The Wrong Pocket: Union Liability for Health and Safety Hazards

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In the past several years, certain courts have permitted employees to sue their unions to recover damages caused by occupational hazards. The author contends that unions should not be liable to their members for negligent failure to enforce health and safety standards. Rather, unions should be held only to the duty of fair representation toward their members, and to their contractual promises to the employer.

I
INTRODUCTION

This article traces the convergence of two developments in the law of the industrial workplace. On one hand, there is a growing awareness of the social costs inflicted by occupational hazards.1 Each year thousands of workers suffer debilitating injuries and illnesses in the course of their employment.2 In most states, however, workers' compensation statutes severely limit the rights of these workers to obtain compensation from their employers.3 Consequently, employees have sought to develop innovative theories of liability in suits against third parties.4

On the other hand, the legal status of labor unions has undergone a subtle change. Now recognized as “grown up” entities that “must assume normal responsibilities,”5 unions have become subject to increasing legal control. They have been viewed as “quasi-public institutions” that owe specific legal duties to the employees they represent.6 The confluence of these two developments gives rise to the present inquiry: when may a union be held liable for health and safety hazards in the workplace?

Unions have always played a role in health and safety. Historically, workplace safety has figured among the primary demands of or-

† B.A. Yale 1977, J.D. University of California (Berkeley) 1981.
2. See D. Berman, Death on the Job ch. 2 (1978) [hereinafter cited as Berman].
3. See notes 54-59 infra and accompanying text.
4. As used throughout this article, “third party” and “third-party tortfeasor” refer to an entity or individual, other than the employer, who is present in the industrial workplace and whose liability is not limited by workers' compensation.
ganized employees. Modern collective bargaining agreements commonly contain extensive health and safety provisions. Health and safety is a mandatory subject of bargaining under the National Labor Relations Act (NLRA). The Occupational Safety and Health Act (OSH Act), which regulates the working conditions of all employees, organized or not, clearly provides for the participation of unions within its administrative framework.

With the right to pursue health and safety objectives comes the correlative question of a union duty. In recent years, arguments for expanded union duties have come from an unexpected source—union members. Employees who are victims of industrial accidents or illnesses often find it impossible to obtain adequate compensation from their employers, for workers' compensation schemes typically limit their recovery to statutorily-fixed amounts and restrict their right to proceed against the employer in tort. If workers' compensation fails to make employees whole, they must turn to third parties. In some instances, this search for a source of compensation has led to the union.

This article surveys the state of the law concerning union liability for health and safety hazards. Section I traces the theoretical development of unions' legal duties to their members and illustrates how Congress and the courts historically have been reluctant to impose broad legal controls over union conduct. Although a union owes certain legal duties to the employees it represents, those duties must be narrowly drawn to achieve specific policy goals that are within the union's control. Against this conceptual background, Section II discusses two distinct theories on which employees or their survivors have sought to base union liability: (1) breach of the duty of fair representation and (2) state law negligence in the performance of duties assumed under a collective bargaining agreement.

In applying the duty of fair representation, I will argue, the courts have correctly concluded that a union should not be liable for its negligent failure to enforce health and safety regulations. While the duty of fair representation may properly be found to create a due care standard

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8. For example, section 14 of the 1977 United Steelworkers agreement with the United States Steel Corporation contains provisions relating to safety equipment, safety dispute arbitration, the Joint Safety and Health Committee and safety training.
13. See notes 54-59 infra and accompanying text.
when applied to routine representation functions, such as the processing of grievances, health and safety is not primarily the province of unions. Chief responsibility for maintaining a hazard-free workplace lies with the employer. The union, I conclude, breaches its duty of fair representation only when it acts discriminatorily or in bad faith in failing to prevent industrial hazards.

Next, I analyze two cases in which employees have been allowed to bring negligence actions against their unions in state court. In both cases, the unions' purported duty to enforce health and safety standards was derived from provisions in the collective bargaining agreements. In concluding that the cases were incorrectly decided, I argue that the federal preemption doctrine precludes application of state law to such collectively bargained obligations. If the union negotiates a mandatory role in the enforcement of health and safety standards, it should be viewed as a contractual promise to the employer. Only the employer should be able to enforce the union's promise in a breach of contract suit under section 301 of the Labor Management Relations Act (LMRA).  

II
THEORIES OF UNION DUTY: AN OVERVIEW

Modern union duties have evolved from a common law tradition of reluctance to regulate internal union affairs. Nineteenth century courts viewed unions as outside the law altogether, illegal conspiracies that imposed restraints on free market trade. Even with the passage of the NLRA, which granted unions legal recognition as legitimate economic actors, the conceptual baggage of nonregulation survived intact. The guiding principle of the Act was to regulate the procedure of collective bargaining, creating a neutral forum for "industrial warfare." The National Labor Relations Board lacks the power to prescribe substantive terms of collective bargaining agreements. This preference for substantive neutrality, though much attenuated, remains embedded in the law's attitude toward the regulation of unions.

Nevertheless, as unions became institutionalized and amassed assets, they of necessity acquired a legal personality vis à vis nonmembers. Their power to contract with third parties is the cornerstone of

16. For an overview of the collective bargaining system, characterized by what the author call "judicial abstentionism," see H. WELLINGTON, LABOR LAW AND THE LEGAL PROCESS 26-46 (1968) and citations therein [hereinafter cited as WELLINGTON].
18. Most unions are unincorporated associations that can sue and be sued; they hold assets
collective bargaining. Section 301\textsuperscript{19} of the LMRA\textsuperscript{20} makes collective agreements enforceable by and against unions in federal and state courts.\textsuperscript{21} Unions may also be held liable in tort for the actions of agents in carrying out union business.\textsuperscript{22}

While unions acquired at an early stage a well-defined legal identity in their dealings with outsiders, the law concerning a union’s duties towards its members developed more fitfully. Early decisions denied members standing to sue their unions either because unions were held not to have discreet legal personalities vis-à-vis their members or because such suits were barred by the fellow servant rule.\textsuperscript{23}

The first significant departures from nonintervention came in the area of employee rights to union membership and participation. In the early twentieth century, courts discovered principled ways of protecting individual employees from wrongful expulsion.\textsuperscript{24} Enforcement of the union constitution and bylaws often served as the basis for judicial intervention.\textsuperscript{25} Courts viewed the union as an implied contractual relationship or corporate entity, in which a member had legally enforceable rights defined by the constitutional provisions.\textsuperscript{26} This approach reflected a relatively conservative philosophy of judicial control. Though courts in varying degrees exercised powers of interpretation over the constitution and bylaws, their functions remained nonprescriptive. Un-

\textsuperscript{23} For example, in Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941), the plaintiff was injured when he tripped over a platform negligently placed in the union hall by union officers. The court held that the plaintiff had no cause of action against the union for negligence, because the union had “no entity or existence apart from that of its members,” and “while a principal may sue an agent for dereliction of duty, he may not sue his co-principals for the dereliction of their common agent.” Id. at 207, 298 N.W. at 589.
\textsuperscript{24} See Bricklayers Union v. Bowen, 183 N.Y.S. 855 (Sup. Ct. Eq. T. (1920)), aff’d without opinion, 198 App. Div. 967, 184 N.Y.S. 938 (1921).
\textsuperscript{25} See, e.g., Polin v. Kaplan, 257 N.Y. 277, 177 N.E. 833 (1931). More recently, the U.S. Supreme Court held that a union constitution is a “contract” for the purposes of section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, allowing a union local to bring an action under that section in federal court against its parent international organization for violation of the union constitution. United Ass’n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Local 334, United Ass’n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, 101 S. Ct. 2546 (1981).
\textsuperscript{26} As the court in Polin concluded: “The constitution and by-laws of an unincorporated association express the terms of a contract which define the privileges secured and the duties assumed by those who have become members. As the contract may prescribe the precise terms upon which a membership may be gained, so may it conclusively define the conditions which will entail its loss.” 257 N.Y. at 281-82, 177 N.E. at 834. See also WELLINGTON, supra note 16, at 191-94.
ions were free—within evolving limits—to lay down their own ground rules.

