Essay

Making the Teamsters Safe for Democracy

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INTRODUCTION: CHANGING DRIVERS

Hollywood at last has cast its glamorizing gaze upon the Teamsters.[1] A century after Homestead—long past the time when Sam Peckinpah and others made the big screen safe for graphic violence—the bloody organizing struggles of the modern labor movement have suddenly been deemed suitable for family viewing. And yet, for all its size and influence, the International Brotherhood of Teamsters[2] was made to wait its turn. In terms of cinematic history, Don Vito Corleone, who first appeared on screen more than twenty years ago, is old enough to be the current *Hoffa*'s godfather.

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1. HOFFA (Twentieth Century Fox 1992). The many distortions and inaccuracies contained in this fictionalized, romanticized, and unavoidably heroic entertainment are detailed in Sean Wilentz, *Tales of Hoffa: A Movie's Shady Connections and Disconnections*, NEW REPUBLIC, Feb. 1, 1993, at 53. *See also* A.H. Raskin, *Was Jimmy Hoffa a Hood? Or Was He a Robin Hood?*, N.Y. TIMES, Dec. 20, 1992, at H9.

2. The full name of the union is the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America [hereinafter the Teamsters or IBT]. Founded in 1903, the union had 1.6 million members in 1991, down from a 1978 high of 2.2 million. Its members work in a variety of jobs and trades throughout the private sector; approximately 8% hold public-sector jobs. Bob Baker, *Teamsters Convene Under Gaze of Justice Department*, L.A. TIMES, June 23, 1991, at A1, A27. The IBT is the largest union in the United States and has "by far" the largest political action committee fund. Peter Carlson, *Teamster Glasnost*, WASH. POST, Dec. 8, 1991 (Magazine), at W15, W17.

Off the screen, of course, the netherworlds of these two different characters have long overlapped. In 1987, one of *The Godfather*'s plot lines seemed almost to become a matter of judicial record, as Teamsters officials and alleged members of organized crime were said to have been involved in collaborating to corrupt gambling in Las Vegas.[3] But prosecutors,[4] journalists, historians[5]—and millions of rank-and-file Teamsters—had become aware of this connection long before. So, indeed, had the entire American public, with Robert Francis Kennedy serving as the national publicist-in-chief:[6] by the 1980's, the union was "an icon of pop culture, like Elvis."[7] During the past four decades, the abuses of the Teamsters leadership were not only the target of repeated investigations,[8] but occasioned the enactment of major federal labor legislation, most notably the Landrum-Griffin Act of 1959.[9] For thirty years, neither the law, nor all this attention, seemed to make much difference. Repeated attacks on corrupt locals,[10] innumerable criminal prosecutions of

3. *See* United States v. Cerone, 830 F.2d 938 (8th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988) (scheme involving skimming from Las Vegas casinos allegedly purchased by alleged crime figures with loan from Teamsters pension fund).

4. *See infra* text accompanying notes 10-13 (detailing previous prosecutorial efforts against Teamsters).

5. Books about the Teamsters' well-known history of corruption are legion. Among the leading ones are STEVE BRILL, THE TEAMSTERS (1978); JAMES R. HOFFA, HOFFA: THE REAL STORY (1975); RALPH C. JAMES & ESTELLE D. JAMES, HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER (1965); JAMES NEFF, MOBBED UP: JACKIE PRESSER'S HIGH-WIRE LIFE IN THE TEAMSTERS, THE MAFIA, AND THE F.B.I. (1989); WALTER SHERIDAN, THE FALL AND RISE OF JIMMY HOFFA (1972); ARTHUR A. SLOANE, HOFFA (1991). The most authoritative and detailed account of the events surrounding the recent change in Teamsters leadership is KENNETH C. CROWE, COLLISION: HOW THE RANK AND FILE TOOK BACK THE TEAMSTERS (1993). Another extremely helpful account and analysis is Kirk Victor, *In the Driver's Seat*, 24 NAT'L J. 2423 (1992), which emphasizes the constraints imposed upon the "New Teamster" leaders by the narrowness of their electoral victory and the continuing domination of the lower ranks of the union bureaucracy by uncooperative, even hostile, holdover officials.

6. This role included service as a congressional investigator, FINAL REPORT OF THE SELECT COMMITTEE ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, S. REP. NO. 1139, 86th Cong., 2d Sess. (1960) [hereinafter MCCLELLAN COMMITTEE REPORT]; as a best-selling author, ROBERT F. KENNEDY, THE ENEMY WITHIN (1960); and as U.S. Attorney General. *See* VICTOR S. NAVASKY, KENNEDY JUSTICE (1971) (recounting and detailing this celebrated "feud" and the Kennedy "Get Hoffa" squad at the Justice Department); *see generally* ARTHUR M. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES (1978).

7. THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT IS FLAT ON ITS BACK 137 (1991).

8. *See, e.g.*, Plaintiff's Complaint at 104, United States v. International Bhd. of Teamsters, 905 F.2d 610 (2d Cir. 1990) (No. 88 Civ. 4486) [hereinafter Complaint] (calling Teamsters "the union most controlled by organized crime," which for decades "has exercised substantial influence over the international union, primarily through the office of the president").

9. The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1988) [hereinafter Landrum-Griffin]. The legislative history of the Act is replete with references to, denunciations of, and calls for fundamental change within the Teamsters. *See* discussion *infra* Part III.

10. *See, e.g.*, United States v. Local 560, Int'l Bhd. of Teamsters, 780 F.2d 267 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); United States v. Bonanno Organized Crime Family, 119 F.R.D. 625 (E.D.N.Y. 1988), *see also* Michael J. Goldberg, *Cleaning Labor's House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903, 965-74, 977-80 (1989) (discussing two previous RICO-based efforts to clean up particular New York and New Jersey locals).

Professor Goldberg's exemplary and definitive article, completed before the events with which this Essay is primarily concerned had taken place, and to which this Essay is heavily indebted, addresses many of the issues discussed here, but in a more thorough and comprehensive manner. It displays a detailed and encyclopedic appreciation of the relevant legal and labor history, and analyzes a wide variety of union

suspect individuals,[11] and even an attempt to transform the union wholesale[12] all failed to alter the union's fundamentally lawless culture.

In 1988, however, the U.S. Department of Justice began the effort anew, filing a massively publicized civil RICO case against the union, its leadership, and a number of individuals alleged to be among the leading figures in organized crime. The 113-page complaint commencing this unprecedented action recounted at gruesome length the sordid and extremely violent relationship between the mob and the union, charging that the union was a large-scale racketeering enterprise.[13] The objective of the suit, according to the chief prosecutor, was "to take back the Teamsters from the Mafia,"[14] and to eradicate the underworld influence that had long since become

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disciplinary devices and Landrum-Griffin issues, as well as the pros and cons of using RICO to reform both national and local unions. For obvious reasons, Professor Goldberg necessarily gives the IBT considerable attention. Perhaps most valuably of all, Professor Goldberg also puts forward ten sensible and nuanced "sentencing rules," responsive to the concerns discussed *infra* Part I, for the use of courts engaged in union clean-up work. *Id.* at 1003-10. Professor Goldberg's extraordinary accomplishment follows in the distinguished tradition established long ago by Professor Clyde Summers, who has also extensively addressed many of the issues discussed in this Essay. *See* Clyde Summers, *Union Trusteeships and Union Democracy*, 24 U. MICH. J.L. REF. 689 (1991) [hereinafter Summers, *Union Trusteeships*] (reviewing past, largely disappointing experiences with insufficiently aggressive court-imposed trusteeships); Clyde Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93 (1984) [hereinafter Summers, *Democracy*] (emphasizing limitations of Landrum-Griffin when it comes to affording genuine internal democracy).

11. One close observer has estimated the number of previous *successful* prosecutions at approximately 340. GEOGHEGAN, *supra* note 7, at 156.

12. *See* Cunningham v. English, 175 F. Supp. 764 (D.D.C. 1958), *aff'd*, 265 F.2d 379 (1959); *see also* Goldberg, *supra* note 10, at 984-94 (describing nationwide, judicially imposed Board of Monitors designed to supervise and reform Teamsters in late 1950's). According to Professor Goldberg, the 1959 passage of Landrum-Griffin, which many thought made the Board's trusteeship superfluous, as well as possible "union-busting rashness" on the part of the judge in response to the union's obstinacy, contributed to the failure, and ultimately to the dissolution, of the Board in 1961. Goldberg, *id.*, at 994.

13. This extraordinary and historic document details a series of at least twenty-two murders, as well as a host of beatings, acts of intimidation, and other serious crimes, stretching back for decades, that were allegedly committed in order to establish and maintain a relationship between the IBT and organized crime. Complaint, *supra* note 8, at 40-76. Its caption also is noteworthy. In addition to the union's International General President and the members of the union's International General Executive Board (as well as the Teamsters union as an entity), the caption names "The Commission of La Cosa Nostra" and more than a dozen other high-profile individuals with suspicious-sounding nicknames, which were also listed in the caption. The consent decree settling the matter, however, was signed only by the Teamsters-official defendants. Consent Decree at 29-31, United States v. International Bhd. of Teamsters, 905 F.2d 610 (2d Cir. 1990) (No. 88 Civ. 4486) [hereinafter Consent Decree]. One of the government's attorneys in the case has subsequently explored other ways in which private parties might also invoke RICO against labor unions. Randy M. Mastro et al., *Private Plaintiffs' Use of Equitable Remedies Under the RICO Statute: A Means to Reform Corrupted Labor Unions*, 24 U. MICH. J.L. REF. 571 (1991). Although this article is addressed to "honest members and officials of trade unions," *id.* at 646, it does not devote much attention to explaining why RICO remedies (or the threat of them) might not also be helpful, at least as a tactical device, to employers involved in labor disputes. *But see* Victoria T.G. Bassetti, *Weeding RICO Out of Garden Variety Labor Disputes*, 92 COLUM. L. REV. 103 (1992); Howard S. Simonoff & Theodore M. Lieverman, *The RICO-ization of Federal Labor Law: An Argument for Broad Preemption*, 8 LAB. LAW. 335 (1992) (warning against consequences of employer use of RICO in labor disputes).

14. Frank Swoboda, *U.S. Sues to Take Over Teamsters; Immediate Trusteeship Is Sought To Squeeze Out Mob Influence*, WASH. POST, June 29, 1988, at A1 (quoting Rudolph Giuliani, U.S. Attorney for the Southern District of New York).

institutionalized within the union.[15] The old-guard Teamsters leadership initially attracted strong outside support for its resistance to this government attack from highly reputable sources, both within the labor movement[16] and without.[17] But in March 1989, for reasons that still remain obscure,[18] the old-guard leaders suddenly and completely surrendered to the government.

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15. One newspaper reporter, noting that the origins of labor racketeering lay in the unions' efforts to protect themselves from employer-instigated violence, summarized the conventional view of the Teamsters' history as follows:

> The Teamsters' relationship with organized crime and their reputation for violence is not unique to organized labor. Government investigations have found smaller-scale problems in some longshoreman, restaurant and laborers union locals. It was not unusual for unions to seek out organized crime figures in the 1930s for defensive muscle against employer-sanctioned violence.
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> The difference in the Teamsters . . . is that this symbiotic relationship became institutionalized under Hoffa: The mob enjoyed access to pension fund loans and jobs, and the Teamsters enjoyed access to the muscle needed to win a strike or force a contract on an unwilling employer.

Baker, *supra* note 2, at A27.

16. Although the government's action probably struck most armchair Teamster-watchers as long overdue, many inside the labor movement, including many who were no friends of the Teamster leadership, saw this unprecedented lawsuit, filed by a national Administration widely perceived to be hostile to organized labor, *see* GEOGHEGAN, *supra* note 7, at 232, 253 (describing Reagan Administration response to the PATCO air traffic controllers' strike, which led to the demise of the union, as well as that Administration's alleged policy of nonenforcement of basic labor laws), to be worrisome and dangerous. For reasons based on fear as well as fraternal solidarity, the filing of the suit was consequently met with outrage from inside organized labor: as soon as the suit was filed, AFL-CIO President Lane Kirkland declared it "a clear abuse of the government's prosecutorial power" that "would undermine a free trade-union movement" were it to succeed. Swoboda, *supra* note 14, at A10. The *Washington Post* also reported that rumors that such a suit might be filed were what had led the AFL-CIO to re-admit the long-expelled Teamsters to AFL-CIO membership the preceding year, as a gesture of solidarity. *See id. See also infra* text accompanying notes 141-50 (describing Teamsters' departure from AFL-CIO).

17. The fact that the IBT is the most generous labor union in the United States in its campaign contributions may be of some relevance here. After Robert Kennedy's assaults on it, the Teamsters had become a steadfastly *Republican* union, in fact, the *only* Republican union once PATCO was extinguished (by a Republican White House) in 1981. *See* Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974) (President Nixon commutes Hoffa's sentence under Kennedy-instigated conviction). *See* BRILL, *supra* note 5, at 109 (describing Nixon on post-resignation golf outing with Frank Fitzsimmons); Swoboda, *supra* note 14, at A10 (U.S. Attorney General Meese recuses himself from anti-Teamster RICO case because he had helped secure Teamsters' endorsement for Reagan's presidential efforts). The leader of the congressional attack against the Republican Justice Department's filing of this novel RICO action was the ranking *Republican* on the Senate Labor Committee, Senator Orrin Hatch. Goldberg, *supra* note 10, at 1001 n.613; Swoboda, *supra* note 14, at A10 (reporting anti-Justice Department remarks of Senator Hatch on MacNeil-Lehrer News Hour). Senator Hatch was far from alone, however. *See* Carlson, *supra* note 2, at W17 (four Presidential candidates, from both parties, address Teamster rally protesting suit; 246 members of Congress send letter of protest to Attorney General).

18. Not *altogether* obscure, however: the RICO complaint had requested that the old-guard leaders be barred from all further involvement in the union and, perhaps even more disturbing, that they be forced to "disgorge" their hefty pensions. Complaint, *supra* note 8, at 112. The consent decree, in contrast, preserved the old guard's pension rights and allowed them to participate in the 1991 election, Consent Decree, *supra* note 13, at 4, whose outcome they may have thought they could control. In addition, settling the suit meant that the individual defendants would be spared what would surely have been a very expensive trial. CROWE, *supra* note 5, at 103.

Ironically, therefore, the government may have done so well in its consent decree precisely by trading upon the same high officer financial self-concern that had always been one of the union's biggest problems. The old leaders' subsequent explanation for having entered the onerous consent decree was that they had been given poor legal advice. *See generally* Bob Baker, *Teamsters Discover the Ballot*, L.A. TIMES, Sept. 27, 1990, at A1; Harry Bernstein, *Ends Justify Means in Teamster Purge*, L.A. TIMES, July 2, 1991, at D3; Bruce D. Butterfield, *The Trials of Billy McCarthy*, BOSTON GLOBE, Aug. 26, 1990, at A3.

They agreed to enter into a comprehensive consent decree ceding decisionmaking power over many of the union's important internal matters to a variety of court-appointed outside monitors.[19]

Acting pursuant to the consent decree, in December 1991, the federal government conducted and supervised a direct, secret-ballot rank-and-file election for the union's International General President and International General Executive Board—the first election of its kind in all of Teamsters history. The winner of the three-way race for a five-year term in Hoffa's old position of International General President was Ron Carey, the clear "outsider" candidate in the race.[20] The leader of a Long Island United Parcel Services Local, nationally celebrated as being "squeaky clean"[21] and unusually devoted to the rank-and-file members' interests as far back as 1978,[22] Carey had made a name for himself within the union by challenging the old guard's routine acceptance of concessionary contracts.[23] He was supported by the anti-establishment dissidents of Teamsters for a Democratic Union, and a number of that organization's leaders joined him in office as members of the union's first democratically elected General Executive Board.[24]

Carey's victory seemed impressive; he drew forty-eight percent of the total vote in the three-man race,[25] and the Carey slate swept all but one of the General Executive Board's seats.[26] But this seemingly sweeping victory may have been less impressive than it appeared. Overall voter turnout was a depressing twenty-eight percent.[27] Pre-election polls suggested that almost a quarter of the members were still too intimidated or cynical to vote, that only

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19. Consent Decree, *supra* note 13. The provisions of the decree are described, in general terms, in United States v. International Bhd. of Teamsters, 905 F.2d 610, 613 (2d Cir. 1990).

20. *See* Robert Fitch, *Revolution in the Teamsters*, TIKKUN, Mar.-Apr. 1993, at 19, 21. Two other candidates appear to have split the old-guard vote. Peter T. Kilborn, *Carey Takes the Wheel*, N.Y. TIMES, June 21, 1992 (Magazine), at 26. A fourth potential candidate, labor attorney James P. Hoffa, the son of the disappeared former General President, was not allowed to run because he had never worked "in the craft" as Teamsters rules required. Baker, *supra* note 2, at A27.

21. *Id.*, at A26.

