

# Union Fines and Workers' Rights\*

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Few would want to deny what the Supreme Court declared in *NLRB v. Allis-Chalmers Manufacturing Co.*<sup>1</sup>: The literal ban of the National Labor Relations Act (NLRA), § 8(b)(1)(A),<sup>2</sup> on union attempts to "restrain or coerce" employees does not prohibit a union from disciplining its members. "Integral to . . . federal labor policy," said the Court, "has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership."<sup>3</sup>

The traditional forms of union discipline are suspension and expulsion. These sanctions are appropriately described as "internal," for they involve no more than loss of union membership. In contrast to such permissible internal sanctions are impermissible job discriminations: a union is prohibited from disciplining a member for offenses against the organization by attempting to cause the employer to penalize him in any way.<sup>4</sup> So long as a worker pays his union dues as required by a union security clause, his employment rights theoretically are safe from union interference.<sup>5</sup>

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1. 388 U.S. 175 (1967).

2. 29 U.S.C. § 158(b)(1)(A) (1970):

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [NLRA § 7]: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

NLRA § 7, 29 U.S.C. § 157 (1970), guarantees to employees the right to organize and engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and also the right to refrain from such activities.

The *Allis-Chalmers* Court did not rely on the proviso to § 8(b)(1)(A); it focused instead on the legislative history of the phrase "restrain or coerce." 388 U.S. at 178-87.

3. 388 U.S. at 181.

4. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), makes it an unfair labor practice for an employer to encourage or discourage membership in a labor union "by discrimination in regard to hire or tenure of employment or any term or condition of employment." NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2) (1970), makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of [§ 8(a)(3)]."

5. A proviso to § 8(a)(3) of the NLRA permits an employer to negotiate a union security clause as part of the collective agreement, requiring workers to join the union

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The problem with *Allis-Chalmers* is not its approval of union discipline, but its exposition of the forms that union discipline may take. *Allis-Chalmers* held that a union may punish strikebreaking members not only by suspension or expulsion, but also by monetary fines. Further, the Court held that a union may enforce its fines not only through suspension or expulsion, but also through the judicial process.<sup>6</sup> The *Allis-Chalmers* Court saw itself as preserving the grand dichotomy between internal union sanctions and impermissible job discriminations.<sup>7</sup> Whether it did so is questionable. It is difficult to see how a union is proceeding "internally" when it hauls the accused from a union hearing into a court of law. Nor is it obvious—and this is the important point—that a union leaves a worker's employment rights inviolate when it exacts a portion of his paycheck in satisfaction of a fine imposed for working.

Since 1967, *Allis-Chalmers* has bedeviled the law of union discipline. Court enforceability of union fines has inhibited the assertion, and jeopardized the vindication, of workers' rights. The recent history of union discipline litigation has been a series of footnotes to *Allis-Chalmers*. To my mind, the text should be rewritten. The decision was close (five to four), and the Court's reasoning weak. Yet so long as it remains the law, these subsequent footnotes merit examination. For buried among them is a doctrine which promises the dissident some relief: Although a worker may have to continue paying dues, he can immunize himself from union fines by resigning his union membership. This doctrine is probably little known to those who stand to profit from it. Indeed, since *Allis-Chalmers* the National Labor Relations Board (NLRB) and the Court have made it difficult for lawyers as well as laymen to define the rights of the individual worker.

### I. The Extent of Union Discipline

Before examining the Court's present attitude toward union fines and the worker's realistic chances of avoiding them, a preliminary survey of the scope of union discipline will indicate the extent of the individual's vulnerability. Unions have the power to discipline their

within a month after their employment begins. 29 U.S.C. § 158(a)(3) (1970). But the Court held in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), that an employee's obligations under a union security clause are limited to payment of union dues and initiation fees. See pp. 1048-51 & note 138 *infra*. Section 8(b)(2) denies a union the power to compel an employer to discharge a worker for any reason other than the worker's failure "to tender the periodic dues and the initiation fees uniformly required." 29 U.S.C. § 158(b)(2) (1970).

6. 388 U.S. at 179, 192-93.

7. See *id.* at 185-86, 195.

members for a wide range of transgressions.<sup>8</sup> Both common and statutory law, however, have been concerned with curtailing this power when it is used to interfere with democracy within the organization.<sup>9</sup> Substantive and procedural limitations restrict the union's authority in areas of direct interest to us here. Unfortunately, in detailing these limitations the Court and the Board have shown little consistency and less conviction. The substantive limitations on union authority must be clarified so that each individual may know the measure of his vulnerability. The procedural limitations on union authority must be enhanced so that union disciplinary procedures may recognize and fully safeguard the rights of the dissident member.

#### A. *Substantive Limitations on Union Discipline*

Substantive limitations on union power have evolved under the rubric of a "public policy" exception to union disciplinary authority. As might be expected, therefore, the limitations lack definition: the NLRB retains a great deal of discretion in passing on the legitimacy of union disciplinary action.

The public policy exception developed from decisions upholding individual members' access to the NLRB. In two companion cases, *H. B. Roberts*<sup>10</sup> and *Local 138, IUOE (Charles S. Skura)*,<sup>11</sup> the Board held that a union could not discipline a member for filing an unfair labor practice charge before he had exhausted his internal union remedies. The Board in *Skura* distinguished its approval of the fines for strikebreaking in *Allis-Chalmers* by explaining that the union rule in *Allis-Chalmers* contravened no "recognized public policies."<sup>12</sup> In contrast it noted:

By the rule under consideration here, however, [the union] attempted to regulate its members' access to the Board's processes. Considering the overriding public interest involved, it is our

8. The following is a representative list of cases upholding union discipline for various "internal" offenses: *Scofield v. NLRB*, 394 U.S. 423 (1969) (exceeding production quotas); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967) (strikebreaking); *Reyes v. Laborers' Local 16*, 464 F.2d 595 (10th Cir. 1972), *cert. denied*, 411 U.S. 915 (1973) (threatening union officials with violence); *Rocket Freight Lines v. NLRB*, 427 F.2d 202 (10th Cir.), *cert. denied*, 400 U.S. 942 (1970) (reporting for work after local but before international ratification of new contract); *Glasser v. NLRB*, 395 F.2d 401 (2d Cir. 1968) (working with nonunion employees); *Local 5795, Communications Workers*, 192 N.L.R.B. 556, 77 L.R.R.M. 1827 (1971) (reporting a co-worker for drinking on job in violation of union rule against informing); *Teamsters Local 70*, 191 N.L.R.B. 227, 77 L.R.R.M. 1415 (1971) (splitting vacations to please employer in violation of union rules).

9. See H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 185-212 (1968).

10. 148 N.L.R.B. 674, 57 L.R.R.M. 1012 (1964), *enforced*, 350 F.2d 427 (D.C. Cir. 1965).

11. 148 N.L.R.B. 679, 57 L.R.R.M. 1009 (1964).

12. *Id.* at 682, 57 L.R.R.M. at 1010.

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opinion that no private organization should be permitted to prevent or regulate access to the Board. . . .<sup>13</sup>

Four years later, in *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, the Supreme Court upheld the Board's concern for the "overriding public interest."<sup>14</sup>

The indefinite boundaries of such "policy" exceptions are illustrated by a series of cases involving union authority to discipline supervisor-members.<sup>15</sup> Section 8(b)(1)(B) of the NLRA<sup>16</sup> bans union coercion against an employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In *San Francisco-Oakland Mailers' Union*,<sup>17</sup> the Board held that this provision prevented a union from disciplining supervisor-members for alleged misinterpretation of a collective bargaining contract. Such discipline, the Board reasoned, would induce the supervisors "to take pro-union positions in interpreting the collective-bargaining agreement," thus "contraven[ing] the statutory policy of allowing the Employer an unimpeded choice of representatives."<sup>18</sup> Following *Oakland Mailers'*, the Board and the courts began to develop § 8(b)(1)(B) under this policy rationale into "a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers."<sup>19</sup> The Supreme Court curtailed this development in *Florida Power & Light Co. v. IBEW Local 641*,<sup>20</sup> establishing certain conditions under which discipline of supervisor-members is permissible.<sup>21</sup> Yet the opinion apparently leaves *Oakland Mailers'* intact,<sup>22</sup> and in so doing creates doubt

13. *Id.*, 57 L.R.R.M. at 1010.

14. 391 U.S. 418, 424 (1968).

15. "Supervisor" is defined in NLRA § 2(11), 29 U.S.C. § 152(11) (1970). Under the Taft-Hartley amendments, supervisors are agents of the employer. "Employee" is defined to exclude them. NLRA § 2(3), 29 U.S.C. § 152(3) (1970). Therefore, supervisors are denied the protection of § 7, which guarantees employees the right to organize and bargain collectively. NLRA § 7, 29 U.S.C. § 157 (1970). Supervisors are not prohibited from joining labor unions, although the employer cannot be compelled to deem them "employees" for purposes of collective bargaining. NLRA § 14(a), 29 U.S.C. § 164(a) (1970). Supervisors frequently obtain union membership in order to participate in union pension and insurance plans. *See, e.g., Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790, 792-93 & n.1 (1974).

16. 29 U.S.C. § 158(b)(1)(B) (1970).

17. 172 N.L.R.B. 2173, 69 L.R.R.M. 1157 (1968).

18. *Id.* at 2174, 69 L.R.R.M. at 1159.

19. *Florida Power & Light Co. v. IBEW Local 641*, 417 U.S. 790, 802 (1974), quoting *Lithographers Locals 15-P & 272*, 175 N.L.R.B. 1072, 1080, 71 L.R.R.M. 1467, 1469 (1969).

20. 417 U.S. 790, 803 (1974).

21. The Court in *Florida Power* held that a union does not violate § 8(b)(1)(B) when it disciplines "supervisor-members for crossing the picket lines and performing rank-and-file struck work during lawful economic strikes . . ." *Id.* at 792, 813.

22. *See id.* at 805.

as to whether the "employer interest" doctrine has been wounded or slain.

Even stripped of any "employer interest" accretions, the "public policy" exception has room for expansion. The NLRB already has held that a union may not discipline members for refusing to strike where the collective agreement contains a no-strike clause, on the ground that the integrity of collective agreements is a public matter and thus beyond the disciplinary authority of the union.<sup>23</sup> The Board likewise has prohibited the fining of members who refuse to honor illegal organizational pickets<sup>24</sup> and secondary boycotts.<sup>25</sup> The Board's initiatives, however, have encountered some judicial resistance,<sup>26</sup> and without further clarification from the Court the contours of this public policy exception will remain vague. This is particularly unfortunate. The tension between union solidarity and individual rights is most marked during a strike. It is at this time that the individual union member is in greatest need of clear definition of his rights and liabilities concerning nonconforming conduct.

The public policy argumentation also has carved a curious distinction into the Board's policy on members disciplined for filing decertification petitions. In *Tawas Tube Products, Inc.*<sup>27</sup> the Board held that § 8(b)(1)(A) of the NLRA<sup>28</sup> did not prohibit the expulsion of such members. Distinguishing the case from *Skura*, the Board found that in the decertification context the member was not asking the Board to correct an unfair labor practice, but rather was attacking "the very existence of the union."<sup>29</sup> Expulsion was therefore a proper, "defensive" union response.<sup>30</sup> Four years later, however, in *Molders Local 125 (Blackhawk Tanning Co.)*,<sup>31</sup> the NLRB refused to allow the union to fine a member who filed a decertification petition. The Board

23. Communications Workers Local 1197, 202 N.L.R.B. 229, 82 L.R.R.M. 1530 (1973); Glaziers Local 1162, 177 N.L.R.B. 393, 73 L.R.R.M. 1125 (1969); Local 12419, UMW, 176 N.L.R.B. 628, 71 L.R.R.M. 1311 (1969). See *Verville v. IAM*, 520 F.2d 615, 619 (6th Cir. 1975). Cf. *Machinists Lodge 284*, 190 N.L.R.B. 208, 77 L.R.R.M. 1100 (1971), *modified sub nom. Morton Salt Co. v. NLRB*, 472 F.2d 416 (9th Cir. 1972), *vacated and remanded on other grounds*, 414 U.S. 807 (1973) (no violation for fining workers who crossed sister union's picket lines; no-strike clause in contract specifically permitted workers to honor another union's legitimate picketing of employer).

24. Retail Clerks Local 1179, 211 N.L.R.B. No. 16, 86 L.R.R.M. 1588 (1974), *enforced*, 526 F.2d 142 (9th Cir. 1975).

25. Building & Constr. Trades Council, 222 N.L.R.B. No. 98, 91 L.R.R.M. 1215 (1976). See *NLRB v. Local 18, IUOE*, 503 F.2d 780 (6th Cir. 1974) (finding no violation where union expels members for crossing illegal secondary picket lines).

27. 151 N.L.R.B. 46, 58 L.R.R.M. 1330 (1965).

28. 29 U.S.C. § 158(b)(1)(A) (1970).

29. 151 N.L.R.B. at 48, 58 L.R.R.M. at 1331.

