

In the Cause of Union Democracy

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I. INTRODUCTION

It is an honor to be a part of this symposium, but I have to admit that I am a little embarrassed by its title. I have certainly never thought of myself as a “public intellectual.” And to whatever limited extent I may fit the definition the organizers had in mind, so do many others of much greater distinction. Even in my own little corner of labor and employment law—union democracy law—I share the public intellectual podium, figuratively at least, with Alan Hyde of Rutgers Law School,² and with my law school classmate, Chicago labor lawyer and writer, Tom Geoghegan, among others.³

Nevertheless, I appreciate the opportunity to write about the cause to which I have devoted a good part of my career both inside and outside the halls of academia: the struggle to make the labor movement more democratic and more responsive to its members. After a brief explanation of how I became involved in the union democracy movement, this article will highlight some of the reasons why I believe union democracy is such an important cause. It will then explain why the role of public intellectuals is particularly important for the cause of union democracy, and will conclude with a description of some of the ways my work in the area of union democracy has enhanced my teaching and scholarship.

1. Professor, Widener University School of Law; AB, Cornell University; JD, Harvard University; LLM, Georgetown University.

2. Professor Hyde's scholarly endeavors include important work in the union democracy area, such as *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984). In addition, Professor Hyde has been on the board of the Association for Union Democracy for many years and has written amicus briefs on its behalf in a number of cases, including *Harrington v. Chao* and *Members for a Better Union v. Bevona*. *Harrington*, 372 F.3d 52 (1st Cir. 2004) (challenging determination that union regional council did not need to be directly elected by members); *Bevona*, 152 F.3d 58 (2d Cir. 1998) (challenging union referendum on amendments to union constitution).

3. Thomas Geoghegan's modern classic, *Which Side Are You on?: Trying to Be for Labor When It's Flat on Its Back*, describes some of his union democracy work on behalf of reformers in the Mine Workers, Steelworkers, and Teamsters unions and also provides his commentary—simultaneously inspiring, depressing, and entertaining—on the state of the labor movement in the late twentieth century. Geoghegan writes frequently for *The New Republic*, the *New York Times*, and other publications. He also has written several other books, including *The Secret Lives of Citizens: Pursuing the Promise of American Life*.

II. MY PATH TO UNION DEMOCRACY

After a brief stint as a welfare-rights organizer following college, I went to law school intent on having a career as some kind of public interest lawyer. During law school, I wrote a piece on employment discrimination⁴ and spent a summer at the ACLU. After a judicial clerkship, I became a graduate fellow at Georgetown's Institute for Public Representation, practicing public interest administrative law. While at Georgetown, I worked with two important union democracy lawyers, Arthur Fox of the Public Citizen Litigation Group, who was working with Teamster reformers on truck safety as well as union democracy matters,⁵ and Joe Rauh, one of the leading civil rights and labor lawyers of his generation.⁶ Rauh, who had previously represented the Miners for Democracy in their successful election campaign in the United Mine Workers, was then representing reformer Ed Sadlowski in his ultimately unsuccessful run for the presidency of the United Steelworkers.

My next stop was a staff attorney position at the Northwest Labor and Employment Law Office (LELO) in Seattle. LELO was a unique public interest firm with a board comprised largely of African-American activists in the Seattle building trades,⁷ Filipino-American reformers in a Seattle longshoremen's local that represented workers in the then-segregated Alaska salmon canning industry,⁸ and Latino members of the Washington affiliate of

4. Michael J. Goldberg, Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. C.R.-C.L. L. REV. 325 (1974). I later solicited an article from a fellow student, who had previously worked on behalf of reformers in the United Mine Workers, which became a groundbreaking work describing the difficulties reformers face in the labor movement. Edgar N. James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections*, 13 HARV. C.R.-C.L. L. REV. 247 (1978).

5. With the assistance of Ralph Nader, Fox founded the Professional Drivers Council for Safety and Health (PROD), which initially focused on truck safety and later evolved into an organization of rank-and-file Teamsters seeking to reform their union as well as promote truck safety. In 1979, PROD merged with Teamsters for a Democratic Union (TDU). See Michael J. Goldberg, *Teamster Reformers: Their Union, Their Jobs, Their Movement*, 72 J. TRANSP. L. LOGISTICS & POL'Y 13, 14-15 (2005). Fox has been a leading union democracy lawyer for many years and longtime board member of the Association for Union Democracy (AUD).

6. See Wolfgang Saxon, *Joseph Rauh Jr., Groundbreaking Civil Liberties Lawyer, Dies at 81*, N.Y. TIMES, Sept. 5, 1992, at A22.

7. Race discrimination in several Seattle building trade unions had been the subject of major Title VII litigation brought by the EEOC. See WILLIAM B. GOULD IV, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 338-62 (1977). We worked with minority members of those unions to help enforce the resulting consent decree.

