Trade Union Power and the Law

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CONSIDER a typical business cartel. For example a group of widget manufacturers agree to fix the price of widgets. In the United States this would be an unlawful, indeed criminal, act. In some other countries it would be lawful. In yet others it would be lawful or unlawful according to particular features of the agreement or of the widget industry.

Notice that so far in this example the widget manufacturers have done nothing other than fix prices. They have not required all widget manufacturers to join their group, though they may well have invited them to do so; still less have they used violence or the threat of it to force dissident manufacturers into their group. They may decide not to make the agreement at all unless all the manufacturers join the group, but if they do decide to proceed with it without one hundred percent membership, they must put up peacefully, with whatever degree of dissidence there is. Similarly, if one of the parties breaks the agreement they must put up with the situation peacefully, though in some circumstances in some jurisdictions they may be able to go to court to obtain an injunction against the breach or damages for it. Of course peaceful behavior does not exclude the use of market power to achieve one's ends, except when the end, in this case the concerted fixing of prices, is unlawful. In those jurisdictions where it is lawful, the cartellists must rely solely upon their peaceful market power, and the issue as between them and any dissidents will depend upon the relative strength of their respective market powers.

If the buyers of widgets seek to elude the group's grip by finding new sources of widget supply, or by resorting to substitutes for widgets, the cartellists will not use violence to prevent them from doing so. They may seek to tie up alternative supplies or substitutes so that the buyers will not succeed in obtaining them, but the means for so doing will be peaceful. If, having agreed to sell widgets at, say, $100 each, they decide at a later date to charge $110, they will terminate the first agreement by whatever notice is required and seek a new sales agreement with the buyers. They will do whatever they can peacefully to induce the buyers to buy from them and them only, but they will not claim that once a buyer has made his first purchase agreement with them, he is tied to them as long as he remains in business.[1] It follows that if, in the first agreement, incidental benefits accrue to them in addition to the $100, they may seek to include them in a new agreement with the $110 price, but they will not claim that these incidental benefits are sacrosanct and therefore accrue to them while there is no agreement between them and the buyers. Here again the outcome will depend upon the relative strength of the peaceful market powers of the sellers and buyers.

Suppose that trade unions were cartels of exactly this pattern. What should then be their legal status? In the United States, as we have noted, business cartels are unlawful. There is much to be said for such a position—indeed it is cogently arguable that this part of American antitrust law, §1 of the Sherman Act, is the only part of the whole corpus of that law (Sherman, Clayton, FTC Act, etc.) for which a fair case can be made. But there is also much to be said against that posi-

tion. In actual operation the record of Sherman, §1 has at best been mixed. In fact it is cogently arguable that even if it is assumed that cartels are inherently undesirable, anti-cartel laws are unnecessary because (a) all known persistently harmful cartels (and other limitations to competition) are the product of State blessings, protection and support, and (b) in the absence of such State favor private cartels have a natural tendency to collapse. Hence there is a strong case for Professor Hayek's view of many years that all that is necessary and desirable is that cartel agreements should not be enforceable at law.

In the early years of American antitrust the law was held to apply to unions as well as to business cartels, but not with complete certainty or clarity. In 1914 the Clayton Act exempted unions from the main thrust of anti-trust, and in 1932 the Norris-La Guardia Act locked, barred and bolted the gates around them against anti-trust attack, except where they may be a collusive party to a business cartel. The reason for the exemption was the false assertion that labor was not an article of commerce, and later the law turned to strong positive support and privilege for unions in the Wagner Act, 1935, only partially redressed by the Taft-Hartley Act, 1947, and the Landrum-Griffin Act, 1959. In other principal jurisdictions it is taken for granted that unions are not to be treated as similar to business cartels, mainly on the baseless view that without them the workers would be at the mercy of capitalist power.

We may treat the prevailing reasons for the exemption of unions from anti-trust with the contempt which they deserve, and still take the view that if unions were in fact of the same character as the peaceful business cartel described above, laws against them would be undesirable. If the Hayekian principle of the simple legal unenforceability of cartel agreements is right for business, it is equally right for labor. Of course the absence of legal action against unions would have to be matched by the equal absence of State or legal action in their favor.