The post-World War II period witnessed a marked change in attitudes toward legal regulation, attributable in part to a popular perception of union leadership as corrupt and oligarchic. Congress responded to this change by passing the Landrum-Griffin Act which regulates such procedural aspects of union democracy as financial disclosure, election practices and trusteeship. The “Employee Bill of Rights” in Landrum-Griffin ensures certain membership rights pertaining to the mechanics of decisionmaking, including the right to bring a legal action against the union.

The Landrum-Griffin Act marked Congress’ attempt to regulate unions through the imposition of procedural norms. More far-reaching changes, however, were taking place in the realm of judicial doctrine. In *James v. Marinship Corp.*, the California Supreme Court blurred the line between regulation of substance and procedure. The plaintiffs, a group of black shipyard workers, complained that the Brotherhood of Boilermakers required union membership as a condition of employment, yet deprived them of the right to participate by segregating them in an “auxiliary” local, isolated from the decisionmaking machinery. The court granted injunctive relief, ordering the union either to abandon its discriminatory practices or to refrain from enforcing its closed shop agreement with the employer.

*James* is significant in two respects. As a doctrine of substantive control, it stands for the proposition that an employee may not be denied the right to participate in decisionmaking for reasons that are arbitrary or against public policy, e.g., race discrimination. More important, however, the *James* court advanced a theoretical justification for substantive regulation, observing that a closed shop union “occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations.” The same court later extended this theory beyond the closed shop context:

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27. A Gallup Poll taken in 1957 indicated that 43% of the American public thought corruption and racketeering were “pretty widespread” in unions. D. Bok & J. Dunlop, Labor and the American Community 21 (1970).

28. Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1976). This is not to overlook the impact of the earlier Taft-Hartley Amendments, particularly as they limited a union’s power to affect a worker’s employment status for reasons other than the nonpayment of dues. § 8(b)(2). That provision clearly imposed a substantive limitation on a union’s options in disciplining members, despite the accompanying § 8(b)(1) proviso that reiterated a union’s right to prescribe rules for the “acquisition or retention of membership.”


32. Id. at 724-25, 155 P.2d at 332.

33. Id. at 731, 155 P.2d at 335.
Participation in the union's affairs by the workman compares to the participation of the citizen in the affairs of his community. The union, as a kind of public service institution, affords to its members the opportunity to record themselves upon all matters affecting their relationship with the employer; it serves likewise as a vehicle for the expression of the membership's position on political and community issues.\(^{34}\)

The quasi-public institution theory is the product of a realistic assessment of the role unions play in industrial society. As *James* and its progeny recognize, unions are not voluntary associations, akin to clubs or philanthropic societies.\(^{35}\) Nor is contract law a powerful weapon for protecting membership rights; the lack of any real opportunity to bargain over the constitution and bylaws renders the employee a victim of an adhesion contract, whose terms should be scrutinized for fairness and consonance with public policy. It is possible, then, to view union membership in terms of status instead of contract.\(^{36}\) Members can protect their status rights through actions against the union for damages as well as injunctive relief. The union is a legal entity distinct from its members, and owes them substantive duties that will be determined by public policy.\(^{37}\)

While the wrongful expulsion cases cleared away the conceptual barriers to substantive regulation, the deeper incursion came with the federal courts' delineation of the duty of fair representation (DFR). The doctrine was created to respond to a particular problem: the protection of minority or uniquely individual interests within unions.

The United States Supreme Court first announced the DFR in *Steele v. Louisville & Nashville Railroad Company*.\(^{38}\) There, a union certified under the Railway Labor Act sought to enter into a contract divesting black employees of seniority rights. The minority employees were allowed neither to join the union, nor to take part in the policymaking that determined seniority rights. Noting that the union was the statutory bargaining agent of all the employees in the unit, whether or not they were union members, the Court held that discrimination based on such non-job-related considerations as race was unlawful and could be enjoined. The Court emphasized, however, that some dispa-


\(^{35}\) Earlier cases had taken steps in this direction. For example, in Wilson v. Newspaper and Mail Deliverers' Union, 123 N.J. Eq. 347, 197 A. 720 (1938), the court acknowledged the monopoly of unions over the labor supply and analogized their function to that of an innkeeper or common carrier. *Id.* at 350, 197 A. at 722.


\(^{37}\) See, e.g., *In re Carter*, 618 F.2d 1093 (5th Cir. 1980), where the court held there was federal jurisdiction to hear a union member's claim that his union had conspired to deny him his employment rights, even though there was no violation of the collective bargaining agreement.

\(^{38}\) 323 U.S. 192 (1944).
rate impact was permissible, so long as it was based on "differences relevant to the authorized purposes of the contract, such as seniority, nature of work or skill."\(^{39}\)

As in *James*, the initial target of the DFR as a doctrine of substantive control was race discrimination. Actually, however, cases involving clear intent to discriminate, or to favor a majority simply by virtue of its voting rights, make up a small and uncontroversial segment of DFR litigation. Application of the doctrine grows more difficult where union conduct is less clearly motivated.

In the landmark case of *Vaca v. Sipes*,\(^ {40}\) an employee challenged his union's decision not to take his grievance to the final stage of arbitration. After holding that the trial court would only hear the merits of the grievance if the employee prevailed in his DFR claim,\(^ {41}\) the Court attempted to define the scope of the union's duty of fair representation. It was not enough, the Court ruled, "to refrain from patently wrongful conduct such as racial discrimination or personal hostility."\(^ {42}\) In addition, the "union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion."\(^ {43}\)

The "arbitrary or perfunctory" standard has spawned a wealth of law review commentaries\(^ {44}\) and case interpretations, often demonstrating that linguistic formulations can result in widely divergent practical results. Clearly the *Vaca* court intended to extend the union duty beyond the traditional invidious discrimination cases. Some commentators have argued that the DFR should not focus on union motivation at all; instead, it should create objective standards for a union's conduct of affairs, designed to ensure the employee a minimum quality of representation\(^ {45}\) or a minimum rationality in the union's decisionmaking.\(^ {46}\)

While the Supreme Court has not clearly defined the limits of the interests protected by the DFR, lower courts have moved the law toward a

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39. *Id.* at 203.
41. Procedurally, *Vaca* held that an employee can bring suit in state or federal court under section 301 of the Labor-Management Relations Act to enforce an employer's contract promise. If, however, the collective bargaining agreement provides for a union-administered arbitration procedure, the employee must first prove that the union violated the DFR in handling his grievance. Only if the DFR breach is established will the court hear the merits of the claim against the employer. *Id.* at 186.
42. *Id.* at 190.
43. *Id.* at 191.
45. R. GORMAN, BASIC TEXT ON LABOR LAW 713 (1976).
46. Clark, *supra* note 44, at 1132-41, argues that the courts abandon the bad faith standard and structure their inquiry to protect the individual employee against "irrational" union behavior.
quality of representation standard, at least with regard to certain union functions.

Recent cases have demonstrated the willingness of some courts to find DFR breaches even in the absence of union bad faith. In Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse the union neglected to process grievance claims stemming from the layoff of senior employees, relying instead on a proceeding before the NLRB. Although the First Circuit found no evidence of bad faith, it ruled that the union's failure to investigate the merits of the grievance and its inability to foresee the inadequacy of the Board remedy constituted perfunctory handling. A similar standard was employed in Ruzicka v. General Motors Corp., where the Sixth Circuit held that a union's clerical error in neglecting to file a "notice of unadjusted grievance" was arbitrary conduct giving rise to a DFR remedy. In both cases the gravamen of the employees' complaint was union negligence in handling grievances. Such results undermine the often-stated rule that a union will not be liable for conduct that is merely negligent. As I will explain, this development raises important questions for the assessment of union liability for health and safety conditions.

This overview of the law relating to union duties underscores two important points. First, there is a historical reluctance—based on a conception of unions as privately ordered voluntary relationships—to impose on unions substantive legal duties toward their members. Second, this reluctance will be overcome when sound policy so requires. Labor law has correctly looked behind formalities and determined that there are membership interests that warrant legal protection. Yet it is important that the perspective of the first point not be lost: the law should not treat a union and its members as adversaries. Any expansion of the union's duties must be justified on the basis of carefully analyzed policy.