8. LELO brought several major Title VII cases against the canneries, including one that years later led to a defeat in the Supreme Court. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989) (rejecting claim of Title VII violation). This case was a major impetus for the Civil Rights Act of 1991. Two of our clients and board members, Silme Domingo and Gene Viernes, also worked with Filipino-American community groups opposed to the tyrannical regime of Ferdinand Marcos in the Philippines. In 1981, they were murdered in their union hall, shortly after winning election to union office on a platform of ending the corrupt practices of their predecessors, who had close ties to Marcos. A jury in a subsequent civil suit determined that Marcos himself had been one of the conspirators behind their murders. See *Marcos's Estate and His Widow Are Held Liable in 2 U.S. Killings*, N.Y. TIMES, Dec. 17, 1989, at A36.

the United Farm Workers union.⁹ While at LELO, I represented a “shop committee” of United Parcel Service employees that later became the backbone of Seattle’s chapter of Teamsters for a Democratic Union (TDU).¹⁰ That work led to a position with TDU,¹¹ where I served in its Washington, D.C. office as general counsel until I entered academia. Since then, in addition to my teaching and scholarly work—much of it focusing on the law regulating internal union affairs¹²—I have remained active in the union democracy movement, serving on the board of the Association for Union Democracy (AUD),¹³ writing the occasional amicus brief,¹⁴ litigating the occasional case,¹⁵

9. See generally Jim Burnett, *Lawyers Who Work for Workers*, JURIS DR., Oct. 1977, at 25. Foundation grants initially funded LELO, with the expectation that it would become self-supporting through court awarded fees in its Title VII litigation. Although the firm won some very significant cases through the tireless efforts of its lead lawyer, Abraham Ardit, the fee awards were delayed for so long that LELO could not survive in its original incarnation. See generally Robert Windrem, *Fee Delays May Destroy Public Interest Firm*, THE AMERICAN LAWYER, Sept. 1979. LELO continues to operate as a community-based civil rights and workers’ rights organization, but it has not functioned as a public interest law firm since the early 1980s.

10. One of my shop committee clients, Bob Hasegawa, later served three terms as the top officer of Teamsters Local 174 in Seattle, remaining active in TDU the entire time. Currently, he is a member of the Washington State House of Representatives.

11. See generally Goldberg, *supra* note 5 (describing TDA and its work).

12. See generally, e.g., Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649 (1983); Michael J. Goldberg, *An Overview and Assessment of the Law Regulating Internal Union Affairs*, 21 J. OF LAB. RES. 15 (2000) [hereinafter Goldberg, *Internal Union Affairs*]; Michael J. Goldberg, *Cleaning Labor’s House: Institutional Reform Litigation in the Labor Movement*, 1989 DUKE L.J. 903 (1989) [hereinafter Goldberg, *Cleaning Labor’s House*]; Michael J. Goldberg, *Derailing Union Democracy: Why Deregulation Would Be a Mistake*, 23 BERKELEY J. EMPL. & LAB. L. 137 (2002); Michael J. Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 BUFF. L. REV. 89 (1985) [hereinafter Goldberg, *Duty of Fair Representation*]; Michael J. Goldberg, *The Propensity to Sue and the Duty of Fair Representation: A Second Point of View*, 41 INDUS. & LAB. REL. REV. 456 (1988); Michael J. Goldberg, *The Teamsters Board of Monitors: An Experiment in Union Reform Litigation*, 30 LAB. HISTORY 563 (1989); Goldberg, *supra* note 5; Michael J. Goldberg, *Union Democracy, American Democracy, and Global Democracy: An Overview and Assessment*, in THE INTERNAL GOVERNANCE AND ORGANIZATIONAL EFFECTIVENESS OF LABOR UNIONS: ESSAYS IN HONOR OF GEORGE BROOKS (Samuel Estreicher, Harry C. Katz & Bruce Kaufman eds., 2001). In recent years, I have also written the updates of the chapters, originally written by others, on the elections of union officers and on the rights of union members within their unions in the *National Lawyers Guild’s Employee and Union Member Guide to Labor Law*, published by Thomson-West.

13. The AUD can be likened to an ACLU for members of the labor movement. The origins and activities of AUD, which has operated on a shoestring budget for almost forty years, are described in a recent book by its founder and longtime executive director, Herman Benson, a former machinist who, together with retired law professor Clyde Summers, virtually created the union democracy movement. See generally HERMAN BENSON, *REBELS, REFORMERS, AND RACKETEERS: HOW INSURGENTS TRANSFORMED THE LABOR MOVEMENT* (2005).

14. See, e.g., *Int’l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 468 (1991) (upholding union candidate’s right to access mailing list for distribution of campaign literature); *Thomas v. Grand Lodge of Int’l Ass’n of Machinists and Aerospace Workers*, 201 F.3d 517, 518 (4th Cir. 2000) (enforcing LMRDA requirement that unions inform their members of Act’s provisions); *Zamora v. Local 11, Hotel Employees and Restaurant Employees Int’l Union*, 817 F.2d 566, 570-71 (9th Cir. 1987) (requiring translation of union meetings in local with substantial Spanish-speaking membership).