22. In many ways, Carey plays the role of the solitary "Good Teamster" in Steven Brill's 1978 *The Teamsters*, an entire chapter of which was devoted to his member-oriented activities as the head of his local. BRILL, *supra* note 5, at 156-99, *See also* Bob Baker, *Reforms Pose Tough Task for Teamsters Winner Carey*, L.A. TIMES, Dec. 14, 1991, at A18 (Carey a union hero for two decades because of his "altruistic, tough-minded leadership" of isolated local); Fitch, *supra* note 20 (Carey's local had "best pensions, best grievance procedures, and best wages in the industry"). *But see* Elizabeth Lesly, *Teamster Chief Hit for Delay of Cleanup*, WASH. TIMES, Aug. 21, 1992, at D1 (discussing 1988 corruption prosecution of second-in-command at Carey's Long Island local); Frank Swoboda, *The Teamsters' New Face*, WASH. POST, June 23, 1991, at H1 (Carey involved with a New York City Joint Council implicated in corruption, but still carries "least baggage" among presidential candidates). *See also* Richard Behar, *How Hoffa Haunts the Teamsters*, TIME, Dec. 21, 1992, at 60 (collecting further adverse information).

23. CROWE, *supra* note 5, at 135-36.

24. Indeed, Fitch, among others, attributes Carey's electoral success in large measure to the efforts and support of the long-standing activist reform group Teamsters for a Democratic Union [hereinafter TDU], numbering about 10,000 members, who had been openly resisting the old-guard leadership since the 1970's. Fitch, *supra* note 20, at 21.

25. CROWE, *supra* note 5, at 259.

26. *Id.* at 287-88.

27. *Id.* at 259.

sixty percent of likely voters knew that the office of General President would be on the ballot, and that forty percent or more of the prospective voters were unable to name a single candidate for General President.[28] Thus, Carey's victory, by itself, was hardly conclusive proof that the novel concept of "Teamsters democracy" really had pierced the members' long-standing apathy and alienation. Indeed, as the returns were further analyzed, the reformers' victory came to seem, if anything, even more precarious: the voting not only was low; it was heavily factionalized. Only the hardest-core supporters of each of the three slates of candidates appeared to have cast ballots.[29] Still, in many labor quarters, the (possibly surprised) reaction was almost embarrassingly ecstatic. Victor Reuther of the UAW called Carey's victory the "most important event for the American labor movement since the rise of the CIO over half a century ago."[30] The following summer, U.S. Representative Joseph P. Kennedy III—the son of the Teamsters' original nemesis—hailed Carey by name before a national television audience, referring to Carey's election as the long-delayed "fruition" of his father's work.[31]

But the federal court charged with supervising the consent decree showed few signs of sharing this otherwise widespread euphoria. The court's reticence was well-founded, for not only may Carey's own hold on power be somewhat fragile, but changing the corrupt, authoritarian, "wiseguy culture"[32] of the Teamsters will, in any event, take much more than changing the union's top personnel. That organized labor as a whole seems to be a rapidly fading economic force[33]—a force teetering on irrelevance, if not extinction, in the

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28. *Id.* at 244.

29. There appears to have been virtually no ticket-splitting in the race: each member of the three slates for General President and 15-member Executive Board received, out of the more than 400,000 votes cast, virtually identical vote tallies, all across the country and all up and down the slate. *Id.* at 287-88. Carey won the General Presidency with fewer than 200,000 votes in a 1.6 million-member union. *Id.* at 287.

30. George Feldman, *The New Teamsters and the Labor Movement*, 38 WAYNE L. REV. 527, 527 & n.2 (1992) (citing Victor Reuther, Congratulatory Telegram to TDU and Carey). Professor Feldman's excellent, if perhaps overly optimistic, article reviews the history of the Teamsters' litigation and the story of Carey's election with an eye toward the possibility that the current Teamsters leadership might set a new ethical and democratic standard for the rest of organized labor. Labor activist and author Tom Geoghegan shares a good part of this "New Teamster"-induced optimism: "Unions probably did more last year than in the last 30 or 40 years to improve their image: They threw the mob out of the Teamsters." Pamela Mendels, *Labor in the '90s: A Special Report*, NEWSDAY, Sept. 7, 1992, Bus. Sec. at 21.

31. Representative Joseph P. Kennedy, Remarks at the Democratic National Convention (July 15, 1992) ("[W]hen Robert Kennedy was alive, he took on the major unions . . . and he said that the union movement of America should stand up for the rights of working people. . . . And today we see Ron Carey taking over the Teamsters Union . . . and 30 years after his work paid fruition.")

32. Fitch, *supra* note 20, at 19, 74.

33. In 1991, 16.1% of the work force was unionized, down from 25% in 1979. During that same period, labor union membership declined from 22.6 million to 16.6 million. Only 11.9% of the private sector work force now consists of union members, a smaller percentage than in 1929. *See* Kenneth C. Crowe, *Labor in the '90s: A Special Report*, NEWSDAY, Sept. 6, 1992, at 84; *see also* Gerald W. McEntee, *Labor Law at the Crossroads*, 61 CHI.-KENT L. REV. 663, 664 (1985) (unionized workers, estimated to comprise 34% of the work force in 1950, are projected to decline to 10% by the year 2000). *See generally* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES (1987).

view of some[34]—only makes this job more delicate and difficult. The most recent attempt to overhaul a corrupt union, Arnold Miller's effort in the 1970's to clean and reinvigorate Tony Boyle's United Mine Workers (UMW), is widely perceived to have been, at least initially, a failure. And this failure often has been attributed to the reformers' own overzealotry, naivete, and inexperienced "grass-roots"-style management.[35] With a union more systematically corrupt, with organized labor as a whole now in steep decline, and with Carey's own election possibly attributable only to low voter turnout and a divided opposition, what exactly does one do to keep the UMW's sorry experience from recurring? How exactly does one build an enduring "culture of democracy" in the Teamsters?

The remainder of this Essay explores, though by no means provides a clear and easy answer to, these questions. Part I situates the current Teamsters clean-up effort within two more general conceptual frameworks: the frequently-made analogy between the "New Teamsters" and the post-Communist "regime changes" of Eastern Europe;[36] and the much-debated concept of the judge's proper role in litigation involving "institutional reform."[37] Part II reviews the most significant postelection interactions between the new Teamsters leaders and the supervising court, to illustrate how delicate—and potentially counterproductive—conditions in that crucial sector already have become. The third Part reviews some developments in post-World War II labor history—or, rather, some *non*developments in *non*history—that may help to explain how the players in the Teamsters litigation have reached the highly complicated position they now occupy with so little in the way of relevant experience, or even academic commentary, upon which to draw. Finally, Part IV describes steps taken by the newly elected Teamsters leadership to deal with the union's remaining corruption, and speculates about the future and significance of the current effort to "clean up" the Teamsters.

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34. GEOGHEGAN, *supra* note 7, at 3 (suggesting that when and if union membership falls below 10% of the work force, organized labor will lose critical mass).

35. *See* GEOGHEGAN, *supra* note 7, at 9-39 (memoirs of lawyer involved in Miller's UMW efforts); *see also* Baker, *supra* note 22, at A18 (Miller's "union soon fell into disarray because of poor administration and squabbles between reformers."). After a prolonged transitional interval, and the election of another reformer president, UMW reform generally is deemed to have gotten back on track. *See generally* PAUL F. CLARK, THE MINERS' FIGHT FOR DEMOCRACY: ARNOLD MILLER AND THE REFORM OF THE UNITED MINE WORKERS (1981).

36. *See, e.g.*, Baker, *supra* note 22, at A18 (quoting Professor Clyde Summers' comments that in old days "members of the Teamsters were somewhat like the Poles or Czechs or East Germans"); Baker, *supra* note 18, at A1 (quoting California Teamsters local lawyer's statement that in the IBT, as in Eastern Europe and USSR, "You've had this archaic, frozen system in place for 50 years, where a little group of power brokers at the top wheel and deal and run the joint, and now nobody knows what's going to happen."); Carlson, *supra* note 2, at W15 (noting that old executive board operated "like the Politburo"); *see also* Steve Early, *Teamsters Election Is a Triumph for Labor*, CHRISTIAN SCI. MONITOR, Dec. 23, 1991, at 18; Jonathon Tasini, *Perestroika for Teamsters?*, NEWSDAY, Nov. 1, 1990, at 80.

37. *See* Goldberg, *supra* note 10.

One thing that this Essay will not do, however, is provide a concise or handy definition of union "corruption." But the reason that it does not is central to its still-unfolding story.

I. REGIME CHANGE AND INSTITUTIONAL REFORM

At the time of Carey's election, no one, except perhaps the old Teamsters leadership itself, doubted that there was a great need for change inside the Teamsters' marble palace. The old guard had long been accused of personal corruption and union-subsidized self-indulgence;[38] of routinely negotiating "sweetheart," kickback-laden contracts; widespread conflicts of interest; and of rampant nepotism and cronyism. Perhaps worst of all, in the eyes of many members, the old guard was seen as having abandoned new labor organizing at a time when deregulation of the trucking industry was radically reducing membership.[39] Thus, although a desire to eliminate corruption was one reason why the rank-and-file members voted the old guard out, a desire to revitalize the union as an *economic* force was another, and possibly an even bigger

38. Like the Teamsters' relationship with *La Cosa Nostra*, some of this self-indulgence was institutionalized. The union's constitution, for example, expressly provides that the union shall, "in addition to all other . . . compensation and allowances," pay for "all expenses" of the General President "when taking periodic rests; the said expenses and allowances shall include travel in this country and abroad, [and] the full and complete maintenance of his wife so that she can accompany the General President." IBT Const. art. V, § 2. *See* Baker, *supra* note 2, at A27 (noting that secretary-treasurer of local who also served as president of joint council and IBT vice president earned over $600,000 per year by drawing multiple salaries); Bob Baker, *Accusations Filed Against Teamsters Leader*, L.A. TIMES, May 8, 1991, at B1 (characterizing retirement gifts and post-retirement perks); Richard Greer, *Atlanta Teamster Reformers Challenge Old Guard*, ATLANTA J. & CONST., Oct. 4, 1992, at H1, H7 (concluding that local leaders lived like English royalty). Prior to Carey's election, the union also maintained a fleet of private jets, widely known as "The Teamster Air Force," *see infra* note 120.

The fact that many of these practices had been "normalized" (that they were formally approved by tightly controlled local boards at duly constituted meetings, for example) raises further complications for the democratization and clean-up process. *Cf.* United States v. International Bhd. of Teamsters, No. 88 Civ. 4486, 1993 U.S. Dist. LEXIS 1421 (S.D.N.Y. Feb. 9, 1993) (concerning allegations of "interest-free" loan from local). The "Nuremberg" ex post facto problem is the most prominent: if alleged self-dealing was "legal" when it occurred, how is it now suddenly to be "punished?" Moreover, as Professor Bruce Ackerman has noted recently, there is here, as elsewhere in the regime-change process, necessarily a trade-off involved in any new regime's choice between the different ways of weeding out its corrupt predecessor's holdovers. On the one hand, a legalistic, "case-by-case" "purge" may be more consistent with instilling the (new) idea of a "rule of law" in a culture previously accustomed—and adjusted—to authoritarian behavior; on the other hand, a quick and wholesale purge may serve the same objective by conveying to the populace that the new regime represents a "clean break" with the past. *See* BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 70 (1992). Technically, it should be noted, there is no formal "Nuremberg" or due process problem here, because the court-appointed officers, who have conducted such extensive clean-up work for the last four years, have been deemed not to be "state actors" and are exercising only the "private" authority of the General President and General Executive Board. *See infra* text accompanying notes 68-71.

39. Carlson, *supra* note 2, at W16-17. According to labor writer Jonathan Tasini, who is himself the President of the National Writers Union, "the majority of IBT leaders nationwide have committed only one major crime: they have held on to their lucrative posts and sat on their hands as IBT rank-and-file watched employers shred their standard of living." Tasini, *supra* note 36, at 80.

one.[40] After more than a decade in which American labor negotiations had generally focused on how much the union would "give back" to management, instead of how much could be "won," a reformer General President genuinely interested in representing "the members" had two different jobs, only one of which concerned the elimination of corruption. And it is clear beyond a doubt that this is how the newly elected Carey saw his task.[41]

Journalists and other commentators commonly compare the Teamsters' new turn toward democracy with post-Cold War events in Eastern Europe.[42] The comparison, no doubt so often made due to the events' chronological coincidence, is at once true and oversimplified. Both General President Carey and President Vaclav Havel—as well as Lech Walesa, Boris Yeltsin, and other post-Communist Eastern European leaders—are indeed engaged in the same complicated task of liberalizing and re-energizing corrupt one-party states, of conducting a fundamental "regime change" toward democracy.[43] In all of these situations, the change that the reformers seek has (at least) two parts. Having suddenly assumed command of a dysfunctional and discredited one-party apparatus, Carey, like the others, needs urgently both to restart the economy and to conduct a purge of corrupt holdovers from the past regime. But these two compelling goals, though sometimes surely linked,[44] may in practice also be competing,[45] in the Teamsters union, as in Eastern Europe.

Too much change too fast, even in the right direction, may be counterproductive and disruptive.[46] The newly arrived leadership's resources,

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40. *Cf.* Fitch, *supra* note 20, at 24, 71 (quoting TDU leader to the effect that, despite what "most journalists think," corruption "wasn't the biggest issue" in overwhelming membership rejection of 1983 master freight agreement that contained secret concessionary provisions).

41. Ron Carey, General President, Teamsters Union, Remarks at the National Press Club (Sept. 23, 1992) (C-Span transcript at 7) (on file with author) [hereinafter Carey, Remarks], at 3, 6 ("[T]he new Teamsters will be judged, not just [on] whether or not we cleaned up the mess that we inherited. . . . [History will also ask,] 'Did we build a new, strong, democratic union, moving in the direction of good jobs?'").

42. *See* sources cited *supra* note 36. Carey himself has made the same analogy, contrasting the U.S. government's praise for the resurgence of democratic unionism in the Polish "Solidarity" movement with what he sees as its undue intervention in the postelection Teamsters. Carey, Remarks.

43. For a comprehensive political science review of contemporary pro-democracy "regime changes," see 1 TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE; 2 TRANSITIONS FROM AUTHORITARIAN RULE: LATIN AMERICA; 3 TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES; 4 TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES (Guillermo O'Donnell et al. eds., 1986); *see also* ROBERT A. DAHL, AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY (2d ed. 1990); ROBERT A. DAHL, POLYARCHY (1971).

44. Carey himself has suggested, for example, that the Teamsters' corruption may be partially responsible for the union's erosion of bargaining aggressiveness and strength, because the former leadership was more concerned with itself than with the members; thus eliminating the one may be an important (if not necessarily the first or only important) step toward restoring the other. CROWE, *supra* note 5, at 142. *Accord* Fitch, *supra* note 20, at 71 ("What really drove the rank-and-file to throw out their leaders was the recognition that corrupt leaders couldn't effectively fight the employers.").

45. *See* ACKERMAN, *supra* note 38, at 70.

46. *Cf.* Nancy Bermeo, *Rethinking Regime Change*, 22 COMP. POL. 359, 363 (1990) (summarizing the views of Robert Dahl to the effect that "gradualism, moderation and compromise" may well be key to accomplishing peaceful change from authoritarianism to lasting democracy).

credibility, and concentration can, at any given moment, only stretch so far.[47] In the face of such constraints and pressures, how exactly should priorities between these potentially competing goals be set? How exactly does one "clean up" the Teamsters in a manner that is fair, and that does not unduly disrupt (or divert resources from) the equally vital task of restarting the union as an economic power? What further constraints are imposed by the delicate and complex relationships between the "new" International and the many semi-autonomous union affiliates and subsidiaries (pension funds, regional conferences, joint councils, and powerful locals) where, by all informed accounts, most of the remaining abuses now reside?[48] To ask these questions with respect to Eastern Europe's new multi-ethnic post-Communist democracies only requires the most minimal of verbal transpositions.

But despite these many similarities, there is one enormous, and highly significant, difference between the two situations. In contemporary Eastern Europe, reform came from below, as the prior regime collapsed; the new turn toward democracy was not a change—however welcome—that was imposed from the outside. In the Teamsters, in sharp contrast, there was no sudden fading of the old guard, nor any sudden grass-roots upsurge. The Teamsters old guard was, in fact, *so* well-entrenched, and also *so* offensive even to those beyond their direct sway, that they inspired the institutional equivalent of a foreign invasion. The Teamsters, consequently, are now more like 1945's post-Hitler Germany than like the current reunited one.[49] If there is any real historical analogue to the current Teamsters situation, therefore, it is not the

47. *Cf. id.* at 364 (reporting that, following a thorough review of regime-change literature, "one is left with the impression that those who want to consolidate a post-authoritarian democracy must not only moderate their demands but possibly 'queue' them, like the tasks in an assembly line. One set of tasks must be completed before another even begins.").