30. *Id.*, 58 L.R.R.M. at 1331.

31. 178 N.L.R.B. 208, 72 L.R.R.M. 1049 (1969), *enforced*, 442 F.2d 92 (7th Cir. 1971).

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admitted, as it had not done in *Tawas Tube*, that every decertification case involves an implicit balancing of the "union's right to self-defense" with "the public policy against permitting a union to penalize a member because he seeks the aid of the Board."<sup>32</sup> The Board reasoned that since fines did not serve the same rudimentary elements of self-defense as expulsion—that is, they did not excise a dissident fifth column within the union—fines could only be regarded as punitive. Stripped of their self-defense rationale, fines for filing decertification petitions were inconsistent with the logic of *Skura* and *Tawas Tube* and were held invalid under § 8(b)(1)(A).<sup>33</sup>

Given *Allis-Chalmers*, the Board's attempt to juggle the interests of the unions, their members, and the public by limiting the form, rather than the subject matter, of union discipline is troublesome. As both the *Allis-Chalmers* Court<sup>34</sup> and its critics<sup>35</sup> have noted, the relative coerciveness of a judicially enforced fine and an expulsion will vary with the strength of the union. A weak union will have little power to discourage decertification by expulsions, since membership may mean nothing to dissidents. By contrast, a worker attacking a strong union may fear that he will lose not only his membership but also his job.<sup>36</sup> Expulsion may thus deter him from seeking the aid of the Board far more effectively than would even a substantial fine. In view of the important public policies favoring union democracy, the NLRB should prohibit any form of discipline of dissidents who seek to unseat an incumbent union by means that Congress has

32. *Id.* at 209, 72 L.R.R.M. at 1050.

33. *Id.*, 72 L.R.R.M. at 1050. *Accord*, Teamsters Local 165, 211 N.L.R.B. No. 100, 86 L.R.R.M. 1433 (1974). *See Price v. NLRB*, 373 F.2d 443 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968).

The Board has similarly held that a member who files a certification petition for a rival union cannot be fined, Printing Specialties Union No. 481, 183 N.L.R.B. 1271, 74 L.R.R.M. 1698 (1970), although he may be suspended or expelled. *See Monon Trailer, Inc.*, 217 N.L.R.B. No. 44, 89 L.R.R.M. 1280 (1975) (leading organizational campaign on behalf of rival union); Tri-Rivers Marine Eng'rs Union, 189 N.L.R.B. 838, 77 L.R.R.M. 1027 (1971) (soliciting authorization cards on behalf of rival union). The Board has also held it irrelevant that expulsion was invoked for nonpayment of an illegal fine. *Communications Workers Local 6306*, 212 N.L.R.B. No. 117, 87 L.R.R.M. 1590 (1974), *enforced*, 519 F.2d 447 (8th Cir. 1975).

34. 388 U.S. at 183.

35. *See, e.g., Note, Judicial Enforcement of Labor Union Fines in State Court*, 46 N.C. L. REV. 441, 443 (1968).

36. Although the worker cannot legally be dismissed from his job so long as he pays his dues, *see note 5 supra*, he is probably unaware of this protection. Moreover, even if he is fully cognizant of his rights, he still may confront the bitterness and expense of a legal battle to regain his job. Expulsion by a strong union may also greatly hamper a worker's ability to find a job where hiring within the trade is coordinated by a union hiring hall. The fact that these and other forms of harassment are illegal does not make them any less real. *See, e.g., Lummus Co.*, 142 N.L.R.B. 517, 53 L.R.R.M. 1072 (1963), *modified*, 339 F.2d 728 (D.C. Cir. 1964).

sanctioned. The threat such dissidents pose to the union's ability to defend its certification is, at best, overstated.<sup>37</sup> The greater danger is that the dissidents' fear of expulsion will perpetuate representation that is no longer responsive to the will of the membership.

Finally, the crusade to protect the public interest has taken the Board into union proceedings themselves. In *Local 294, International Brotherhood of Teamsters*,<sup>38</sup> the Board held that a fine allegedly imposed for causing the arrest of a union brother—an offense which the NLRB assumed was subject to union discipline—was in reality intended to punish the accused for filing unfair labor practice charges.<sup>39</sup> The Board likewise has found violations of § 8(b)(1)(A) in discipline imposed for pretext charges where the actual offense was expression protected by the Landrum-Griffin Act.<sup>40</sup> In one such case, *Carpenters Local 22*,<sup>41</sup> the Board noted the suspicious nature of the proceedings, including threats by union officials to “think of something” with which to charge the accused.

In detailing the substantive limitations on union disciplinary power, the Board has been concerned in large part with the individual union member and his place in the statutory scheme. Yet the shifting and indefinite bounds of the public policy exception do not clearly demarcate the rights of the individual. The union dissident may confront the dilemma of either suffering potentially illegal union discipline or relying on an ambiguous, volatile public policy exception and incurring the trouble of litigating union sanctions before the Board and the courts.

### B. *Procedural Limitations on Union Discipline*

In their 1969 survey of the procedural limitations on union discipline, Etelson and Smith concluded:

37. A union presumably has little to fear from the decertification efforts of isolated dissidents if it commands the support of its membership.

38. 193 N.L.R.B. 920, 78 L.R.R.M. 1479 (1971), *enforced*, 470 F.2d 57 (2d Cir. 1972).

39. *Id.* at 926, 78 L.R.R.M. at 1483. *Accord*, Philadelphia Moving Picture Machine Operators Local 307 v. NLRB, 382 F.2d 598 (3d Cir. 1967) (voiding expulsion of member on four counts where three were valid, but one was for filing unfair labor practice charge); Automotive Salesmen's Ass'n, 184 N.L.R.B. 608, 74 L.R.R.M. 1576 (1970) (voiding fines allegedly imposed for strikebreaking, where members who had supported decertification petition or testified against union in unfair labor practice case were fined more heavily than others).

40. Section 101 of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 411 (1970), established a “bill of rights” for union members. Members are guaranteed the rights of speech and assembly, and the right to participate fully and freely in the union's internal affairs.

41. 195 N.L.R.B. 1, 1, 79 L.R.R.M. 1194, 1195 (1972). *But cf.* Burch v. IAM, 433 F.2d 561 (5th Cir. 1970) (finding no pretext in terminating union president's membership for nonpayment of dues despite evidence that international was “displeased” with him).

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[A]lthough the Landrum-Griffin Act spawned numerous controversies over its scope, its procedural guarantees, and its remedial provisions, the past ten years have seen a satisfactory resolution of most issues. Time and further experience should lead to a practical resolution of the conflicts which remain. The courts are steadily moving toward a new and more desirable accommodation between the private institutional needs of labor unions and their public responsibility under our federal labor policy.<sup>42</sup>

Today this prediction seems optimistic. If procedural problems have been resolved, it has been largely because the courts have declined to intervene actively in internal union affairs. A member challenging disciplinary proceedings on procedural grounds generally has only the minimal protections of § 101(a)(5) of the Landrum-Griffin Act:<sup>43</sup>

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues . . . unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Even a cursory examination of the decisions applying this section suggests that a union tribunal remains an unlikely forum for the vindication of individual rights. The Supreme Court has played a major role in preserving this union autonomy at the individual's expense. In rejecting the view of some lower courts that "penal provisions in

42. Etelson & Smith, *Union Discipline under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 771 (1969).

43. 29 U.S.C. § 411(a)(5) (1970). Before he even reaches the courts, the member may be required to exhaust his internal union appeals for up to four months. *Id.* § 411(a)(4). Such appeals are normally based on union procedural safeguards that vary substantially. Compare CONST., UAW, art. 31 (1974) (guaranteeing specific charges, timely trial, right to counsel, randomly selected trial committee, and fixed penalties) with CONST., UNITED STEELWORKERS, art. XIII, §§ 3, 4 (1974) (leaving all trial procedures to discretion of local).

Unfortunately for members of more enlightened unions, there is authority suggesting that unions need not adhere to their own procedures so long as they meet the minimal standards of § 101(a)(5). See *Buresch v. IBEW Local 24*, 343 F. Supp. 183, 189-90 (D. Md. 1971), *aff'd*, 460 F.2d 1405 (4th Cir. 1972); *Null v. Carpenters Dist. Council*, 239 F. Supp. 809, 814-15 (S.D. Tex. 1965). State courts, perhaps because they are unencumbered by § 101(a)(5), have generally reached a different conclusion. See, e.g., *Posner v. Utility Workers*, 90 L.R.R.M. 2515, 2517 (Cal. Ct. App. 1975) (Disciplinary procedures "which do not conform to the union constitution are void and will not be enforced by the courts."); see *Cox, Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 835 & n.53 (1960). The approach of the *Posner* court is clearly correct, so long as the courts insist on the metaphor of the constitution as a union-member contract. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 182-83 (1967). Surely if the member is held to have consented to union discipline by accepting membership, his consent presupposes that the union will fulfill its half of the bargain by imposing discipline only in accordance with its own rules.

union constitutions must be strictly construed,"<sup>44</sup> the Court concluded in *International Brotherhood of Boilermakers v. Hardeman*<sup>45</sup> that there was nothing "in either the language or the legislative history of § 101(a)(5) that could justify such a substitution of judicial for union authority to interpret the union's regulations in order to determine the scope of offenses warranting discipline of union members."<sup>46</sup> Indeed, the Court went so far as to explain that since "a union may discipline its members for offenses not proscribed by written rules at all, it is surely a futile exercise for a court to construe the written rules in order to determine whether particular conduct falls within or without their scope."<sup>47</sup>

The *Hardeman* Court did concede that when the union's charges make reference to specific written provisions, the courts should examine those provisions to ensure that the accused was not misled or prejudiced in presenting his defense.<sup>48</sup> Yet *Hardeman's* overly generous attitude toward vague or even unwritten union rules seems a clear invitation to even less specific indictments. Other courts have continued to reverse union convictions where specificity and notice were grossly inadequate; but in so doing each has more or less side-stepped *Hardeman*,<sup>49</sup> suggesting that the Court, by its opinion, has impeded the progress predicted by Etelson and Smith.<sup>50</sup>

The guarantee in § 101(a)(5) of a "full and fair hearing" is also less significant than one might wish. The courts have granted the accused some of the rudiments of due process—the right to be present, to call his own witnesses, and to cross-examine his accusers.<sup>51</sup> Yet

44. *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193, 198 (5th Cir.), cert. denied, 391 U.S. 935 (1968) (quoting *Allen v. International Alliance of Theatrical Employees*, 338 F.2d 309, 316 (5th Cir. 1964)). See *Gleason v. Chain Serv. Restaurant*, 300 F. Supp. 1241, 1252-55 (S.D.N.Y. 1969), aff'd per curiam, 422 F.2d 342 (2d Cir. 1970) (voiding expulsion because charges lacked specificity required by § 101(a)(5)).

45. 401 U.S. 233 (1971).

46. *Id.* at 242-43.

47. *Id.* at 244-45.

48. *Id.* at 245. Unfortunately, disciplinary provisions in union constitutions are often extremely vague. See T. KEELINE, NLRB AND JUDICIAL CONTROL OF UNION DISCIPLINE 88 & n.12 (U. Pa., Wharton School, Industrial Research Unit, Labor Rel. & Pub. Pol'y Serv. Rep. No. 13, 1976) (Most prominent among disciplinary provisions are those sanctioning "conduct detrimental to welfare" of union and "conduct unbecoming to a member.")

49. See, e.g., *Smith v. Musicians*, 80 L.R.R.M. 3063, 3067-68 (S.D.N.Y. 1972) (bypassing *Hardeman* and relying heavily on pre-*Hardeman* lower court opinions); *Eisman v. Baltimore Regional Joint Bd., Clothing Workers*, 352 F. Supp. 429, 434 n.8, 435 (D. Md. 1972), aff'd per curiam, 496 F.2d 1313 (4th Cir. 1974) (distinguishing *Hardeman*).

50. For a more favorable assessment of judicial performance in construing § 101(a)(5), see Beard & Player, *Union Discipline of Its Membership Under Section 101(a)(5) of Landrum-Griffin: What Is "Discipline" and How Much Process Is Due?*, 9 GA. L. REV. 383 (1975).

51. See T. KEELINE, *supra* note 48, at 62-63 (citing cases); Etelson & Smith, *supra* note 42, at 745-46 (citing cases).