15. See, e.g., *Knight v. Int’l Longshoremen’s Ass’n*, 457 F.3d 331, 339, 343-44 (3d Cir. 2006) (expanding union members’ rights to free speech and due process under Landrum-Griffin Act); *Grant v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 806 F.2d 114, 119 (7th Cir. 1986) (rejecting union members’

and otherwise trying to advance the cause of union democracy in the real world.¹⁶

III. WHY UNION DEMOCRACY MATTERS

Most of my reasons for promoting union democracy are pragmatic. While I have no quarrel with those who value democracy as an end in itself, I am more inclined to see union democracy as an essential means toward achieving a particular end: a stronger labor movement that is not only more successful at the bread-and-butter functions of organizing and collective bargaining, but is also more effective representing working people in the broader political arena. A stronger and more democratic labor movement is an essential ingredient in a revitalized movement for progressive change and social justice, which I believe is so important to this country's future. As New York University professor and social commentator Todd Gitlin has asked, "[W]hat higher priority can there be for intellectuals? A revival of union strength ought to be the single greatest priority for the progressive liberal left."¹⁷ My desire for that result helps me resist the occasional depressing thought that I am toiling in a remote corner of a backwater field in a world where labor unions are in danger of becoming irrelevant.¹⁸

Most of labor's power, both on the shop floor and in society at large, depends on its ability to mobilize its members to, in the words of the newsletter *Labor Notes*, "put the movement back in the labor movement." Although a top-down organizational model may occasionally work, if the "organizing model of unionism" or "social movement unionism" is to succeed, members must have both the opportunity to participate in union decisions and a sense that it is, in fact, *their* union, not just an "insurance agency" that collects their dues.¹⁹ As one commentator argued, "What is at stake in the fight for

claim of statutory requirement for membership meetings under LMRDA).

16. For example, in 1996 and again in 2001, I served as an adjunct election officer helping to oversee elections in the Laborers International Union, pursuant to the pre-filing settlement of a civil RICO suit threatened by the U.S. Department of Justice as part of its effort to root out the influence of organized crime in the labor movement. Together with attorney Arthur Fox and Professor Clyde Summers, I also worked on the AUD's successful rulemaking petition that resulted in U.S. Department of Labor requirements that unions representing federal employees inform members of their rights to free speech, due process, and fair elections in their unions. See 29 C.F.R. § 458.4 (2006).

17. Todd Gitlin, *Beyond Identity Politics: A Modest Precedent*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 152, 156 (Steven Fraser & Joshua B. Freeman eds., 1997); see also BENSON, *supra* note 13, at xiii, 210; Eric Foner, *Intellectuals and Labor: A Brief History*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 46, 56 (Steven Fraser & Joshua B. Freeman eds., 1997).

18. Union density in the United States has been steadily falling for more than fifty years, from its peak of 32.5% in 1953 (35.7% in the private sector) to 12% in 2006 (7.4% in the private sector). KIM MOODY, U.S. LABOR IN TROUBLE AND TRANSITION: THE FAILURE OF REFORM FROM ABOVE, THE PROMISE OF REVIVAL FROM BELOW 100 (2007).

19. See generally, e.g., PHILIP M. DINE, STATE OF THE UNIONS: HOW LABOR CAN STRENGTHEN THE

participatory democracy is the future of the labor movement. When unions deprive the rank and file of choice, when leaders favor mobilization but not participation, they succeed only in driving a deeper nail in labor's coffin."²⁰

Although the labor movement has not had many victories in recent decades, growing evidence suggests that more democratic unions are increasingly effective at their core collective bargaining functions. For example, the successful 1997 Teamsters UPS strike used a highly mobilized and united rank and file to prevail, despite decades of UPS efforts to drive a wedge between its full-time and part-time employees.²¹ It is not a coincidence that this victory occurred during the high-water mark of democracy in the Teamsters Union, just before the fall from grace of Ron Carey, the reform candidate elected as Teamsters President in 1991 in the first direct rank-and-file election for the union's top officers.²² An increasing number of studies suggest that democratic unions tend to fare better than autocratic ones in both organizing campaigns and at the bargaining table.²³ If nothing else, democratized unions create

MIDDLE CLASS, IMPROVE OUR ECONOMY, AND REGAIN POLITICAL INFLUENCE (2008) (discussion of social movement unionism by sympathetic journalist); RICK FANTASIA & KIM VOSS, *HARD WORK: REMAKING THE AMERICAN LABOR MOVEMENT* 126-34 (2004) (suggesting social movement unionism beneficial and transformational); MIKE PARKER & MARTHA GRUELLE, *DEMOCRACY IS POWER: REBUILDING UNIONS FROM THE BOTTOM UP* (1999); *REKINDLING THE MOVEMENT: LABOR'S QUEST FOR RELEVANCE IN THE 21ST CENTURY* 10-11 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001) (suggesting union strength derived from member participation); *THE TRANSFORMATION OF U.S. UNIONS: VOICES, VISIONS, AND STRATEGIES FROM THE GRASSROOTS* (Ray M. Tillman & Michael S. Cummings eds., 1999).