48. Steven Brill and the Assistant Inspector General of the Labor Department appear to agree in this assessment of where the remaining problems are, and the former head of the University of Pennsylvania Industrial Research Institute describes the remaining clean-up task as so "fearfully large" that perfection is improbable. Robert Davis, *To Throw the Bums Out, He Must First Find Them*, USA TODAY, Feb. 10, 1992, at 2A; *see also* Garth L. Mangum, *RICO vs. Landrum-Griffin as Weapons Against Union Corruption: The Teamster Case*, 40 LAB. L.J. 94, 95, 100, 103 (1989) (given Teamsters' history of "local power centers, . . . cleaning up the IBT would require more, not less, imposition of International power on the locals" because "[w]ith the exception of the benefit funds, the opportunities for racketeering are at the lower level"). *Accord* Phill Kwik, *After Nine Months, New Leadership Is Transforming the Teamsters: But Resistance from the Old Guard Is Slowing Reform*, LAB. NOTES, Nov. 1992, at 1.

According to an attorney with the Association for Union Democracy, General President Carey "barely has one layer—the top." Baker, *supra* note 22, at A18. Also, as a delegate to a postelection convention of the Teamsters for a Democratic Union put it, "at the bottom we've still got the old guard who are not membership-oriented, but are just out for themselves." *Teamster Reform Group Redefines Role in Wake of Carey's Election as President*, Daily Lab. Rep. (BNA) No. 208, at A-3 (Oct. 27, 1992) [hereinafter *Teamster Reform Group*] (quoting Erv Weagner). It is important to recognize, moreover, that these lower-level, holdover leaders have shown themselves to be tenacious in their resistance to Carey's reforms, and anxious to protect their own positions for as long as possible, if need be by inciting an actual "counter-revolution" or large-scale "civil war." Kwik, *supra*. It has also been suggested that Carey may need to replace some of his own holdover "International Representatives" who may be, at best, useless political appointees. *Teamster Reform Group*, *supra*.

49. *See* DAHL, POLYARCHY, *supra* note 43 (distinguishing between grass roots-induced regime changes and those resulting from foreign invasion).

current elimination of ex-Communists in the new democracies of Eastern Europe. The real European analogue is post-World War II denazification.[50]

A number of important real-world consequences follow, all of which make the position of the regime-change leaders in the Teamsters far more complex, at least conceptually, than those of similarly situated Eastern European leaders. First, in the Teamsters case, as in postwar Germany, an "occupying army"—a federal court supervising a consent decree—remains firmly and finally in overall control. As a result, the new Teamsters leadership, unlike the Eastern Europeans, cannot simply clean out all of the prior regime's suspect holdovers that they would like or that they believe their circumstances require. They must instead clean out all of those holdovers that the "occupying force" says they must remove as a condition of its own withdrawal, as a prerequisite for the return of the reformers' entity to its autonomous and sovereign status. Perhaps most significantly they must manage the task of regime change at the occupying force's pace, and in accordance with its sense of priorities.

Second, because theirs was an outsider-instigated regime change, the new Teamsters leaders must build a new grass-roots culture of democracy in their entity from scratch, and from the top, after a transfer of formal power already has occurred.[51] Although, according to one expert, "[t]he record of democratizations shows that just about the easiest, almost surgical, method of replacing modern dictatorship with democracy has been war and occupation,"[52] forcibly overthrowing an old regime is not the same as—and in fact may be much simpler than—building a durable cultural constituency for a new democratic entity. In the Teamsters, where the regime-change election results themselves suggest that cynicism and apathy continue to exercise a strong hold, rank-and-filers must be convinced that democracy is a better system strictly through the evidence adduced by the newcomers' own performance in office. And all of the participants are aware that "better" is likely to be evaluated, in the long run, largely in terms of whether democracy can "deliver" more.

To make matters more complicated still, these two major differences from the Eastern European situation are not distinct and separate; they interact dynamically. The fact that the "occupying force" is still present, and that a new culture of democracy must now simultaneously be built, means that the consent decree's surrender of union authority to the government—this final legacy from the old regime—assumes a more ambiguous significance than the press and commentators generally have recognized. The intensive and ongoing oversight mandated by the federal court's decree brings heavy psychological, political, and cultural costs to the union and its new leaders, not to mention significant

50. *Cf.* Summers, *Union Trusteeships*, *supra* note 10, at 700 (making same analogy with respect to court's task in a Landrum-Griffin trusteeship context).

51. *See* Tasini, *supra* note 36, at 80.

52. GIUSEPPE DIPALMA, TO CRAFT DEMOCRACIES 32 (1990).

financial ones.[53] Because the membership, and especially the activist-reformer leaders, predictably will seek to flex their new-found muscle in the postelection universe, the decree can come to be perceived, and certainly comes to operate, as a set of constraints upon a suddenly triumphant democratic impulse that has been long suppressed. Consequently, even if the free and fair election itself would have been unimaginable without the government's intervention, the consent decree's constraints may still be deeply resented—at best, ambivalently accepted—by newly empowered democrats, less deferential and beholden to their liberators than those well-intentioned liberators might expect or like. Even in dislocated postwar Germany, it has been said, resistance to post-Nazi reform apparently was rooted in part in the pure and simple fact that the reforms were being imposed "from without."[54] It thus is not hard to credit veteran *Los Angeles Times* labor reporter Harry Bernstein when he says that, in spite of the fact that the government's RICO suit was responsible for opening up the Teamsters, the majority of the union's members nonetheless urgently want to break the government's grip,[55] just as other similarly situated, newly liberated peoples also often do.

Moreover, American trade unionists are not just a generic "liberated people." They are a particular, historically situated one, with their own traditions, values, heritage, and culture, and the postelection Teamsters' situation implicates those as well. The right to free and independent trade unions, reflected in Landrum-Griffin,[56] is not mere statutory boilerplate. It is a basic and central component of the labor movement's traditional ideology and worldview, that serves—or at least can serve—as an animating vision, a source of personal identity, for a union and its members. The prerogative of union members to "clean house *themselves*"[57] is only one part. The government's RICO-based effort to clean up the union may well have been

53. The consent decree places the cost of its implementation on the union, and those costs had run to an estimated $37 million as of mid-1992. James Warren, *Song for an Unsung Hero: Mike Holland's 'Government Intrusion' Helped Reform the Teamsters*, CHI. TRIB., Aug. 9, 1992, at Tempo 2. *But see* United States v. International Bhd. of Teamsters, 803 F. Supp. 748, 789 (1992) (arriving at a lower figure by leaving out costs associated with former leadership's resistance). No matter how the expenses related to the decree are calculated, they almost certainly contribute to the union's $30.6 million operating deficit. Kenneth C. Crowe, *Talk Softly, Carry a Big Broomstick: New Teamsters Head Pushes Cleanup Effort*, NEWSDAY, May 10, 1992, at 58. Plainly, any cost at all is unwelcome to the new leaders, especially at a time when the union's budgetary position has created some feeling that a dues increase may be required despite a powerful "no new taxes" membership mood. Kwik, *supra* note 48. At a minimum, the money spent on lawyers and on paying for the federal monitors of course must be diverted from somewhere else, including, perhaps most painfully, from the revived union organizing efforts that form a central part of Carey's economic regime-change agenda. *See infra* text accompanying note 118.

54. *See generally* John H. Herz, *Denazification and Related Policies*, *in* FROM DICTATORSHIP TO DEMOCRACY: COPING WITH THE LEGACIES OF AUTHORITARIANISM AND TOTALITARIANISM 15 (John H. Herz ed., 1982).

55. Harry Bernstein, *Ends Justify Means in Teamster Purge*, L.A. TIMES, July 2, 1991, at D3.

56. *See* United Steelworkers of America v. Sadlowski, 457 U.S. 102, 116-17 (1982).

57. 105 CONG. REC. 6476 (1959) (remarks of Senator McClellan) *quoted in* Jonathan E. Richman, Note, *Facial Adjudication of Disciplinary Provisions in Union Constitutions*, 91 YALE L.J. 144, 151 n.42 (1981) (emphasis added).

legally and morally justified in the context of the union's extraordinary history.[58] But in the postelection context this outside "invasion" raises anew not only all of the standard questions about RICO's potentially excessive elasticity,[59] but also the longstanding, fundamental tension between the ideal of independent, self-governing trade unions and all government regulations and rules. As one trade union member recalled, in the 1980's, there was once a time when "it was more like a religion than a union,"[60] and an independence-minded reform leader's vision, in particular, will inevitably be affected, even clouded, by a desire to try to bring such times back. His or her behavior will likely be affected too. For reasons based on strong personal belief, as well as from a desire to do what will play well with the members, the reformist union leader is likely to experience a powerful impulse to resist outside intervention, or to try to control its terms, whether or not doing so, at any given time, seems to make much sense to those who do not share this vision.[61]

These competing and conflicting lines of force come together in the much-debated concept of "the role of the judge in public law litigation,"[62] for it is

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58. *See* Bernstein, *supra* note 55.

59. *See generally* Gerard E. Lynch, *RICO: The Crime of Being A Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987); Gerard E. Lynch, *RICO: The Crime of Being A Criminal, Parts III & IV*, 87 COLUM. L. REV. 920 (1987); Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989).

60. STUDS TERKEL, THE GREAT DIVIDE: SECOND THOUGHTS ON THE AMERICAN DREAM 168 (1988) (interview with Cliff "Cowboy" Mazo).

61. Indeed, most recent accounts and descriptions of this once powerful collectively minded trade union culture focus precisely on the extent to which it is no longer widely shared; they focus on its breakdown in the face of economic decline, consumerism, mass communication, and postwar (and particularly Reagan-era) individualism. *See* RICK FANTASIA, CULTURES OF SOLIDARITY: CONSCIOUSNESS, ACTION, AND CONTEMPORARY AMERICAN WORKERS 63-72 (1988). TERKEL, *supra* note 60, at 168-70 (1988). Some see big labor itself as being partially responsible for this ethic's decline. *Id.* at 166 (interview with Victor Reuther, founding member and former United Auto Workers president). *Cf.* Henry Weinstein, *AFL-CIO Plans Ads to Extol Unions' Virtues*, L.A. TIMES, Oct. 26, 1987, at 1 (public opinion polls show consistent decline in public image of unions and in belief in unions' necessity). For those outside this culture, opportunities even to observe it seem recently to have diminished. Since Sayles' 1977 *Union Dues*, for example, modern American fiction appears to have turned away from trade union concerns almost entirely. First-person accounts of "journeys across class lines" by individuals who might conceivably be *this* Journal's readers or writers seem mostly to have been limited to Terkel's and Geoghegan's work since the 1974 publication of JOHN R. COLEMAN, BLUE-COLLAR JOURNAL: A COLLEGE PRESIDENT'S SABBATICAL (1974). To be sure, these bald generalizations are perhaps less true of the (usually also less true) movies: the classic *On the Waterfront* appears to have spawned *Norma Rae*, *Matewan*, and Sylvester Stallone's never-to-be-forgotten *F.I.S.T.*, as well as the current *Hoffa* and any number of documentaries.

62. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *see* Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725 (1986); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983); David Rudenstine, *Judicially Ordered Social Reform: Neofederalism and Neonationalism and the Debate over Political Structure*, 59 S. CAL. L. REV. 449 (1986); Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887 (1984); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). A comprehensive case study is provided by LARRY W. YACKLE, REFORM AND REGRET: THE STORY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM (1989). Professor Michael Goldberg's *Cleaning Labor's House*, *supra* note 10, is most immediately germane, but so too are articles that discuss the pitfalls of judicial involvement in "political thickets" generally. *See, e.g.*, Peter H. Schuck, *The Thickest*

the judge alone who ultimately commands the "occupying force." At first glance, the Teamsters litigation resembles other "institutional reform" litigation designed to correct abuses in other major social institutions, such as schools, hospitals, and prisons, through massive, long-term injunctive intervention. But this simple analogy, like the Eastern European one, also conceals an important and fundamental difference: given the trade union movement's values and traditions (not to mention prevailing law),[63] one of the central interests that the court should be protecting is the right of the union's members to *run* the institution themselves. There is therefore a tension, and a potentially paradoxical element, to the Teamsters litigation that is not presented elsewhere. In this case, unlike others, there may well be a point at which the court's aggressive involvement "on behalf of" the union members' rights actually begins to *undermine* those rights, even if there is, at a strictly logical level, no inherent contradiction between cleaning up the union and democratizing it.[64] In practice, a member's right to have a union free of corruption may not be entirely consistent with a member's right to exercise independent, autonomous control.

Consequently, the concerns so frequently voiced about inadequate "interest representation"[65] and insufficient participation by affected individuals[66] in institutional reform litigation are especially intense here. The government, the court, and the law presume that an immediate scorched-earth purge fulfills the absent class members' fondest desires and reflects their own priorities. But where autonomy *from* court control is a *separate* (but equal) interest of the class members, it may fairly be doubted whether this well-intended presumption is entirely true. As Professor Derrick Bell has noted, one's class action clients may want equality in education, but they may want a quality

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Thicket: Partisan Gerrymandering and Judicial Regulation of Politics, 87 COLUM. L. REV. 1325 (1987).

63. *See* Goldberg, *supra* note 10, at 961-64 (discussing relationship of freedom of association principles to trade union movement and federal labor law), 1006-07 (advocating separate representation for members in RICO actions to clean out corrupt labor hierarchies, for the reasons suggested here); *See also infra* note 138.

64. Indeed, one part of the post-World War II denazification process actually was called "democratization through denazification." Herz, *supra* note 54, at 24; *see also* JEROME VAILLANT, LA DENAZIFICATION PAR LES VAINQUERS: LA POLITIQUE CULTURELLE DES OCCUPANTS EN ALLEMAGNE 1945-1949 (1981) (comparing Allies' different strategies for conducting mass re-education efforts directed toward building new culture of democracy in occupied Germany). *But see* INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 201-98 (Deborah L. Schneider trans., 1991) (suggesting that West Germany may have long functioned democratically without complete, or even adequate, denazification).

65. *See, e.g.*, Chayes, *supra* note 62, at 1310-13.

66. *See* Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707, 736 (1978) (recounting how community participation lessened resistance to school desegregation decree); Colin S. Diver, *The Judge as Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 90 (1979) (advocating a "bargaining" approach because "[V]irtually all organizational theorists stipulate as one condition for successful change the participation of those whose behavior must be altered"); Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 436-67 (1977) (counselling courts not to rely "passively" upon "formal, adversarial processes" during remedial phase).

education even more.[67] There is no reason to believe that a separate interest in the autonomy of one's union operates on human beings differently.

Other troubling issues confront the judge supervising this unusual case, and some of these border upon the strictly "legal." Because the court is enforcing a consent decree reached under RICO, rather than the member-rights protections contained in Landrum-Griffin, it may frequently be tempted to extend governmental power beyond otherwise permissible legal bounds. Landrum-Griffin, to be sure, does provide for pervasive court involvement in internal union affairs in drastic situations.[68] But the Teamsters consent decree permits the postelection monitor that it establishes to exercise, by settlement-decree proxy, the almost certainly *even broader* constitutional powers of the union's own General President.[69] Because these include the power to punish not just *La Cosa Nostra* connections, but corruption more generally, as well as anything that might "bring reproach" upon the union,[70] a real question exists as to whether this consent decree represents a broadening of the government's power beyond the limits Congress had believed appropriate. The Second Circuit's holding that the court-appointed officers are not "state actors"[71] drains this analysis only of its technical legal force; it retains enough more general force also to counsel heightened sensitivity on the part of the court in its enforcement of this consent decree, especially after those who gave their (self-annihilating) "consent" to the decree are gone.

Finally, even these numerous cultural, policy, and quasi-legal concerns do not exhaust the special burdens that the postelection Teamsters situation places on the supervising judge, nor do they fully suggest the peculiarity of his position. Those burdens are augmented further by the possibly unique role that the government's case against the Teamsters has required the court to play during the current, postelection phase. At this point, the decree calls upon the court to oversee only a single part of the broader regime-change process that is now in progress. It must oversee the purge. The necessary changes in bureaucratic rules—the provisions for elections and the like—have already

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67. *See generally* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

68. *See* Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 461-66, 521 (1988) (trusteeships and investigations). *see also* Goldberg, *supra* note 10, at 937-38. *But see infra* text accompanying notes 151-54 (discussing impact of Landrum Griffin). *See generally* Summers, *Democracy*, *supra* note 10.