48. Id. at 284.
49. 523 F.2d 306 (6th Cir. 1975).
50. See Dente v. Masters, Mates, & Pilots Local 90, 492 F.2d 10 (9th Cir. 1973), cert. denied, 417 U.S. 910 (1974); Bazarte v. United Transp. Union, 429 F.2d 868 (3d Cir. 1970). Cases, other than Ruzicka and Figueroa, in which what amounted to union negligence was found to have been a breach of the DFR, include: Smith v. Hussman Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980); Conally v. Transcon Lines, 583 F.2d 199 (5th Cir. 1978); Milstead v. Teamsters Local 1957, 580 F.2d 232 (6th Cir. 1978); Robesky v. Qantas Empire Airways, 573 F.2d 1082 (9th Cir. 1978); Faust v. Electrical Workers, 572 F.2d 710 (10th Cir. 1978), rev'd on other grounds, 442 U.S. 42 (1979); Lowe v. Pate Stevedoring Co., 558 F.2d 769 (5th Cir. 1977); Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975); Beriault v. ILWU Local 40, 501 F.2d 258 (9th Cir. 1974); Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972). See also NLRB General Counsel Memo 79-55, July 9, 1979, reprinted in 4 CCH Labor Law Reports ¶ 9200, in which the General Counsel indicates that gross negligence may violate the DFR, while mere negligence does not.
III

UNION LIABILITY FOR WORKPLACE HEALTH AND SAFETY

Two threshold observations are crucial to an understanding of union health and safety duties. First, the main responsibility for providing a hazard-free workplace lies with the employer: the union bears any duty secondary. The "general duty" clause of the OSH Act furnishes a clear expression of this principle, providing that every employer shall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious injury. . . . [and] shall comply with occupational safety and health standards promulgated under this Chapter.

The employer bears exclusive responsibility for violations of the Act.

Second, in most instances workers' compensation schemes limit an injured employee's recovery from his employer to statutorily-fixed amounts. It is generally an exclusive remedy, supplanting the employee's common law rights of action against the employer. Workers' compensation posits a quid pro quo: in return for limited recovery, the employee is relieved of the burden of proving employer fault.

Increasingly, however, critics of workers' compensation have argued that for the employee, the quid pro quo is an inequitable exchange. They contend that statutory compensation levels are insufficient to make seriously injured workers whole. The problem is particularly acute in the area of health, where debilitating industrial illness may not even be discovered until years after the employment relation has ended. Thus, if the employee subject to workers' com-


52. 29 U.S.C. § 654(a) (1976). In contrast, an employee is required to "comply with occupational safety and health standards and all rules, regulations and orders issued pursuant to this chapter which are applicable to his own actions and conduct." 29 U.S.C. § 654(b) (1976).


54. Every state has enacted some form of workers' compensation. The rights of a particular employee will depend on three features of the applicable state statute: the classes of employees covered, the type of injuries compensated and the exclusiveness of the workers' compensation remedy. In 1960 it was estimated that approximately 78.2% of the American labor force was covered by some form of workers' compensation. See 1A Larson, Law of Workmen's Compensation, §§ 5.30 at 38-40 (1978) [hereinafter cited as Larson].

55. Id., § 65.10 at 12-1 to 12-9.

56. Id.

57. For a critical analysis of the workers' compensation system in general see Berman, supra note 2, at 54-73.

58. See Kutchins, The Most Exclusive Remedy Is No Remedy At All: Workers' Compensation Coverage for Occupational Diseases, 32 Lab. L.J. 212 (1981); Robblee, The Dark Side of Workers'
pensation is to receive adequate compensation, he may be compelled to proceed against a third party. The union is an obvious target in the organized workplace.

A. Failure to Enforce Health and Safety Standards Under the Duty of Fair Representation

In bringing third party claims against unions, injured employees have generally alleged failure to enforce workplace health and safety standards. Since it is unlikely that an employee will be able to prove that the union harbored intent to create hazardous conditions, the question of recovery normally turns on whether a union can be held liable for its negligent acts. Insofar as these claims have been litigated as DFR breaches, plaintiffs have been uniformly unsuccessful. The courts have adopted a rule that is, as I will explain, supported by sound labor law policy: in the absence of conduct more culpable than negligence, a union's failure to enforce health and safety standards does not constitute a breach of the DFR.

1. The duty to discover health and safety hazards

No case has yet suggested that a union has a plenary duty—whether under the common law or the DFR—to discover and eliminate all industrial hazards. In Carollo v. Forty-Eight Insulation, Inc., a Pennsylvania court rejected the plaintiff's contention that the mere status of health and safety as a mandatory subject of bargaining implied a duty to search out workplace dangers. The court held that the federal DFR preempted the plaintiff's state law claim, which alleged that the union negligently failed to discover the possible ill-effects of exposure to asbestos fibers. Furthermore, it expressed doubt that the union could be held liable under any legal theory, noting "Congress


59. It is not the object of this article to discuss the merits of workers' compensation as a means of socializing the costs of industrial hazards, nor to inquire into the adequacy of compensation provided by particular statutes. It suffices to observe that the limitation on employer liability under workers' compensation causes injured employees to pursue legal remedies against third parties, including unions.

60. The term "health and safety standard" is intended here in the broadest sense to mean both specific regulations (as set forth in the collective bargaining agreement and by regulatory agencies) and the general requirement of providing a hazard-free workplace.

61. In Bryant, the plaintiffs alleged, inter alia, that the union had been engaged in a conspiracy with the employer to fail to enforce compliance with safety rules. No evidence was introduced to support this allegation and it was dismissed by the court. 467 F.2d at 5.


63. Id. at 434, 381 A.2d at 996. For an extended discussion of the federal preemption issue, see notes 116-42 infra and accompanying text.
did not seek to make the union responsible for its members' working conditions.\footnote{Id. at 433, 381 A.2d at 995. Carollo was followed under similar facts in Farmer v. General Refractories Co., 271 Pa. Super. Ct. 349, 413 A.2d 701 (1979).}

The court in \textit{Brough v. United Steelworkers}\footnote{437 F.2d 748 (1st Cir. 1971).} similarly refused to recognize a broad duty of due care. There, an employee injured by a faulty machine sued the union for damages. The theory of the action was a New Hampshire common law rule that rendered an employer's safety advisors liable for negligent inspections, regardless of their motivation or contractual obligations. When the union removed the case to federal court, the plaintiff amended the complaint to allege a breach of the DFR. The First Circuit upheld summary judgment for the union on the DFR count, observing that federal law "imposes upon the exclusive bargaining representative only a duty of good faith representation, not a general duty of due care."\footnote{Id. at 750.} The court reserved judgment on the merits of the common law claim and remanded the action to state court. It recognized, however, that application of the safety advisor rule to unions was a "difficult question" that might ultimately be preempted by federal law.\footnote{Id. at 749 n.1. There is no record of further proceedings in the New Hampshire courts. The court noted that until the \textit{Brough} complaint the safety advisor rule had been applied only in cases involving insurance carriers. \textit{Id.}}

\section*{2. Enforcement of contractual health and safety provisions under the DFR}

Actions alleging a general union duty to search out hazards have presented little difficulty for the courts and are rarely litigated. Clearly, such a duty is far afield from the union's normal role as bargaining representative for unit employees. The bulk of litigation, therefore, has proceeded on a narrower theory—the allegation that the union has assumed an affirmative duty through some term in the collective bargaining agreement. Such terms may take two forms: the incorporation in the contract of a specific health and safety standard or the creation of a union role in the enforcement process.

The leading case is \textit{Bryant v. United Mine Workers},\footnote{467 F.2d 1 (6th Cir. 1972).} where survivors of eight workers killed in a mine explosion charged the union with failing to enforce the Mine Safety Program of the National Bituminous Coal Wage Agreement. The contract incorporated by reference the standards of the Federal Mine Safety Code and required the employer to comply with the recommendations of federal inspectors. In addition, it created a union-controlled Mine Safety Committee, which had power
to inspect jobsite conditions, make safety recommendations to management and, in the event of imminent hazards, cause the removal of all workers from the mines. The plaintiffs contended that these two provisions created an enforcement duty with which the union failed to comply.