The case for Hayekian legal neutrality would possibly be even stronger in relation to peaceful labor cartels than in relation to similar business cartels. For the likelihood is that most unions of such a character would have a checkered and ineffective career. They would negotiate with employers for their members, but every time they withdrew their labor in a dispute, their members would dismiss themselves from their jobs. They would be entitled to seek one hundred percent membership (*i.e.* a closed shop) by peaceful agreement, but employers would be equally entitled to make union membership a bar to employment (*i.e.* the "yellow-dog" contract in American parlance). They would take no action except peaceful persuasion (not persuasion under threat of violence) against competing non-members ("scabs" or "blacklegs"). In these circumstances probably only unions of small numbers of men possessing exceptional and hard to substitute skills would be likely to be effective—and this only in the short or medium term, for in the long term no skill is essential, and the very effectiveness of the unions would stimulate devices to dispense with their members' labor. Possibly also coal miners' unions might be effective, because miners tend to live in isolated tight-knit communities and because there are numerous occasions for disputes in their industry (*cf.* the persistence of effective collective action by the Asturian miners during General Franco's rule in Spain). However, even this is doubtful, for despite all its legal privileges and its constant resort to cruel violence, the United Mine-Workers union has been unable to kill off the non-union mines in the United States.

Obviously unions in our world are not cartels of the peaceful business kind. What then are they? Before this question is answered, it is well to consider certain

widespread beliefs which sustain the view that the unions familiar to us are worthy and necessary bodies.

First, unions are said to rest upon the fundamental right of association of free men in a free society. We need spend little time on this. Obviously the right of association depends upon the association's purposes or practices. Associations whose acts or purposes are unlawful are called conspiracies and are proscribed. If it is judged that the purposes or practices of modern unions, though now lawful, ought to be made unlawful, they cannot be saved by appeal to a fundamental right of association.

Secondly, we are constantly told that the most characteristic and powerful instrument of union policy, namely the strike, is an expression of the fundamental right of free men to withdraw their labor. The truth is otherwise. When free men withdraw their labor, they also withdraw from their jobs and all incidents of their jobs. Strikers withdraw their service but do not withdraw from their jobs. On the contrary they claim that the jobs belong to them and no one else, even though they have withdrawn the services required by the jobs; and they further claim that their entitlement to pension rights and other fringe benefits is unaffected. In effect strikers claim that employers have the status of serfs, being tied to their employees as mediaeval serfs were tied to the land and its owners. They also in effect claim that rights are determined by status, not by contract, and that their status is superior to that of other workers who may wish to do the work which they refuse to do. Thus in every respect the strike is a challenge to fundamental principles of law in a free society.

Thirdly, unions claim a right in justice to require membership as a condition of employment (the closed shop), or at least payment by non-members of dues equal to those levied upon members (the agency shop), because otherwise non-members would get the benefit of union action without paying for it (the "free rider" problem). This contention has little substance. In the first place workers of above average quality would get higher wages were it not for the uniformities imposed by union action. In the second place union wage rates are often no more than what would be established in a free market. In the third place a non-member might claim with abundant reason that beyond the short term the effect of union power is to reduce wages by way of its deterrent to investment and enterprise.

The unions' own claims for a rationale for their actions are easily punctured. What the unions do not declare to the world is the most important feature of their operations, namely violence or the threat of it. The threat is much more important than the actuality for the threat operates at all times whereas the actuality displays itself only sporadically. It is a rare union, and usually only one which is also in some measure a professional association adhering to professional standards of behavior, which does not rely on the threat of violence. This has been the case throughout union history. In this matter the difference between the moderate, responsible, or business-type of union and the revolutionary type is only a matter of degree. All known picketing has some element of the threat of violence in it. All sit-ins, however apparently peaceful, are violent seizures of employers' property. All signals of displeasure with individual members of shop stewards or other union agents or officials are read by those members as carrying some threat of violence, however minimal.

These observations on union claims confirm and emphasize the fact that unions differ fundamentally from the type of business cartel described above. Yet if they are envisaged simply as cartels with illicit or undesirable modes of operation, an essential feature of their character is missed. The truth is that they are power structures, the maintenance and expansion of whose power becomes more and

more their purpose, irrespective of benefit or detriment to their members. By way of the promise of benefit to their members they first climb on the worker's back, and from that coign of vantage they seek to climb upon the back of the whole society. Thus they become a state within the state, with a claim of right to the use of force upon the citizens which ought to be the monopoly of the state, if state there is to be. Just as the citizen finds himself born subject to the rule of a state, without choice except by way of emigration, so the modern worker often finds himself willy-nilly in large measure subject to the power of some union if he wishes to earn a living. Accordingly, unless checked by law or popular resistance, the purpose of union leadership becomes less and less the rendering of service to members and more and more domination over them. The members become foot-soldiers, who are largely conscripted and must obey their officers, in an army which is used for aggression against the whole of society. This is why unions tend conspicuously to be undemocratic bodies, even in those cases where there are formally democratic procedures, and even though theoretically every conscript in the union army may carry a marshal's baton in his knapsack.[2]

It follows that modern unionism in its typical form is a challenge to the authority of the state, and in particular an affront to the rule of law upon which the authority of the liberal state should rest. Hence, if unions were bound by their nature to assume the predominant character of modern unionism, the proper role of law would be to proscribe them. Whether their proscription could in practice be enforced is a separate question.