69. Consent Decree, *supra* note 13, at 19. *See infra* text accompanying notes 85-89 (discussing postelection monitor).

70. IBT Const. art. II, § 2(a) & art. XIX, § 7(b).

71. United States v. International Bhd. of Teamsters, 941 F.2d 1292, 1295-97 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1161 (1992). *See generally* discussion *infra* Parts III & IV. As previously noted, *supra* note 38, this distinction signifies, among many other things, that no formal ex post facto "Nuremberg problem" is presented, except to the extent that the outside monitors may overstep the General President's authority for punishing past "bad" behavior that was "legal" within the union at the time. But this itself raises the further question whether the president of a voluntary association shall be bound by such constraints.

been made (they were what precipitated the regime change in the first place), and eliminating "bad people" is the sole remaining institutional reform at issue. Thus, the consent decree's "implementation" now effectively amounts to a continuing process of *ad hominem* prosecution, and it is safe to say that few, if any, other institutional reform cases outside the union context have any comparable phase, or any comparable judge's role.[72] Even in its narrow corruption-fighting capacity, then, the court is plainly sailing in what are, at best, some poorly charted waters;[73] waters that have not been traversed terribly successfully before.[74]

These many tensions in the judge's role are as serious as they are intricate. Democratic self-control, economic viability, and freedom from corruption are all simultaneously in play, and the court may already be operating at the outer edges of its own capabilities and authority. Astute political management, interpersonal diplomacy, cultural sensitivity, and sheer tact may thus be especially important components of the judge's role when it comes to the postelection Teamsters case. The complex prudential judgments required from a court charged with implementing any consent decree necessarily are magnified here. After the election, in particular, a narrow focus on eradicating corruption, the task originally imposed by the consent decree, may not be enough; something much more modulated, even solomonic, than the normal focus on achieving attractive "bureaucratic" outcomes may be necessary. Special sensitivities on the part of the largely "innocent," democratically elected defendants may be at stake, and those same defendants will also have other vital regime-change agenda items on their minds. An enlightened court, faced with this unusual half regime-change, half institutional-reform litigation, might therefore be wise also to embrace an unusual responsibility: to help build a culture of democracy, with an eye toward the day when the court itself eventually withdraws.[75] For better or for worse, in a case like this, where a new reform-oriented leadership has been chosen in an election certified by the government as having been uniquely clean and fair, and where a union and its members have been suffering not just ethically but economically, a special burden may well rest upon the court not to let the old paradox from Vietnam resurface: not inadvertently to "destroy the village in order to save it."

To assume that the court can avoid this risk, however, is to assume something else: that the American labor movement itself knows how to

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72. Consideration of the contempt proceedings that other institutional reform cases often involve, which may give the superficial appearance of being similar, serves to underscore the point. In the ordinary institutional reform case, contempt hearings follow the alleged violation of a remedial decree that was *prospective* at the time when it was entered. "Do not *have been* corrupt" is the court's real order here.

73. *But see* Goldberg, *supra* note 10 (describing previous efforts to "purge" corrupt unions and locals, and substantial legal bases under RICO and Landrum-Griffin for asserting such authority); Summers, *Union Trusteeships*, *supra* note 10 (conceding the necessity for intrusive and long-lasting trusteeships).

74. Goldberg, *supra* note 10.

75. *See generally id.*, at 1003-10.

undertake extensive or aggressive efforts to eradicate union corruption and dishonesty "from the top." As shall be seen,[76] there is little evidence to support such an assumption. For a variety of reasons—legal, cultural, historical, institutional, and personal—the higher reaches of organized labor in America have felt no need, nor have they shown much inclination, to address the issue of internal union corruption for a good long time. In the current Teamsters litigation, judges, court-appointed monitors, reform-oriented elected officers, *anti*-reform-oriented officers, and millions of rank-and-file members all have different agendas, perspectives, attitudes, and interests. But when it comes to cleaning up the Teamsters—to conducting a radical, top-down regime change in an American labor union—few individuals on any side possess genuinely relevant experience. Improvisation may be the only course that is available to anyone responsible for managing this fundamental regime change or, for that matter, any other.[77] The most that anyone can hope for may be that this inevitable improvisation will be fact specific and context sensitive.

The only thing that all the players here should know is that they all must improvise together. It is perhaps true that "the perspectives of the courts and the organizations they seek to change are, in the nature of things, radically different" at all times and in all circumstances.[78] But if "participation in the formulation of a remedy" by affected individuals and entities serves "an independent value" whenever meaningful reform is achieved through structural litigation,[79] one may fairly assume that such participation has an even higher value when a case involves enforcing a decree negotiated by a party now discredited and departed.[80] And the value of this participation is bound only to be enhanced further when the long-term objective of all concerned is—or at least should be—to build a clean, autonomous, economically viable, and durably democratic institution.

II. OPERATION OVERLORD

How well all the parties actually are working together is perhaps best seen by examining a series of events that followed entry of the consent decree,

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76. *See* discussion *infra* Part III.

77. Robert Dahl, for one, notes the near impossibility of drawing general conclusions—much less of writing precise guidebooks—for regime-change participants based upon the study of previous cases in which an outside "invasion" has resulted in the democratization of a particular political system. To the contrary, he concludes that "concrete historical statements, or predictions based upon a particular configuration of international forces at a specific time, may be more fruitful than theoretical generalities about the interplay between foreign domination and polyarchy." DAHL, POLYARCHY, *supra* note 43, at 193. Carey appears at least to have made an effort to tap such experience as may be around: he hired as his Special Assistant, and later appointed to the Independent Review Board. *See infra* text accompanying notes 103-06, a leading figure in the UMW reform administration; *see also* CROWE, *supra* note 5, at 8-12.

78. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1297 (1983).

79. Sturm, *supra* note 62, at 1377.

80. *See* Berger, *supra* note 66.

events that convey both the depth of the new leadership's feelings regarding their own autonomy and the often "Byzantine"[81] flavor of this highly unusual structural reform litigation.

The decree mandated two separate phases of implementation. In the first phase, it provided for a court-appointed Independent Administrator charged with responsibility for overseeing the clean-up process through the investigation and removal of corrupt officers, a process that was to be accomplished in large measure through the front-line efforts of two additional court-appointed officers.[82] A tireless and aggressive Investigations Officer eventually investigated nearly two hundred Teamsters officials and displaced almost one hundred,[83] and an Election Officer[84] scheduled and conducted a free and, most significantly, *direct*[85] secret ballot rank-and-file election for the

81. United States v. International Bhd. of Teamsters, 948 F.2d 1338, 1340 (2d Cir. 1991).

82. *See* Consent Decree, *supra* note 13, at 7-18 (spelling out the responsibilities and powers of the court-appointed officers). The Administrator was to have the same corruption-fighting powers as the IBT's General President and General Executive Board, *id.* at 7, and was to use a "just cause" standard for imposing sanctions, *id.* at 9.

83. Davis, *supra* note 48, at 2A (151 officials charged; 26 reputed mobsters barred; 37 top members "kicked out"; 27 more suspended); Robert L. Jackson, *Union Reformers Taking a Back Seat to Outsiders in Cleanup of Teamsters*, L.A. TIMES, July 7, 1992, at A5 (170 officials charged; 50 have resigned; 22 have agreed to make restitution to the union); Elisabeth Lesly, *No. 2 Teamster Faces Probe of Vote-Rigging*, WASH. TIMES, Aug. 10, 1992, at A1 (charges filed against nearly 200; 95% of expulsions sought by Investigations Officer upheld by supervising court).

84. In general, the Election Officer, a Chicago attorney, performed his functions with the highest diplomacy, determination, and skill, after some initial controversies with union democracy activist groups concerning his initial election rules, which would have allowed the elections to be conducted through the old-guard-controlled locals. CROWE, *supra* note 5, at 122-28. The court set aside these rules and ordered the Elections Officer to undertake much more direct and detailed control of the election process. *Id.* at 126-28. The federal government also has the right to supervise the IBT's 1996 elections, though at its own expense. Consent Decree, *supra* note 13, at 16.

Whether because of modesty or culturally sophisticated shrewdness, the Election Officer accepted only a labor-lawyer hourly rate of $125 for his extensive services, in sharp contrast to the rates charged by the New York-based Administrator and Investigations Officer. The Administrator was initially guaranteed a $340-per-hour rate, later raised by the court to $385 in response to the Administrator's request. The Investigations Officer received $250. Warren, *supra* note 53. The $385 hourly figure for the Administrator does not include the Administrator's health and other benefits, however, which raise the effective hourly rate to at least $500 per hour. Kenneth C. Crowe, *Friction Drives the Hearings in the Judge's Watch over Teamsters*, NEWSDAY, Oct. 4, 1992, at 86. The Administrator, who also became the government's appointee to the Independent Review Board, draws a $100,000-plus-overtime salary in that second capacity, and the court ruled that he may continue to be paid in both capacities until the Administrator's backlogged docket winds down. United States v. International Bhd. of Teamsters, 1992 U.S. Dist. LEXIS 15016 (S.D.N.Y. Oct. 6, 1992).

These substantial fees have been a major source of irritation to the union throughout the postelection period. The reasons may not be strictly budgetary. Issues of social class may also be involved. At a National Press Club appearance, Carey, whose own wife works at Macy's, seemed to be genuinely amazed by the fact that anyone could make $385 an hour: before what was probably a well-heeled audience, he emphasized "not per day, per hour." Carey, Remarks, *supra* note 41, at 7.

85. In the view of one recent commentator, the significance of this *direct* election procedure can hardly be overstated: Geoghegan maintains that direct grass-roots elections for high union positions—an *extreme* rarity under the by-laws of most major labor organizations (which usually rely upon complicated, and easily co-opted, multi-tier election procedures)—would be something like a "silver bullet" solution to all of labor's corruption and economic problems. Thomas Geoghegan, *American Labor's Dark, Romantic Years*, N.Y. TIMES, Sept. 2, 1991, at 19. *But see* Herman Benson, *More Than Meets the Eye*, 87 UNION DEMOCRACY REV., Apr. 1992, at 6-7 (suggesting that dissidents' success in UMW and IBT may be causing them to overrate direct elections' value).

union's top leadership positions. Despite considerable incumbent-inspired litigation, these first rank-and-file elections for General President and for the sixteen-member General Executive Board were conducted in a fair and open manner.

In the decree's second phase, which was to begin after the December 1991 election (and which actually became effective in the fall of 1992), the Administrator was to be replaced by a three-member Independent Review Board (IRB) charged with continuing the investigative and disciplinary aspects of the extensive clean-up process. The decree provided that the Department of Justice and the union each would choose one member of the IRB and that the two appointed members would then jointly choose the third, in a manner resembling other arbitration-oriented labor law devices.[86] The IRB, whose anti-corruption mandate was defined so as to be coextensive with the corruption-fighting powers granted to the General President by the IBT constitution, had no expiration date.[87] To the contrary, by court-ordered constitutional amendment, the IRB was to be made a permanent part of the union's own fundamental law[88]—an internal anti-corruption watchdog, half-appointed by the U.S. government. Like others of its kind, the consent decree also provided for a return to the court whenever the court's assistance was deemed necessary to secure the decree's implementation.[89]

Probably not surprisingly, during the pre-election phase, the court-appointed officers met with considerable resistance. Indeed, promptly after "settling" the case, the old guard mounted a tooth-and-nail resistance to every aspect of its actual implementation.[90] Removals were contested, election rules disputed, and as many of the consent decree's provisions as possible ignored or evaded, sometimes in quite ingenious ways.[91] The Administrator and the court had every reason to perceive the decree's implementation as just involving more ordinary litigation, and to assume an ordinary adversarial attitude toward the implementation process generally throughout the pre-election phase.

But even if the old guard's pitched resistance to the consent decree was unsurprising, one incident occurring during the pre-election phase strongly suggests that more than mere rear-guard self-defense was at issue and

86. Consent Decree, *supra* note 13, at 19.

87. *Id.*

88. *Id.*, at 23.

89. *Id.* at 25. The decree as a whole continues in effect until the court grants "a joint motion of the parties . . . for entry of judgment dismissing this action with prejudice," *id.* at 2, an event that, it is fair to say, is unlikely to occur for some time.

90. *See* Butterfield, *supra* note 18, at A1.

91. Among these was an effort by the old guard to change the organization's official magazine, *The International Teamster*, from a monthly to a quarterly publication, so that the rank-and-file would see the Administrator's "Messages" to concerned members less frequently. Carlson, *supra* note 2, at W16, *see also* Butterfield, *supra* note 18, at A1, A3. The consent decree authorized the Administrator to print these messages in "each" issue of the magazine. Consent Decree, *supra* note 13, at 16.

illustrates the sensitive context within which the court was operating. As noted, the consent decree contained an unusual provision reflecting in a concrete way the special nature of structural reform litigation involving an institution that was at least formally "democratic." Possibly because of a concern that the named old-guard defendants might lack legal authority under the union's constitution to settle the case in such a way as to make their own deal stick, the decree required that certain of the changes agreed to by the named defendants also be incorporated into the IBT constitution at the group's June 1991 convention.[92] In other words, the old guard's consent decree required that delegates to a new national convention—who were also for the first time (thanks to the decree) to be democratically elected through a secret-ballot rank-and-file election,[93] and who themselves had never elected the old guard in the first place—would be forced to vote to accept changes in their union's fundamental law that the discredited old guard had negotiated, whether the delegates wanted to or not.

When the convention was held in June 1991, the resistance of the assembled delegates to this requirement turned out to be enormous, and it did not break down tidily on old-guard versus new-guard lines.[94] Delegates associated with the old guard naturally opposed the proposed amendments as a matter of basic substance, and indeed, it may have been precisely the old guard's objective to have its hand-picked delegates, who were still very much in the majority at this meeting,[95] refuse to abide by this portion—as by all other portions—of the decree's overall reform plan. But many of the reform-

92. These constitutional changes included a post-hoc extension of the union's own "statute of limitations" regarding internal corruption from one year to five, Consent Decree, *supra* note 13, at 4; clarification of the General President's ability to suspend members and officers facing criminal or civil trial, *id.* at 5; a prohibition on the use of outside funding for union election campaigns, *id.* at 5; new procedures for filling the office of General President (by direct election), *id.* at 5, 13-15; and the permanent establishment of the IRB, *id.* at 19. If the IBT did not formally amend its constitution at the convention, the government retained the right to have the court forcibly impose these changes. *Id.* at 5-6. The old-guard leadership had thus effectively handed over to the government the unjoined rank-and-file members' constitutional "proxy," apparently based upon its authority under the constitution to amend through the General Executive Board, rather than through a convention, in cases where a court had declared that one or more portions of the constitution was "invalid or inoperative." IBT Const. art. XXVI, § 2. It may have been because the government doubted the validity or applicability of this constitutional provision that it had the amendments put to the convention anyway, although prior to the convention, in May 1991, it also took pains to secure a judicial ruling declaring that the amendments would be imposed by the court if the convention failed to ratify them. United States v. International Bhd. of Teamsters, 764 F. Supp. 787 (S.D.N.Y. 1991). *See generally* CROWE, *supra* note 5, at 206-07. When the amendments ultimately were imposed through court order, *see infra* text accompanying note 97, the applicability of the provision was upheld. United States v. International Bhd. of Teamsters, 905 F.2d 610, 622-23 (2d Cir. 1990).

93. *See* CROWE, *supra* note 5, at 172-73. The same convention also served as the nominating forum for the candidates for the December election. *Id.* That Carey entered the convention with only 240 nominating votes, out of a total of 1,926 delegates, *id.* at 204-06, provides further evidence of the political precariousness of his position. Establishment candidates garnered over 80% of delegates from the pre-convention voting. Merrill Goozner, *With Teamsters Democracy Doesn't Come Overnight*, CHI. TRIB., June 30, 1991, Perspective at 1.

94. Baker, *supra* note 2.

95. *See* Goozner, *supra* note 93.

minded activists suddenly in attendance at the 1991 convention, painfully aware of how long their democratic rights had been suppressed and denied, were displeased as well. For them, the issue was union independence. Their idea of union reform did not involve exchanging one dictator for another, or being forced to legitimate an agreement that the two resented "dictators" had struck with one another.[96]

When the convention strongly rejected the constitutional reforms that the consent decree had mandated, those changes were forcibly imposed by the court, in accordance with a fallback provision contained in the decree.[97] To make the tensions between the court and the convention even worse, an additional set of constitutional amendments proposed and adopted by the convention's suddenly inspired delegates was set aside by the Independent Administrator. This reform-oriented proposal to establish an Ethical Practices Committee composed of prominent outsiders, and designed to have extensive powers to root out corruption, was supported by both old- and new-guard delegates alike.[98] From the Independent Administrator's point of view, such a potentially "competing" body might well have seemed like a threat (or even another well-planned old-guard design) to slow or complicate the task of cleaning up the union.[99] Whatever the (quite possibly substantial) merits of that suspicion may have been, it at least was clear, as of June 1991, that independence and reform were already somewhat at loggerheads.

These gathering intimations of a potential conflict between the ethos of institutional reform and the ethos of union self-control were, unfortunately, realized in full immediately after Carey assumed office in February of 1992. Although the consent decree provided that the two members of the now-operative postelection IRB would jointly select the third, when the time came to make that crucial selection an impasse quickly developed: each list of nominees for the third IRB slot put forward by one of the already-appointed IRB members was promptly vetoed by the other. Resolution of the impasse was referred to the court, in accordance with the decree, and the proceedings there at once revealed a fundamental clash between the prevailing ethos of "ordinary litigation" and the culture of democratic trade unionism. Despite the

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96. At the convention local union officials were quoted as having told the old leadership, for example, that "you put it on us . . . You should be ashamed of having to have the government come in . . . ." Another asked, "Who signed the consent decree? Who spent $12 million of our members' money fighting it?" Merrill Goozner, *Teamsters Attack U.S. Intervention*, CHI. TRIB., June 25, 1991, Bus. at 1. Discussing the promised fair and open election, Carey himself put the members' dilemma over the role of the "occupying force" most succinctly during the debate on these amendments: "I don't want the government in, but I'm in favor of the right to vote." *Id.*

97. United States v. International Bhd. of Teamsters, 905 F.2d 610 (2d Cir. 1990); Frank Swoboda, *Teamsters Jeer Bush, Court Order; U.S. Imposes Reforms After Delegates' Vote*, WASH. POST, June 25, 1991, at C1. *See supra* note 92 (discussing validity of this external imposition of constitutional amendments).