20. Stanley Aronowitz, *Unions and Democracy*, *DISSENT*, Winter 1999, at 81, 83. Despite the benefits of democratic participation, union officials have been reluctant to abandon the top-down approach, as Herman Benson explains:

Perhaps officials are dismayed by the vision of an activated union membership, trained, educated, newly accustomed to exercising independent initiative and judgment. And once so inspired, after resisting the employer establishment at work, they might be inclined to do the unmentionable: criticize the establishment of their own union and actually run for office as insurgents. For incumbents, this is not so much a vision as a nightmare.

Herman Benson, *A Rising Tide of Union Democracy*, in *THE TRANSFORMATION OF U.S. UNIONS: VOICES, VISIONS, AND STRATEGIES FROM THE GRASSROOTS* 27, 44 (Ray M. Tillman & Michael S. Cummings eds., 1999).

21. See generally David Moberg, *The UPS Strike: Lessons for Labor*, 1 *WORKING USA* 11 (1997); Michael Schiavone, *Rank-and-File Militancy and Power: Revisiting the Teamster Struggle with the United Parcel Service Ten Years Later*, 10 *WORKING USA* 175, 180 (2007); Matt Witt & Rand Wilson, *The Teamsters' UPS Strike of 1997: Building a New Labor Movement*, 24 *LAB. STUD. J.* 58 (1999).

22. See generally KENNETH C. CROWE, *COLLISION: HOW THE RANK AND FILE TOOK BACK THE TEAMSTERS* (1993) (describing 1991 Teamster election). This book also discusses the government's civil RICO case that prompted the election and the important role TDU played in the case and the election. *Id.* Unfortunately, during his reelection campaign five years later, Carey failed to stop an illegal fundraising scheme cooked up by his campaign staff that led to union funds being diverted into his campaign. As a result, Carey's reelection was overturned and he was expelled from the union. See Steven Greenhouse, *Board Expels Ron Carey from Teamsters for Life*, *N.Y. TIMES*, July 28, 1998, at A12.

23. See, e.g., Robert Bruno, *Democratic Goods: Teamster Reform and Collective Bargaining Outcomes*, 21 *J. LAB. RES.* 83, 84 (2000); Jack Fiorito & Wallace E. Hendricks, *Union Characteristics and Bargaining Outcomes*, 40 *INDUS. & LAB. REL. REV.* 569, 580 (1987) (concluding democracy enhances non-wage

enormous incentives for complacent or incompetent union leaders to improve their performance.²⁴

Another reason for promoting union democracy is that democratic unions are less susceptible to problems of corruption, labor racketeering, and infiltration by organized crime.²⁵ The last twenty years have seen significant progress in the efforts to clean up historically corrupt unions like the Teamsters, the Hotel & Restaurant Employees, and the Laborers.²⁶ Where corruption remains a problem or creeps back in, however, it not only has an immediate impact on the members of the affected unions, but it also tarnishes labor as a whole, as evidenced by the fact that anti-union employers can be expected to bring it up in response to almost every union-organizing campaign.²⁷

When the focus shifts from organizing and collective bargaining to labor's role as a political voice for its members, union democracy becomes even more essential. Together with its allies in the civil rights and women's movements, the labor movement is the most important and best-organized segment of the polity that has consistently struggled for a more equitable distribution of wealth and power in society.²⁸ With the expanding impact of campaign contributions from special interests, the political role of organized labor, including its capacity to contribute funds and mobilize voters, assumes increased importance as a countervailing force against corporate influence on the political process. Aside from unions, it is difficult to think of any other organizations in America that represent, or even seek to represent, the interests of working people *as* working people in the political arena.²⁹ Indeed, at a symbolic level, "the

outcomes); Patricia M. Maranto & Jack Fiorito, *The Effect of Union Characteristics on the Outcome of NLRB Certification Elections*, 40 INDUS. & LAB. REL. REV. 225, 225 (1987) (detailing positive influences of democracy on unions).

24. See George Strauss, *What's Happening Inside U.S. Unions: Democracy and Union Politics*, 21 J. LAB. RES. 211, 211 (2000) (discussing effect of democracy on incumbent union leaders).

25. See Seymour Martin Lipset, *The Law and Trade Union Democracy*, 47 VA. L. REV. 1, 6 (1961). The relationship between autocratic unionism and corrupt unionism was one of Congress' justifications for passing the principal federal statute promoting union democracy, the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. §§ 401-531 (2000). See Goldberg, *Cleaning Labor's House*, *supra* note 12, at 935 (noting congressional response to findings of corrupt union practices uncovered by McLellan Committee).

26. See generally JAMES B. JACOBS, *MOBSTERS, UNIONS, AND FEDS: THE MAFIA AND THE AMERICAN LABOR MOVEMENT* (2006).

27. See National Right to Work Legal Defense Foundation, <http://www.nrtw.org>; The Center for Union Facts, <http://www.unionfacts.com> (providing examples of typical arguments of anti-union employers). See generally ROBERT FITCH, *SOLIDARITY FOR SALE: HOW CORRUPTION DESTROYED THE LABOR MOVEMENT AND UNDERMINED AMERICA'S PROMISE* (2006) (offering a withering, if sometimes over-the-top critique of unions from an author sympathetic to some of labor's goals).