The Sixth Circuit affirmed summary judgment for the union. It found, in the first instance, no evidence of Code violations. The duties of the Safety Committee, moreover, were couched in nonimperative language; the contract accorded a mere right to inspect, which was not the equivalent of a binding contractual duty.

In discussing the case as a DFR action, the Bryant court recognized that a union is under an obligation to "enforce fairly the provisions of the collective bargaining agreement." It noted that liability, however, does not necessarily flow from the mere failure to enforce. The DFR is breached "only where the union in bad faith acts or fails to act for reasons that are arbitrary or discriminatory." Bryant's clear import is that the union should be exempt from liability under the DFR for negligent nonenforcement.

A district court case, House v. Mine Safety Appliances Co., dealt with a similar theory of liability. A group of employees filed suit against various third-party tortfeasors for damages suffered in a mine fire. Two of the defendants brought a cross complaint for indemnity, charging the union with common law negligence in the enforcement of contractual safety provisions. The contract clauses in question created a safety committee vested with responsibilities arguably broader than those in Bryant. While the court concluded that the union's role

69. The contractual provision provided in relevant part:
   The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the lives and bodies of the mine workers, it shall report its finding and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

Id. at 4 n.3.

70. The court interpreted the pleadings to state causes of action on two distinct theories of liability: breach of contract and breach of the DFR. Id. at 2.

71. Id. at 5.

72. Id.


74. 417 F. Supp. at 941.

75. The district court asserted ancillary jurisdiction over the common law claim. Id.

76. The relevant provisions provide in part:

A [Safety Committee] consisting of three employees designated by the Union and three Management members designated by the Company shall be established. By mutual agreement, the committee may be increased to not more than six representatives for each party. The safety committee shall hold regular meetings at times determined by the committee. The function of the safety committee shall be to advise with the Plant Manager concerning safety and health matters but not to handle grievances.
"seemed advisory," it observed that "[e]ven if the agreement here can be read to impose a mandatory duty, liability does not automatically accrue. . . ."77

The cross complainants in House did not bring the action under the rubric of DFR. The court, however, noted:

In light of the collective bargaining agreement in this case, a theory of common-law negligence for breach of an alleged safety duty is inextricably intertwined and embodied in the union's duty of fair representation. . . . Since the third-party plaintiffs categorically disclaim any reliance on a breach of fair representation, they have failed to state a claim for which relief can be granted.78

Simple relabeling of the action, moreover, would not have cured the defect, for "[n]egligence on the part of the union is insufficient to impose liability for breach of a duty of fair representation."79 The record contained no evidence of union bad faith or discrimination.

3. Applying the DFR standards: a differentiated approach

There appears, then, to be a tension within existing DFR law. On one hand, grievance-handling cases such as Figueroa and Ruzicka80 evince a broadening trend, moving the DFR toward a negligence standard and making unions insurers of some minimal quality of representation. On the other hand, litigation involving union safety duties has resulted in judicial pronouncements that DFR violations require a showing of bad faith (Bryant) or, at least, conduct more culpable than negligence (House). The problem, I would suggest, is not in the disparate results, but in the failure of courts to recognize that the DFR is an amalgam of different duties. Commentators have argued that the scope of the DFR must vary according to context,81 but no court has em-

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77. Id. at 942 n.1 (emphasis in original).
78. Id. at 945-46.
79. Id. at 945. The court's statement clearly implies that any common law cause of action, based on an alleged assumption of duty in a collective bargaining agreement, is preempted by federal labor law. See notes 116-42 infra and accompanying text. Assuming arguendo that state law was applicable, the court went on to conclude that Idaho's fellow servant rule would preclude recovery against the union. Id. at 947.
80. See notes 47-49 supra and accompanying text.
81. See Clark, supra note 44, at 1155:

The duty of fair representation should serve one major goal: assuring the individual employee that his union will represent his interest unless it conflicts with the group's interests. To achieve this goal, the doctrine must prohibit more than actual malice and subjective bad faith. It must require the union to consider individual and minority interests; it must demand rational decisionmaking processes; and it must prohibit discriminatory action based on criteria unrelated to union functions. Because a union's decisionmaking process varies with the function it is performing, the duty of fair representation should adapt to the different processes.

Clark suggests that the DFR should accord unions a wide range of discretion in contract negotia-
braced this view or set about a systematic analysis.

In both Ruzicka and Figueroa the union breached the DFR by failing to process an employee's grievance faithfully. It is not fortuitous that the development of a negligence standard has come in this area: there is a compelling rationale for imposing a high standard of care on the union in the context of grievance handling. There are no more clearly defined features of the American labor law system than the preference for arbitral resolution of conflict and the hegemony of unions over the grievance machinery. The union role as conduit for employee complaints has its origins in the NLRA, as well as in individual collective bargaining agreements; no other actor intrudes on that function.

Grievance handling is a routine union function susceptible to generalized rules defining due care. In effect, the negligence standard creates a procedural norm for a union's behavior, independent of its contractual obligations. As discussed in Section II, Congress and the courts historically have preferred to regulate union conduct through such procedural controls, rather than influence the substantive terms on which the parties contract.

Finally, the mishandling of grievances does not result in an assessment of damages against the union alone. Grievances serve to enforce the contractual promises of the employer—promises made for the benefit of the workers. If an employee is successful in his suit to enforce the contract, the damages will be apportioned between the union and employer. The union will be liable only to the extent that its DFR

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82. While section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1976), provides that the employer may adjust employees' grievances without intervention of the union, the negative implication is that in the normal course of affairs the union will be the grievance handler. The Supreme Court has ruled that the intent of the section 9(a) proviso is to permit the employer to deal directly with employees, not to grant workers an affirmative right to circumvent the union's control of the grievance process. Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 61 n.12 (1975). See also ARO, Inc. v. NLRB, 596 F.2d 713 (6th Cir. 1979).

83. See Note, FORD, L. REV. 1062 (1976). The author argues that under the DFR a negligence standard should apply to those grievance handling functions that are ministerial in nature, such as compliance with time deadlines, serving of notice and filing of required statements. However, where the function involves "substantive" considerations, such as the determination of whether an employee's grievance has merit, the union should be accorded more discretion in its decisionmaking process. Id. at 1067. See Clark, supra note 44, at 1171, similarly suggesting that a union should be liable for "carelessness" in processing grievances.

84. It should be noted that the individual collective bargaining agreement sets forth the specific details of the grievance and arbitration procedure. The union, however, bears a generic duty to comply with those procedures—e.g., to file all claims within the applicable time limits—regardless of the precise contractual terms. Moreover, the contract does not generally affect the degree of union control over the grievance machinery as it does the union's ability to enforce health and safety standards.

85. See notes 16-30 supra and accompanying text.
violation—mishandling of the grievance—aggravates the employer's contract breach.\textsuperscript{86}

In contrast, the union's duty to enforce health and safety regulations presents fundamentally different considerations. It does not involve the enforcement of solely contractual rights. The employer's duty to provide a hazard-free workplace arises first under statute (e.g., workers' compensation and the OSH Act) and the common law. It is true that a contract may specify certain safety standards, such as the Federal Mine Safety Code in \textit{Bryant}, creating a contractual, in addition to the statutory, duty to maintain a safe workplace. Yet while \textit{Bryant} acknowledges that the DFR requires the union to "fairly enforce the contract,"\textsuperscript{87} such a rule—insofar as it has come to imply a negligence standard—should not be applied outside the grievance context. The arguments in support of a duty of due care in the handling of grievances are simply absent in the area of health and safety.

First, unlike its domination of the grievance machinery, a union's ability to affect working conditions depends on the contract and is not, in most cases, absolute.\textsuperscript{88} The application of a due care standard would therefore require a case-by-case analysis. The reasonableness of a union's conduct would depend on its enforcement powers under the collective bargaining agreement. As a result, the judicial finder of fact would be drawn into the unfamiliar area of contract interpretation. Moreover, as emphasized in \textit{Bryant} and \textit{House}, the union would be encouraged to avoid liability by simply refusing to negotiate any enforcement role.\textsuperscript{89}

Second, creation of a negligence standard is particularly inappropriate in the area of health and safety because of the limitations on employer liability. An employer is normally immune from damages in excess of statutory compensation, even where his conduct constitutes a breach of contract.\textsuperscript{90} The apportionment rule adopted by \textit{Vaca} in the grievance context, under which the employer remains fully liable for the consequences of his breach, would thus be inapplicable. The entire

\textsuperscript{86} "[D]amages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." \textit{Vaca v. Sipes}, 386 U.S. at 197-98. \textit{See also} Ruzicka v. General Motors Corp., 523 F.2d at 312.

