implied obligations and the subtracting of clauses against public policy reveal the boldness with which the courts have departed from the constitution as a standard to create standards of their own.

JUDGE-MADE STANDARDS

Recognition that the courts are, in fact, fashioning their own standards brings us face to face with the critical question: What are those standards? Are the cases but a jumble of jack-straws in which judicial whimsy is thinly camouflaged by contract verbiage, or is there some discernible rational pattern? The judges' opinions give little guidance, for judges who compulsively avow that they but follow the constitution will not overtly declare their basis of judgment. However, by their selection of facts or inflection of phrase they may betray their hidden reasons. To search for these inarticulate standards is to grope in the semi-darkness where one may mistake shadow for substance, but some tentative conclusions may be suggested.

The most openly expressed judicial standard is protection of procedural due process. Regardless of what the constitution provides, the court will fashion and enforce its own minimum standards for a fair hearing without any evident reluctance to tell unions how they must conduct their affairs. Words are seldom wasted in warping the constitutional provisions, reading in implied clauses, or voiding oppressive ones. The court openly and directly applies its own standard of procedural fairness. This standard is not precise and its application leaves

64. See cases cited supra notes 53 to 58.
many uncertainties—what specific procedural protections does it require by way of detailed notice, subpoena power, cross-examination, or right of counsel? How do those requirements vary in different procedures such as denial of admission,65 expulsion of a member,66 removal of an officer,67 or imposing a trustee on a local union?68 Does it apply to such procedures as determination not to process a grievance or changing the jurisdiction of a local union?69 Some of these questions have been answered by the cases, but others have not been raised or squarely faced.

The precise content of this standard is not important here. The significant point is that in answering these questions the courts apply not personal whimsy but are guided by traditional norms of fairness evolved to govern judicial, administrative and even private proceedings. In spite of its indefiniteness, the standard is predominately external and not personal, is one which is commonly left to the courts to define; and is one which our legal system deems relevant in such proceedings.

The second broad judicial standard which emerges rather clearly from the cases is the protection of the democratic process within the union. Only a few cases, like Madden v. Atkins,70 have openly avowed this standard in protecting the right to organize opposition groups within the union or to make vitriolic attacks on the officers and their conduct of affairs of the union.71 However, the courts have in fact enforced this standard by ingenious though thinly disguised subterfuges. Thus, in Schrank v. Brown, mentioned earlier,72 the court blocked

65. Although a union may be free to deny admission on any grounds, it cannot enforce its closed shop against those unreasonably excluded. Clark v. Curtis, 297 N.Y. 1014, 80 N.E.2d 536 (1948) (union closed to all but legitimate sons of members); Wilson v. Hacker, 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (women excluded from Bartenders Union). If exclusion were for having been a strikebreaker or company spy, dual unionism, or past criminal conduct, would it be unreasonable for the union to make that determination without a fair hearing?


68. Notice and hearing of at least a rudimentary sort is required in trustee cases, although the hearing may be held after the trustee is imposed. Fanara v. International Brotherhood of Teamsters, supra note 53; Garcia v. Ernst, supra note 53.

69. See, e.g., Nilan v. Colleran, 283 N.Y. 84, 27 N.E.2d 511 (1940); Hendren v. Curtis, 164 Misc. 20, 297 N.Y. Supp. 364 (Sup. Ct. 1947). In both cases, the procedural problem was ignored.

70. See note 9 supra.


72. Supra notes 49 to 51.
three successive attempts to discipline a local union for issuing a circular criticizing
the actions of the international officers. The court resorted to literal interpretations
of the constitution, the last time stiff-neckedly refusing to find any power in the
convention to discipline members or locals. Similarly, when members of the
Carpenters were expelled for accusing officers of misconduct, the court gave
protection by seizing on the technical defect that three members of the district
council, which acted as the trial body, had not been elected but had been
appointed to fill vacancies.73

The courts commonly protect democratic rights by warping the constitution
to fit their needs. The right to voice and vote has been read into the constitution,74
and clauses prohibiting conduct tending to cause disruption have been narrowed
so as not to reach accusations against the officers for diversion of union funds.75
Members of the Teamsters who help shop meetings contrary to the order of the
officers were ordered reinstated because the constitution did not explicitly make
disobedience to officers an offense.76 Members of the Bartenders who were
stripped of their seniority for organizing an opposition group were given
judicial protection on the grounds that the constitution did not provide for this
type of penalty.77