98. Swoboda, *supra* note 22.

99. *Id.*

union-appointed IRB member's strong objection, the court imposed as the IRB's third member the government appointee's nominee, William Webster—former U.S. Attorney, former federal judge, former FBI and CIA director, and current board of directors member of the IBT-organized employer Anheuser-Busch.[100] But perhaps more important than this ruling is what the court's opinions arising from this incident reveal about the potential for culturally based misunderstandings between reform-oriented judges and government-selected monitors, on the one hand, and reform-oriented union leaders, on the other—between the "ordinary" adversarial culture and the more collectively oriented independent trade union culture generally.

Surprisingly, this profound conflict did not initially manifest itself in any discussion of the question of who the third member of the IRB would be. The clash first became apparent in the court's remarks concerning exactly who the *union*-appointed member was,[101] confusion over which, according to the court, was responsible for the third-member impasse.[102] In the view of the court, this impasse arose largely because the Teamsters-appointed member had fundamentally misperceived his own IRB role, as had Carey, who appointed him.[103] Although the consent decree required that all of the members of the IRB be truly "independent"[104] of any of the parties, Carey had appointed his own Special Assistant. Noting that this dual position might create both "an untenable conflict of interest" (if Carey's own office ever had to be investigated, for example), as well as an "intolerable appearance of bias" with respect to the IRB's adjudicatory function in disciplinary cases, the court interpreted the decree so as to bar from appointment to the IRB any person actually holding union office.[105] The court therefore held that any officer so

100. Carey found this last fact to be particularly objectionable, claiming that this corporate board position represented a serious "conflict of interest" for Webster. *Federal Judge Names William Webster to Independent Teamsters Review Board*, Daily Lab. Rep. (BNA) No. 151, at A-16 (Aug. 5, 1992). The judge did not find Webster's board membership to be significant, however, stating that, as a member of the IRB, Webster would have "no role in labor-management relations," United States v. International Bhd. of Teamsters, 803 F. Supp. 806, 817 (S.D.N.Y. 1992), and noting with seeming approval that none of the Teamsters lawyers had "had the impudence" to suggest that Webster's corporate board membership presented a potential conflict of interest. *Id.* It bears noting that recently issued rules pertaining to presidential transition work, dealing with similar issues, have been criticized extensively for permitting corporate board members to participate in matters related to the companies on whose boards they serve. Jason DeParle, *Experts Find Loopholes in Clinton's Ethics Rules*, N.Y. TIMES, Nov. 14, 1992, at A8 (collecting disapproving remarks from ethics experts on law school). Webster subsequently also joined the board of directors of the once-infamous Pinkerton Agency, a move not likely to unruffle any knowledgeable trade unionist's already-ruffled feathers. Herman Benson, *Who Will Monitor "Ethical Practices" in the Teamsters Union?*, 91 UNION DEMOCRACY REV., Nov. 1992, at 2.

101. United States v. International Bhd. of Teamsters, 803 F. Supp. at 815-16.

102. *Id.* at 811-12.

103. The impasse was not limited to determining the identity of the IRB's third member but extended to disputes concerning office space, operating and internal voting rules, expenses, and compensation—in effect, the entire IRB. United States v. International Bhd. of Teamsters, 803 F. Supp 761, 768-70, 790-99 (S.D.N.Y. 1992).

104. *Id.* at 796-97.

105. *Id.*

appointed would be required to resign his or her IBT position before serving on the IRB.[106]

When the court subsequently addressed the impasse concerning the naming of the IRB's third member directly, it returned to this same theme. Opening the discussion with the candid recognition that he was confronting a "fundamental philosophical difference" between the IRB's two existing members,[107] the judge focused on the IBT-appointed member's use of the term "the neutral party" in a letter to the government-appointed Board member as a way of describing the as yet unappointed member of the IRB.[108] In using this term, the judge said, the IBT-appointed member had displayed a fundamental misperception of the essential nature of the IRB as that body was contemplated by the decree. The IBT appointee's use of this weighted phrase, the judge believed, "ignores that the IBT and the Government do not have separate and distinct interests in IRB operation."[109] The IRB, the judge continued, "is meant to have three, three neutral members—not two partisans

106. *Id. See also* United States v. International Bhd. of Teamsters, 803 F. Supp 806, 815-16 (S.D.N.Y. 1992). Ironically, on October 16, 1992, the Justice Department-appointed member of the IRB himself (who was the same individual who had been serving—and who continued to serve—as the Independent Administrator, *supra* note 84) accepted an additional appointment from the Department of Justice. United States v. International Bhd. of Teamsters, 808 F. Supp. 271, 272-73 (S.D.N.Y. 1992). Pursuant to his appointment as a nonstatutory "special prosecutor," he was to investigate a possible federal government cover-up in the alleged "Iraqgate" scandal, which included allegations of possible impropriety on the part of Justice Department officials. *Id.* at 272-73. When the IBT's lawyers argued that the acceptance of this appointment was inconsistent with the same IRB rule that had been applied to Carey's (by now former) Special Assistant during the previous summer, the court informed the IBT's lawyers that the inconsistency was theirs. *Id.* at 273. Charging them not only with having previously offered an interpretation of that rule different from the one that they had now put forward (i.e., during the previous summer's controversy surrounding the IBT's IRB appointee, prior to the rule's ever having been interpreted or applied), the court declared their later interpretation to be "mechanistic," *id.*, "patently unreasonable," *id.*, and "robotic," *id.* at 275, evidencing (at best) "intellectual myopia," *id.*, if not "intransigence and mindless opposition," *id.* at 275, to the consent decree and a "desire to stymie the work of the IRB at all costs," *id.* at 276. Holding that the rule in question was "primarily" designed to prohibit "full-time Government or IBT employee[s]" from serving on the IRB, the court concluded that this additional Justice Department appointment would not even create the "appearance" of pro-government bias or partiality on the part of the Justice Department-appointed IRB member. *Id.* at 274. When the special prosecutor's report, which recommended no indictments, was eventually released, it was, rightly or wrongly, "widely regarded as a whitewash" in the media. Marcia Chambers, *Sua Sponte*, NAT'L L.J., Dec. 28, 1992-Jan.4, 1993, at 13. *See* William Safire, *Iraqgate Deadline Day*, N.Y. TIMES, Dec. 7, 1992, at A19 (denouncing IRB member as a "patsy prosecutor"); Harry Bernstein, *Get High-Priced Help Out of Teamsters*, L.A. TIMES, Jan. 19, 1993, at D3 (accusing IRB member of being a salary "double dipper," like the old-guard Teamsters leaders); Editorial, *Mr. Barr's Cloud: Growing Darker*, N.Y. TIMES, Dec. 11, 1992, at A38 (IRB member's report "incredible," his "ostensibly independent" investigation a "squalid exercise;" based upon reading his report, the IRB member himself seems "far more interested in finding scapegoats than in finding facts"). Fairly or unfairly, an "appearance" question with respect to the other Justice Department role of this IRB member, indeed, seemed to have been raised.

The IRB rule at issue in this matter provides, in full, that "No member of the IRB or its staff, including the Chief Investigator, shall, at the same time he holds any position with the IRB, hold any position with the Government, the IBT, or any IBT affiliate, other than membership in the IBT." Rules and Procedures of the Independent Review Board § F(3), *reprinted in* United States v. International Bhd. of Teamsters, 803 F. Supp. 761, 801 (S.D.N.Y. 1992).

107. 803 F. Supp. at 812-13 (S.D.N.Y. 1992).

108. *Id.* at 811, 815.

109. *Id.* at 815.

and one neutral member."[110] Discounting the IBT-appointed member's assertion that the term "neutral" is a term of art in arbitration-oriented labor union circles, the judge declared that use of the term demonstrated the "partisan mind-set" brought by the IBT appointee and the IBT itself to the IRB as an institution.[111] And the judge found further evidence of this same erroneous perception in the IBT appointee's use of "the plural pronoun 'we'" in a letter that he had written to the government appointee expressing his views on another IRB-related matter. The use of such a term, the court said, indicated that the IBT-appointed member saw himself more as a union representative than as a detached outsider, and the use of such a term was therefore, in the court's view, "chilling" evidence that "a Union which entered into the consent decree to eradicate improper outside influences, would itself improperly influence an independent body designed to achieve this goal."[112]

Nor did this by now wide-open cultural clash end there. If anything, an even sharper conflict between the legal and trade union cultures was evidenced in the court's subsequent remarks concerning two of the IBT's now passed-over nominees for the IRB's third seat, each of whom was a former U.S. Secretary of Labor. Conceding that the these two nominees had distinguished personal reputations, and the fact that "their positions as Secretaries of Labor entailed an investigative aspect,"[113] the court nonetheless concluded that these two former cabinet officials lacked "the breadth and depth of investigatory and judicial experience necessary to perform tasks that are essential to the IRB's mandate under the Consent Decree."[114] In the view of the court, in other words, the IRB was *solely* about prosecuting, and not about trade unionism[115]—about prosecution *generically*, moreover, not prosecution in the labor union context. A more dramatic example of the incongruity between the different visions of what the Teamsters' regime change meant would be difficult to invent.

The point is not to take issue with the court's specific rulings, whether or not they seem entirely well-advised. The point is rather to highlight possible differences in perception that may be induced by the side of the bench one is on, and by the culture one inhabits. Despite having perceived that it was in the presence of a "fundamental philosophical difference," the court seemingly made little effort to bridge or to mediate, rather than simply to *adjudicate*, that dispute. Moreover, to insist, as the court did, that the "union that entered into the consent decree" is exactly the same union as the one that committed the

110. *Id.* (quoting transcript of Aug. 4, 1992 hearing).
111. *Id.* at 816.
112. *Id.*
113. *Id.* at 816 (citing Labor Management Relations Disclosure Act, 29 U.S.C. § 501 (1988)).
114. *Id.*
115. The court said "the IRB is an investigative and adjudicative body," *id.* at 815, which "has no role in day-to-day affairs of the Union," *id.* at 814.

alleged postelection "impropriety" is to misconstrue and undervalue what this unprecedented decree—and the court's own unflagging efforts to have it enforced[116]—already had accomplished. Whether or not the IBT's approach to the IRB-appointment controversy was the most shrewd and subtle possible, the real question is whether the presumably more dispassionate court should have found even an alleged "impropriety" of this sort to be so "chilling," coming, as it did, from the agent of a democratically elected trade union regime-change leader. For the court to have done so is for it to have shortchanged the political, not to mention the economic, nature of the regime-change process that it now was supervising.

Technically—that is, legally—the court was of course correct: the union now before the court is, of course, the same one that entered into the decree. But heartfelt independence and hard-core intransigence are not the same, even when they look similar. The Teamsters' enormous problems with corruption are far from over, if they ever will be. And yet in the context of union reform, experience and reason both suggest that reform should not just be *ordered*, but *encouraged*, out of a realization that a culture will endure after the court is gone.[117] Signs of emergent democratic self-confidence—of the reinvigoration of traditional trade union values—are far from unhealthy at the Teamsters. At most, they are only normal. And in the context of the Teamsters, that itself is progress.

III. BACKGROUND SILENCES

Any creditable regime-change expert observing Carey's behavior in the months immediately following his February 1992 inauguration would have had no choice but to conclude that Carey had decided to "queue up"[118] the economic and politically symbolic items on his reformist agenda first. Upon his swearing in, Carey immediately cut his own salary by $50,000,[119] sold the union's condos, limousines, and private jets,[120] and enforced the new prohibition against the International officers' long-denounced practice of drawing multiple salaries.[121] He transferred the $11 million in proceeds from

116. By the early winter of 1993, the court had intervened in the case more than one hundred times since the consent decree was entered, and the meter will of course continue to run for some time to come.

117. *See* Goldberg, *supra* note 10, at 1005-06.

118. *See* Bermeo, *supra* note 46, at 364.

119. Frank Swoboda, *Carey Is Sworn in as President of Teamsters*, WASH. POST, Feb. 2, 1992, at A7. The new salary was $175,000, down from a previous $225,000. *Id.*

120. Jackson, *supra* note 83; Carlson, *supra* note 2, at W18. The size of the former "Teamster Air Force," as Carlson calls it, appears to be a matter of dispute. Jackson says there were two jets and Carlson says four. *The New York Times* votes for two, and adds that the current International General President of the IBT—the incumbent successor to Jimmy Hoffa, Frank Fitzsimmons, and Jackie Presser—now not only flies commercial, but coach. Kilborn, *supra* note 20, at 27.

121. That the new prohibition against this practice applied only to officers of the International (i.e., not to officers of locals, Regional Conferences, etc.) was the result of one of the less disinterested actions of the 1991 convention, many of whose delegates were lower-level IBT officials. Frank Swoboda, *Teamster*

these various sales and cutbacks to a new fund dedicated to jump-starting the union's flagging organizing efforts, as one part of a larger effort to increase the union's organizing staff tenfold.[122] He established official budgets for the union's operations—"a previously unheard-of practice."[123] He also launched the first "corporate campaign" in Teamsters history, as a way of organizing new workers by bringing public and community pressure to bear on employers without risking current workers' jobs.[124] He was simultaneously swept up in personally renegotiating a series of national collective bargaining agreements that were about to expire, as well as in managing the union's response to a variety of other crises, including a nationwide demonstration against car-haul dealerships.[125] He revamped and renamed the union's magazine—it is now *The New Teamster*—and, in a series of nationwide swings through the hustings, attempted to re-energize the rank-and-file membership for further activism and reform. In a major break with longstanding Teamsters tradition, Carey, himself an ex-Marine Republican,[126] moved the union (and $4 million in "get out the vote" and other funds) behind Democratic Presidential candidate Bill Clinton for the 1992 election.[127] In his first "one hundred days," as one source put it, Carey "had the Teamsters acting like a union."[128]

Amidst all of this economically oriented regime-change activity, however, major new efforts to root out the remaining IBT corruption did take something of a back seat. Almost immediately upon assuming office, Carey announced his intention to appoint an internal Ethical Practices Committee,[129] to be run under his constitutionally established corruption-fighting authority as General President (which meant that this Committee, unlike the one proposed at the 1991 convention, could be run without a constitutional amendment). The new

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Vote Cap on Officers Pay; Delegates Still Allow Local Leaders to Hold Multiple Union Jobs, WASH. POST, June 27, 1991, at B14.

122. CROWE, *supra* note 5, at 264-66.

123. Behar, *supra* note 22, at 61.

124. Carey, Remarks, *supra* note 41, at 7. Of course, firing workers for engaging in union organizing is impermissible, 29 U.S.C. § 158(a) (1988), but in recent times, according to experienced observers, the effectiveness of these legal protections may be doubted. *See* GEOGHEGAN, *supra* note 7, 252-54 (discussing underenforcement of these provisions in 1980's, which allowed employers to accept "unfair labor practices" findings, with minimal penalties, years after organizing campaigns were stopped by firing employees engaged in union organizing); *accord* Richard B. Freeman & Joel Rodgers, *A New New Deal for Labor*, N.Y. TIMES, Mar. 10, 1993, at A19.

125. Crowe, *supra* note 52. At least one high profile local strike also became a focus of the General President's personal attention. *Ron Carey to Join Washington Talks Aimed at Settling Pittsburgh Press Strike*, [Current Developments] Daily Lab. Rep. (BNA) No. 189, at A9 (Sept. 29, 1992). These and other developments (most notably, a threatened Northwest Airlines Flight Attendants "defection" to another union, a major campaign involving Safeway supermarkets, and a dispute involving *The New York Times*) were summarized in *The New York Times* by Kilborn, *supra* note 20, at 27, 32.

126. CROWE, *supra* note 5, at 132.

127. *Id.* at 265-66.