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growth of the fair hearing concept undoubtedly has been stunted by the courts' unwillingness to require that the accused be allowed representation by counsel at disciplinary hearings.<sup>52</sup> Although it is undeniably true that the framers of the Landrum-Griffin Act never intended to grant a right to counsel,<sup>53</sup> it is also true that in the past 17 years both the stakes involved in union discipline and the very meaning of due process have changed. Unions may now impose substantial fines and enforce them judicially, thus inflicting penalties often far harsher than the expulsion contemplated in 1959.<sup>54</sup>

At the same time that union discipline has become more severe, the right to counsel in the criminal context has been expanded to reach all cases in which imprisonment is a potential penalty.<sup>55</sup> I do not suggest that the right to counsel in union proceedings is of constitutional dimension. But if the courts are to consider the prevailing level of due process in society in applying § 101(a)(5),<sup>56</sup> they should reconsider the severity of a few days in jail as opposed to a \$1,000 fine<sup>57</sup> coupled with expulsion from the union. The latter may seri-

52. See *Winterberger v. Teamsters Local 162*, 89 L.R.R.M. 2737, 2737-38 (D. Ore. 1975); *Smith v. Sheet Metal Workers Int'l Ass'n*, 357 F. Supp. 1386, 1393 (E.D. Tenn. 1972); *Buresch v. IBEW Local 24*, 343 F. Supp. 183, 191-92 (D. Md. 1971), *aff'd*, 460 F.2d 1405 (4th Cir. 1972); *Sawyers v. Grand Lodge, IAM*, 279 F. Supp. 747, 756 (E.D. Mo. 1967); *Cornelio v. Metropolitan Dist. Council United Bhd. of Carpenters*, 243 F. Supp. 126, 128-29 (E.D. Pa. 1965), *aff'd*, 358 F.2d 728 (3rd Cir. 1966), *cert. denied*, 386 U.S. 975 (1967); *Smith v. General Truck Drivers Local 467*, 181 F. Supp. 14, 17 (S.D. Cal. 1960).

As these cases illustrate, union constitutions and bylaws often expressly deny an accused member the right to be represented by outside professional counsel. See, e.g., *Winterberger v. Teamsters Local 162*, 89 L.R.R.M. 2737, 2738 (D. Ore. 1975).

53. See T. KEELINE, *supra* note 48, at 64; Etelson & Smith, *supra* note 42, at 746.

54. Before the Court in *Allis-Chalmers* upheld the judicial enforcement of fines, it appeared that unions would as a rule enforce fines only through expulsion. See T. KEELINE, *supra* note 48, at 18; cf. C. SUMMERS & H. WELLINGTON, *CASES AND MATERIALS ON LABOR LAW* 1121 (1968) ("Unions, which insisted that courts should not intervene in their internal affairs, did not look to the law to enforce their discipline.") Therefore, expulsion was seen as the severest sanction that could be visited on a union member.

55. After more than a decade of development, a unanimous Court in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), held that counsel must be provided when any imprisonment may result. Writing for the Court, Justice Douglas was careful to note that the Court was not considering "the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved . . ." *Id.* at 37. Yet Justice Powell may well have been writing for the Court of the future when he stated in concurrence:

It would be illogical—and without discernible support in the Constitution—to hold that no discretion [as to the need for counsel] may ever be exercised where a nominal jail sentence is contemplated and at the same time endorse the legitimacy of discretion in "non-jail" petty-offense cases which may result in far more serious consequences than a few hours or days of incarceration.

*Id.* at 51.

56. See, e.g., *Gleason v. Chain Serv. Restaurant*, 300 F. Supp. 1241, 1251 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 342 (2d Cir. 1970); *Jacques v. Local 1418, Int'l Longshoremen's Ass'n*, 246 F. Supp. 857, 859-60 (E.D. La. 1965), *aff'd*, 404 F.2d 703 (5th Cir. 1969).

57. See note 70 *infra*.

ously hamper the accused's ability to earn a living.<sup>58</sup> Moreover, if the Court is interested in eschewing complex questions of fundamental fairness in union proceedings, it should adopt the approach it used in the coerced confession cases<sup>59</sup> and avoid difficult factual determinations simply by requiring the right to counsel as an adequate prophylactic.

This brief review is not intended to suggest that individuals are completely at the mercy of their unions. It does seem, however, that in failing to require specific indictments or the right to counsel even in cases of major proportions, the courts have failed to appreciate the important individual rights at stake when a union disciplines a member. The courts have repeatedly justified their abstention by citing the need to avoid invasion of union disciplinary functions.<sup>60</sup> Yet what is involved is not a jurisdictional bout between union tribunals and federal courts. What is involved is a fundamental balancing of the individual rights of the member and the institutional imperatives of his union.

## II. Penalties and Enforcement

The restrictions discussed above afford the individual some shelter from union power. If he engages in conduct protected by an important public policy, union discipline is barred. If he engages in unprotected conduct, he may yet escape discipline if union procedures are grossly unfair. Yet the protection afforded by these restrictions is obviously limited and uncertain. The errant member generally will have to face the music and incur the penalty that the trumpets announce.

Union constitutions and bylaws typically provide for a wide range of penalties, including suspension, expulsion, reprimands, and removal from office. The sanction that has recently received the greatest attention, however, is the monetary fine.<sup>61</sup> Since *Allis-Chalmers* it has

58. See *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233, 250 n.7 (1971) (Douglas, J., dissenting) ("Hardeman testified at trial that following the loss of his union card he was unable to work in the boilermaker's trade beyond one job lasting five days.")

59. Compare *Miranda v. Arizona*, 384 U.S. 436 (1966), with *Townsend v. Sain*, 372 U.S. 293 (1963).

60. See, e.g., *NLRB v. Boeing Co.*, 412 U.S. 67, 72-75 (1973).

61. E.g., T. KEELINE, *supra* note 48; Archer, *Allis-Chalmers Recycled: A Current View of a Union's Right to Fine Employees for Crossing a Picket Line*, 7 *IND. L. REV.* 498 (1974); Note, *Union Power to Discipline Members Who Resign*, 86 *HARV. L. REV.* 1536 (1973); Note, *Union Disciplinary Fines and the Right to Resign*, 30 *WASH. & LEE L. REV.* 664 (1973).

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been clear that unions can enforce such fines in court. What has not been clear until recently is the extent to which that enforcement, and its immunity from § 8(b)(1)(A), depends on the fine's reasonableness and the accused's full membership in the union. In three recent decisions, *NLRB v. Granite State Joint Board, Textile Workers Local 1029*,<sup>62</sup> *Booster Lodge No. 405, IAM v. NLRB*,<sup>63</sup> and *NLRB v. Boeing Co.*,<sup>64</sup> the Court resolved these questions by striking a rather curious balance. If a worker is a "full union member," he can—so far as federal law is concerned—be required to pay unreasonably large fines; but if a worker resigns from his union, he apparently cannot be fined at all.

### A. *The Issue of Reasonableness*

In *Allis-Chalmers* the Supreme Court upheld judicial enforcement of disciplinary fines. While such enforcement arguably might permit unions to collect excessively large fines, the Court reasoned that this concern, even were there evidence that Congress shared it, should not prevent enforcement of fines reasonable in amount.<sup>65</sup> Since § 8(b)(1)(A) did not prohibit expulsions, the Court concluded that it should not be read to limit the often less severe penalty of a reasonable fine.<sup>66</sup>

Two years later in *Scofield v. NLRB*,<sup>67</sup> the Court seemingly made reasonableness of both the amount of the fine and the manner of its imposition prerequisites for judicial enforcement:

[Section] 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced . . . .

. . . .

In the case at hand, there is no showing in the record that the fines were unreasonable or the mere fiat of a union leader . . . .<sup>68</sup>

*Scofield* invited speculation that the Court would invalidate fines that were (1) unreasonably large in relation to the damage done the union by members violating its rules (as suggested by the Court's

62. 409 U.S. 213 (1972).

63. 412 U.S. 84 (1973).

64. 412 U.S. 67 (1973).

65. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192-93 (1967).

66. *Id.* at 183-84, 191-93. *See id.* at 198 (White, J., concurring).

67. 394 U.S. 423 (1969).

68. *Id.* at 430.

theory that the rules were a contract between the union and its members);<sup>69</sup> (2) unreasonably large in relation to the member's ability to pay (as suggested by the anti-coercion policy of § 8(b)(1)(A)); or (3) imposed in an arbitrary manner or on the basis of vague provisions (as suggested by the procedural guarantees of § 101(a)(5)).

But *Scofield* notwithstanding, the NLRB consistently refused to inquire into the reasonableness of union fines—even fines substantially larger than those *Scofield* had deemed fair.<sup>70</sup> According to the Board, congressional intent compelled this abstention. Determinations of reasonableness were “of an equitable nature,”<sup>71</sup> and equity was not an administrative province. The Board acknowledged that *Allis-Chalmers* and *Scofield* had spoken of reasonableness, yet it argued that these words were not addressed to the Board; they were instructions to courts that were asked to enforce fines.<sup>72</sup>

While the Board's position fared badly in the courts of appeal,<sup>73</sup> its reasoning prevailed where it counts most. In *NLRB v. Boeing Co.*,<sup>74</sup> the Supreme Court held that the reasonableness of union fines was an issue for state courts, to be decided under “the law of contracts, voluntary associations, or such other principles of law as may be applied.”<sup>75</sup> State courts, said Justice Rehnquist, were willing and able to address this issue:

Indeed, the expertise required for a determination of reasonableness may well be more evident in a judicial forum that is called upon to assess reasonableness in varying factual contexts than it is

69. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 182, 192 (1967). See also T. KEELINE, *supra* note 48, at 87-88.

70. In *Scofield* the union imposed fines of \$50 and \$100. 394 U.S. at 426. Among the many cases in which the NLRB refused to consider the reasonableness of fines are: *Machinists Lodge 284*, 190 N.L.R.B. 208, 77 L.R.R.M. 1100 (1971), *modified sub nom.* *Morton Salt Co. v. NLRB*, 472 F.2d 416 (9th Cir. 1972), *vacated and remanded*, 414 U.S. 807 (1973) (\$1,000 fine for crossing sister union's picket line); *Printing Pressmen's Union No. 60*, 190 N.L.R.B. 268, 77 L.R.R.M. 1199 (1971) (\$2,000 fine for one day of strikebreaking); *Carpenters Local Union 101*, 186 N.L.R.B. 708, 75 L.R.R.M. 1421 (1970) (\$300 fine for four hours of strikebreaking); *Rubber Workers Local 510*, 186 N.L.R.B. 765, 75 L.R.R.M. 1420 (1970) (\$525 fine for strikebreaking that yielded member \$425 in wages); *Booster Lodge No. 405, IAM*, 185 N.L.R.B. 380, 75 L.R.R.M. 1004 (1970), *modified*, 459 F.2d 1143 (D.C. Cir. 1972), *rev'd in relevant part sub nom.* *NLRB v. Boeing Co.*, 412 U.S. 67 (1973) (\$450 fine for strikebreaking that yielded member approximately \$225).

71. *IAM Local Lodge 504*, 185 N.L.R.B. 365, 368, 75 L.R.R.M. 1008, 1010 (1970), *rev'd sub nom.* *O'Reilly v. NLRB*, 472 F.2d 426 (9th Cir. 1972), *vacated and remanded sub nom.* *IAM Local Lodge 504 v. O'Reilly*, 414 U.S. 807 (1973).

72. *Id.*, 75 L.R.R.M. at 1010.

73. *Morton Salt Co. v. NLRB*, 472 F.2d 416 (9th Cir. 1972), *vacated and remanded*, 414 U.S. 807 (1973); *Booster Lodge No. 405, IAM v. NLRB*, 459 F.2d 1143 (D.C. Cir. 1972), *rev'd in relevant part sub nom.* *NLRB v. Boeing Co.*, 412 U.S. 67 (1973).

74. 412 U.S. 67 (1973).

75. *Id.* at 74.

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in a specialized agency. In assessing the reasonableness of disciplinary fines, for example, state courts are often able to draw on their experience in areas of law apart from labor relations.<sup>76</sup>

A review of Justice Rehnquist's evidence in support of his faith is not reassuring. The Court cited seven state cases considering union fines.<sup>77</sup> In two the fines were approved with no substantive discussion of their reasonableness.<sup>78</sup> In two other cases the issue was allotted less than a paragraph, and the fines were summarily upheld as liquidated damages under the contract theory of the union-member relationship<sup>79</sup> endorsed in *Allis-Chalmers*.<sup>80</sup> A New Jersey decision was cited by the Court for reduction of a \$750 fine to \$500. Yet the New Jersey court actually held the fine of \$250 for each offense reasonable in amount;<sup>81</sup> the reduction owed not to any excessiveness of the fine, but to the trial court's finding insufficient proof for the union board's guilty verdict on one charge.<sup>82</sup> In a Pennsylvania case a \$300 fine was reduced to \$100 solely because the larger sum could have made an intraunion appeal prohibitively expensive.<sup>83</sup>

The only decision cited by the Court that involved reduction of a fine on grounds of reasonableness was that of the Los Angeles Municipal Court in *Farnum v. Kurtz*.<sup>84</sup> There the court, in reducing a fine for circulating a "nasty letter" about union officials, cited no contract and precious little labor law. It concluded that the union had not been damaged in the amount of its fine. "Moreover," the judge added,

this Court has had the duty and obligation of passing judgment in thousands of cases where defendants were found guilty of misdemeanors. In the vast majority of such cases the first offender is also dealt with kindly, compassionately, and understandingly,

76. *Id.* at 76-77 (footnotes omitted).

77. *Id.* at 76-77 nn.12-13.