The court may not only warp the constitution but also interpret and weigh
the evidence and find it wanting. Members of a Musicians local which was in
receivership were expelled because they had defied explicit orders by calling a
meeting, electing officers and drawing a constitution. The court, however, found
that this was really not a meeting or election but only a dramatic demonstration to
the international that the local desired self-government, and ordered reinstatement.78

The insuperable obstacles which the court may erect against destruction of
free criticism and debate within the union are revealed in Shapiro v. Gehlman.79

73. Jose v. Savage, supra note 41.
74. Bertucci v. United Cement Masons Union, Local 570, 139 Misc. 703,
75. Reilly v. Hogan, supra note 21. Clauses prohibiting carrying on union
business outside of meetings were held not to reach bringing suit against the
union or testifying in such a suit. A. Angrisani v. Stearn, 167 Misc. 731, 3
N.Y.S.2d 701 (Sup. Ct. 1938); T. Angrisani v. Stearn, 167 Misc. 728, 3 N.Y.S.2d
(Sup. Ct. 1939). Clauses explicitly prohibiting suits against the union have been
narrowly construed to prevent expulsion for bringing such suits. Polin v. Kaplan,
supra note 28; Moore v. Moreschi, supra note 16.
76. Coleman v. Leary, supra note 37.
Koukly v. Canavan, 154 Misc. 343, 277 N.Y. Supp. 28 (Sup. Ct. 1935). For a less
striking manipulation of the evidence, see Fritz v. Knaub, 57 Misc. 405, 103
(2d Dep't 1908).
79. 244 App. Div. 238, 278 N.Y. Supp. 785 (1st Dep't 1935), modified 269
N.Y. 517, 199 N.E. 515 (1935).
A member who accused two local officers of mishandling union funds was charged with slandering officers. The constitution provided for trials before the executive committee, but because this would include the officers he had accused, a special trial committee was appointed. The court held that since the constitution had not been followed, the proceedings were void. Not surprisingly, the same court in a later case held that where a member was tried by a committee which included officers whom he had accused of misconduct, the proceedings were void for bias.

Frequently the courts need not seek far nor strain hard to find grounds for protecting freedom of speech and assembly within the union. Arrogant leaders who curb criticism and crush opposition are often not scrupulous in obeying the constitution or in providing due process. Particularly, the lack of an unbiased tribunal is nearly inherent in proceedings growing out of a political fight within the union. If the trial is before the executive board, it will include the very persons who have been criticized; if it is before an elected committee, the political factions will fight for control of the committee; if it is before the union membership, the majority may be intolerant of the critical minority, and even if it is chosen by lot political hostility is not eliminated. Because unions lack any independent judiciary, the courts can almost always discover the blemish of bias when democratic rights are denied.

Protecting the integrity of elections in unions seldom requires the courts to go beyond the constitutional provisions, for most unions carefully prescribe an honest voting procedure. The courts will normally look to the constitution to determine the time of the election, the required notice, qualifications of candidates, method of balloting and other details. However, the courts can take more aggressive action where necessary. When President Bradley of the Longshoremen summarily disqualified two opposition candidates, the court enjoined holding the election.

82. See, e.g. Coleman v. O'Leary, supra note 37; Moore v. Moreschi, supra note 16; Cohen v. Rosenberg, supra note 57.
83. In Madden v. Atkins supra notes 5 and 9, both sides tried to load the trial committee with partisans. The incumbent officers by rulings from the chair were able to win out. The meeting was so chaotic that the courts could not tell whether the selection was proper or not.
84. See Reilly v. Hogan, supra note 21, where the court said the local's vote to expel was motivated by "partisan politics."
88. Wilkens v. Sofield, supra note 22; Fritsch v. Rarback, supra note 43.
tion without their names on the ballot; and when Hoffa attempted to take over the Teamsters Joint Council in New York by issuing charters to paper locals, the court reviewed the status of the locals and the credentials of the delegates, reversing the decision of the international which had ruled for the Hoffa adherents. In two cases where insurgent locals of the Operating Engineers and the Hodcarriers were being ruthlessly suppressed by trusteeships imposed by the international, the court ordered the trustees removed and directed elections under the supervision of the court.

This second judicial standard of protecting the democratic process has not been precisely defined. The right to debate union policies, to criticize union officers, and to organize for the purpose of changing policies or officers—these rights are protected. Their limits, however, have not been clearly drawn. Can unions curb debate during a strike to prevent undermining of morale? Can unions punish criticism which is grossly defamatory? Can opposition groups seek aid from outsiders, including those whose interests are hostile to the unions? Even beyond these lie unexplored areas such as the right to equal access to the union publications, the right to membership lists, and limitations on those in power using union funds to campaign for reelection. The lack of answers to these questions results in part from the courts' studied refusal to declare the standard, which has in turn stifled open discussion and clouded consideration of its application.