28. See RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 192 (1984); see also FANTASIA & VOSS, *supra* note 19, at 162.

29. To some degree, worker centers seek to represent workers as workers, particularly for low-wage minority and immigrant workers, but they generally operate on a local level. See generally JANICE FINE, *WORKERS CENTERS: ORGANIZING COMMUNITIES ON THE EDGE OF THE DREAM* (2006).

worker” has virtually disappeared from the social and political imagination, replaced instead by the more amorphous figure of “the consumer,” whose interests are often seen as conflicting with those of the worker.³⁰ The irony, of course, is that consumers are for the most part comprised primarily of workers or their dependents.

Given the important and unique role of unions in representing the interests of working people in the political process, it is critical that the positions they advocate be reached through a democratic process. The Teamsters’ endorsement of Ronald Reagan in the 1984 presidential election provides an instructive example of how the absence of union democracy can distort labor’s political voice. The union endorsed Reagan following a poll of its membership by then Teamsters President Jackie Presser, which allegedly revealed support for Reagan over Democratic candidate Walter Mondale by a ten-point margin. As the head of the union’s public relations department later admitted in a memoir appropriately titled *Devil’s Pact*, the actual results of the poll favored Mondale by more than a two-to-one margin before Presser’s staff discarded thousands of Mondale votes and stuffed the ballot boxes with phony Reagan votes.³¹ The more unions adhere to democratic principles, the more likely it becomes that their political activities will accurately represent the views and interests of their membership.³²

Beyond the realm of electoral politics and legislative lobbying, unions assume an additional political role. In this age of “bowling alone,” to use Robert Putnam’s phrase,³³ unions are among the civic associations that play a crucial mediating role, protecting and insulating individuals from the overreaching efforts of the state and large corporations.³⁴ In that capacity, unions—provided they are in fact democratic—can also be critically important “schools for democracy” where the habits of self-governance and direct responsibility are instilled.³⁵ As the democratic theorist Barbara Cruikshank put it, “[C]itizens are not born; they are made,”³⁶ and in this context, unions

30. FANTASIA & VOSS, *supra* note 19, at 27.

31. See F.C. DUKE ZELLER, *DEVIL’S PACT: INSIDE THE WORLD OF THE TEAMSTERS UNION 127* (1996).

32. See Lipset, *supra* note 25, at 8; Clyde W. Summers, *The Public Interest in Union Democracy*, 53 NW. U. L. REV. 610, 622 (1958). When unions are democratic, their arguments against “paycheck protection” and other legislative efforts to reduce labor’s political clout are much more persuasive. Goldberg, *Internal Union Affairs*, *supra* note 12, at 29.

33. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000).

34. See Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORNELL J.L. & PUB. POL’Y 555, 556 (1998) (discussing countervailing role of nonprofits in today’s society).

35. Thomas C. Kohler, *Civic Virtues at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 299 (1995).

36. See BARBARA CRUIKSHANK, *THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS* 3 (1999); see also John Gaventa, *Citizen Knowledge, Citizen Competence, and Democracy Building*, in *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 49 (Stephen L. Elkin & Karol Edward Soltan eds., 1999).

function as “seedbeds of the civic virtues.”³⁷ In too many voluntary organizations, like the American Association of Retired Persons and the Sierra Club, membership often means little more than sending in a dues payment in exchange for a newsletter subscription.³⁸ In contrast, union members

learn to develop strategies to change existing conditions in their workplaces, neighborhoods, and in their unions. And they will understand how to organize and mobilize themselves and others for action as they evaluate and learn together. . . . Every action of the union, such as bargaining for a new contract, resolving a grievance, or conducting a job action, becomes a learning experience that, in practice, demonstrates how organizing, mobilizing, and educating are all aspects of the same effort.³⁹

A prerequisite for union efficacy as schools for democracy is that the unions themselves operate democratically. After all, undemocratic or autocratic unions also educate their members, but teach very different lessons. “The message conveyed, sometimes brutally, sometimes subtly, is: Sit down and shut up, and pay your dues. Don’t rock the boat.”⁴⁰ If union members expect, or worse, accept an absence of democracy in their unions, they may likewise become resigned to a loss of democracy in their government. To the extent unions are training grounds for public leaders and stepping stones to public office,⁴¹ it is the commitment to democratic ideals that those unions cultivate—

37. Kohler, *supra* note 35, at 279. One of the reasons unions are such key schools for democracy is because of their connection to the workplace as “work is the chief (and again for many, the only) place outside the family where people directly are involved in a common undertaking.” *Id.* at 300. As Professor Estlund points out, “We may be ‘bowling alone,’ but we are working together.” Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO L.J. 1, 5 (2000). Equally important is the fact that as a result of anti-discrimination laws, workplaces—and consequently the unions that represent the workers employed there—are perhaps the “most important arena[s] of racial and ethnic integration” in our society. *Id.* at 17.