\textsuperscript{87} 467 F.2d at 5. \textit{See also} \textit{Vaca v. Sipes}, 386 U.S. at 177.

\textsuperscript{88} Concerning the implications of a contractual provision that grants the union exclusive control over working conditions, see the discussion in Section II(B) \textit{infra}.

\textsuperscript{89} \textit{Bryant v. UMW}, 467 F.2d at 5; \textit{House v. Mine Safety Appliances Co.}, 417 F. Supp. at 946.

\textsuperscript{90} In \textit{Hensley v. United States}, 279 F. Supp. 548 (D. Mont. 1968) the employer was required by contract to comply with certain safety codes. The court held that, absent an explicit promise by the employer to pay damages, an injured worker could not bring suit for breach of contract. The employee's exclusive remedy was workers' compensation, notwithstanding the contractual obligation. \textit{See} 2A \textit{LARSON, supra} note 54, § 65.10 at 12-9.
burden of personal injury damages, offset perhaps by the employer's workers' compensation contribution, would fall on the union. Though public policy certainly favors union vigilance in enforcing contractual health and safety provisions, imposition of liability for negligent missteps would pervert the DFR by transforming unions into primary insurers of hazard-free workplaces.

The arguments against a negligence standard apply with equal force where the collective bargaining agreement allocates to the union a specific enforcement function, such as inspections by a safety committee. Such a function, if found to be mandatory, should be construed as what it literally is—a contractual promise by the union to the employer, enforceable only by the employer. The union's contractual obligations to the employer should not be engrafted to the DFR, which has its origin not in the individual collective bargaining agreement but in federal labor policy. The general duty to enforce the contract embodied in the DFR is founded in labor policy and only requires the union to use the grievance machinery fairly in order to secure the benefits of the employer's promises for all unit members. The obligation of a safety committee to inspect a jobsite is a different duty, arising solely out of a particular collective bargaining agreement and should be enforced as such.

_Bryant_ and _House_ correctly limit liability for a union's failure to enforce workplace standards to instances of discrimination or bad faith. The primary purpose served by the DFR is the protection of

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91. See _Note, Safety in the Workplace: Employee Remedies and Union Liability_, 13 _Creighton L. Rev._ 955, 969-73 (1980) [hereinafter referred to as _Creighton Note_] for a discussion of damages where the union breaches the DFR regarding health and safety. Compare Professor Feller's view that the remedy arising from a DFR breach should not be conceptualized as "damages." Feller, _A General Theory of the Collective Bargaining Agreement_, 61 _Calif. L. Rev._ 663 (1973). Feller argues that the sole function of a DFR suit should be the preservation of the employees' right to a contractual remedy under the collective bargaining agreement. When the union mishandles a grievance, he argues, it should be responsible only for that part of the contractual remedy, determined by an arbitrator, attributable to its misconduct. Feller, however, does not reach the question of whether a "damage" award would be appropriate in a DFR claim unrelated to the handling of grievances. _Id._ at 808-09. Moreover, the courts have failed to follow the Feller view, allowing judicial determinations of both the DFR breach and the underlying contract claim, and awarding damages accordingly. _Vaca v. Sipes_, 386 U.S. at 197-98.

92. See notes 143-57 infra and accompanying text.

93. It is beyond the scope of this article to analyze what union conduct regarding health and safety would violate the "discriminatory or bad faith" standard. As noted above, it is unlikely that a union would ever baldly intend to expose its members to industrial hazards. It is conceivable nonetheless that a union's failure to negotiate health and safety protections for some portion of the workforce could, under some circumstances, amount to discrimination or bad faith. Significantly, however, no employee has ever successfully litigated a DFR claim based on such a theory. _Cf._ Creighton _Note_, _supra_ note 91, at 969 n.108. The author seems to assume, without discussion, that the DFR applied under a discrimination or bad faith standard will prove to be a viable theory of recovery for employees who are victims of industrial hazards. He further remarks that the failure of the DFR claim in _House_ was attributable merely to the plaintiffs' failure to draft the complaints
minority interests within the union. If the doctrine is to be broadened to ensure a minimum quality of representation, the scope of representation functions must be carefully limited. Applied to anything but the most routine procedural functions—the ones completely and inherently dominated by the union—the negligence standard can only force the union to abdicate its representation duties for fear of incurring liability.

B. Enforcement of Health and Safety Standards Under State Statute and the Common Law

1. Helton and Dunbar

While DFR theories have consistently failed as a basis for union liability, the same is not true for actions sounding in common law negligence or under state wrongful death statutes. To illustrate the salient issues and the split that has developed among the authorities, I will examine two cases in which the plaintiffs have been successful.

Helton v. Hake94 arose from the electrocution of a construction worker. The decedent’s survivors filed an action for damages in Missouri state court against two third-party tortfeasors—the union and the local municipal authorities. The cause of action against the union relied on a safety provision in the collective bargaining agreement directing that no work was to be done “in the immediate area of high tension lines until power was shut off.”95 Another clause of the agreement provided:

[The union steward] shall see that the provisions of these working rules are complied with and report to the Union the true conditions and facts. He shall report the injury of any employees to the proper officers of the Union. ... [T]he Employer is in no way responsible for the performance of these functions by the steward.96

The complaint alleged union negligence in the performance of the duty assumed under contract.

After the union removed the action to federal court, the plaintiffs filed a motion to remand. In remanding, Judge Hunter of the district court determined the essence of the action to be a state wrongful death claim, not a section 301 suit for breach of contract. First, he noted, the absence of any allegations of “arbitrary, discriminatory or bad faith” union conduct precluded litigation of the matter as a DFR case.97

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94. The federal decision is reported at 386 F. Supp. 1027 (W.D. Mo. 1974); the state court decision on remand is found at 564 S.W. 313 (Mo. Ct. App.), cert. denied, 439 U.S. 959 (1978).
95. 564 S.W. at 316.
96. Id.
Next, he rejected jurisdiction under section 301 over the case as an action to "enforce the contract":

This Court has not been able to find any reported case in which any federal court has held that the mere negligent failure by the union to perform a duty owed only to its own members under a collective bargaining agreement has been held sufficient to invoke Section 301(a) jurisdiction, where the failure resulted in a personal injury and the suit seeks relief via damages predicated upon negligence for the injury sustained.98

Judge Hunter concluded that, though the origin of the union's duty was a promise in the collective bargaining agreement, the allegations of negligence should be governed by Missouri tort law.99

On remand, a jury awarded damages against the union, and the Missouri Court of Appeals affirmed. Relying heavily on Judge Hunter's opinion ordering remand, the court ruled that the state wrongful death statute properly controlled the plaintiff's claim. Under Missouri law, the court noted, "liability in negligence may grow out of the breach of duty imposed by a contract."100

The focus of the opinion is the federal preemption issue. The court relied on the preemption test first announced in San Diego Building Trades Council v. Garmon:101 state law may not be applied to conduct that is either arguably protected or arguably prohibited by the NLRA. The facts in Helton, the court observed, involved no such conduct:

The failure of the Union steward Hake to enforce the safety provisions of the collective bargaining contract is in no way protected by Section 7 of the National Labor Relations Act nor could it constitute an unfair labor practice under Section 8 of that Act.102

Further, the court expressed concern that application of the preemption doctrine to the facts before it would lead to an anomalous result: "[A] union's negligent performance or negligent failure to perform a duty owed to an employee which resulted in that employee being injured would not be actionable in any way."103

The Helton court proceeded to distinguish the facts before it from

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98. Id. at 1032.
99. Id. at 1033-34. On motion to remand, the applicability of state law was not before the court, and the opinion contains no discussion of the federal preemption issue. Judge Hunter, nonetheless, clearly expressed his opinion that a common law cause of action would lie: "Plaintiffs herein are not praying for reinstatement of back wages, or for the improvement of working conditions. They are not employees or union members, but rather survivors bringing suit under the Missouri wrongful death law." Id. at 1034.
100. 564 S.W.2d at 317.
102. 564 S.W.2d at 318.
103. Id. at 319, quoting Judge Hunter's opinion on motion to remand. 386 F. Supp. at 1033 n.5.
those presented in *Bryant* and *House*, suggesting that the doctrinal inconsistencies with the two earlier cases were "more apparent than real." The basis of the distinction drawn by the court is the collective bargaining agreement itself. While the contracts in *Bryant* and *House* provided for only a limited union role in the safety program, the court noted, the union in *Helton* went "beyond a mere advisory status or representative capacity in the processing of grievances. Rather it has taken over for itself a managerial function, namely the full independent right to enforce safety requirements." Such a managerial function, the court found, transcended the union's normal representation duties and could therefore be enforced in tort. The court thus affirmed the award of damages.