78. *Jost v. Communications Workers Local 9408*, 13 Cal. App. 3d Supp. 7, 91 Cal. Rptr. 722 (1970) (court expressed willingness to discuss reasonableness had issue been raised by parties); *Local 248, UAW v. Natzke*, 36 Wis. 2d 237, 153 N.W.2d 602 (1967).

79. *Walsh v. Communications Workers Local 2336*, 259 Md. 608, 614-15, 271 A.2d 148, 151 (1970); *UAW Local 283 v. Scofield*, 50 Wis. 2d 117, 134, 183 N.W.2d 103, 112 (1971). See *Communications Workers Local 6003 v. Jackson*, 84 L.R.R.M. 2689 (Okla. Sup. Ct. 1973) (upholding \$275 strikebreaking fine as reasonable, citing *Walsh* liquidated damages theory).

80. 388 U.S. at 192.

81. *Newspaper Guild Local 173 v. Rakos*, 110 N.J. Super. 77, 91, 264 A.2d 453, 460-61 (App. Div. 1970).

82. *Id.* at 81-82, 264 A.2d at 456.

83. *McCauley v. Federation of Musicians*, 26 L.R.R.M. 2304, 2305-06 (Pa. Ct. C.P. 1950) (privilege of appeal conditioned on payment of half of fine).

84. 70 L.R.R.M. 2035 (L.A. Mun. Ct. 1968).

not only by this individual judge but by practically all judges. The first offender in misdemeanor cases is usually regarded as a student who should be taught that society requires its laws be obeyed, not as a hardened criminal.

Based upon the facts herein and the Court's experience aforesaid, the fine assessed is much too large and unreasonable.<sup>85</sup>

Whatever else may be said for this melange of contract, criminal, and labor law, it is clear that state courts have not yet developed anything approaching a consistent view of the reasonableness of union fines. Indeed, it is surprising that the Supreme Court expects them to do so. The contracts involved are almost always union rules which are easily changed and are drafted, interpreted, and applied by union officials. The applicable "criminal law" principles are seldom specific and are applied in the first instance by union trial boards, tribunals that have few of the safeguards of a criminal court. And the labor law in this area is now, thanks to *Boeing*, an enormous vacuum.<sup>86</sup>

The responsibility for determining the reasonableness of a fine should have been vested in the Board. Member McCulloch, dissenting in *IAM Local Lodge 504*,<sup>87</sup> argued persuasively that while the line delimiting reasonable fines might be difficult to draw, the need for a

85. *Id.* at 2041.

86. Besides providing no substantive guidance to state courts for determining the reasonableness of union fines, *Boeing* creates several procedural ambiguities. For example, as fines increase, defendant union members may be entitled to jury trials. Because state courts generally treat fines as compensating the union for its damages, see T. KEELINE, *supra* note 48, at 87-88, the question of whether a fine is reasonable is decided by the jury. Indeed, one state court has already held that the reasonableness of the fine is a question of fact. *Ballas v. McKiernan*, 63 Misc. 2d 432, 435, 312 N.Y.S.2d 204, 208 (N.Y.C. Civ. Ct. 1970), *rev'd on other grounds*, 41 App. Div. 2d 131, 341 N.Y.S.2d 520 (1973), *aff'd*, 35 N.Y.2d 14, 315 N.E.2d 758, 358 N.Y.S.2d 695, *cert. denied*, 419 U.S. 1034 (1974). Thus the *Boeing* Court's faith in the experience of state judges may, in reality, come to rest on less experienced state juries.

Given state courts' analogy of union fines to liquidated damages, see p. 1035 *supra*, the courts must decide whether the union or its fined member bears the burden of proof on reasonableness. In contract actions generally the defendant must prove that the amount fixed in the liquidated damages clause is unreasonable in light of actual damages flowing from the breach. See, e.g., *Norwalk Door Closer Co. v. Eagle Lock & Screw Co.*, 153 Conn. 681, 686, 220 A.2d 263, 267 (1966). In the case of union fines, however, no fixed amount is established before the breach. Instead, the union fills in a blank in an implied, unwritten clause to the effect that, "I, loyal union member, promise to pay the union \$\_\_\_\_\_ if I am found guilty of breaking union rules." Given this interpretation, the plaintiff union would seem to have the initial burden of proving that its completion of the blank was reasonable. State courts have not yet examined this question, but its very formulation suggests the folly of allowing state courts to enforce imaginary contracts without limitations derived from somewhat more substantial labor law.

87. 185 N.L.R.B. 365, 75 L.R.R.M. 1008 (1970), *rev'd sub nom.* O'Reilly v. NLRB, 472 F.2d 426 (9th Cir. 1972), *vacated and remanded sub nom.* IAM Local Lodge 504 v. O'Reilly, 414 U.S. 807 (1973).

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uniform labor policy required that the Board, and not 50 state courts, accept the task.<sup>88</sup> A reasonable fine, said McCulloch, should not exceed the gain the member derived from his prohibited conduct. In assessing greater penalties, a union would go beyond the permissible bounds of regulating its internal affairs, coercing its members in violation of § 8(b)(1)(A).<sup>89</sup>

This rule is hardly foolproof. It would bend if a union could prove damages greater than the wages a strikebreaker earned. It would fail completely in cases where discipline is imposed for noneconomic conduct. Yet a prima facie rule that a union may deny transgressors only the fruits of their offenses seems far more promising than the cursory examinations thus far provided by state courts. Moreover, it is difficult to believe that state courts, with little or no experience in labor relations, will develop more consistent and rational standards than would the NLRB, which frequently is required to determine the reasonableness of labor-related activity.<sup>90</sup>

The Court's approach in *Boeing* may lead unions to impose still larger, more coercive fines. The worker will have little hope of relief. By refusing to consider his claims under § 8(b)(1)(A), the Court leaves him with only the far less effective remedy<sup>91</sup> of defending himself in state court—when, and if, the union seeks judicial enforcement. The Court's holding undoubtedly has made it less likely that a union will need to sue to collect its fines, save from its most well-informed and litigious members.

88. *Id.* at 371, 75 L.R.R.M. at 1013. Justice Rehnquist responded to this argument in *Boeing* by standing the preemption doctrine on its head:

Since state courts will have jurisdiction to determine reasonableness in the enforcement context in any event, the Board's independent determination of reasonableness in an unfair labor practice might well yield a conflict when the two forums are called upon to review the same fine.

412 U.S. at 77-78. This argument assumes its conclusion: that an unreasonably large fine is not a violation of § 8(b)(1)(A). For if the Board and the Court were willing to brand such fines as coercive, the Board's jurisdiction over the initial imposition of the fine would preclude any subsequent enforcement by state courts. *See Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

89. 185 N.L.R.B. at 370-71, 75 L.R.R.M. at 1013. McCulloch argued that a fine in excess of the wages earned by strikebreaking effectively assesses the worker a sum representing wages earned after the strike is over. The union thus goes beyond internal sanctions and interferes impermissibly with the worker's employment rights. *See* p. 1022 & note 4 *supra*. The *Boeing* dissent recited McCulloch's argument approvingly. 412 U.S. at 82 (Douglas, J., dissenting).

90. The Board determinations most akin to the reasonableness of disciplinary fines are those involving excessive initiation fees. Section 8(b)(5), 29 U.S.C. § 158(b)(5) (1970), requires the Board to consider the reasonableness of such fees.

91. Not only is the union member subjected to greater uncertainty, but a court fight will also undoubtedly be more expensive than pressing a complaint before the NLRB.

### B. *Jurisdiction over the Member*

At the same time that they were retreating from the problem of unreasonably large fines, the Board and the Court were developing the proposition that a union cannot impose any fine on a member for his conduct after resigning from the union. Not only are such fines unenforceable, but they violate § 8(b)(1)(A) as well. This proposition holds promise for dissidents who decide that the potential liability for breaking union rules outweighs the advantages of being a union member.

The individual's ability to immunize himself from union discipline by resigning was first tested in *NLRB v. Granite State Joint Board, Textile Workers Local 1029*.<sup>92</sup> The court of appeals held that a member's liberty to resign from the union and return to work during a strike is qualified by the contract doctrine of mutual reliance.<sup>93</sup> The court found that, having voted for a strike, a latter-day dissident was barred from crossing the picket line he had helped to erect. If he disappointed his fellow members' expectations he could be fined, his timely resignation notwithstanding. The Supreme Court reversed. Giving the mutual reliance doctrine "little weight,"<sup>94</sup> the Court held that strike solidarity must yield to the individual's right under § 7 of the NLRA<sup>95</sup> to refrain from "concerted activities for the purpose of collective bargaining":

Events occurring after the calling of a strike may have unsettling effects, leading a member who voted to strike to change his mind. The likely duration of the strike may increase the specter of hardship to his family; the ease with which the employer replaces the strikers may make the strike seem less provident. . . . [T]he vitality of § 7 requires that the member be free to refrain in November from the actions he endorsed in May . . . .<sup>96</sup>

Citing *Allis-Chalmers*<sup>97</sup> and *Scofield*,<sup>98</sup> the Court held that after the lawful dissolution of their relationship "the union has no more con-

92. 446 F.2d 369 (1st Cir. 1971), *rev'd*, 409 U.S. 213 (1972).

93. *Id.* at 372-73.

94. 409 U.S. at 217.

95. 29 U.S.C. § 157 (1970).

96. 409 U.S. at 217-18.

97. *Id.* at 215 (workers legitimately fined in *Allis-Chalmers* "enjoyed full union membership") (citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 196 (1967)).

98. 409 U.S. at 215-16 (citing *Scofield v. NLRB*, 394 U.S. 423, 430 (1969)). In *Scofield*, the Court observed that

§ 8(b)(1)(A) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

394 U.S. at 430 (emphasis added).

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trol over [its] former member than it has over the man in the street.”<sup>99</sup>

In *Booster Lodge No. 405, IAM v. NLRB*<sup>100</sup> the Machinists Union argued that its constitution provided a basis for such continuing control. The constitution contained an express anti-strikebreaking clause. Invoking the metaphor of the “union-member contract,” the Machinists contended that a worker was bound to honor his pledge, freely undertaken while a member, even after he had resigned. Unanimously, the Court demurred. It refused to deduce an implied post-resignation commitment from the constitutional proscription, as it had refused to infer such an implied commitment from the strike vote in *Granite State*.<sup>101</sup> Thus, the former member was under no obligation to refrain from strikebreaking, and the union violated § 8(b)(1)(A) when it fined him for working.<sup>102</sup>

99. 409 U.S. at 217. The Court held that a “union commits an unfair labor practice when it seeks enforcement of fines” for a worker’s post-resignation conduct. *Id.* It may be argued that in stressing the “enforcement of fines” rather than the act of fining, the Court avoided the issue of whether a union may fine a resigner where the fine is enforced only by expulsion. If a fine may be enforced by expulsion, the disciplined ex-member will be forced to pay the fine before he can regain membership. The Board apparently has taken the position that a post-resignation fine is illegal regardless of how it is enforced. See *Booster Lodge No. 405, IAM*, 185 N.L.R.B. 380, 382, 75 L.R.R.M. 1004, 1006-07 (1970), *modified*, 459 F.2d 1143 (D.C. Cir. 1972), *aff’d in part*, 412 U.S. 84, and *rev’d in part sub nom. NLRB v. Boeing Co.*, 412 U.S. 67 (1973) (union violates § 8(b)(1)(A) “by imposing disciplinary fines on resigners” and is ordered to cease such conduct “including attempts to collect the illegal fines through court proceedings” (emphasis added)). The Fifth Circuit has held, however, that a post-resignation fine is valid if enforceable solely by expulsion. *Local 1255, IAM v. NLRB*, 456 F.2d 1214 (5th Cir. 1972), *denying enforcement to* 188 N.L.R.B. 928, 76 L.R.R.M. 1456 (1971).

A related question is whether a union may discipline a resigner by imposing sanctions other than fines. The Board’s position seems to be that a union may expel a resigned member, although it may not suspend him. Compare *District Lodges 99 & 1239, IAM*, 194 N.L.R.B. 938, 79 L.R.R.M. 1208 (1972), with *Pattern Makers’ Ass’n*, 199 N.L.R.B. 96, 81 L.R.R.M. 1177 (1972). The Board’s distinction between expulsions and suspensions has thus far failed to impress the courts. See, e.g., *NLRB v. District Lodge 99*, 489 F.2d 769, 771 (1st Cir. 1974), *modifying* 194 N.L.R.B. 938, 79 L.R.R.M. 1208 (1972). In approving discipline against resigners in the form of expulsion or fines enforceable by expulsion, the courts have relied upon the proviso to § 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1970), which preserves the union’s right to prescribe rules for acquiring membership. See 489 F.2d at 771; *Local 1255, IAM v. NLRB*, 456 F.2d 1214, 1217 (5th Cir. 1972). Expulsion is merely a bar to membership; a fine enforceable by expulsion merely conditions readmission to membership on payment of the fine. *Id.*

This suggestion that a union can expel a member who has already resigned is odd and may lead to confusion among both union members and the courts should the member seek reinstatement. It would seem far better to stress the *Granite State* Court’s “man in the street” language and hold that once the member resigns the union cannot discipline him in any way. The possibility of members jumping in and out of a union merely to avoid strikebreaking penalties should not arise since such activity would incur additional initiation fees and substantial social pressure upon reinstatement.