38. See Kohler, *supra* note 35, at 291.

39. JOSE LA LUZ, *Education for Worker Empowerment*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 85, 87 (Steven Fraser & Joshua B. Freeman eds., 1997); see also Paul Johnson, *Organize for What? The Resurgence of Labor as a Citizenship Movement*, in REKINDLING THE MOVEMENT: LABOR’S QUEST FOR RELEVANCE IN THE 21ST CENTURY 27, 38 (Lowell Turner, Harry C. Katz & Richard W. Hurd eds., 2001).

40. See BENSON, *supra* note 13, at 213. As Benson previously explained:

[It is] [n]ot that top union leaders want their members always to remain passive. Many see their members as a directed mass that acts in response to the leader’s signal, to vote, to pay dues, to stand up and fight but then to sit down and shut up when ordered. They want an army that responds to their command, but they are wary of members who respond to their own critical judgment and who insist on asking questions.

Benson, *supra* note 20, at 27, 44.

41. See *supra* note 10 (detailing ascension of Bob Hasegawa from union representative to state representative); see also Summers, *supra* note 32, at 623 (describing union role in training its members for

or, as the case may be, the habit of suppressing those ideals—that those leaders will take with them onto the political stage.⁴²

IV. THE IMPORTANCE OF SUPPORT FOR UNION DEMOCRACY FROM PUBLIC INTELLECTUALS

Public intellectuals can play a particularly critical role in the union democracy movement. Reformers among the union rank and file often stand alone and thus are extremely vulnerable to retaliation. Both the incumbent union leadership and management typically perceive these reformers as thorns in their sides, if not outright threats.⁴³ If management and labor want to get rid of a perceived troublemaker, a small obstacle like the duty of fair representation is rarely going to stop them, even in the absence of a permissible cause for termination under the collective bargaining agreement.⁴⁴ Moreover, retaliation against reformers is not limited to threats to their jobs. Threats of physical violence or its actualization, including beatings and even murder, are not uncommon, particularly in unions infiltrated by organized crime.⁴⁵

Entrenched union officers also have tremendous advantages as incumbents in any electoral challenge to their control over union affairs, especially at the national level.⁴⁶ Where that advantage is not enough, they sometimes resort to other tactics. These may include violations of members' free speech and due process rights under the Landrum-Griffin Act; improper exercise of union discipline including fines, disqualification from union office, and suspension or expulsion from the union; unlawful campaign tactics; and outright theft of union-officer elections.⁴⁷

Unfortunately, apart from a small organization like the Association for Union Democracy, there is no organized constituency for union democracy.⁴⁸

public service).

42. See Summers, *supra* note 32, at 623.

43. See FANTASIA & VOSS, *supra* note 19, at 60-61 (exploring dissident groups' challenges to corrupt unions and management responses)

44. The duty of fair representation will rarely prevent the termination of a reformer without cause for a number of reasons, including: the difficulty potential DFR plaintiffs have in finding knowledgeable lawyers to represent them, the procedural hurdles and short limitations periods plaintiffs must overcome (including frequently short filing deadlines for pursuing internal union remedies, where exhaustion of such remedies is a prerequisite to filing suit), and substantive standards for proving a breach of duty, which are very difficult to meet even when plaintiffs have ample evidence of union hostility towards them. See Goldberg, *Duty of Fair Representation*, *supra* note 12, at 143 n.198, 140-49.

45. Herman Benson's memoir of his work with the AUD, *Rebels, Reformers, and Racketeers*, and the pages of the AUD's newsletter, *Union Democracy Review*, are filled with examples of such retaliation.

46. See generally James, *supra* note 4 (detailing nature of union elections); Clyde W. Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93 (1984) (outlining various problems with union elections).

47. See generally BENSON, *supra* note 13. The hundreds of reported cases under the Landrum-Griffin Act provide further examples of union officers' unlawful conduct. See 29 U.S.C. §§ 401-531 (2000).

48. During the 1940s and 1950s, the ACLU was an early advocate for federal legislation promoting democracy within unions. See Goldberg, *Internal Union Affairs*, *supra* note 12, at 17, 19 (reporting early

As Herman Benson explained, “[I]f you are a loyal unionist, and you need assistance against arrogant officials to keep your union honest and democratic, you search in vain for an influential ally.”⁴⁹ Consequently, there is no entity to pressure the Department of Labor to effectively enforce the Landrum-Griffin Act.⁵⁰ Moreover, rank-and-file reformers typically lack sources of legal assistance and moral support. The American Federation of Labor and Congress of Industrial Organization (AFL-CIO) and its rival, the Change to Win Federation, are at best indifferent, and often hostile, to the cause of union democracy.⁵¹

Joe Rauh personally experienced this hostility to union reformers. After taking the Miners for Democracy and reformers in the Steelworkers as clients during the 1970s, he was virtually expelled from the union bar.⁵² As he later explained, “I have had more obloquy and more scorn from the labor movement for representing Yablonski and Sadlowski and helping reformers in . . . other unions than I ever got from representing people under attack during the McCarthy period of the 1950’s.”⁵³

In the 1970s and 1980s, the labor law section of the National Lawyers’ Guild (NLG) placed a high priority on union democracy matters. For a few years, the NLG supported the National Labor Law Center in Washington, D.C. that, among other things, produced a series of educational materials on union members’ rights.⁵⁴ As more NLG labor lawyers began to represent union

ACLU advocacy of union democracy). Since then, however, its efforts on behalf of union democracy have been minimal. See BENSON, *supra* note 13, at 67.