128. Fitch, *supra* note 20, at 21.

129. *Federal Judge Issues Rules Governing Operation of Teamsters Review Board*, [Current Developments] Daily Lab. Rep. (BNA) No. 163, at A8 (Aug. 21, 1992); *see infra* Part IV.

reform-oriented General Executive Board promptly approved this move.[130] Two particularly suspect locals were put under new International trusteeships, although one of the trustees Carey appointed was himself under an ethical cloud.[131] Well aware of the difficulty of finding and eradicating Teamsters corruption strictly from the top, the union's long-time grass-roots dissidents did not seem unduly disturbed by the pace of postelection ethical reform.[132] But in mid-1992, the supervising judge, despite having indicated that he considered the proposed Ethical Practices Committee to be a positive initial step,[133] said that he found Carey's ethical reform efforts during his first seven months in office to have been, on the whole, "anemic"[134] and "pathetic."[135]

Still, even if Carey indeed may have been showing some signs of ethical "anemia," he was not alone. He was, to the contrary, in the middle of a labor movement-wide epidemic, and the disease from which he suffered had a quite specific social and historical etiology. The truth is that *any* reform-minded new president of *any* corrupt union would have been writing on a largely blank historical slate. Indeed, on a mostly blank conceptual and academic slate as well: for although the literature on union "democracy" is extensive, the literature on internal union "ethics" is virtually nonexistent.[136] For many

130. Resolution of the General Executive Board, International Brotherhood of Teamsters, Feb. 3, 1992 (on file with author).

131. Carey subsequently acknowledged that this appointment had been "a mistake." Behar, *supra* note 22.

132. One of the newly elected Executive Board members, who was also co-chair of TDU's International Steering Committee, pointed out, to apparent approval, at the dissident group's annual convention that "It took a long time to screw this union up; its going to take a while to fix it. . . . Some things can't be done by the General Executive Board, they have to be done at the local level." *Teamster Reform Group Redefines Role in Wake of Carey's Election as President*, [Current Developments] Daily Lab. Rep. (BNA) No. 208, at A-3 (Oct. 27, 1992) (quoting Diana Kilmury, IBT Vice President At Large). A TDU member who was a vice president on a local executive board said, "It's going to take two or three years to see reform take hold. There are substantial areas of resistance." *Id.* (quoting Steve McDonald).

Such support was not unanimous, however. Some reformer activists thought Carey had lost the opportunity to cleanse the union by failing to strike aggressively during his "first one hundred days." *See*, Fitch, *supra* note 20, at 73-74. Still others saw a positive reason for failing to move too rapidly to conduct a radical house cleaning: Carey simply needed the middle level old-guard leadership in order to wage a successful economic campaign against the large companies by whom so many Teamsters are employed. *Id.* at 73. In this, Carey's position does not differ much from that of other contemporary regime-change leaders. *See, e.g.*, Theodore Draper, *A New History of the Velvet Revolution*, N.Y. REV. BOOKS, Jan. 14, 1993, at 14, 19 (many Czech Communists "were protected after the fall" because so many were in "essential occupations").

133. United States v. International Bhd. of Teamsters, 803 F. Supp. 761, 792 n.20 (S.D.N.Y. 1992).

134. *Id.* at 788.

135. *Id.* at 786. Strong words such as these evoked a strong response from Carey, which may give a good capsule summary of the IBT's reaction to what Carey saw as the government encroachment involved in the proceeding described in Part II, *supra*: "Any time I object to them . . . expanding their control, the first thing they say is 'You're covering up corruption.'" he said. Victor, *supra* note 5.

136. To be sure, the absence of an extensive literature on internal union ethics may actually be indicative of something good, not bad. Perhaps the reason there is so little written on the subject is that most unions are honest. In government, ethics laws, independent counsel laws, etc. seem most frequently to come into being after a "scandal" of some sort has just occurred. The absence of such "laws" and procedures inside the labor movement may therefore only be indicative only of a general absence of labor union "scandal." If so, the real story here would be how well the Landrum-Griffin Act works. *See* Goldberg, *supra* note 10, at 1005, 906 n.19 (citing federal organized crime commission report finding only

individual American unions, internal union ethics rules and ethics enforcement procedures—devices and procedures directed *specifically* at the problem of possible internal corruption—are the exception rather than the rule. At the national level, union ethics has been on labor's organizational backburner for more than thirty years. It is ironic that this across-the-board neglect of internal ethics issues by American organized labor appears, at least in part, to have its roots in the legislative circumstances surrounding the 1959 passage of the Landrum-Griffin Act,[137] a major piece of "labor reform" legislation, normally understood to have had as its central purpose the goal of specifically *insuring* honest and ethical unions.

As it was ultimately enacted, the Landrum-Griffin Act was premised upon the questionable notion that "union democracy"—open access to the ballot box, honest vote counts, and the like—could serve as a cure-all for labor's internal ethical shortcomings, by allowing rank-and-file members to clean house for themselves simply by electing different officers.[138] Experience in other realms of course suggests that whether democracy alone can ever reliably produce such a pleasant outcome is open to considerable doubt: in our general public life, democratically elected government officials are now going to jail in record numbers for their ethical transgressions,[139] and neither a Bill of Rights nor honest elections seems to guarantee honest behavior once individuals assume office. But some seldom-revisited labor history from the

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300-400 locals, in a universe of 70,000, to be tied to *organized* crime).

On the other hand, the absence of such rules or of any accompanying literature also may indicate that nothing is really being done to ensure that unions are honest. According to one of the few scholars to have previously considered the relationship between union codes of ethics and the Landrum-Griffin Act, the "Landrum-Griffin experience does *not* . . . adequately indicate the abuses that still take place in unions that have little or no tradition of idealism or of genuine internal democracy." Kenneth Fiester, *How Labor Unions View and Use Codes of Ethics*, *in* THE ETHICAL BASIS OF ECONOMIC FREEDOM 233, 244 (Ivan Hill ed., 1976) (emphasis added).

137. Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531 (1988).

138. *Id.* In addition to a definitional and jurisdictional introduction, the Act includes seven subchapters. The most salient are Subchapter II, §§ 411-15, the "Bill of Rights of Members of Labor Organizations," which assures free and equal voting rights, as well as freedom of speech; Subchapter III, §§ 431-41, "Reporting By Labor Organizations, Officers, and Employees of Labor Organizations and Employers," which requires the adoption of union constitutions and bylaws, the keeping of certain financial records, and the filing of regular financial reports with the Department of Labor; Subchapter IV, §§ 461-66, "Trusteeships," which allows subordinate union bodies to be put under the operating control of superior bodies in instances of (among other things) "corruption" and also allows the Secretary of Labor to initiate a federal district court action to put a union or one of its bodies under the trusteeship of the court; Subchapter V, §§ 481-83, "Elections," which requires periodic, secret ballot elections; Subchapter VI, §§ 501-04, "Safeguards for Labor Organizations," which establishes a fiduciary relationship between a union's officials and the organization and its members, and forbids Communists and persons convicted of a variety of violent, extortionate, and embezzlement-style crimes from holding union office; and Subchapter VII, §§ 521-31, "Miscellaneous Provisions," which gives the Secretary of Labor authority to investigate possible violations of the Act and criminalizes the use or threat of force for the purpose of interfering with rights recognized under the Act.

139. *See* Elder Witt, *Is Government Full of Crooks or Are We Just Better at Finding Them?*, *in* ESSENTIALS OF GOVERNMENT ETHICS 343 (Peter Madsen & Jay M. Shafritz eds., 1990) (documenting recent upsurge in prosecutions of elected officials for corruption in office). *But see* GEORGE W. PLUNKITT, PLUNKITT OF TAMMANY HALL 43 (William L. Riordon ed., 1905) (politicians of 1905 no more corrupt than politicians of 1835).

end of the 1950's also suggests that passage of the optimistically conceived Landrum-Griffin Act may actually have aborted what had looked like a nascent interest on the part of the AFL-CIO in union ethical self-policing. To say "looked like" here, however, is to use some carefully chosen words, for even this unusual, high-profile flirtation with "internal union ethics" by the higher reaches of organized labor may have arisen as much from strategic legislative maneuvering as from a sincere desire to ensure honest unions.

The evidence for this unflattering conclusion lies in the Act's now largely forgotten political history, and more specifically in Congress' wavering exploration, following the McClellan Hearings,[140] of various ways of ensuring American workers honest unions. One obvious way would have been to establish a legal requirement that all unions set up internal self-policing mechanisms. Early drafts of late 1950's anti-corruption legislation therefore included a requirement that unions proclaim and enforce their own codes of ethics.[141] But, by then, big labor already had begun making a crafty move. While these predecessor bills to Landrum-Griffin were being developed, the AFL-CIO took preemptive action. It issued episodically, from 1955 to 1957, a vague and diffuse, multipoint Code of Ethical Practices for American labor unions, drafted by then-AFL-CIO General Counsel (and future Supreme Court justice) Arthur J. Goldberg.[142] The Code served two strategic purposes, both useful in the effort to avoid government-imposed monitoring requirements. First, it disarmed congressional proponents of legislatively mandated ethics rules by suggesting that big labor would take on this job itself. Second, it provided a basis for drawing a sharp public distinction between the AFL-CIO and the most notoriously corrupt union in the country. The promulgation of the Code provided the AFL-CIO with the means to expel the Hoffa-era Teamsters (who had been the McClellan Committee corruption-fighters' highly-publicized Exhibit A) from the national organization, for it was known in advance that the Teamsters would be unwilling to adopt or abide by any such code.[143] With

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140. *See generally* MCCLELLAN COMMITTEE REPORT, *supra* note 6.

141. Then-Senator John F. Kennedy, a member of the McClellan Committee and the brother of Hoffa-busting Robert, introduced labor reform legislation in both the 85th and 86th Congresses with a title dedicated to these codes. S. 3974, 85th Cong., 2d Sess. (1958); S. 1555, 86th Cong., 1st Sess. (1959). *See* Richman, *supra* note 57, at 154 n.57. (discussing the 1959 bill). *See generally* R. ALTON LEE, EISENHOWER & LANDRUM-GRIFFIN: A STUDY IN LABOR-MANAGEMENT POLITICS (1990).

142. Robert W. Bennett et al., *In Memoriam: Arthur Goldberg*, 84 NW. U. L. REV. 807, 824 (1990); *see Obituary of Arthur Goldberg*, DAILY TELEGRAPH, Jan. 22, 1990, at 19 (code of ethics led to Teamster expulsion from AFL-CIO). A slightly kinder view of these codes, as well as a slightly more generous interpretation of their origin, is given in Fiester, *supra* note 136, at 233-53. Like this Essay, Fiester links the promulgation of the codes to the McClellan Hearings and the Landrum-Griffin Act, and he states that "[w]hether these AFL-CIO actions would have been rigorously enforced against any future misdeeds by affiliates will never be known for sure," *id.*, thereby apparently conceding that, in the aftermath of Landrum-Griffin, they in fact have not been.

143. *See* Bennett, *supra* note 142, at 824, *accord* John Schwartz, et al., *Breaking the Teamsters*, NEWSWEEK, June 22, 1987, at 43; *Obituary of Arthur Goldberg*, *supra* note 142, *see also* LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, S. REP. NO. 187, 86th Cong., 1st Sess. 23 (1959) [hereinafter SENATE REPORT] (discussing Act's purpose to instill ethics in labor unions). For a more

this self-initiated Code in place, and with the Teamsters formally declared to be labor movement outlaws, the labor establishment was better positioned to argue that an ethics-oriented legislative mandate was unnecessary. By the time Landrum-Griffin was passed, its provisions mandating the enforcement of union ethics codes had been deleted[144] and were replaced by an exclusive reliance upon rank-and-file activism through the ballot box as a means of keeping unions honest. A union members' Bill of Rights was seen as adequate to serve the function of the previous substantive guarantees.[145] Although the AFL-CIO was still not entirely happy with the end result,[146] the previous direct focus on the ethics monitoring responsibilities of a union's incumbent officers had been removed.[147] That big labor's interest in its Code may not have been sincere or profound is observable in what followed: having fulfilled its primary purpose of defeating externally imposed ethical monitoring provisions, the AFL-CIO Code of Ethical Practices promptly fell into utter and complete oblivion. Thirty years later, just as the government was filing its historic Teamsters RICO suit, the AFL-CIO openly told a federal court that big labor considered its own Code to be defunct.[148] By 1990, the Code was even out of print,[149] having been cited during its entire life in only one reported federal case.[150]

Moreover, incumbent labor leaders came to enjoy, if not to claim, a greater victory for union autonomy (and especially for the autonomy of high-level union incumbents) as Landrum-Griffin began to be enforced. Because the Act placed responsibility for enforcing its free-speech-and-fair-elections rules in the

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complete version of the IBT's expulsion from the AFL-CIO, see JOHN HUTCHINSON, THE IMPERFECT UNION: A HISTORY OF CORRUPTION IN AMERICAN TRADE UNIONS 333-41 (1970).

144. A bill containing the statutorily imposed ethics code was adopted by the Senate, but the House passed a bill without a code. *Compare* S. 1555, 86th Cong, 1st Sess. (1959), *reprinted in* NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 516 (1959) [hereinafter NLRB, LEGISLATIVE HISTORY] *and* SENATE REPORT, *supra* note 143 (considering Title IV of S. 1555 on "Codes of Ethical Practices") *with* H.R. 8342, 86th Cong., 1st Sess. (1959), *reprinted in* NLRB, LEGISLATIVE HISTORY, *supra*, at 619 *and* CONFERENCE REPORT ON LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, H.R. REP. NO. 1147, 86th Cong., 1st Sess. (1959) (showing that Senate ethics code provisions disappeared in conference from what became Landrum-Griffin).

145. *See* Richman, *supra* note 141, at 154 n.57.

146. According to Fiester, "The AFL-CIO endorsed the Landrum-Griffin standards of union democracy and financial integrity, but bitterly opposed the scope of the bonding provisions and the extensive paper work required of even the smallest local union." Fiester, *supra* note 136, at 242.

147. That Congress was aware of these AFL-CIO Codes is clear beyond a doubt. They were entered into the Congressional Record, in their entirety, three times from 1957 to 1959. 103 CONG. REC. 7996, 9990 (1957); 105 CONG. REC. 17859 (1959). Statements and testimony by Arthur J. Goldberg and George Meany, the President of the AFL-CIO, were also offered. 105 CONG. REC. 7425 (1959) (testimony of Arthur J. Goldberg); 105 CONG. REC. 14645 (1959) (excerpts from testimony of President George Meany).

148. Goldberg, *supra* note 10, at 982 n.478 (discussing United States v. Local 30, Tile and Composition Roofers Ass'n, 686 F. Supp 1139 (E.D. Pa. 1988), *aff'd*, 871 F.2d 401 (3d Cir. 1989), *cert. denied*, 493 U.S. 953 (1989)).

149. Bennett, *supra* note 142, at 824.

150. United States v. Ford, 632 F.2d 1354, 1377 (9th Cir. 1980), *cert. denied*, 450 U.S. 934 (1981) (holding admission of AFL-CIO Code of Ethical Practices into evidence in pension fund corruption case involving International Laborers Union not an abuse of discretion).

hands of the Secretary of Labor, it happily relieved incumbent union leaders of the politically problematic task of investigating, disciplining, and displacing their in-house constituents and allies. The potentially expansive Title V fiduciary relationship provisions of the Act, which theoretically could have served as a basis for reading broad substantive anticorruption guarantees back into it, have been underutilized when it comes to serving that purpose, and have generally not been interpreted to apply to such thorny areas as cronyism and nepotism.[151] Finally, as the Bill of Rights and election-oriented provisions of the Act were themselves construed, the rule gradually came to be established that the interpretation of the unions' own constitutions was to be entrusted to the incumbent union officers themselves.[152] Not only were rank-and-file union dissidents thus left largely to the incumbent leaders' mercies when it came to campaigns and elections, but interpretation and enforcement of the vague anti-corruption provisions contained in most union constitutions were left wholly in those leaders' hands as well.[153] For all its radical reform potential, Landrum-Griffin in the end only marginally disturbed the long-recognized "iron law of oligarchy" in union management, even in the Landrum-Griffin-regulated area of union elections.[154] And it affected such arguably *un*regulated areas as ensuring ethical behavior on the part of incumbent union officers even less.

Even considered as an historical artifact, the AFL-CIO Code of Ethical Practices leaves much to be desired as a model for self-directed union reform. For one thing, the Code has no enforcement provision: the AFL-CIO required that its constituent unions "comply with the provisions of these codes promptly."[155] Although some formal enforcement activity did coincide with the Code's adoption,[156] the Code actually says nothing about whether

151. 29 U.S.C. §§ 501-04 (1988). *See* Quinn v. DiGiulian, 739 F.2d 637, 653 n.2 (D.C. Cir. 1984) (summarizing cases taking a "broad view" of § 501, which themselves all deal with "official" union duties). *But see* Morrisey v. Curran, 482 F. Supp. 31 (S.D.N.Y. 1979) (excessive travel reimbursement); Richardson v. Tyler, 309 F. Supp. 1020 (N.D. Ill. 1970) (holding that "self dealing" may bring otherwise unredressable behavior within the scope of § 501). *See* Stewart J. Schwab, *Union Raids, Union Democracy, and the Market For Union Control*, 1992 U. ILL. L. REV. 367, 369 (The results of attempting to use this section to control non-financial corruption have been "haphazard.")