100. 412 U.S. 84 (1973).

101. *Id.* at 89-90.

102. Unfortunately, the holding in *Booster Lodge* is less clear than one would wish. The Court noted that the anti-strikebreaking clause did not expressly apply to former members and that the resigners did not realize that the union interpreted the clause as applying to them. This reasoning suggests that, had the constitution contained an ex-

*Granite State* and *Booster Lodge* appear to establish firmly the individual's right to insulate himself from union fines by withdrawing from union membership. Upon resignation, the union's jurisdiction over the worker, and hence its power to fine him, ends. Yet a closer examination of what the Court said, and left unsaid, about that right to resign suggests some rather unsettling possibilities.

### III. Limitations on the Right to Resign

After a decade of development, the Supreme Court has shaped the law of union discipline in such a fashion that the dissident's best, indeed his only clear avenue of escape from union discipline is resignation. Given the variety of pressures on workers in organized industries today, of course, Leonard Woodcock and Frank Fitzsimmons need not fear mass withdrawals tomorrow. Even so, an effective and well-known right to resign would protect the worker who disagreed with union policy without financially injuring the union with a security clause.<sup>103</sup>

I would suggest, however, that the right to resign is neither effective nor well-known and that the Court and the Board are to blame. The Court's decisions, which so distinctly proclaimed the right to resign, contain dicta suggesting that the right may be far from absolute. Moreover, even if theoretically unlimited, the right to resign may go unexercised as a result of ignorance and misinformation. Owing to the ambiguity of over-inclusive union security clauses which simply require "membership" in the union as a condition of employment, a worker may well be deterred from resignation by fear of losing his job. Most importantly, few workers are even aware of their right to

press ban on post-resignation strikebreaking of which the workers were aware, the union could have fined them even though they had resigned. The Court's suggestion that a union constitution can restrict the post-resignation conduct of its former members is ominous and utterly inconsistent with the Court's "man in the street" language in *Granite State*.

Now that the Court has given the cue, however, it seems only a matter of time before unions amend their constitutions and bylaws to make their regulations explicitly applicable to resigners. Indeed, the Machinists have already done so. See RULES OF ORDER FOR LOCAL LODGES, IAM, art. L, § 3 (1974) (resignation during strike or less than 14 days before strike begins will not relieve members of obligation not to strikebreak). In the first test of the Machinists' provision, the Board rose to the occasion and held that the provision impaired workers' § 7 rights. It therefore invalidated strikebreaking fines against resigners. *Machinists Local 1994*, 215 N.L.R.B. No. 110, 88 L.R.R.M. 1120 (1974). Yet the Court's unfortunate language in *Booster Lodge* assures that further litigation will follow. For an argument that an explicit union prohibition of post-resignation strikebreaking would be valid, see Note, *Union Power to Discipline Members Who Resign*, *supra* note 61, at 1553-57.

103. See note 5 *supra*.

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resign. It is here that the Board has failed. The Board must take steps not only to prevent unions from unduly restricting the right of resignation, but also to require that unions inform members of their freedom to resign with impunity.

### A. *Union Restrictions on the Right to Resign*

The major uncertainty to be resolved concerns the degree to which a union can limit the right of resignation through its constitution, bylaws, or collective agreements. In permitting resignations in the past, the Board and the lower courts have noted that the constitutions before them contained no express restrictions on the right to resign.<sup>104</sup> In *Granite State* the Court plainly reserved the question of a union's power to develop such restrictions: "We do not now decide to what extent the contractual relationship between union and member may curtail the freedom to resign."<sup>105</sup> The Court encouraged further speculation in *Booster Lodge* when it said, in a footnote, that "[s]ince the collective-bargaining agreement expired prior to the times of the resignations, the maintenance-of-membership clause therein was no impediment to resigning."<sup>106</sup> Inasmuch as a worker's obligation under this or any type of union security clause is limited to payment of dues,<sup>107</sup> it is hard to understand how a maintenance-of-membership clause could ever pose an "impediment to resigning"—provided, of course, that the resigner tenders dues. Nevertheless, this strange little footnote suggests that such a clause can, under so far unknown conditions, limit the right to resign.<sup>108</sup>

104. See, e.g., *Booster Lodge No. 405, IAM v. NLRB*, 459 F.2d 1143, 1153 (D.C. Cir. 1972), *aff'd in part*, 412 U.S. 84, and *rev'd in part sub nom. NLRB v. Boeing Co.*, 412 U.S. 67 (1973). *Machinists Local 1994*, 215 N.L.R.B. No. 110, 88 L.R.R.M. 1120, 1122 (1974); *District Lodges 99 & 2139, IAM*, 194 N.L.R.B. 938, 938, 79 L.R.R.M. 1208, 1208 (1972).

105. 409 U.S. at 217. See *Booster Lodge No. 405, IAM v. NLRB*, 412 U.S. 84, 88 (1973) ("And here, as [in *Granite State*], we leave open the question of the extent to which contractual restriction on a member's right to resign may be limited by the [NLRA].")

106. 412 U.S. at 88 n.8. Maintenance-of-membership provisions impose no obligations on nonmembers, but require employees who have voluntarily elected to join the union to maintain their union membership for the life of the contract or some other specified time period. Maintenance-of-membership provisions appear in approximately four percent of all collective bargaining agreements and are especially common in the petroleum, textile, and insurance industries. 2 COLL. BARG. NEGOT. & CONTR. (BNA) 87:2-3 (1975). A maintenance-of-membership arrangement differs from the more common union shop, under which all employees in a bargaining unit are required to join the union and maintain their membership as a condition of employment.

107. See pp. 1048-51 *infra*.

108. Collective agreements requiring maintenance of membership frequently establish "escape periods" during which employees may resign from the union. Escape periods typically run for 10, 15, or 30 days and usually come at the start of the contract term, at its conclusion, or at the contract anniversary date. See 2 COLL. BARG. NEGOT. & CONTR.

Despite the Court's confusing statements in *Granite State* and *Booster Lodge*, neither the Board nor any post-*Allis-Chalmers* court has yet found a valid union restriction on the right to resign. This record has been fairly easy to maintain because few unions have explicitly addressed the question of a member's resignation rights. It seems only a matter of time, however, before unions revise their constitutions to restrict this important means of escaping discipline. Indeed, the process of revision has begun.<sup>109</sup>

What type of restriction would be valid? The Teamsters' requirement<sup>110</sup> that a member meet any outstanding financial obligations should pass muster. In fact, such a provision may not even be necessary. Voluntary association cases at common law conditioned the freedom to resign on the payment of past dues and assessments.<sup>111</sup>

Reasonable restrictions designed to ensure that a resignation is intentional should also be upheld. The Board has adopted the general rule that an effective resignation should be in writing, although it

(BNA) 87:141-42 (1976). The Board has taken a hostile position toward contract escape periods. See *Chemical Workers Local 143*, 188 N.L.R.B. 705, 707 & n.3, 76 L.R.R.M. 1385, 1387 & n.3 (1971) (holding one-day escape period invalid). The only court to confront them has sidestepped the issue of their validity. See *NLRB v. Mechanical Workers Local 444*, 427 F.2d 883, 885 (1st Cir. 1970) (holding two-week escape period in new contract inapplicable to resignations tendered before new contract took effect).

Alternatively, the union might try to block a resignation by relying on dicta in Supreme Court decisions suggesting that a union may waive all other membership requirements and declare that the resigner who merely pays dues is a "full member" subject to union discipline. In *NLRB v. General Motors Corp.*, 373 U.S. 734, 743-44 (1963), the Court stated:

Of course, if the union chooses to extend membership even though the employee will meet only the minimum financial burden, and refuses to support or "join" the union in any other affirmative way, the employee may have to become a "member" under a union shop contract, in the sense that the union may be able to place him on its rolls.

In *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 197 (1967) (footnote omitted), the Court expressly reserved the question of the legality of disciplining mere dues-payers:

Whether [the] prohibitions [of § 8(b)(1)(A)] would apply if the locals had imposed fines on members whose membership was in fact limited to the obligation of paying monthly dues is a question not before us and upon which we intimate no view.

It seems absurd to suggest that a union may redefine its membership to include those who grudgingly pay dues, but who have expressed a clear intent to limit their participation to the barest minimum. The *Allis-Chalmers* Court, despite its refusal to consider the question of disciplinary powers over mere dues-payers, cited *General Motors* for the proposition that § 8(a)(3) "whittled down" the obligation of such "members" to its "financial core." 388 U.S. at 197 n.37. Despite such language, and the plain intent of the resignation decisions, one is left hoping for a clear and explicit resolution of the doubts which linger.

109. See Millan, *Disciplinary Developments Under § 8(b)(1)(A) of the National Labor Relations Act*, 20 LOY. L. REV. 245, 268-73 (1974).

110. CONST. INT'L BHD. OF TEAMSTERS, art. II, § 2(h) (1971) (No member may resign, nor will his resignation become effective, until "all dues, assessments, fines and other obligations" have been paid.)

111. See, e.g., *Communications Workers v. NLRB*, 215 F.2d 835, 838 (2d Cir. 1954) (relying on and discussing common law rule).

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has permitted resignation in the form of surrendered membership cards,<sup>112</sup> and, occasionally, oral resignations.<sup>113</sup> More elaborate resignation procedures, involving witnesses, "magic words," or "counseling" by union officials, should be invalidated. These procedures are either unnecessary, given the informal agreement between a union and its members, or coercive, providing union officials with an opportunity to pressure a member to stay within the organization. Provisions requiring a resigner to notify the union of his decision should likewise be acceptable, provided the requirements are kept to a minimum: no more should be demanded than a written statement. Although the union occasionally may need a brief period to update its records, more restrictive provisions requiring "advance warning" or a waiting period<sup>114</sup> should be voided as needless interference with the freedom to resign.<sup>115</sup>

Unfortunately, the Board has complicated the simplicity of its written-notification rule by holding that resignation does not take effect until notice is actually received. The member who wants to avoid a personal confrontation must wait until the "close of the business day" on which his mailed resignation reaches union officials.<sup>116</sup> Since strikes often are called on short notice, and since the Board's abstention on "reasonableness" may permit a member to be heavily fined for only a few hours of strikebreaking,<sup>117</sup> this rule could prove a trap. Nor is it necessary. A union gains little by receiving actual notice of a member's resignation. Although the Board must ensure that workers do not gain retroactive immunity for crossing picket lines, a worker who has irrevocably entrusted his resignation to the mails should be at liberty to break union rules. The Internal Revenue Service is content with a postmark.

112. *E.g.*, Communications Workers Local 6135, 188 N.L.R.B. 971, 971, 76 L.R.R.M. 1635, 1636 (1971).

113. Local 1384, UAW, 219 N.L.R.B. No. 123, 90 L.R.R.M. 1152, 1154 (1975); Mechanical Workers Local 444, 173 N.L.R.B. 325, 327, 69 L.R.R.M. 1384, 1385 (1968).

Despite repeated union attempts to argue that a particular resigner's actions were inconsistent or ambiguous, in only one case has the Board held that a member failed to resign. That individual had merely revoked his dues-checkoff authorization and told a union official that he was "thinking of getting out of the Union." District Lodges 99 & 2139, IAM, 194 N.L.R.B. 938, 938, 79 L.R.R.M. 1208, 1210 (1972).

114. *Cf.* Constr., IUE, art. XIX, § D (1975) (60-day advance notice required); Constr., UAW, art. 6, § 17 (1974) (resignation must be tendered during last 10 days of fiscal year; resignation effective 60 days after end of fiscal year).

115. *Contra*, Millan, *supra* note 109, at 277 (advocating 60-to-90-day waiting period).

116. Local 1012, United Electrical, Radio & Mach. Workers, 187 N.L.R.B. 375, 375, 76 L.R.R.M. 1038, 1038 (1970), followed in Bookbinders Local 60, 203 N.L.R.B. 732, 734 & n.9, 83 L.R.R.M. 1518 (1973).

117. *E.g.*, Printing Pressmen's Union No. 60, 190 N.L.R.B. 268, 272, 77 L.R.R.M. 1199 (1971) (\$2,000 fine for one day of strikebreaking); Carpenters Local 101, 186 N.L.R.B. 708, 75 L.R.R.M. 1421 (1970) (\$300 fine for four hours of strikebreaking).