49. BENSON, *supra* note 13, at xii.

50. See generally Joseph L. Rauh, *LMRDA—Enforce It or Repeal It*, 5 GA. L. REV. 643 (1971) (demonstrating early but still valid critique of Department of Labor’s role in enforcing fair elections); see also BENSON, *supra* note 13, at 162-89 (providing recent analysis of Department of Labor’s enforcement of intra-union trusteeship and officer elections).

51. Note that the limited revitalization at the highest levels of the labor movement in recent years, which began with the 1995 AFL-CIO election of John Sweeney’s insurgent slate, would not have occurred but for earlier successes of reformers in the United Mine Workers and particularly in the Teamsters union. Ironically, it was support from those two unions that made the election of the Sweeney slate possible. See Benson, *supra* note 20, at 31-33. Yet, of all the top AFL-CIO leaders “who gathered around Sweeney [and] were the beneficiaries of the successful Teamster reform movement, none had ever contributed an iota to its victory, none had offered even moral encouragement when Teamster reformers were on the embattled defensive.” *Id.* at 42.

52. See BENSON, *supra* note 13, at 83 (recounting Rauh’s advocacy work for union reformers). Rauh had been an attorney for the United Automobile Workers, among other unions, and he had also represented a consortium of unions in major litigation with the National Right to Work Committee. *Id.*

53. BENSON, *supra* note 13, at 95. During that time, the United Steelworkers sued AUD and some of its supporting charitable foundations for sponsoring a fair election project. The project sought to assure a level playing field during reformer Ed Sadlowski’s union election campaign. The United Steelworkers also requested that the IRS and the State of New York investigate the AUD’s tax-exempt status. Although the lawsuit and tax investigation were expensive and time-consuming distractions, neither uncovered any wrongdoing on the part of the AUD or the foundations. *Id.* at 102.

54. In fact, the NLG’s National Labor Law Center shared a suite of offices in Washington, D.C. with TDU, where the author previously worked as general counsel.

clients themselves, however, they quickly learned that retaining those clients usually required forsaking union democracy work on behalf of clients in other unions.

Important public interest groups like the Ralph Nader-inspired Public Citizen have compromised on the question of union democracy in the face of union pressure. Paul Alan Levy, a lawyer at the Public Citizen Litigation Group, was one of the country's foremost union democracy lawyers in the 1980s and 1990s. For years, he was permitted to do extensive and valuable work for TDU and clients that the AUD referred to him. Public Citizen, however, requested that he drastically cut back on that work when its union allies on issues related to the North American Free Trade Agreement (NAFTA), occupational safety and health, and other matters pressured it to do so.⁵⁵

Even Cornell University's School of Industrial and Labor Relations (ILR) buckled under union pressure after the ILR Press published the interim report of a state task force on corruption and racketeering in the New York City construction industry.⁵⁶ The report discussed labor racketeering and organized crime infiltration of several building trades unions. The backlash from labor was so great that when the final report was completed two years later, the ILR Press refused to publish it.⁵⁷

Many important causes cry out for the moral, material, and legal support of public intellectuals, but few of those causes find their natural constituencies as isolated and vulnerable as union reformers often are. Herman Benson put it most eloquently:

There is nothing more demoralizing than to fight on against heavy odds, unknown and unheralded. Amnesty International solicits letters to isolated prisoners of conscience so that they may take heart from knowing that someone, somewhere, knows that they are there and why. The writer, the reporter, the critic, the publicist, the commentator have the power to give that kind of moral boost to the union reformer.⁵⁸

Intellectuals have long played an important role in both the development of the labor movement as a whole and in the cause of union democracy,⁵⁹

55. Fortunately, Levy has not been completely barred from doing union democracy work, and he remains an active member of the AUD Board.

56. NEW YORK STATE ORGANIZED CRIME TASK FORCE, INTERIM REPORT ON CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY (Cornell ILR Press 1988).

57. See BENSON, *supra* note 13, at 139. The final report was published by the New York University Press. NEW YORK STATE ORGANIZED CRIME TASK FORCE, FINAL REPORT ON CORRUPTION AND RACKETEERING IN THE NEW YORK CITY CONSTRUCTION INDUSTRY (NYU Press 1990).