The first offspring of the *Helton* analysis appeared in 1979. *Dunbar v. United Steelworkers* grew out of the same mine disaster that produced *House*, and involved the same collective bargaining agreement. The *Dunbar* plaintiffs charged the union with negligence in performing a variety of safety duties, among them the enforcement of contractual accident prevention provisions. Rejecting the defendant's preemption argument, and finding that the complaint raised material issues of fact, the Idaho Supreme Court reversed a trial court's grant of summary judgment in favor of the union.

In holding the employee's action exempt from federal preemption, *Dunbar* reiterated the *Helton* analysis and added a perspective of its own. Even if preemption applied "in a general term" to the union safety duty, the court noted, the action would fall into one of the judicially recognized exceptions to the doctrine—areas over which the state retains jurisdiction because the effect on the federal scheme is "tangential and remote." The lack of a nexus between the union conduct and federal labor policy becomes the opinion's keynote:

> We believe that the interests protected by the state wrongful death statutes are unrelated to those governed by federal labor laws and we ascertain no conflict which will necessarily arise between state and federal authorities as a result of permitting such traditional litigation in

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104. 564 S.W.2d at 320.
105. *Id.* at 321.
106. The Supreme Court denied the union's petition for certiorari, with three justices (Brennan, Marshall and White) voting to grant. 439 U.S. 959 (1978).
108. The relevant contractual provisions are set forth in note 76 *supra*.
109. 100 Idaho at 525, 602 P.2d at 23.
110. *Id.* at 528-29, 602 P.2d at 26-27.
The court analogized the safety duty to the negligent operation of an automobile by a union agent, concluding that normal tort liability should not be relieved solely because the injured party happens to be a union member.\textsuperscript{113}

Despite the efforts by the courts in Helton and Dunbar to harmonize the holdings of Bryant and House by means of factual distinctions, on close consideration the cases cannot stand together. The House court’s explicit disapproval\textsuperscript{114} of the district court opinion in Helton can only extend a fortiori to the subsequent state decision and to Dunbar; its observation that the DFR and common law negligence for breach of safety duty are “inextricably intertwined”\textsuperscript{115} leaves little room for the application of state tort law. House, with good reason, does not consider the effect of such negligence actions on federal labor policy to be tangential and remote. The approach of Helton and Dunbar, I believe, is thus subject to criticism on two fronts: (1) it misapplies preemption law and (2) it misapprehends the nature of the union duty assumed.

2. Federal preemption

Neither Helton nor Dunbar probes deeply into the murky waters of preemption. The key to their analyses is Garmon; they observe that a union’s negligent performance of safety duties is neither arguably protected nor arguably prohibited under the NLRA. The relative simplicity of the Garmon test, initially lauded as its main virtue, has left it open to criticism as being at once over- and under-inclusive.\textsuperscript{116} While, as Dunbar observes, Garmon continues to be “viable,” it has not remained the definitive test for federal preemption.\textsuperscript{117} Exceptions to Garmon have threatened to swallow the rule, particularly regarding conduct that is arguably protected\textsuperscript{118} or neither protected nor prohibited.\textsuperscript{119} It is in this latter area that Helton and Dunbar, by refusing to go beyond Garmon, have failed to apply established preemption principles.

Employment Relations Commission, the Supreme Court affirmed the principle that some conduct which is neither protected nor prohibited must be left to the "free play of economic forces." More specifically, the Court held that a state may not regulate a union's use of economic weapons that fall outside the protections of section 7. Any state regulation of tactics upsets the balance of power envisaged by Congress and influences the substantive terms on which the parties contract. As the Court has noted, it is "abundantly clear that state attempts to influence the substantive terms of collective bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB." By converting a contractual provision into a tort duty, the state court in Helton did more than distort the bargaining process: it directly affected the enforcement of substantive contractual terms already in existence. The Supreme Court dealt with this type of state regulation in Local 24, Teamsters v. Oliver. There, the Court held preempted an Ohio antitrust law that prohibited a truck rental provision in the Teamsters' collective bargaining agreement. Since federal law directed the parties to bargain about rentals, the Court reasoned, state law could not be allowed to intrude on their private agreement. The Court commented:

We believe there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. ... Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State.

120. Id. at 140, quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971). The court in Lodge 76 held that a state labor board was not free to regulate union members' concerted refusal to work overtime during negotiations for a new contract.
121. 427 U.S. at 142-49. See also Local 20, Teamsters v. Morton, 377 U.S. 252 (1964).
122. 427 U.S. at 153.
124. Id. at 296. See also White Motor Corp. v. Malone, 545 F.2d 599 (8th Cir. 1976). In holding a state pension law preempted, the court commented:

[Lodge 76] makes it abundantly clear that neither the states nor the National Labor Relations Board may attempt to influence the substantive terms of collective bargaining agreements by regulating the conduct of the parties to collective bargaining negotiations. These agreements are to be controlled by and left to the free play of economic forces. If states cannot control the economic weapons of the parties at the bargaining table, a fortiori, they may not directly control the substantive terms of the contract which results from that bargaining.

125. 358 U.S. at 296 (citations omitted).
Oliver clearly demonstrates the Court's reluctance to allow state law to modify or proscribe collectively bargained obligations. Despite its broad language, however, the opinion does not absolutely preclude state regulation respecting mandatory subjects of bargaining.\(^{126}\) Implicit in the Court's approach is a balancing of substantive interests. The state's interest in regulation must be weighed against the danger that the intrusion will frustrate the process of private dispute resolution through collective bargaining.\(^{127}\)

The application of state law in Helton and Dunbar poses a formidable threat to the collective bargaining regime. Where the union negotiates its agreement unaware of the potential state law liability, the subsequent imposition of a tort duty will frustrate the parties' contractual expectations. The scope of the union duty—a duty assumed in the contract—is thus determined by a body of law totally outside the contemplation of the contracting parties.

Where the union is aware of the potential liability during contract negotiations, state law imposes an impermissible burden on the bargaining process. As Professor Cox has stated in formulating an alternative preemption test that avoids the deficiencies of Garmon: \(^{128}\) "Any state statute putting duties on employers, unions, or employees specifically in connection with union organization, collective bargaining, or labor disputes, belongs in the class which could not be applied to industries subject to NLRB jurisdiction."\(^{129}\) Potential tort liability such as that in Helton and Dunbar "puts a duty" on the unions in collective bargaining and should thus be preempted.\(^{130}\) If tort law were allowed

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126. The Oliver court stated: "We have not here a case of a collective bargaining agreement in conflict with a local safety or health regulation; the conflict here is between the federally sanctioned agreement and state policy which seeks specifically to adjust the relationships in the world of commerce." *Id.* at 297. It is generally recognized the states have the power to legislate substantive health and safety regulations independent of federal law. See Industrial Welfare Comm'n v. Superior Court, 27 Cal.3d 690, 725-29, 613 P.2d 579, 599-601, 166 Cal. Rptr. 331, 351-52 (1980); New York Cent. R.R. Co. v. Lefkowitz, 46 Misc.2d 68, 92-102, 259 N.Y.S.2d 76, 101-12 (1965).