152. Woodell v. IBEW, Local 71, 112 S. Ct. 494 (1991); NLRB v. IBEW, Local 340, 481 U.S. 573 (1987); Pattern Makers League v. NLRB, 473 U.S. 95 (1985). *See* Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984) (courts do not enforce union constitutions); Summers, *Democracy*, *supra* note 10 (reviewing limitations of Landrum-Griffin as device for effectively establishing real "democracy" inside unions). *But see* 29 U.S.C. § 431(a)(5) (requiring unions to have constitutions and bylaws and to report to Labor Department on provisions relative to union discipline); 29 U.S.C. § 411(a)(5) (establishing minimum of procedural protections that must be offered in disciplinary cases).

153. *See* Richman, *supra* note 141, at 148.

154. *See* Roger C. Hartley, *The Framework of Democracy in Union Government*, 32 CATH. U. L. REV. 13, 62-92 (1982); Summers, *Democracy*, *supra* note 10.

155. George Meany, *Foreword, in* AFL-CIO, AFL-CIO CODES OF ETHICAL PRACTICES, PUB. NO. 50, at 4 (1958) [hereinafter AFL-CIO CODES].

156. Ambiguous excerpts from a 1956 Executive Council Resolution authorized an AFL-CIO Committee on Ethical Practices to conduct various investigations and hearings, but the remedies available for misfeasance were nowhere spelled out. *See* Meany, *Forward*, *id.* at 4. Beginning in 1956, an AFL-CIO

compliance was intended to mean more than formal adoption. Moreover, as a piece of drafting, the so-called "code" does little honor to that name. It is a strange and rambling forty-eight page document full of speeches, vague denunciations of crooks, Communists, and fascists, and wild variations in the degree of specificity with which it describes the various offenses it purports to forbid.[157] It contains six basic items, covering matters from "local union charters"[158] to "Union Democratic Processes,"[159] but to call the format inaccessible is gravely to understate the case. Full of references to what "should be" standard union practice,[160] the Code outlaws having "compromising personal ties" and being irresponsible.[161] The few specific practices that it does unequivocally declare to be unethical (for example, taking "'kickbacks' and under-the-table payments"[162]) are unlikely to add much to a modern reform-minded union leader's intuitive sense of what should be considered right or wrong. Although the AFL-CIO Code probably does at least nod toward most of the essential points that a truly meaningful code would cover, its precatory tone and flowery high-mindedness convey on every page that this document was not intended to establish a genuinely enforceable guide to proper ethical behavior by incumbent union officers.

Since the Code's promulgation—and almost instantaneous eclipse—the labor movement's silence concerning union ethics has been deafening, with but a single, notable exception. That exception is the Public Review Board established thirty-five years ago by the United Auto Workers (UAW), a union as famous for its integrity as the Teamsters have been for their corruption.[163] The UAW Public Review Board, composed of prominent, non-labor-movement citizens, has jurisdiction over complaints brought by union members against their own power structure, and it appears to have been the model for the

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Committee on Ethical Practices investigated about half a dozen allegedly corrupt unions, including the IBT, for their failure to meet the AFL-CIO's standards governing ethical union practices. The Committee ceased conducting such inquiries in 1958, however, about the time that the Landrum-Griffin Act assumed its final form. HUTCHINSON, *supra* note 143, at 288-341.

157. *Id.* at 5. In fairness, it should be noted that the Code's author, Justice Goldberg, did not share this view. He saw the Code as setting "high standards for unions and union officials," and believed "that the adoption of these codes by the AFL-CIO constitutes a most significant step in protecting the rights of union members to clean unions." ARTHUR J. GOLDBERG, THE DEFENSES OF FREEDOM: THE PUBLIC PAPERS OF ARTHUR J. GOLDBERG 176-77 (Daniel P. Moynihan ed., 1966).

158. AFL-CIO CODES, *supra* note 155, at 16.

159. *Id.* at 44. In between are provisions concerning "Health and Welfare Funds" (item II), "Racketeers, Crooks, Communists and Fascists" (item III), "Investments and Business Interests of Union Officials" (item IV), and "Financial Practices and Proprietary Activities of Unions" (item V). There is also a "Supplemental Code" addressing "Minimum Accounting and Financial Controls." *Id.* at 40.

160. *E.g.*, "A charter should never be issued or permitted to continue in effect for a 'paper local' not existing or functioning as a genuine local union of employees." *Id.*

161. *Id.* at 23.

162. *Id.* at 33.

163. Frank Swoboda, *UAW Reform Movement Stands Next in Line for Union Change*, WASH. POST, Dec. 29, 1991, at H2 ("Unlike the Teamsters, corruption is not an issue within the UAW, long viewed as one the nation's cleanest unions," and pointing out that economic decline alone may sometimes be enough to spark grass-roots union reform movements).

proposed IBT Ethical Practices Committee disallowed by the Independent Administrator in 1991.[164] But even this singular exception to the labor movement's pervasive "ethical anemia" may be more theoretical than real. Although the UAW Public Review Board has jurisdiction over "ethical" complaints, under a brief, four-provision UAW Ethical Practices Code adopted by the union in 1970,[165] in practice only about one in twenty of the membership complaints that the Board has received and reviewed were filed pursuant to the UAW Ethical Practices Code.[166] The vast majority have concerned instead union election and free speech-related disputes of a standard Landrum-Griffin type. The allegedly wrongful withdrawal of a particular individual grievance—a prototypical "duty of fair representation" complaint[167]—has been by far the most common matter to come before the Board.[168] In practice, if not in theory, therefore, even this unique exception to labor's general lack of concern for ethical self-policing provides limited practical guidance to a contemporary regime-change reform leader.

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164. For a description of the origins and mandate of the UAW Public Review Board, as well as a listing of the small number of other unions that have adopted similar review bodies, see Jerome H. Brooks, *Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline*, 22 OHIO ST. L.J. 64, 84-95 (1961), which describes the operations of the Board in considerable detail. Another early study is JACK STIEBER ET AL., DEMOCRACY AND PUBLIC REVIEW: AN ANALYSIS OF THE UAW PUBLIC REVIEW BOARD (1960). Walter E. Oberer's contribution to this study raises a number of issues particularly relevant to the current IBT situation, including the Board's lack of clear, justiciable standards for reviewing member complaints due to a vague constitution, and the possible adverse impact of the review process on the union's "fighting mission" against more powerful employers. Walter E. Oberer, *Union Democracy and Rule of Law*, *in* STIEBER, *supra*, at 38-39, 41-42. According to a leading historian of union corruption, only three other American unions had shown an active interest in the idea of public review as of 1970. HUTCHINSON, *supra* note 143, at 378. Apparently, some members of a fourth union also once tried (but failed) to have a similar public review mechanism established. Goldberg, *supra* note 10, at 924, n.98.According to Professor Goldberg, these other boards have generally garnered "mixed reviews" at best. *Id.*

165. The UAW Code is shorter, more definitive, and more accessible than that of the AFL-CIO. It prohibits, *inter alia*, making loans from pension funds to officers and members, the receipt of fees or salaries from health or welfare funds, and any and all personal financial conflicts of interest. It also outlaws the use of third parties (i.e., friends, associates, and family members, to whom, for example, the title to property could be transferred) as a subterfuge for violation of its rules. It further mandates use of "the best accounting practices" in keeping union books, regular and periodic audits, and the use of competitive bidding for all proprietary or bookkeeping functions of the union and its subdivisions. UAW, UAW ETHICAL PRACTICES CODE (1989).

166. Based upon a personal review of the UAW's Public Review Board's Annual Reports, from 1959 to 1990. Kenneth Fiester has also noted that the UAW's decision to go further than the AFL-CIO Codes in assuring ethical conduct is a great exception within the field, as well as the general under-utilization of the UAW's Public Review Board by the UAW's members. Fiester, *supra* note 136, at 240-42.

167. *See* Clayton v. United Auto. Workers, 451 U.S. 679 (1981) (district courts have discretion regarding whether members must exhaust their union's own remedies before bringing such a suit); Vaca v. Sipes, 386 U.S. 171 (1967) (upholding right of member, under NLRA, to sue union for failure to take grievance to arbitration).

168. A review of these complaints reveals that the allegations they contain break down into roughly the following categories: grievances, "First Amendment" issues (speech and union newspaper), membership (failure to attend meetings, etc.), procedure (e.g., jurisdiction of the Board), mismanagement (e.g., term of office rules and financial irregularity), and a large variety of election-related issues (such as irregularities in vote counting, access to voter lists, multiple voting, use of union resources for campaign purposes, irregularities in the printing of ballots, eligibility for office rules, and the rights of retired or laid-off members to vote). See author's personal review, *supra* note 166.

In micro as in macro, the existence of Landrum-Griffin seems to have effectively preempted any effort by the labor movement to define ethical and unethical behavior, and any search for an effective means of ensuring ethical behavior on the part of union officers. In the UAW members' thinking, as in the AFL-CIO's politics, what is already illegal is also deemed unethical. Within the bounds of what *is* legal, however, everything else is, if not permitted, at least formally unchallenged within the union, and left to the Department of Labor or the electoral processes of general union "democracy" to correct. In an honest union like the UAW, democracy may really work to keep a union clean. But if this is so, the UAW experience says little that is useful to a reform-oriented leader confronted by an historically corrupt union that is very newly reform-oriented—and, so far, reform-oriented only at the very top. Moreover, an alternative analysis of the UAW Public Review Board's relative "ethical" inactivity suggests that in the union context, as elsewhere, what is formally codified into "law" may eventually serve to define and establish the reigning normative categories for all those concerned.[169] A statutory focus on the *processes* of union democracy may eventually come to mean that it is everyone's—and therefore no one's—job to concern themselves with actually keeping the unions clean. And this may well be a worldview that is accepted, for different reasons and through different routes, by rank-and-file membership and labor union leadership alike.

For Carey and his "New Teamsters," this worldview presents both a temptation and a challenge. Even a reform-oriented General President might well be tempted to use the resented Independent Review Board to serve the same purpose for the "New Teamsters" as the Department of Labor's Landrum-Griffin oversight responsibilities do for the labor movement generally. Indeed, one particularly experienced and astute observer has already noted that the IRB represents a device that might be used by Carey as a politically helpful scapegoat, to take the real responsibility—and the internal political heat—for cleaning up the Teamsters off his hands.[170]

Giving in to this temptation would have costs when it comes to building a new culture of democracy, however, or any widely shared sense of honesty, or of a new internal rule of law within the Teamsters. In the absence of an aggressive, internally directed clean-up campaign conducted by the New

169. This common social dialectic is well illustrated in Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985), as well as in the (modern) *loci classici*, DOUGLAS HAY ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND (1975) and E.P. THOMPSON, WHIGS AND HUNTERS (1975). It has been applied specifically to American labor law in, *inter alia*, Dianne Avery, *Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894-1921*, 37 BUFF. L. REV. 1 (1989) and Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978). *See generally* JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

170. *See* Benson, *supra* note 100, at 4.

Teamsters themselves, the very idea of union ethics runs the risk of becoming resented, just as the current "outsider" enforcer of union ethics seems to be resented. Carey's challenge is instead to move vigorously against remaining Teamsters corruption in a manner calculated to create simultaneously a culture of democracy and a sense of internal rule of law for the union as a whole, and in a way that will outlast what could still turn out to be Carey's shaky, temporary grasp on union power.

IV. THE FUTURE OF TEAMSTERS "CORRUPTION"

Throughout the Teamsters litigation, the question of what shall constitute "corruption" in the Teamsters has been answered more in practice than in theory. Although the government's complaint focused on "racketeering" and the *La Cosa Nostra* connection, the activities of the Investigations Officer under the consent decree's first phase actually ranged more widely. Allegations concerning embezzlement of a more personal sort, and of other more "routine" forms of misbehavior, became a basis for disciplinary action.[171] The mandate of the IRB, the Administrator's second-phase successor, is almost limitless. The mandate is to attack not just the influence of *La Cosa Nostra*, but to eliminate any corruption, indeed to rectify and punish "any action that might bring reproach upon" the union.[172] The IBT constitution, from which this mandate is derived, takes this same general—and very vague—approach. What the IBT's constitution outlaws is simply corrupt activities, but it does not otherwise define "corruption."[173]

In the absence of effective guidance from the IBT constitution or from the remainder of the labor movement, the Carey administration has chosen to proceed, initially at least, by establishing ethics structures and procedures rather than ethics rules. Carey had his Ethical Practices Committee (EPC) up and running by the fall of 1992. Although Carey has suggested on various occasions that an ethics code or compliance manual may eventually be forthcoming,[174] in the short run it appears that the New Teamsters' sense of what constitutes an unethical practice will evolve in a case-by-case common law manner, just as the Independent Administrator's did. Obviously, in the absence of a formal code, the seriousness of the New Teamsters' commitment

171. *Cf.* United States v. International Bhd. of Teamsters, 803 F. Supp. 734 (S.D.N.Y. 1992) (allegation of embezzlement); United States v. International Bhd. of Teamsters, 787 F. Supp. 345 (S.D.N.Y. 1992) (charge of physical assault), *see also* United States v. International Bhd. of Teamsters, 782 F. Supp. 256, 260 (S.D.N.Y. 1992) (alleged physical assault said to "bring reproach" upon the union); United States v. International Bhd. of Teamsters, 765 F. Supp. 1206 (S.D.N.Y. 1991) (allegedly nepotistic award of printing contract as basis for RICO-style "racketeering" charge).

172. IBT Const. art. II, § 2(a); *see* United States v. International Bhd. of Teamsters, 803 F. Supp. at 802; Consent Decree, *supra* note 13, at 20.

173. IBT Const. art. XIX, § 7.

174. Carey, Remarks, *supra* note 41, at 12.

to eradicating corruption will be subject to meaningful evaluation only *after* these all-important substantive definitions have been developed and given meaning through their application—and once it has been seen just how vigorous and aggressive that process of application really is.

There is at least real potential for substantial, on-the-ground ethical improvement through the EPC. At least the EPC has teeth: the Committee's rules and procedures provide for the imposition of sanctions ranging from orders to perform community service to permanent expulsion from the union.[175] Moreover, the judicial deference to incumbent officers' interpretations of union constitutions, which has so long operated to suppress dissent and insulate those leaders,[176] may now be turned on its head. Given not just general Landrum-Griffin principles, but the specific history of this case, it is extremely doubtful that those held to have violated the EPC's and General President's conception of "corruption" will have any meaningful opportunity to have such internal union findings overturned in court.[177]

With a public review board outlawed by the Administrator,[178] and with the remaining corruption problems widely conceded to be locally based,[179] Carey has chosen to proceed in a decentralized "in-house" manner, at least for

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175. Rules and Procedures, Ethical Practices Committee, International Brotherhood of Teamsters, § 7(b) (Oct. 30, 1992) (on file with author) [hereinafter "EPC Rules and Procedures"]. Additional potential sanctions include censure, reprimands, fines, restitution orders, suspension, and temporary and lifetime bars from holding union office. *Id.* The "community service" provision is limited to orders to provide such service "to the International union or its subdivisions." *Id.* An "unreasonable" failure or refusal to cooperate with an EPC investigation is one offense against the IBT constitution that *is* now specifically defined. *Id.* at § 5(e)(iii) ("Investigative Powers: Members' Duty to Cooperate"). *But see infra* text accompanying note 190 (General President not bound by EPC "recommendations" regarding imposition of sanctions). It should also be noted that the IBT constitution already establishes a set of internal union complaint procedures to handle a number of different issues. IBT Const. art. XIX. These procedures start at the level of locals, and gradually work up through the established "chain of command," that is, through all of the incumbent-controlled layers of the union where the remaining ethical problems are thought to be. As noted, the EPC, in contrast, operates based upon a special power granted to the General President to consider allegations having to do specifically with corruption.

176. *See supra* text accompanying notes 151-53. *See* Richman, *supra* note 141, at 166.

177. *See supra* text accompanying notes 151-53 (discussing decisions under Landrum-Griffin deferring to incumbent union officers' construction of union constitutions). Given the court's past criticism of Carey's ethics efforts as "pathetic," *supra* text accompanying note 135, the possibility that it will routinely *reverse* his individual decisions to impose sanctions does not seem great. *See also* Lesly, *supra* note 83 (finding 95% of expulsions sought by investigations officer upheld by court). Moreover, early in the litigation, the court supervising the consent decree issued a decision, pursuant to the All Writs Act, consolidating all IBT-related disciplinary matters with the case before it. United States v. International Bhd. of Teamsters, 728 F. Supp. 1032, 1050 (S.D.N.Y. 1990), *aff'd*, 907 F.2d 277 (2d Cir. 1990). Even the Second Circuit has noted the extreme hostility of this district court to claimants seeking to establish that they are *not* deserving of severe sanctions for charges arising from alleged IBT-related misconduct. *See* United States v. International Bhd. of Teamsters, 899 F.2d. 143, 149 (2d Cir. 1990) (overturning district court-imposed conditional contempt citation as abuse of discretion); United States v. International Bhd. of Teamsters, 978 F.2d. 68 (2d Cir. 1992) (chastising district judge for unilaterally increasing penalties suggested by Independent Administrator—from five-year suspension to lifetime bar—without adequate respect for "notions of individual justice and fair play" and based solely upon court's own "fixed view that it should 'throw the rascals out'").