58. BENSON, *supra* note 13, at 24.

59. See Norman Birnbaum, *Intellectuals and Unions: Retrospect and Prospect*, in AUDACIOUS DEMOCRACY: LABOR, INTELLECTUALS, AND THE SOCIAL RECONSTRUCTION OF AMERICA 223 (Steven Fraser &

although “outsider rules” frequently limit that role in union-officer elections.⁶⁰ The lawyers and law professors among them can help union members learn their rights, assist them in finding attorneys to help enforce those rights,⁶¹ and perhaps even take on a pro bono case or two. For those willing to give their time or financial resources, organizations like the AUD, Labor Notes, and TDU’s nonprofit rank-and-file education and legal defense foundation will happily put them to good use.⁶²

V. THE RELATIONSHIP TO TEACHING AND SCHOLARSHIP

In addition to serving a good cause, I believe my union democracy work has enhanced my teaching and scholarship in many ways. No doubt these benefits would have followed from any public interest work I might have undertaken; they are not unique to union democracy. By remaining engaged in the real world, and to a limited degree, in the work that lawyers do, however, I enhance my credibility with my students, who, after all, want to be lawyers, not law professors. Moreover, my work in the field of union democracy, both before entering academia and since, has provided alternative insights and perspectives, as well as ideas for scholarship that never would have occurred to me if I were entirely ensconced in the ivory tower.

My work has also generated some excellent case files for use not only in the labor law classes I teach, but also in my other courses, civil procedure and administrative law. For example, together with two other lawyers on the AUD’s board, I worked on a lengthy rulemaking campaign before the U.S. Department of Labor that in 2006 led to regulations requiring unions representing federal employees to inform their members of their rights to free

Joshua B. Freeman eds., 1997); Strauss, *supra* note 24, at 211-13. Among the public intellectuals involved with the union democracy movement in its early and middle days were Michael Harrington, Irving Howe, Ralph Nader, and Norman Thomas. See BENSON, *supra* note 13, at 11, 24, 34, 43, 63, 69, 197.

60. The United Steelworkers, and later other unions, adopted “outsider rules” to prevent the very type of outside assistance that was a critical ingredient to the earlier success of the Miners For Democracy in the United Mine Workers. See generally BENSON, *supra* note 13, at 157-60. While concern about the meddling of outsiders in union elections was legitimate, federal law already prohibited any involvement by one group of outsiders whose exclusion should be a high priority, employers, and the outsider rules have no real effect on the other external influence that poses the greatest danger to union autonomy: organized crime. 29 U.S.C. § 481(g) (2000). See generally PRESIDENT’S COMMISSION ON ORGANIZED CRIME, THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR UNIONS (1986); JACOBS, *supra* note 26; Goldberg, *Cleaning Labor’s House*, *supra* note 12. Some of these outsider rules are arguably overbroad, prohibiting contributions even from candidates’ immediate family members and retired union members, and they may make it even harder for challengers to overcome the advantages of entrenched incumbents, especially in campaigns for national union offices. Nevertheless, the Supreme Court has upheld their legality under the Landrum-Griffin Act. See *United Steelworkers of Am. v. Sadlowski*, 457 U.S. 102, 121 (1982).

61. This is no easy task considering the limited financial resources available to most union reformers and the fact that very few labor lawyers are willing to risk alienating their union or management clients in order to represent members of the rank-and-file.

62. These organizations can be contacted through the following websites:
<http://www.uniondemocracy.org>; <http://labornotes.org>; and <http://www.tdu.org>.

speech, due process, and fair elections in their unions.⁶³ That rulemaking effort had two immediate effects. First, it proved highly critical in enforcing similar rights in the International Longshoremen's Association in a case I recently litigated.⁶⁴ Second, elements of that rulemaking case file became required reading in my administrative law course. It also inspired a writing assignment where each student must find a pending rulemaking proceeding before any federal agency and draft a hypothetical client letter describing the proposed rule and suggesting comments the client might want to file during the agency's public comment period on the proposed rule. Similarly, I assign first-year civil procedure students materials from an *ex parte* temporary restraining order proceeding I worked on for TDU involving a Landrum-Griffin Act challenge to an unlawfully conducted union referendum. The materials never fail to convince my students that my clients were entitled to the TRO until I splash them with a dose of reality and inform them that the judge concluded we had not made a sufficient showing of irreparable harm.⁶⁵

Finally, I should mention that during my academic career, I have also served several stints as a law school administrator, including dean of faculty, vice dean, and acting dean. As a faculty member, I always appreciated having an administration supportive of my union democracy work, so I tried to encourage and support colleagues engaged in pro bono work or acting in other capacities as public intellectuals when I was an administrator.

Shortly after I first became an associate dean, I had a memorable conversation with my friend and former boss, Ken Paff, the head of TDU. I was a little embarrassed when I had to admit to him I was now in management, and I asked him whether I could still attend TDU's annual conventions. You have to know Ken to fully appreciate his answer, but here is what he said: "Oh, I suppose that means they're paying you more money now. So does that mean you can make a bigger contribution to our legal - defense fund?"

"Besides," he continued, "you're not really in management anyway. You're just bossing around a bunch of college professors!"

That made me feel much better.

63. See *supra* note 16 (detailing promulgation of 29 C.F.R. § 458.4 (2006)).

64. *Knight v. Int'l Longshoremen's Ass'n*, 457 F.3d 331, 346 (3d Cir. 2006).

65. We did, however, ultimately prevail on the merits.