127. The Oliver Court commented: "To allow the application of the Ohio anti-trust law here would wholly defeat the full realization of the congressional purpose. The application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving, and in the solution of which it imposed no limitations relevant here." 358 U.S. at 295-96. See also State v. Milk Handlers Ass'n, 52 Misc. 2d 658, 276 N.Y.S.2d 803 (1967), holding that the "police power of the State, affecting the health of its inhabitants which is directly related to the price of milk" justified a New York restraint of trade law prohibiting price fixing agreements between milk producers and a drivers union. *Id.* at 663, 276 N.Y.S.2d at 810.


129. Cox, supra note 116, at 1356.

130. It may be argued that the wrongful death statute applied in Helton is a law of general application, not intended to affect bargaining interests. Cox, however, states: "Decisional rules developed as particular application of general tort principles are likewise preempted because application results from weighing the competing interests in a labor dispute." *Id.* By basing the
to function, the practical effect would be to discourage unions from playing any role in the maintenance of a hazard-free workplace.

The intrusion of state law also creates the danger of inconsistent adjudication of the union's duty. A fundamental purpose of the preemption doctrine is to ensure uniformity of decision through the creation of a unified body of federal labor law. State tort law varies in different jurisdictions as to such crucial elements as judicial administration, standards of proof and compensable injuries. In some states, for example, the negligence theory advanced in *Helton* would be barred by the fellow servant rule, which provides that an employer may not bring an action for personal injuries against a co-worker. Some courts have extended this ban to suits against the workers' collective personality, the union. The extent of the union's liability would thus depend on the law of the individual state where the suit is brought—precisely the situation Congress has sought to avoid.

Reduced to their essence, *Helton* and *Dunbar* purport to enforce the union's contractual obligation. The issue then is what law to apply in enforcing the contract. By using state tort law as the means of enforcement, the decisions run afoul of the rule firmly laid down by the Supreme Court in *Local 174, Teamsters v. Lucas Flour Co.*: the enforcement of collective bargaining agreements is to be governed exclusively by uniform federal law. Where the effect of a court's action is to enforce the parties' agreement, all state law, whether contract or tort, must be preempted.

The *Dunbar* court attempted to avoid preemption by dismissing the threat to the federal scheme as "tangential and remote." The contention, however, is based on nothing more than a flawed analogy to Supreme Court precedent. The court relies on a line of cases which have allowed state tort law to function in areas where the state interest is strong and the prohibited conduct bears no relation to the

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union's tort duty on a term in the collective bargaining agreement, *Helton* makes a particular application of a general tort duty that necessarily involves weighing the interests of the union, employer and injured employee.


Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.


133. 369 U.S. 95 (1962).

134. *Id.* at 103.

135. 100 Idaho at 529, 602 P.2d at 27.

136. *See* note 111 *supra* and accompanying text.

137. In reviewing the line of cases cited by *Dunbar*, the Court in *Farmer* commented: "We
collective bargaining agreement. In none of the cases cited by the court does the tort duty attach solely because of a term in the contract.

It is the relation of the union's duty to the contract that undermines Dunbar's facile analogy between a safety duty suit and a negligence action by a member struck by a union automobile.\footnote{138} A union owns and operates property, such as automobiles, subject to normal negligence laws and independent of any contractual obligations.\footnote{139} The safety duty, by contrast, devolves solely from the terms of the contract. Enforcement of that duty necessarily affects the collective bargaining process in a way the suit for negligent driving does not.\footnote{140}

Finally, Dunbar asserts that the traditional state interest in compensating the victims of industrial hazards should not be displaced by federal law.\footnote{141} Again, the court's view is myopic. Neither Helton nor Dunbar presents a situation in which a state court or legislature has chosen to impose on unions a general duty of due care for the working conditions of their members.\footnote{142} Quite to the contrary, by enacting workers' compensation statutes the legislatures have imposed that duty on employers. The state's interest in providing compensation has thus been met through employer liability, which the legislature is free to expand if liability is found to be inadequate. Any duty the union bears is derivative, a product of the collective bargaining agreement. It would be counter-productive for a state court blindly to pursue the goal of added compensation at the cost of frustrating the bargaining process; the end result would be the union's refusal to bargain about workplace health and safety.

In the last analysis, Helton's invocation of tort law can be ex-

\footnote{138} Marshall v. ILWU, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962); Hromek v. Gemeinde, 238 Wis. 204, 298 N.W. 587 (1941).

\footnote{139} The New Jersey Superior Court recognized this distinction in Brooks v. New Jersey Mfrs. Ins. Co., 170 N.J. Super. 20, 405 A.2d 466 (1979). In refusing to apply state law to enforce a union safety duty assumed under contract, the court remarked: "It must be emphasized that we are not concerned in this case with the right of a union member to sue his union for damages unrelated to the collective bargaining agreement." \textit{Id.} at 29, 405 A.2d at 471.

\footnote{140} Nor do Helton and Dunbar purport to create substantive health and safety standards applicable to all workplaces; rather they involve only the question of who will bear responsibility for non-compliance with existing statutory and contractual standards. The cases are thus not within the preemption exception for state regulation of health and safety standards, discussed at note 126 \textit{supra}.
plained by the fear that the union’s duty would otherwise be unenforceable. In expressing that fear, the court overlooks an alternative: the union’s duty, assumed in the collective bargaining agreement, can be analyzed and enforced as a contractual promise. The contract approach should be preferred for reasons of both analytical clarity and labor policy.

3. Enforcing the union duty: a section 301 contract approach

The most remarkable aspect of Helton and Dunbar is the complete absence of contract analysis. By imposing a tort duty, the two courts obviate any inquiry into the parties’ intent. Helton, for example, repeatedly emphasizes that the union’s function in the safety program was couched in imperative language: in delineating the union steward’s role as safety supervisor and expressly disclaiming employer responsibility, the contract appeared to create a mandatory duty. But by refusing to view the duty as a contractual promise, the decision fails to analyze what the parties intended to achieve through such a provision. More specifically, the court never asks what liability the union agreed to assume and for whose benefit the promise was made.

Formally, a collective bargaining agreement is a contract between the union and employer. The typical agreement contains a wide array of union promises, such as the obligation to follow certain grievance procedures or the pledge not to instigate or support work stoppages during the term of the contract. These promises benefit the employer, who can obtain judicial enforcement of the agreement in a suit under section 301 of the LMRA.

The employees governed by the collective bargaining agreement are not parties to the contract. It therefore must follow that a union’s contractual promises normally do not run to the employees it represents. A small number of cases have held that individual employees may bring suit under section 301 to enforce a union’s contractual obli-

143. Section 301 of the LMRA, 29 U.S.C. § 185 (1976), provides for “suits for violation of contract between an employer and a labor organization....” (emphasis added).

144. See note 19 supra and accompanying text.

145. See Feller, supra note 91, at 663-64 nn.1-4. Feller notes that the employee’s relationship to the collective bargaining agreement defies analysis in terms of conventional contract doctrine. Instead, he argues that the collective bargaining agreement establishes two different legal relationships: a contract between the union and employer, and a code of workplace rules governing the employees’ conduct. Id. at 718-36. Yet the Supreme Court has held that, in order to protect the rights of individuals within the collective bargaining scheme, an employee may bring a section 301 suit to enforce the employer’s contractual promises. The employee’s section 301 suit is subject only to the procedural requirements of Vaca. See note 41 supra. It does not follow, however, that an individual employee should have a correlative right to enforce the union’s contractual promises, which are made for the benefit of the employer. In the normal bargaining relationship, an employer does not negotiate contractual promises on behalf of its employees; the union, not the employer, is the bargaining agent of the workers.
UNION LIABILITY

146. However, these situations have been rare, limited to instances where the union's contractual promise was clearly intended to confer a benefit on the employees, and where employers would be unlikely to enforce the promise themselves. 147

These formal aspects of collective bargaining agreements thus suggest an alternative analysis: absent clear intent to create a duty enforceable by the employees, a union's assumption of a role in the enforcement of health and safety standards should be viewed as a promise to the employer. In many cases, where the contract provides for an advisory union role, the promise will be legally unenforceable; no damages will flow from the union's nonperformance. Where the parties have sought to create a mandatory duty, however, the union's failure to discharge its function should constitute a breach of contract, actionable by the employer under section 301.