Finally, the courts will undoubtedly be faced with provisions barring resignation entirely, barring it during strikes,<sup>118</sup> or permitting it only at certain inconvenient times. To date, the most notorious of these provisions is the Auto Workers' requirement that members tender their resignations by registered mail during the last 10 days of the fiscal year.<sup>119</sup> The First Circuit upheld the 10-day restriction over a decade ago, finding a "rational basis" for it in the union's need to preserve fiscal certainty.<sup>120</sup> The Board, however, has persistently struck the provision down<sup>121</sup> and has indicated that it will continue to do so unless the Supreme Court directs otherwise.<sup>122</sup>

Let us hope that the Board's action is a portent of things to come. Under § 7, *Scofield*,<sup>123</sup> and the resignation cases, any union restriction on the timing of resignations should be declared invalid. If the resignation doctrine is to mean anything, the right to resign cannot be confined to those few periods when the member is least likely to be disenchanted with his union.<sup>124</sup> Indeed, § 7 requires that a member be free to leave even at times of greatest stress. To hold otherwise is to resurrect the discredited doctrine of mutual reliance and liken the member, as the union urged in *Granite State*, to a "volunteer for military service" who "is under strict discipline for the duration."<sup>125</sup>

Such pleas should not sway the courts in explicating the right to resign. It is difficult to believe that union leaders are so far removed from their rank and file that they cannot predict how many deserters they will encounter during a strike. To the extent that union officials do have honest doubts about their capacity to wage protracted economic

118. *E.g.*, CONST., IUE, art. XIX, § D (1975). The Newspaper Guild amended its constitution after *Booster Lodge* to prohibit acceptance of resignations or withdrawals during strikes. Millan, *supra* note 109, at 268.

119. CONST., UAW, art. 6, § 17 (1974).

120. NLRB v. UAW, 320 F.2d 12, 16 (1st Cir. 1963). The opinion, of course, came down before *Allis-Chalmers*, *Scofield*, and the resignation decisions.

121. Local 469, UAW, 221 N.L.R.B. No. 125, 90 L.R.R.M. 1563, 1564 (1975); Local 1384, UAW, 219 N.L.R.B. No. 123, 90 L.R.R.M. 1152, 1154 & n.4 (1975); UAW Local 647, 197 N.L.R.B. 608, 609, 80 L.R.R.M. 1411, 1412 (1972).

122. 90 L.R.R.M. at 1154 n.4. The Court missed its chance in *Granite State*. The Textile Workers had argued that their practice was to accept resignations only during an annual 10-day escape period, with which the resigners had failed to comply. Rather than determining the validity of the practice the Court apparently found it inapplicable because the resigners were unaware of it. 409 U.S. at 217 n.5.

123. See note 98 *supra*.

124. Professor Gould has noted that, while auto strikes normally are called in September, the UAW member has to make his resignation decision between December 21 and 31, hardly a time for sober reflection. See Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1105.

125. Brief for Respondent at 15, NLRB v. Granite State Joint Bd., Textile Workers Local 1029, 409 U.S. 213 (1972).

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war (a source of concern if one accepts the underlying rationale of *Allis-Chalmers*<sup>126</sup>), they could poll their membership in a secret ballot.<sup>127</sup> Moreover, unions are meant to be democratic institutions. If unfettered freedom to resign so depletes a union's ranks over time that the strength of its strike is sapped, one is tempted to say that the members have spoken, the consensus has evaporated, and the strike should come to an end.

While this area of union discipline is uncertain, guidance is available. In considering future restrictions on the right to resign, the Board and the courts should follow the spirit, if not the literal prescriptions, of both the discipline and the resignation decisions. They should hold that a union may do no more than require resigners to fulfill past financial obligations and tender their resignations in an unambiguous manner.

### B. *The Real and Imagined Effects of Resignation*

Union constitutional restrictions are only a threshold impediment to resigning. As the disaffected union member contemplates the rewards of resignation, it undoubtedly will occur to him that the benefits will not be realized without some corresponding costs. His assessment of these costs will determine whether the right to resign, which we shall assume is freely available, will actually be exercised.

Resignation plainly has its disadvantages. Most notably the worker will lose whatever influence he once had in the union which will continue to represent him, despite his resignation, in negotiations with his employer. Unfortunately, the worker may be misled into thinking that resignation will mean the loss, not only of internal union

126. "The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strike-breakers is essential if the union is to be an effective bargaining agent' . . ." 388 U.S. at 181 (quoting Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1049 (1951)).

127. If the union were to sample rank-and-file opinion, including periodic checks on members' inclination to resign, all strike votes and such opinion sampling would have to be conducted in a confidential manner to insure accuracy. Unfortunately, while some unions now require such secrecy, many others do not. See Brief for IAM as Amicus Curiae at 16a-17a, *NLRB v. Granite State Joint Bd., Textile Workers Local 1029*, 409 U.S. 213 (1972).

It is not persuasive for union leaders who conduct nonconfidential strike votes to argue that free resignation will defeat their carefully developed consensus. Indeed, the *Granite State* Court probably was impressed by the fact that the strike vote in that case, touted by the First Circuit as an expression of unanimous resolve, 446 F.2d at 370-73, in reality stood for very little because the balloting was not secret. See Brief for Petitioner at 20 n.16, *NLRB v. Granite State Joint Bd., Textile Workers Local 1029*, 409 U.S. 213 (1972) ("Radziewicz, the first employee to resign, testified that he attended the strike authorization meeting and 'stood up' in favor of the strike because 'they all stood up.'")

benefits, but also of his job. His dismissal most certainly should be illegal. Yet the Court has failed, in its union fine cases, to clarify the law.

### 1. *Resignation and Union Rights*

In making his resignation decision, the dissident must remember that the union whose policies he finds distasteful will continue to hold substantial economic power over him as exclusive bargaining agent.<sup>128</sup> By resigning, the worker surrenders his right to vote for union officials, to express himself at union meetings, and even to participate in determining the amount or use of dues he may be forced to pay under a union security clause.<sup>129</sup> Throughout the collective bargaining process he will be mute. He will have no part in formulating the union's demands or in choosing its bargaining team; he will have no vote in declaring a strike or in ratifying the contract it produces.<sup>130</sup> Although he will be able to cross picket lines with immunity from union discipline, his "right to work" may prove hollow. Strikebreaking is never pleasant; in most heavily unionized industries it may be impossible, since the stoppage will often shut operations down entirely. The nonmember will then have to endure a strike he has had no part in calling, unassisted by any strike benefits that union members receive.

The dissident should also consider the effect of resignation on his use of the collective agreement's grievance procedures. No matter how impartial the union is in processing grievances, the nonmember may find that his interests have been previously bartered away so effectively that he simply has no grounds for invoking the procedure. A worker who has challenged the union may also have difficulty persuading the members of a union grievance committee to act on his complaint, however valid. Although a nonmember is not com-

128. NLRA § 9(a), 29 U.S.C. § 159(a) (1970), provides that the representative selected by a majority of the employees in a unit shall be the exclusive bargaining representative of all employees in the unit. This provision provides the basic statutory underpinning for the "duty of fair representation," the duty of a union to represent fairly all employees for which it is the bargaining representative, regardless of whether those employees are members of the union. H. WELLINGTON, *supra* note 9, at 129-84.

129. The member's rights of participation in union government, including, but not limited to, the rights enumerated in the text, are guaranteed by the Landrum-Griffin Act. See 29 U.S.C. § 411(a)(1), (2), (3) (1970). That Act, however, defines "member," the term used in all the guarantee provisions, as one "who has fulfilled the requirements for membership . . . and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership . . ." *Id.* § 402(o).

130. See *NLRB v. General Motors Corp.*, 373 U.S. 734, 737 (1963) (employees deciding not to join "would not be entitled to attend union meetings, vote upon ratification of agreements negotiated by the union, or have a voice in the internal affairs of the union").

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pletely at the mercy of such officials, the deference shown by the Board and the courts to union "discretion" in processing claims should be considered by the dissident before he decides to resign.<sup>131</sup>

A more pressing factor will be fear of tangible loss. A union, of course, may not deprive a resigner of insurance, pension, or similar payments that accrue from the operation of the collective contract. The Board and the courts have repeatedly held that a union violates § 8(b)(1)(A) when it denies, or threatens to deny, such "terms of employment" to nonmembers.<sup>132</sup> Yet the union can, and undoubtedly will, deny resigners union benefits, including pensions, insurance, strike benefits, medical facilities, recreation centers, and dependents' scholarships.<sup>133</sup> The former member has financed these benefits in the past and may be forced to fund them in the future through continuing dues.<sup>134</sup> American unions in 1973 had a net worth of almost \$2.9 billion or nearly \$150 per member.<sup>135</sup> While the value of this

131. Under the proviso to NLRA § 9(a), 29 U.S.C. § 159(a) (1970), the employee may present grievances directly to his employer. See *NLRB v. Union Pac. Stages, Inc.*, 99 F.2d 153, 164 (9th Cir. 1938). Yet in attempting to invoke the final appeal to arbitration as provided in most collective agreements, the employee must rely on the union's duty of fair representation, a breach of which is often difficult to prove. See *Vaca v. Sipes*, 386 U.S. 171, 190-93 (1967) (merely proving that employee's claim is meritorious insufficient to show breach of duty of fair representation when union subsequently chooses not to seek arbitration).

132. E.g., *Local 167, Progressive Mine Workers v. NLRB*, 422 F.2d 538 (7th Cir.), cert. denied, 399 U.S. 905 (1970) (pension benefits); *Teamsters Local 729*, 167 N.L.R.B. 147, 66 L.R.R.M. 1009 (1967) (insurance benefits).

133. See *NLRB v. Local 286, UAW*, 222 F.2d 95 (7th Cir. 1955) (union which threatens employees with loss of insurance benefits unless they pay disciplinary assessments not guilty of unfair labor practice).

134. Since the union shop was permitted out of a concern that nonmembers would be given a "free ride" in the collective bargaining process, the Board at one time had held that a mere dues-payer could refuse to pay dues levied for nonbargaining purposes. *Teamsters Local 959 (RCA Service Co.)*, 167 N.L.R.B. 1042, 1044, 66 L.R.R.M. 1203, 1205 (1967); see *NLRB v. Food Fair Stores, Inc.*, 307 F.2d 3 (3d Cir. 1962) (affirming Board ruling that special strike assessments are not dues that may be demanded under union security clause).

More recently, however, the Board has all but overruled *RCA Service*, holding that no basis exists for distinguishing between dues "allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union." *Detroit Mailers Union No. 40*, 192 N.L.R.B. 951, 952, 78 L.R.R.M. 1053, 1054 (1971). So long as the dues are "periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy," they can be required under a union security clause and under NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970). 192 N.L.R.B. at 952, 78 L.R.R.M. at 1054. *But cf. Reid v. UAW Dist. Lodge 1093*, 479 F.2d 517 (10th Cir.), cert. denied, 414 U.S. 1076 (1973) (union does not violate duty of fair representation by spending union dues on political campaigns, provided it maintains rebate procedure to refund money to objecting employees).

This change is of no small significance. For example, in 1970 the International Typographical Union reported that only 17% of its dues was used for internal staff, bargaining representatives, and legal expenses. The remainder went to union pensions, strike benefits, training centers, public relations bureaus, and the union journal. *Book of Laws, ITU, Back Cover* (1972).

135. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 372-73 (1975).

capital aggregation obviously varies from worker to worker, it cannot be ignored in an analysis of whether to continue union membership.

## 2. *Resignation and Employment Rights*

Section 8(a)(3) of the NLRA provides that a union and an employer may negotiate a union security clause requiring "as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment . . . ."<sup>136</sup> This tolerance of union security clauses is qualified by § 14(b),<sup>137</sup> the "right to work" section. It reads:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Where a valid union security agreement has been negotiated between a union and an employer, the dissident contemplating renunciation of union "membership" is bound to ask: "Will the union security provision empower the union, following my resignation, to demand my discharge?" The short, and I would hope correct, answer is "No." Under the Supreme Court's decision in *NLRB v. General Motors Corp.*, "'membership' as a condition of employment" has been "whittled down to its financial core."<sup>138</sup> So long as the resigner continues to tender his dues he would appear to exhaust the demands of "membership" as defined by § 8(a)(3); his job would thus seem to be safe. Yet some doubt remains, and neither the Board nor the Court has done anything to dispel it, despite their recent emphasis on the right to resign.

The doubt stems from a literal reading of § 8(a)(3),<sup>139</sup> which provides that

no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . (B) if he has reasonable grounds for believing that membership was denied or

136. 29 U.S.C. § 158(a)(3) (1970).

137. *Id.* § 164(b).

138. 373 U.S. 734, 742 (1963). As the Court further observed:

It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues.

*Id.*

139. 29 U.S.C. § 158(a)(3) (1970).