Although the standard is not exact or self-defining, it provides a guide for the judge beyond his personal whims or alimentary instincts. His reference points are those rights which are commonly considered essential to a democratically controlled government. His task here bears likeness to his protection of those rights against legislative or administrative encroachments.

The third judicial standard, which lies largely submerged in the cases but occasionally appears in clear view, is the personal virtuousness of the parties. Honesty is rewarded and corruption chastised. Recently, when a local of the Bakery Workers seceded, the court flaunted the express provisions of the constitution to award the assets to the seceding local. Not content with a half dozen real or imaginary grounds, it said, "A flagrant violation, or series of violations, of the basic principles of a trade union by one party renders his hands so unclean that he may not seek the aid of a court of equity in enforcing the letter of his

89. Maineculf v. Robinson, supra note 22. This is in sharp contrast to the evasive action of the court in Gray v. Atkins, supra note 1.
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rights under the constitution." In Kaplan v. Elliott, the court rationalized away serious procedural defects to ratify removal of officers who had been publicly accused of embezzling union funds, selling job assignments, and extorting from employers. In other cases deviations from the constitution in holding elections seem to have been easily overlooked when corrupt leaders have been unseated and procedural defects in discipline cases have been deemed insubstantial or waived when the court believed the member guilty.

The standard of personal virtue may make political purity a test for legal rights, and place Communists beyond the pale of judicial protection. When the UE, which had been expelled from the CIO for left-wing domination, sought to recapture the treasury of a seceding local, the court said, "So UE stands before this Court, in equity, garbed in red as the CIO saw it and so accused it and tries to awaken the Court's conscience to claimed wrongs perpetrated against it." The trial court in Madden v. Atkins included the claimed left-wing affiliations of some of those expelled as "some evidence supporting the conclusion of the trial committee." Most courts are not so blunt, but their opinions may betray their use of this standard. For example, in Ames v. Dubinsky, opposition candidates were expelled for circulating leaflets which criticized the officers as undemocratic, red-baiting, and corrupt. The court in upholding the expulsion emphasized that the
expelled persons were admitted Communists and devoted six pages to a discourse on the evils of godless materialistic communism. 101

The frequency with which this standard is in fact applied can not be determined from the reported decisions, for only reckless or wilful judges would admit its use, even to themselves. That adjudication of a man's legal rights in a particular case should depend on his general honesty or political beliefs violates elementary principles in our system of justice. 102 It empowers the judge to decide cases not according to general legal rules but according to his personal estimate of the relative virtues of the particular parties, often based on judicial notice of stories in the daily press. 103

These three judge-made standards are the most significant and apparent ones, but there are others of more limited impact and there may be some too deeply submerged to discover. The courts have enforced a standard of financial accountability on union officers, 104 but its scope is surprisingly uncertain. 105 The courts may in fact be protecting local autonomy, but the pattern is far from clear. These various standards or policies, known or suspected, when applied in the cases are often overlapping or antagonistic. 106 This makes their presence difficult to diagnose and nearly impossible to prove without going behind the published opinions.

Although these standards give some coherence to the cases, they fall far short of rationalizing all of the cases. There remains the lurking suspicion that a substantial segment of the decisions fit no intelligible pattern. In Stroebel v. Irving, 107 a member was suspended for six months because he had given financial aid to an expelled member who was suing for reinstatement. The constitution did not make

101. See also, Clark v. Fitzgerald, supra note 39; Garcia v. Ernst, supra note 53.

102. Only the naive are unaware that such irrelevancies affect the outcome of lawsuits, particularly where juries are involved, but this does not make them any less offensive.

103. The courts can not make reliable evaluations, for the necessary evidence is usually excluded as irrelevant and prejudicial. The court must act on the scraps that are sneaked into evidence or injected by remarks of counsel. In the Masters, Mates and Pilots case, the trial judge thought he saw Communist influence in the opposition group, but he failed to see corruption in the incumbent officers.