The circumstances in Helton illustrate this approach. Under the contract, the union steward bore exclusive responsibility for compliance with work rules, including the regulations concerning power lines. The same provision relieved the employer of all responsibility for the steward's performance of that duty. It thus appears that the

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146. Buzzard v. Local Lodge 1040, IAM, 480 F.2d 35 (9th Cir. 1973). As the court in Buzzard concluded: “While we have been unable to find any case for the proposition that § 301 will support a suit by a union member against his union for redress from union refusal to honor rights conferred an employees by Union promises in the collective bargaining agreement, we are convinced that § 301 does confer such jurisdiction.” (emphasis in original). To date, only Ransdell v. IAM, 443 F. Supp. 936 (E.D. Wis. 1978) seems to have followed this reasoning.

147. In both Buzzard and Ransdell the union refused to honor “no reprisal” agreements negotiated in the wake of work stoppages. The Ransdell court commented: “It is difficult, if not impossible, to comprehend on whose behalf the agreement was entered into, if not that of the Northwest Airlines employees represented by the IAMAW who crossed the picket lines in violation of the union order.” 443 F. Supp. at 939. In these unique circumstances it is plausible that the union's promise was exacted for the benefit of the employees; the employer had incentive to negotiate protection for those employees who had sided with it during the strike. In the health and safety area, however, the employer cannot “create” worker protections; it can only contract with the union to shift some of its preexisting responsibility, under statute and the common law, to provide a hazard-free workplace.

148. In interpreting the contract, the court would be free to consult parol evidence of bargaining history to determine the parties' intent.

149. Since the responsibility for working conditions under public law lies exclusively with the employer, there should be a general presumption that a union's role is advisory. To rebut the presumption, the courts should require unambiguous evidence of the union's intent to assume a legally enforceable duty. In an analogous situation, the court in Penn Packing Co. v. Meat Cutters Local 195, 497 F.2d 888 (3d Cir. 1974), refused to find that a union assumed “absolute” liability for wildcat strikes, beyond that normally imposed by the LMRA. The assumption of such an extra-legal liability, the court found, would require “very explicit language in the contract” evincing the union's intention to “shoulder such a large risk. . . .” Id. at 890. A union's liability for health and safety hazards, similarly beyond that imposed by law, should also require a clear manifestation of intent. The explicit disclaimer of employer responsibility contained in the Helton agreement would seem to satisfy this standard.

150. 584 S.W.2d at 316.

151. Id.
parties intended to effect a contractual delegation of responsibility; the union agreed to take over part of the employer's general duty, under statute and the common law, to maintain a hazard-free workplace. When the steward failed to shut off the power lines in the area where Helton was working, the steward breached a contractual duty owed to the employer.

The primary significance of the contract approach is its impact on the issue of damages. Under this view, the union's failure to enforce the work standards gives the employer a remedy in contract under section 301. The measure of damages is the employer's liability, determined by workers' compensation. The breach of contract action indemnifies the employer or his insurer for compensation paid under statute to the injured worker. The effect, in short, is to extend the liability limitations of workers' compensation to a union which assumes an enforcement duty under contract.

In addition to its analytical neatness, the contract approach finds ample support in labor law policy. As noted in *House* and *Bryant*, if unions are exposed to unlimited tort liability, they will simply refuse to negotiate about working conditions. If, however, the union is only required to indemnify the employer, it may rationally choose to assume a specific enforcement function and the liability it entails. In a process of free negotiation, the employer could induce the union to assume certain responsibilities by granting concessions on other bargaining issues. Indeed, a union might be willing to assume limited liability without consideration, simply to effectuate a policy of worker control over health and safety conditions. The imposition of tort liability would put too high a price tag on that control.

Under the contract approach, the employee loses the right to sue the union, whether in tort or contract. But the injured worker's position is no worse than it would have been had his union never bargained about health and safety: the full statutory benefits under workers' compensation remain due. There is no rational justification for providing a windfall recovery to the worker simply because the union has opted to play a role in the health and safety program.

152. Under workers' compensation statutes an employer commonly has subrogation rights against third party tortfeasors who are responsible for industrial hazards. The employer may proceed against the third party to recover statutory benefits paid to injured workers. *House* v. *Mine Safety Appliances Co.*, 417 F. Supp. at 946. *See* Creighton Note, *supra* note 91, at 961 n.59. A section 301 suit against the union would serve a similar function, but the basis for indemnity would be contract not tort.

153. *See* note 89 *supra* and accompanying text.

154. If both the union and employer are subject to the same liability, a particular enforcement function can be allocated through collective bargaining to the party best able to perform it. Where the union bears more extensive liability than the employer for the performance of the same function, however, such rational allocation would be impossible.
Finally, this approach fits harmoniously within the conceptual framework of union regulation. As noted at the outset, federal labor law creates a neutral context for collective bargaining, the enforcement of freely negotiated contractual promises lies at the heart of the labor system. The analysis of those promises must focus on the intent of the contracting parties.

The intrusion of tort law countenanced by Helton and Dunbar imposes on unions a legal duty that lies outside of the contract. As demonstrated in Section II, courts historically have been reluctant to saddle unions with legal obligations toward their members. Where specific duties have been carved out—such as the DFR or the prohibition of discriminatory denial of membership rights in the James case—they have been the product of sound policy analysis.

Policy does not support the tort duty found in Helton and Dunbar. Clearly, the union is a quasi-public institution vis-à-vis its members. Nevertheless, it is axiomatic that the law may not saddle an institution with duties that are beyond its control. Though industrial health and safety, like racial equality in Steele and James, is properly favored by public policy, the union cannot control the workplace as it does its membership rolls. Unions do not manage production; their ability to affect working conditions comes only by contract from the employer. If unions are to participate in maintaining hazard-free workplaces, they must be allowed to determine their own role, and the scope of their liability, through collective bargaining.

IV
Conclusion

The law of union liability for health and safety hazards is in a transitional state. Federal courts have correctly held that a union's negligent failure to enforce health and safety standards will not violate the DFR. The trend in DFR doctrine toward the imposition of a standard of due care should be limited to routine representation functions, such as grievance handling. A union has neither absolute power to control working conditions nor resources to compensate injured workers. It should incur liability only when its actions respecting health and safety matters are discriminatory or in bad faith.

Helton and Dunbar, granting employees a right of action under state law, were incorrectly decided. A union bears no general responsibility, under state or federal law, for maintaining safe working conditions. Any duty it has must therefore devolve from the terms of the

155. See notes 16-17 supra and accompanying text.
156. See notes 31-33 supra and accompanying text.
157. See notes 38-39 supra and accompanying text.
collective bargaining agreement. The union's *contractual* assumption of a role in the health and safety program should not be held to confer a state law cause of action on employees. The preemption doctrine commands that collectively bargained obligations be interpreted and enforced under federal labor law. The intrusion of state tort law can only destroy the collective bargaining process and discourage unions from negotiating about health and safety.

When the union assumes a mandatory enforcement role under the collective bargaining agreement, it should be viewed as a contractual promise to the employer. Such a contractual provision shifts part of the employer's responsibility for working conditions to the union. The union's failure to perform its contractual obligation should be actionable exclusively by the employer in a breach of contract suit under section 301 of the LMRA. In no case should the union's monetary liability be greater than that of the employer.

The courts in *Helton* and *Dunbar* were motivated by the laudable goal of compensating injured workers. But the opinions show a marked insensitivity to the danger of casting workers and their unions as adversaries. The vision of the union as a "grown up" institution must be kept in perspective. A union is not a commercial enterprise. It does not control the means of production or the quality of working conditions, nor is it an effective cost-spreader. State legislatures, in enacting workers' compensation statutes, have chosen to socialize the costs of industrial hazards through employer liability. A union, by contract, may choose to assume part of that liability. If, however, the limits on workers' compensation work injustice on injured employees, the limits themselves are the problem. Any attempt to impose unlimited tort liability on unions can only drive a wedge between organized employees.