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terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

Thus far, the Board and courts construing § 8(a)(3) have had no difficulty in limiting the worker's obligation to payment of dues. When a union conditions membership on satisfaction of additional requirements—such as securing the endorsement of union members, passing union tests, attending initiation ceremonies, or even swearing allegiance to the union<sup>140</sup>—it demands something more than “periodic dues and the initiation fees uniformly required.” The danger is that this reasoning, reflecting the *General Motors* “gloss” on § 8(a)(3), may not apply to the resigner. The union could argue that “membership” in § 8(a)(3) means *full-fledged* membership, *i.e.*, the satisfaction of all the union's financial and nonfinancial membership requirements. The union would concede that under § 8(a)(3)(B) the employer cannot fire a worker whose “membership” the union has denied or terminated for a reason other than the worker's failure to pay dues. But the resigner's membership has not been “denied or terminated” by the union: the worker severed the relationship on his own initiative. One can imagine union officials arguing that they watched helplessly as a worker resigned and were now only exercising their rights in demanding that the ill-advised employee be fired.<sup>141</sup> The union might buttress its argument by reference to the ambiguous footnote in *Booster Lodge* which suggested that the maintenance-of-membership clause posed “no impediment to resigning” in that case *only* because the contract had already expired.<sup>142</sup>

These arguments, if accepted, would eviscerate the right to resign. The Supreme Court in *Booster Lodge* should have stated plainly that a resigner's employment rights are safeguarded by § 8(a)(3), provided he tenders his dues. There is ample support for such a construction of that section. Its legislative history, as the Court found in *Radio*

140. *E.g.*, *Bricklayers Union No. 4*, 160 N.L.R.B. 1837, 1843, 63 L.R.R.M. 1204, 1205 (1966) (endorsement of union members); *A. Nabakowski Co.*, 148 N.L.R.B. 876, 57 L.R.R.M. 1105 (1964), *enforced sub nom.* NLRB v. Sheet Metal Workers Local 65, 359 F.2d 46 (6th Cir. 1966) (union tests); *Carpenters Local 824*, 115 N.L.R.B. 518, 37 L.R.R.M. 1338 (1956) (initiation ceremonies); *Union Starch & Ref. Co.*, 87 N.L.R.B. 779, 25 L.R.R.M. 1176 (1949), *enforced*, 186 F.2d 1008, 1010 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951) (loyalty oath).

141. The union proffered this argument unsuccessfully in *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083, 1085 (9th Cir. 1975). The court held that in applying § 8(a)(3) it was “irrelevant whether the employee did or did not desire membership in the Union.” *Id.* at 1086 (quoting *Local 749, Int'l Bhd. of Boilermakers v. NLRB*, 466 F.2d 343, 344-45 n.1 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973)).

142. *See p.* 1041 *supra*.

*Officers' Union v. NLRB*,<sup>143</sup> indicates a clear congressional intent "to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees."<sup>144</sup> Section 8(a)(3) was enacted to address the "free-rider" problem by allowing unions to exact dues from nonmembers: "No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned."<sup>145</sup> Similarly, the *General Motors* Court noted that, in explaining § 8(a)(3), Senator Robert A. Taft compared it to Canadian law, which provided that an individual had a right to be employed without joining the union so long as he paid dues.<sup>146</sup> This view of § 8(a)(3), grounded in legislative history, is confirmed by judicial interpretation. In their consideration of workers who have refused to assume full union membership, the courts have repeatedly emphasized that a worker has a right to be employed provided he pays his dues.<sup>147</sup> In the case of an individual who never consents to join the union, as in the case of an individual who joins but later resigns, "membership" has not been denied or terminated by the union. The courts have uniformly upheld the individual's employment rights in the former case, and the result should be the same in the latter.

Any other construction of § 8(a)(3) makes nonsense of the resignation decisions. To suggest that the Supreme Court, in its *Booster Lodge* footnote, was adding an unspoken "Of course, if you resign, you will be fired," is to accuse it of the worst form of sophistry. Moreover, as a matter of federal labor policy, the conclusion that a worker may not be discharged for resigning is consistent with the overriding intent of both § 8(a)(3) and § 8(b)(1)(A) to separate employment rights from union rights.<sup>148</sup> Just as union discipline cannot be enforced by either actual or threatened job discrimination,<sup>149</sup> it seems

143. 347 U.S. 17, 41 (1954).

144. *Id.*

145. *Id.* at 41-42.

146. 373 U.S. at 743 n.9. It must be noted, however, that there appears to have been no legislative consideration of the section's applicability to resigners. Even Senator Taft's comment concerned an employee who had sought membership, but had been denied it by the union. 93 CONG. REC. 4887 (1947).

147. *E.g.*, *Local 749, Int'l Bhd. of Boilermakers v. NLRB*, 466 F.2d 343, 345 (D.C. Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *NLRB v. Zoe Chemical Co.*, 406 F.2d 574, 579 (2d Cir. 1969).

148. *See Motor Coach Employees v. Lockridge*, 403 U.S. 274, 284 (1971); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

149. *E.g.*, *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-42 (1954) (union may not penalize dues delinquency by loss of seniority); *NLRB v. Longshoremen's Local 17*, 431 F.2d 872 (9th Cir. 1970) (union may not seek worker's discharge for nonpayment of fine); *Local 167, Progressive Mine Workers v. NLRB*, 422 F.2d 538 (7th Cir.), *cert. denied*,

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clear that no union security clause, however broad, can justify discharge of a former member who has resigned to escape union discipline, so long as he meets his minimal financial obligations.

### C. *Notice Problems and the Right to Resign*

The preceding discussion has examined factors which are of crucial importance to the individual who is in substantial disagreement with union policy. If the dissident is to conduct an intelligent analysis of the costs and benefits of continued union membership, he must be fully informed. He must know precisely what is at stake should he resign. Unfortunately, there is reason to believe that, at present, the individual does not have adequate information to make an informed decision.

The magnitude of this obstacle was demonstrated not long ago by a case involving William F. Buckley, Jr.<sup>150</sup> Mr. Buckley apparently believed that his membership in a labor union constrained his not insubstantial wit and might force him to compromise his often unpopular views. Mr. Buckley wanted out; indeed, he later testified that he had never wanted in.<sup>151</sup> In seeking to establish that compulsory union membership infringed his rights, Mr. Buckley relied heavily upon representations on the subject of resignation made to him by union officials. He had been told that he could not limit his union obligations to payment of dues and initiation fees; that resignation would not alter his duty to respect picket lines and join nationwide strikes; and that, if he resigned, his television shows could no longer be broadcast in New York, California, or perhaps even abroad.<sup>152</sup> He had been told, in brief, that "the ultimate penalty for failing to remain a 'full-fledged' member would be his discharge from employment."<sup>153</sup>

Faced with these representations, Mr. Buckley was understandably reluctant to resign from his union. His reluctance, we must expect, is shared by many. At the outset, it should be noted that most union security clauses fail to inform the worker that his statutory obligation

399 U.S. 905 (1970) (union may not deny job-related pension benefits after expelling member for dual unionism); Local 43, Printing Pressmen, 202 N.L.R.B. 286, 82 L.R.R.M. 1638 (1973) (union may not remove worker from overtime lists for breaking union rules).

150. *Evans v. American Fed'n of Television & Radio Artists*, 354 F. Supp. 823 (S.D.N.Y. 1973), *rev'd and remanded sub nom. Buckley v. American Fed'n of Television & Radio Artists*, 496 F.2d 305 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

151. 354 F. Supp. at 834.

152. *Id.* at 836.

153. 496 F.2d at 312.

is limited to payment of dues.<sup>154</sup> This failure is hardly surprising. Eighteen years ago, the Board suggested a "model" clause which also failed to contain this information.<sup>155</sup> There is little reason to believe that the average worker, confronted with an over-inclusive union security clause, a silent union constitution, and ambiguous Supreme Court statements will have the faintest glimmer of his right to immunize himself from union discipline.<sup>156</sup> Today, as in 1967 when Mr. Justice Black first noted the problems inherent in the "full membership" concept, "[f]ew employees forced to become 'members' of the union by virtue of the union security clause will be aware of the fact that they must somehow 'limit' their membership to avoid the union's court-enforced fines."<sup>157</sup> And given that Mr. Buckley apparently was misled as to his right to resign without losing his job, one can imagine the plight of the many union members who pretend to considerably less sophistication than does the editor of the *National Review*.

Clearly, the Board and the courts must develop a mechanism to ensure that only willing and informed members subject themselves to the possibility of union discipline. The solution lies in disclosure. Each worker should be informed about his legal obligations and rights under a union security clause. Each union member should know that he has a right to resign and that he must exercise this right to avoid union discipline. He should know what the legal consequences of that exercise are. Through disclosure the private decisionmakers will

154. See the representative union security clauses reprinted in 2 COLL. BARG. NEGOT. & CONTR. (BNA) 87:61-63 (1976). An exception was the union security clause at issue in *General Motors*. See 373 U.S. at 735 n.3 (maintenance of membership required "to the extent of paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union").

The only class of union security provision that notifies the worker of his limited financial obligation is the agency shop clause. 2 COLL. BARG. NEGOT. & CONTR. (BNA) 87:121-23 (1976). In an agency shop, employees are not required to join the union, but are required to pay a service charge equal to union dues. The agency shop exists as the sole form of union security in approximately four percent of collective agreements. 2 COLL. BARG. NEGOT. & CONTR. (BNA) 87:1 (1976).

155. See *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 885, 42 L.R.R.M. 1456, 1458-59 (1958).

156. Gould, *supra* note 124, at 1108, suggests that the members' lack of knowledge may lead "unscrupulous management" to attempt "union busting" by providing resignation information on a sub rosa basis. This fear, and its premise that the employer will prove to be the employee's advisor of last resort, seems overstated. It is difficult to imagine a large corporation risking the wrath of a firmly entrenched union by advising prospective members that they need not assume the burdens of full membership or that they may resign at any time. Where the employer does have something to gain by such counseling, his actions may constitute an unfair labor practice under § 8(a)(1). Compare *NLRB v. Elias Bros. Big Boy, Inc.*, 325 F.2d 360, 363 (6th Cir. 1963), with *Martin Theatres of Georgia, Inc.*, 126 N.L.R.B. 1054, 45 L.R.R.M. 1441 (1960).

157. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 215 (1967) (Black, J., dissenting).

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be furnished with the information requisite to intelligent decision-making. Only through disclosure will private ordering work.

The state of the law at present is hostile to the approach I propose. This hostility, like many of the difficulties which confront union dissidents, can be traced to *Allis-Chalmers*. The Court held that, despite the existence of a union security clause, there was no indication that "any of the fined employees enjoyed other than full union membership."<sup>158</sup> Citing *IAM v. Street*,<sup>159</sup> the Court declared that full membership should be presumed absent clear evidence to the contrary.<sup>160</sup> This presumption of full membership is implicitly endorsed each time the Board or a court upholds a union fine without first determining that the accused knew the minimal extent of his statutory obligation. This presumption unfortunately suggests that unions, at present, have no duty to inform members of their § 7 right to refrain from full union membership. This presumption indicates that, if the right to resign is to be made effective, we must move beyond existing law.

Of course, the ideal solution, or at least the foundation of an ideal solution, would be for Congress to rewrite the proviso to § 8(a)(3), making explicit what is now inferred from legislative history and buried in decisional law: that although a union may discipline its full-fledged members, a worker cannot be forced to become such a member.<sup>161</sup> But as such statutory tinkering is always difficult, the Board and the courts should begin now, with the means available, to develop a duty on the part of the union to differentiate between committed members and mere dues-payers.

### 1. *Moving Beyond Existing Law: The Role of the Courts*

Since the courts are inclined to rely on the metaphor of contract in enforcing union discipline,<sup>162</sup> contract law seems a fair place to begin in developing the union's duty to disclose. Indeed, the Supreme Court itself has suggested that contract theory may be rele-

158. *Id.* at 196.

159. 367 U.S. 740 (1961).

160. 388 U.S. at 196-97.

161. Wording such as the following might be used:

*Nothing in this subchapter shall preclude an employer from making an agreement with a labor organization to require as a condition of employment that each employee, on or after the thirtieth day following the beginning of such employment, shall tender and shall continue to tender the periodic dues and reasonable initiation fees uniformly required as a condition of acquiring or retaining membership in said labor organization.*

162. See, e.g., *NLRB v. Boeing Co.*, 412 U.S. 67, 75-76 (1973); *Scofield v. NLRB*, 394 U.S. 423, 426 n.3 (1969); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192 (1967).

vant in this regard. In *Granite State* the Court forbade union discipline of resigners by reasoning that the union's power over its members was "certainly no greater than the union-member contract."<sup>163</sup> And in *IAM v. Gonzales*,<sup>164</sup> the Court, noting that the "contractual conception of the relation between a member and his union widely prevails in this country,"<sup>165</sup> upheld the authority of state courts to interpret a union constitution as limiting the union's power of expulsion.

The recognition that the "union-member contract" may limit union disciplinary power forms the groundwork for a duty to disclose. State courts should build upon this foundation. They should refuse to enforce union discipline unless they find that the union's constitution and bylaws explicitly warned members that such discipline was possible and that the members accepted that possibility in the finest tradition of "offer and acceptance." In *Glass Workers Local 188 v. Seitz*<sup>166</sup> the Washington Supreme Court refused to enforce a fine after discovering that the union's constitution and bylaws gave no express warning that the union would seek judicial enforcement. Unfortunately, the *Seitz* approach has not been followed in the few state decisions involving union fines.<sup>167</sup> If it were followed, the effect would be devastating. Of the constitutions and bylaws of 13 major unions studied, only three contained a warning that the union would attempt to enforce its fines in court.<sup>168</sup>

The *Seitz* approach is valid so long as the courts insist on the metaphor of a union-member contract. Moreover, in this day of increasing consumerism, we should ask whether the union-member relationship can withstand scrutiny on "contract of adhesion" grounds.<sup>169</sup> When

163. *NLRB v. Granite State Joint Bd.*, *Textile Workers Local 1029*, 409 U.S. 213, 217 (1972).