106. For example, in the Hodcarrier Cases, discussed supra, all of the policies of due process, democratic rights, financial accountability, and local autonomy were combined to repel the corrupt and dictatorial international. On the other hand, in Ames v. Dubinsky, supra note 100, protection of democratic rights in the opposition was outweighed by the judge's violent antagonism to Communists.

this an offense, and required procedures were not followed, but the court upheld the discipline. When the opposition in the Masters, Mates and Pilots sought to get equal access to the union newspaper and obtain a mailing list of the members during an election campaign the court not only gave them no protection, but waited until after the election and then said they must first exhaust their internal appeals. In a ten year legal struggle against the dictatorial and corrupt leadership of the Operating Engineers, the court first gave energetic protection to the opposition, but then unexplainably abandoned them. It finally upheld a referendum on a new constitution which gave the President more drastic powers in spite of clear violations of the established voting procedure and various suspicious circumstances. Similarly, in the long legal battle in the Hodcarriers against Moreschi, the court suddenly turned cold and aloof, permitting Moreschi to again seize the local it had just freed. These results were not a product of applying the constitution, nor are they explainable under any imagined judicial standard. The most charitable explanation is that they represent random returns to blind non-intervention.

CONCLUSIONS

Monotonous drumming of the tired slogan that the law should keep out of internal union affairs has deadened awareness of problems which can not be wished away. The law must intervene in union disputes. The alternative is either to abdicate to brute force or to ratify the exercise of arbitrary power. The question is not whether the law should intervene but what standards it should apply in replacing arbitrariness with established rules.

The union constitution has failed to fulfill its two basic purposes as a standard. First, it has not provided the body of law to be applied in settling internal union disputes, particularly the difficult ones coming before the court. The process of interpretation has not made the constitution more precise but has rather made it more formless, and the courts are left unguided and unconfined. Union arbitrariness has not been replaced by established rules but by judicial discretion—and in some cases by judicial arbitrariness. The second failure flows from this. The rules for settling disputes are not made by the union, but by the courts which under the guise of interpretation rewrite the constitution.

The courts' creation of their own standards poses questions of fundamental policy which are deeply hidden or hopelessly confused by the courts' refusal to acknowledge their true role. The reluctance to intervene has its roots in our

109. See Note, Judicial Intervention in Revolts against Union Leaders, 51 YALE L.J. 1372 (1942).
concept of a pluralistic society in which state centralism is prevented by a distribution of power. Unions and other private organizations play a vital role in this distribution of power, but they can not fulfill this function if legal controls make them but arms of the state. On the other hand, distributed power can not be left wholly unchecked lest pluralism repudiate democracy and disintegrate government. The reconciling of these two competing demands is the central problem in determining the standards to be used in settling internal disputes. That reconciliation is now being made by the courts with no evident awareness of the import of their action.

This does not mean that the judge-made standards are necessarily inappropriate, for the courts in evolving them may have been responsive to the pressures of the competing demands. Protection of procedural due process and protection of the democratic process within the union have a basic validity in reconciling the demands for freedom and control. Protection of these basic rights gives increased assurance that the union internally will be just and responsive to its members. This increases the reliability of union decisions and in turn reduces the need for control. In contrast, the standard of personal virtue opens the door to total judicial proctorship of the union.

The main source of weakness in the judicial standards lies in the failure of the courts to articulate them. Without explicit statement of them the courts can not even begin to inquire into their basic validity, much less define and apply them. Fitting the first two standards to the cases requires an intimate understanding of the complex structure of the union, a careful consideration of its special needs as well as a clear perception of the law's limited usefulness. These are never systematically explored or critically examined. Their vision blocked by avowals of non-intervention and distracted by language of contract, the courts are unable to focus on the real and immediate problems. Unable to admit, even to themselves, what they are doing, they cannot do it well.

The valid standards might be made more articulate through three separate avenues. First, the courts might overcome their neurotic fear of involvement, by gaining insight as to their past behavior, and accepting their inescapable but limited role. Second, the unions might themselves make these standards explicit by removing from their constitutions the multitude of clauses which deny basic rights and replacing them with clauses which affirm and protect those rights. The presence of provisions guaranteeing freedom of criticism, equal opportunity in election campaigns, and the right to organize opposition groups within the union would enable the courts to use the constitution as a guide while enforcing the compelling policies of due process and democratic rights. Unions, by thus assuming
self-responsibility, might become masters of their own house, and the courts could follow their basic instincts to apply the unions' standards. Finally, these standards could be made articulate by legislation which explicitly stated the appropriate basic standards now in fact enforced by the courts. This would not increase legal control of unions, but would rather tend to confine it within consciously defined channels. The alternative is to perpetuate vagrant judicial intervention which is neither limited nor responsible.