178. *See supra* text accompanying notes 97-99.

179. *See supra* note 48.

purposes of initial adjudications. The sixteen-member EPC will function in Circuit-like three-member panels, with each panel having initial jurisdiction over one of the IBT's five Area Conferences.[180] Each panel includes an International Vice President, a local union officer, and—in a substantial innovation consistent with the larger goal of building a long-term culture of democracy—a rank-and-file union member.[181] Prior to appointment in the fall of 1992, each EPC member was subjected to an extensive personal background check by an outside personnel security firm,[182] and each also has an ongoing duty to file confidential personal financial disclosure forms with the union's headquarters.[183] The Committee's staff is to be directed by the EPC's sixteenth (and nonvoting) member, who assumes the position of EPC Administrator.[184] The Administrator conducts investigations and reviews incoming member-filed complaints, weeding out the frivolous ones and determining whether any should more appropriately be referred to some non-EPC Teamsters organ for investigation or action.[185] Additional staff is to be provided to the Administrator as necessary, and the IBT has already arranged with the personnel security firm that conducted the members' background investigations to provide additional investigative assistance.[186] The Committee is to function both by acting upon member-filed complaints and through Administrator-initiated investigations.[187] The Administrator (or his/her delegate) is guaranteed access to all documents and individuals necessary to conduct "complete" investigations, and refusal to cooperate with such investigations is specifically defined as an offense against the union's constitution by the Committee's rules.[188]

The procedure for imposing sanctions upon a formally charged member involves three steps. First, a hearing is to be held before the relevant EPC panel. Where a member has filed the initial complaint, the member prosecutes the case; the EPC's Administrator prosecutes cases arising from IBT-initiated

180. EPC Rules and Procedures, *supra* note 175, at § 1(b). The members are to serve without pay, but will be reimbursed for expenses and lost wages. *Id.*

181. *Id.* Of course, whether the rank-and-file member actually will be a significant player in the EPC panel's deliberations, or instead will just be overwhelmed by the authority of his/her union officer "peers" and "colleagues," remains to be seen. *Cf.* Benson, *supra* note 100 (questioning whether rank-and-file EPC members will actually behave independently).

182. EPC Rules and Procedures, *supra* note 175, at § 2(a). The investigations were completed, and the appointees announced, on October 30, 1992. News Release, International Brotherhood of Teamsters, Oct. 30, 1992 (on file with author) [hereinafter News Release]. The background investigation was conducted by a private security investigation firm headed by the former chief of the U.S. Attorney's Office in the Southern District, Criminal Division. Crowe, *supra* note 84, at 86.

183. EPC Rules and Procedures, *supra* note 175, at § 2(b).

184. *Id.* at § 1(b).

185. *Id.* at §§ 1(d), 5; *see also supra* note 175 (IBT constitution provides alternate internal complaint procedure, operating through existing hierarchy).

186. *Id.* at § 1(c), d(ii); News Release, *supra* note 182.

187. EPC Rules and Procedures, *supra* note 175, at § 3(a)-(d).

188. *Id.* at § 5(e).

investigations.[189] If the panel concludes that the imposition of sanctions is appropriate following this hearing, it must formally recommend particular sanctions to the General President in a Final Report, which must be submitted to the General President (with specific factual findings, and minority and/or dissenting views, if any) in every case, regardless of whether sanctions are recommended.[190] The next step is the General President's written decision to accept or dismiss the findings and suggested sanctions contained in the EPC's report, or to impose such other sanctions "as seem fair and just."[191] Finally, the Administrator, the complainant, and any person who may be the subject of sanctions have a right to appeal a decision by the General President imposing sanctions to the union's General Executive Board.[192] The confidentiality of raw investigative files is strictly protected,[193] but the General President's and General Executive Board's final decisions, as well as each panel's Final Report, are open to inspection by any rank-and-file member.[194] In order to preserve an unbiased forum, the EPC Administrator is prohibited (presumably upon pain of being disciplined himself or herself) from *ex parte* communication with the General President, General Executive Board, or other EPC members with respect to particular complaints and/or investigations.[195]

Aside from the possibility that this process will prove to be excessively cumbersome (how much General President and General Executive Board time will be consumed reviewing final reports and appeals remains to be seen),[196] the most obvious question to be raised concerning the Teamsters' new EPC concerns its overlapping relationship with the IRB already in place.[197] Already it has been noted that there is potential for self-defeating competition

189. *Id.* at § 6. Procedural protections for the accused include access to the investigative record, a specification of charges, the right to introduce new evidence at the panel hearings, a stenographic transcript, and the right to be represented at the EPC's hearing by any other union member, as well as "speedy trial" guidelines for the completion of investigations and hearings. *Id.* The existence of a right to cross-examine opposing witnesses appears to have been assumed. The standard of proof is "the preponderance of the reliable evidence," *Id.* at § 6(c)(v), the same standard that is applied to NLRB unfair labor practice matters. 29 U.S.C. § 160(c) (1988).

190. EPC Rules and Procedures, *supra* note 175, at § 7(a).

191. *Id.* at § 8 (a)-(b).

192. *Id.* at § 8(c).

193. *Id.* at §§ 4, 6(c)(ii).

194. *Id.* at § 8(d). The EPC also has a duty to make annual reports and to provide technical assistance to IBT subsidiaries interested in establishing similar bodies at the local level. *Id.* at §§ 10, 11.

195. *Id.* at § 5(c). Exactly how one enforces this requirement, in the event of a general conspiracy to avoid its terms, is of course a very good question.

196. For discussions of similar administrative problems arising in the context of other institutions' internal self-policing mechanisms, see Richard J. Terill, *Alternative Perceptions of Independence in Civilian Oversight*, 17 J. POLICE SCI. & ADMIN. 77 (1990); Susan Watt, *The Future of Civilian Oversight of Policing*, 33 CAN. J. CRIMINOLOGY 347 (1991); Harold Beral & Marcus Sisk, Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1963); Margaret A. Lenzi, Note, *Reviewing Civilian Complaints of Police Misconduct—Some Answers and More Questions*, 48 TEMP. L.Q. 89 (1975).

197. *Cf.* Benson, *supra* note 100 (reviewing and analyzing EPC).

and rivalry between the two: neither Carey nor the Independent Administrator, who is now appointed to the Independent Review Board by the Justice Department, and who might be expected to form an alliance with the third IRB member he suggested,[198] seems to think that he really needs the other.[199] In accordance with the terms of the consent decree,[200] the IRB's rules permit that body to refer potential violations against the International to the EPC for initial action,[201] but the IRB retains the authority not only to withdraw a referred matter from the EPC's jurisdiction (for example, in the event that it detects reluctance to investigate or prosecute on the part of the Committee), but also to reverse all EPC decisions.[202] The IRB's rules also penalize any EPC "failure to cooperate" with the IRB on referred matters, an offense which includes a failure to proceed upon them in a "timely" manner.[203] Obviously, this intensive "oversight of the overseer" provided for in the IRB's rules holds the substantial, and ironic, potential actually to penalize Carey for having established the EPC. It not only creates a new type of official malfeasance arising from cases referred to the EPC, but also diminishes, in such cases, the opportunity for resorting to the otherwise politically attractive option of "blaming the IRB" for unpopular disciplinary actions.[204] At the same time, this intensive oversight holds the potential for accomplishing much long-term good. Precisely by eliminating the opportunity for the EPC to duck hard or politically unpleasant cases, it could compel the EPC to fulfill its own potential—and effectively compel all of the New Teamsters, high and low, to develop meaningful hands-on experience with the internal rule of law.

The second major danger connected with the EPC is that, like most union disciplinary proceedings,[205] it could itself become politicized.[206] Although this danger is not to be minimized for the long term (and is aggravated by the absence of an actual "criminal code"), as a practical matter this danger probably should not generate too much worry for some time. As noted, the IRB and the court are there to prevent the EPC from running amok by holding the EPC's feet to the fire with respect to the conduct of its own affairs. Second, and perhaps more importantly, given the widespread consensus that much of the lower-level old guard is still in place,[207] and that the union's

198. *See* discussion *supra* Part II.

199. *See* Benson, *supra* note 100.

200. Consent Decree, *supra* note 13, at 20-22.

201. Exhibit A, "Rules and Procedures for Operation of the Independent Review Board for the International Brotherhood of Teamsters," §§ I(4) & (5), *reprinted in* United States v. International Bhd. of Teamsters, 803 F. Supp. at 761, 803 (S.D.N.Y. 1992) [hereinafter Exhibit A].

202. Exhibit A, *supra* note 201, at §§ I(7) & M(1); *see also* Consent Decree, *supra* note 13, at 22-23.

203. Exhibit A, *supra* note 201, at § I(9).

204. *Cf.* Benson, *supra* 100, at 4 (discussing political attractiveness of such a move when alleged misconduct involves either particularly powerful lower-level leaders or organizational "hot potatoes," which might result in, *inter alia*, secession of large locals from International's structure).

205. *Id.* at 3; Richman, *supra* note 141.

206. Benson, *supra* note 100, at 3-4.

207. *See* Kwik, *supra* note 48.

corruption problems are still widespread,[208] the EPC holds relatively little real-world potential for adding significantly to the risk of individual unfairness in particular cases, at least not in the short to medium run. If Carey's internal union "enemies" are also the enemies of clean conduct, as so many aver, then even a "politicized" EPC would have its hands full investigating and prosecuting "political" opponents who also happen to be genuinely susceptible to charges of allegedly having engaged in "corrupt" conduct. Crude as it may be to say so, even untoward subjective motives on Carey's or the EPC members' part in the administration of union discipline would probably not have any untoward objective consequences in the IBT for quite a while. In the alternative, more optimistic scenario, an internal ethic of integrity and democratic self-policing may also have an opportunity to take root inside the Teamsters as the EPC begins its heavily regulated life. And this ethic itself might also present some defense against politicization of this disciplinary process in the future.

But to help ensure that the EPC really does achieve its promise and does not become politicized—and also to help realize larger regime-change objectives—Carey would do well to promulgate the ethical practices code he has sometimes mentioned. In order to avoid giving such a code the appearance of being just an out-of-touch reformist *ukase*, he could at first apply the code to his own "top layer," International level staff, over whom he indisputably has direct control. Alternatively (or in addition), he could issue such a code as an "interpretation" of the broad anti-corruption mandate accorded to him by the IBT constitution, making it binding on the union as a whole as an interim measure. In either event, he could later secure the adoption and ratification of that code (or something resembling it) by the union's next constitutional convention, so as to make the code a permanent part of the Teamsters' institution-wide fundamental law and something that would outlast his own administration. Not only would the formal adoption of such a code help institutionalize his own regime change, but it would also help eliminate the nettlesome due process and "Nuremberg" problems that really do bedevil the current EPC (and, for that matter, judicial/IRB) arrangement. Considered from a more Machiavellian perspective, Carey's voluntary promulgation of such a code—even as a non-constitutionalized "interpretation"—might benefit him personally, allowing him to profit politically from a salutary "Cincinnatus effect," for in promulgating such a code he would in effect be voluntarily and formally limiting his own otherwise largely unfettered discretion. In this connection, Carey might remember that George Washington has been said to have entered the regime-change pantheon not for having been the commanding general in a revolutionary war, nor for having been elected a new regime's first president, but precisely as a result of the "virtue" that was perceived in

208. *See* sources cited *supra* note 48.

his having voluntarily agreed to relinquish his own potentially unlimited powers.[209]

Moreover, the process of deciding what such a code should contain presents the New Teamsters with a unique deliberative "constitutional moment" that may serve well to raise rank-and-file democratic consciousness by helping to instill the sense that their beleaguered brotherhood, even during outside "occupation," still has the capacity to assume at least some responsibility for redefining *itself*.[210] And such a code might eventually even serve the independence-minded rank-and-file in another way: as an additional basis for arguing, someday, that the court and the government may safely withdraw, more secure that another "democratic" (more accurately, demagogic) Hoffa will not some day arise.[211] "Delivering the economic goods" is not the sole objective of regime change after all; for a short time anyway, even a Juan Peron knows how to accomplish that. Destroying—or looting—a democracy is easier than building one, and institutionalizing a "government of laws and not of General Presidents" should be a separate, and important, objective for Carey as well.

Exactly how one defines (or redefines) "corruption" in the drafting of this code is a separate question. If a durable culture of democracy is eventually to be built, it is better if that definition is generated from inside the union so that any opportunity the IBT may have to experience a "republican" or "constitutional" moment may be fully grasped. Models for drafting such a definition are available. For all that has been said about it in this Essay, the AFL-CIO Code does at least touch on most of the right bases. Undoubtedly, among the topics that any such code would cover are conflicts of interest for officers and their friends and families; undue self-enrichment; accounting for and reimbursement of expenses; gifts and gratuities, both from sources outside the union, and to and from union officials with respect to members; respect for free speech, election, and association rights; discrimination and sexual harassment; nepotism and cronyism; and the management of union proprietary activities. But a sensitivity to context, as well as a love for lofty morals, should inform exactly what is said. The code should be comprehensive, rigorous, and detailed, but also simple, clear, and carefully adapted to trade union

209. *See* GARY WILLS, CINCINNATUS: GEORGE WASHINGTON & THE ENLIGHTENMENT 3 (1984) (Washington "a virtuoso of resignations" who "perfected the art of getting power by giving it away"); Gordon Wood, *The Greatness of George Washington*, 68 VA. Q. REV. 189 (1992) (the "greatest act of his life, the one that made him famous, was his resignation as commander-in-chief" of the Revolutionary Army, which had "a profound effect everywhere in the Western world").

210. *Cf.* ACKERMAN, *supra* note 38 (advocating constitutional conventions in Eastern Europe as way of consolidating pro-democracy regime change); James G. Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 366-67 (1990) (discussing resort to "strong democracy," i.e., large scale popular participation, at times when an entity's "basic direction" is at issue).

211. *Cf.* CROWE, *supra* note 5, at 266 (Carey might pursue a "strategy of undermining [the IRB] by giving it little to do as the Teamsters cleanse themselves").

circumstances and legitimate trade union norms. Given resource constraints, formal and informal enforcement priorities would probably have to be developed for such a code as well, just as they have developed for criminal prosecutions generally, and will inevitably develop through the EPC. And for the same democratic reasons, those too would best be generated from within.

There are, to be sure, risks associated with pursuing this course. Holdover incumbents are not likely to delight in seeing their old and quiet ways so publicly and systematically challenged. Enemies will be aroused. At the same time, the potential benefits of promulgating such a code from—of all unlikely places—Jimmy Hoffa's former office are also great, and not just for the Teamsters. As others have noted, during its current, high public-profile moment, the IBT has at least a temporary opportunity to spark elsewhere in the labor movement, if not similar regime changes, some marginal reforms in ethics as in economics.[212]

CONCLUSION

Lenin had some experience with "regime change;" he too ran a "revolution from above." His purpose was different, to be sure, but his famous question, slightly rephrased, nonetheless applies: what exactly is *likely* to be done?

The only honest answer is that it is anybody's guess. Given the federal court's obvious and powerful determination to carry out its anti-corruption mandate, whether the remaining corrupt individuals will be removed is the easiest prediction to make. Whatever difficulty that court may be having in developing a sensitivity to the regime-change dimension of the task in which it is engaged, there is no doubt as to its devotion to the more narrowly defined task of "throwing the rascals out." Therefore, whether the EPC itself contributes anything substantial to the eradication of corruption in the near future may not turn out, after all, to be a terribly important question. EPC or no EPC, code of ethics or no code of ethics, the strong probability is that this task will eventually be done, and as thoroughly as any court can do it.

Considerably less certain is whether the internally-based EPC, with its rank-and-file participation and openness to member-initiated complaints, can assist in the long-term regime-change process by fostering a faith in the *possibility* of honest, autonomous unions, and of an honest, democratic Teamsters union in particular. Where honesty and democracy have been so long suppressed, instilling faith in this possibility is plainly the necessary first step toward building a new post-authoritarian culture. A single free and open election—however happy in result—does not a successful regime change make, and over the longer run, a successful pro-democracy regime change inevitably depends for its survival upon the existence of active support for the democratic

212. *See* Feldman, *supra* note 30.

regime from below. If Carey does not create it—through the EPC, a code, or otherwise—his own election may well turn out to be merely another historical footnote. Whether the EPC will make more than a symbolic contribution to the building of such a democratic culture remains to be seen. But, in a situation of fundamental pro-democracy regime change, symbols matter too.

Whether *any* of this matters is the largest and the most uncertain question of all. The United Auto Workers' vaunted integrity has not protected that union's members from a drastic, precipitous loss of jobs, wages, benefits, and future opportunities. If national and global economic changes mean that organized labor's social and economic role will continue its precipitous decline, the current effort to reform the Teamsters may amount to no more than routine law enforcement—welcome for its own sake, but of little lasting concern except to those directly involved. On the other hand, if organized labor were somehow to revive, then reforming and revitalizing this largest union in the country is a matter of great consequence for everyone—for national economies here and overseas, for those who work with their hands, and for those who work in—or just represent—the corporate suite.