164. 356 U.S. 617 (1958).

165. *Id.* at 618.

166. 65 Wash. 2d 640, 642, 399 P.2d 74, 75 (1965).

167. *See, e.g.*, *Local 248, UAW v. Natzke*, 36 Wis. 2d 237, 251-52, 153 N.W.2d 602, 609-10 (1967).

168. The constitutions studied were those of the Teamsters, Machinists, Retail Clerks, Auto Workers, Steelworkers, Carpenters, Communications Workers, Meatcutters, Ladies Garment Workers, Laborers, Electrical Workers (IBEW), Typographical Workers, and Mine Workers. Only the first three contained the desired warning. CONST., INT'L BHD. OF TEAMSTERS, art. XXVI, § 1 (1971) (All financial obligations, including fines, "shall be legal obligations of the members upon whom imposed and enforceable in a court of law"); RULES OF ORDER FOR LOCAL LODGES, IAM, art. F, § 1 (1974) ("fines shall constitute a legal liability" of member and "[c]ost of litigation arising from charges against a member by reason of such liabilities shall constitute a legal debt" of member); CONST., RETAIL CLERKS INT'L ASS'N, § 31(I) (1972) ("[A]ll financial obligations . . . shall be legal obligations . . . enforceable in a court of law.")

169. *See generally* Kessler, *Contracts of Adhesion: Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

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we now require auto dealers to put warranty disclaimers in conspicuous print and lending companies to emphasize their effective annual interest rates, it seems bizarre to permit unions to obfuscate the potential liability of their members. Indeed, the argument for declaring the union-member "contract" one of adhesion seems far stronger. In the case of car dealers and loan companies, the consumer is free to decline the offer. Only in the case of labor unions is there an apparent legal compulsion—the over-inclusive security clause—to sign the contract. To enforce fines as the product of that contract seems unfair where there is good reason to believe that the member was misled into accepting the contract and was never warned, in even the finest of print, that misbehavior could land him in court.

### 2. *Moving Beyond Existing Law: The Role of the Board*

Conditioning judicial enforcement of fines on a union's prior disclosure, through its constitution, of the possibility of such enforcement would be a step in the right direction. But it would not go nearly far enough in guaranteeing the worker's right to insulate himself from union discipline. The preemption doctrine, which states that all actions arguably protected or prohibited by the NLRA are within the exclusive jurisdiction of the NLRB,<sup>170</sup> would probably limit state courts to denying enforcement of fines already assessed; it appears they would have no legal power to prevent the initial imposition of fines, however unenforceable. Yet even an unenforceable fine may be coercive: "A man who is held up at gunpoint is coerced whether or not the gun is loaded."<sup>171</sup> More fundamentally, disclosure that only makes members' legal liabilities explicit does not penetrate to the heart of the problem: it fails to inform workers that they need not become full members at all. To assure the dissemination of this information is the responsibility of the Board.

First, the Board should prohibit, as a violation of § 8(b)(1)(A), any

170. The doctrine is explained in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959):

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

*Accord*, *Amalgamated Ass'n of Street Ry. Employees v. Lockridge*, 403 U.S. 274 (1971).

171. *Booster Lodge No. 405, IAM*, 185 N.L.R.B. 380, 381, 75 L.R.R.M. 1004, 1005 (1970), *modified*, 459 F.2d 1143 (D.C. Cir. 1972), *aff'd in part*, 412 U.S. 84, and *rev'd in part sub nom.* *NLRB v. Boeing Co.*, 412 U.S. 67 (1973).

union security clause that does not explicitly limit the worker's obligation to the payment of dues. The fact that workers are unlikely to be aware of the *General Motors* gloss on more sweeping clauses suggests that such a prohibition would significantly enhance the member's understanding of the effects of resignation. The fact that a number of major collective agreements function quite adequately with such limited clauses<sup>172</sup> suggests that the prohibition would not significantly impair a union's right to organize.

Ample precedent in Board and court rulings supports this approach. A good example is the treatment of union security clauses containing illegal preferential hiring provisions.<sup>173</sup> Unions often tried to hedge their bets by including an addendum purporting to suspend operation of the clause if these provisions were found illegal, thus arguably rendering the clause valid on its face. The courts invalidated such clauses anyway.<sup>174</sup> As the courts then appreciated, the question was not whether the addendum contractually eliminated the illegality of the union security clause: "the ordinary employee" would not appreciate such legalisms.<sup>175</sup> The question was whether the clause as a whole was coercive, and the courts found that it was. As Judge Augustus Hand explained, the very existence of an agreement promising preferential treatment for union members unfairly "tends to encourage membership in a labor organization."<sup>176</sup>

The same reasoning governs our problem. A union security clause which simply requires "membership" will be of scant assistance to "the ordinary employee," who is unlikely to appreciate the vastly different legal consequences that flow from "full-fledged membership" as compared to "dues-paying membership." A union security clause that requires membership without further advising that, under *General Motors*, it can demand no more than the payment of dues and initiation fees unfairly encourages "full-fledged membership." It leaves the worker ignorant of his less onerous alternative. For the reasons expressed by Judge Hand, the Board should invalidate any union

172. See, e.g., Agreements between Ford Motor Co. and the UAW, art. II, § 1 (Oct. 31, 1973); Agreement between General Motors and the UAW, § 4 (Nov. 19, 1973); Agreements between the B.F. Goodrich Co. and the Rubber Workers and Rubber Workers Local 5, art. vi, § 1(a) (May 31, 1973) (all on file with *Yale Law Journal*).

173. Preferential hiring plans generally provide that an employer will hire only union workers if available, or that he will give preference to workers who are already union members. Such plans are invalid under NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), since they constitute employer "discrimination in regard to hire or tenure of employment . . . to encourage . . . membership in [a] labor organization."

174. E.g., *NLRB v. Local 1566, Int'l Longshoremens Ass'n*, 278 F.2d 883 (3d Cir.), cert. denied, 364 U.S. 890 (1960).

175. *Red Star Express Lines, Inc. v. NLRB*, 196 F.2d 78, 81 (2d Cir. 1952).

176. *Id.*

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security clause that does not expressly disclose to the worker the true extent of his statutory obligation.

Secondly, the Board should hold that a union violates § 8(b)(1)(A) when it disciplines a member who was not previously informed of his right to limit his membership to the payment of dues and initiation fees. Authority is available in the related area of discharges for nonpayment of dues. In *Electrical Workers Frigidaire Local 801 v. NLRB*,<sup>177</sup> then-Judge Warren Burger held that a union violates its "fiduciary" duty when it seeks the discharge of a worker delinquent in his dues who was not properly advised of his financial obligation under the union security clause.<sup>178</sup> A union, Judge Burger stated, is "charged with an obligation of fair dealing, which includes the duty to inform the employee of his rights and obligations so that [he] may take all necessary steps to protect his job."<sup>179</sup> In explaining the union's duty, Judge Burger drew upon the law of agency:

A union may not treat as adversaries either its members or those potential members whose continued employment is dependent upon union membership. . . . The Union is the agent for employees and as such "is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have . . . ." <sup>180</sup>

In adapting this concept of "fiduciary" duty to the resignation context, the Board and the courts should consider both the relative harm flowing from an ill-informed act and the relative probability that the worker will be ill-informed. On the first count, it must be conceded that discharge—the sanction for nonpayment of dues—is the most severe penalty a union can exact; but a substantial fine, which a worker cannot escape even by finding a new job, is far from trivial. And on the second count, the case for requiring disclosure of the limited nature of mandatory union membership seems far stronger than that for requiring disclosure of the obligation to pay dues. A poll of prospective employees would undoubtedly reveal that the vast majority in union- or agency-shop industries are aware that they must tender dues to keep their jobs. Those who are blissfully ignorant are

177. 307 F.2d 679 (D.C. Cir.), *cert. denied*, 371 U.S. 936 (1962).

178. *Id.* at 683. *Accord*, *NLRB v. Local 182, Int'l Bhd. of Teamsters*, 401 F.2d 509 (2d Cir. 1968), *appeal dismissed and cert. denied*, 394 U.S. 213 (1969); *NLRB v. Hotel Employees Local 568*, 320 F.2d 254 (3d Cir. 1963); *Typographical Union Local 21*, 218 N.L.R.B. No. 72, 89 L.R.R.M. 1733 (1975).

179. 307 F.2d at 683.

180. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 381 (1958)).

very likely to be enlightened by fellow workers or union officials. By contrast, few workers are apt to realize that they need not assume the burdens of full membership in order to work. Nor are they likely to be so advised by fellow workers or union officials interpreting an over-inclusive union security clause.

In sum, there is good reason to hold that a union violates a fiduciary duty when it fails to inform a worker of his right to limit his membership to payment of dues.<sup>181</sup> If the union later disciplines the worker who has not been so informed, especially if it extends its sanctions beyond the internal union punishments of suspension and expulsion, the case for a violation of § 8(b)(1)(A) is compelling.

Thirdly, the Board should exercise its atrophied rulemaking powers to assure that workers have the information they need for intelligent decisions about union membership. At least since *NLRB v. Wyman-Gordon Co.*,<sup>182</sup> it has been clear not only that the Board has the power to make rules,<sup>183</sup> but also that it is under an obligation to do so.<sup>184</sup> The resignation area seems an excellent place to start.

The goal of rulemaking should be to modify the *Allis-Chalmers* presumption of full, voluntary membership<sup>185</sup>—a presumption that seems unrealistic, especially where union and employer negotiate a broad union security clause.<sup>186</sup> By rulemaking, the Board could indicate that the *Allis-Chalmers* presumption would apply if, and only if, each individual who joins the union receives certain information. The nature of this information undoubtedly can be guessed from what

181. It should also be noted that under § 105 of the Landrum-Griffin Act, 29 U.S.C. § 415 (1970), unions have an affirmative obligation to explain to members their rights regarding free speech, union elections, and the like. It would be strange if federal labor policy should require that a worker be informed of his rights as a member, yet not require that he be informed of his § 7 right to refrain from becoming a member in the first place.

For a similar recommendation that unions be required to discharge their "fiduciary responsibilities," see Seham, *Limitations Upon and Directions of a Union's Right to Discipline Its Members*, in PROCEEDINGS OF NEW YORK UNIVERSITY 25TH ANNUAL CONFERENCE ON LABOR 191, 201 (1973).

182. 394 U.S. 759 (1969).

183. See NLRA § 6, 29 U.S.C. § 156 (1970), which provides:

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter.

184. 394 U.S. at 764-66. The Board frequently has been criticized for its refusal to use the rulemaking procedures of the NLRA. See, e.g., Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961).

185. See p. 1053 *supra*.

186. It should be noted that the *Allis-Chalmers* Court was construing a union security clause that explicitly limited the member's obligation "to the extent of paying his monthly dues . . ." 388 U.S. at 196. Both the Board and future courts should, therefore, consider open the present validity of a presumption of full membership where the union security clause is not so limited.

has gone before: Each worker should be told that he need not become a good union member, that all he need do is tender periodic dues and initiation fees. Each worker should be told that if he joins the union he can be subject to union discipline and that such discipline may include court-enforced fines. Each worker should be told that he is free to change his mind and resign from the union, and he should be informed of the limitations on and costs of resignation. Unless the union could demonstrate that the worker received this information, by pointing to an oath of allegiance<sup>187</sup> or a conspicuous warning in its constitution or bylaws, the *Allis-Chalmers* presumption should be reversed. While such "Miranda warnings" would be impossible to police in every instance, this rulemaking by the Board would undoubtedly produce better informed workers and more responsible unions.

These proposals may strike some as drastic or anti-union. But they may prove to be what the unions need to keep their disciplinary powers intact. Union officials should be aware that Supreme Court opinions are occasionally overturned and that, at the age of nine, *Allis-Chalmers* hardly qualifies as hoary precedent. Academic commentators have suggested that the Court's wisest course would be to reverse *Allis-Chalmers* and start over from scratch.<sup>188</sup> Whatever else my proposals are, they are pro-individual. I believe in majority rule; but even more, I am concerned that the laws should protect the dissenter. Laws should help individuals help themselves, and that is really all disclosure purports to do.

187. While union oaths of allegiance typically stress the member's duty to abide by union rules and regulations, apparently none presently includes a disclaimer of either actual or potential coercion. A model disclaimer might be: "*I assume these obligations voluntarily with full knowledge that I need not do so in order to retain employment.*"

188. See, e.g., T. KEELINE, *supra* note 48, at 95.