However, unless it is judged desirable to proscribe cartels of all kinds—a view which has been rejected above—it is unnecessary to have recourse to proscription. The purpose of law should then be to limit the activities of unions to those which would be pursued by completely peaceful cartels which relied solely on market power.

Here we must admit a difficulty. Our widget cartel would not be recognized in law at all, even though tolerated. It could own no property, nor could it sue or be sued as a corporate body. In the union case this would not be satisfactory, since it would be desirable to enable unions to hold property and to sue and be sued in contract and tort. The solution is to allow unions a legal corporate existence, but to make membership agreements unenforceable at law, and to subject union activities to such rules as would force them to be peaceful. The essentials of law and policy would then comprehend at least the following.

1. The law of tort should apply to unions and their members equally with all other bodies and persons. The exemption from liability in tort, which was given to British unions in 1906 and which has since then been extended, is a flagrant breach of the rule of law, and has been a major cause of the lawless union power with which Britain is plagued.

2. The law of contract should apply to unions and their members equally with all other bodies and persons (save that membership agreements should be unenforceable at law.) Contracts between employers and unions should be fully enforceable against employers, unions, and individual union members by way of injunctions and awards of damages. If a union contract is broken by individual members without the authority or connivance of the union, the employer should have a right of action not only against those members but also against the union unless its rules provide for the expulsion of members in breach of its contracts and the employer has prior notice of such rules.

3. All workers should be free in law to join or not to join a union, except that in certain specified cases such as, for example the police, prison warders, firemen, public health personnel, higher civil ser-

vants, and possibly others, it may be a justifiable act of public prudence to be decided on its merits in each case, to forbid membership in a union. It goes without saying that union membership should be forbidden to personnel in the armed forces.

4. All employers should be free in law to hire union or non-union workers, and should have the right in law to make non-membership of a union a condition of employment (the "yellow-dog" contract).

5. No union should have a right in law to compel non-members to be represented by it (whether on the ground of a majority vote or otherwise), or to pay the equivalent of union dues, or any dues, to it. Nor should any union or its members have a right in law to compel an employer to administer the payment of dues by check-off.

6. No employer should be required in law to "negotiate in good faith" according to the construction of those words established in United States law, or according to the administration of employer behavior imposed by the American National Labor Relations Board. An employer should have the right in law to negotiate with a union or with employees according to the normal law of contract.

7. The possession or non-possession of a coercive right in law should not preclude free agreements granting such a right or derogating from it, except where such agreements would be of a criminal nature or contrary to public policy. Hence a union might properly but peacefully seek one hundred percent membership, or one hundred percent dues payment, or dues payment by check-off, in any plant or company. The question arises whether an employer should be free to agree to make union membership, or the payment of dues, or the check-off a condition of employment. Clearly governmental employers should not, for such agreements would deprive the workers of the right to be free from coercion by government except for the protection of other persons and their property. Private employers also should not, but for a different reason. If an employer may make non-membership of a union a condition of employment, why not also membership? The answer is that since employer-union agreements would be enforceable at law, it would enable union membership or dues payment to be enforceable at law by a side door.

8. A union or any person or persons should have the right in law, subject to contract, to call for or to instigate a concerted withdrawal of labor from any employer (except where union membership is forbidden in law), but such withdrawal should take effect as self-dismissal from the jobs concerned, unless the employer freely agrees not to treat it as such. Similarly an employer should have the right in law, subject to contract, to lock out any or all of his employees at will. In either case, if the withdrawal of labor or the lockout is in breach of an agreement, the normal consequences for breach of contract by way of damages or otherwise should ensue (see paragraph 2 above). If the instigator of a withdrawal of labor thereby produces a breach of contract, he should be liable to pay damages accordingly.

9. Sympathetic withdrawals of labor and secondary boycotts should, subject to contract, be lawful. Correspondingly, employers should have the right, subject to contract, to join together in defense against any union or labor action, and to maintain and exchange worker black-lists (subject to the law of libel and slander). In present conditions of union legal privilege and widespread union violence, the sympathetic strike and the secondary boycott are intolerable invasions into the rights of others, and ought to be illegal; but with the strict limitations on union power suggested in this paper, there would be no need to proscribe these practices.

10. Compulsory arbitration and compulsory cooling-off periods should have no place in labor law. Such matters could of course be provided in free agreements.

11. The concept of unfair dismissal should have no place in labor law. Subject to contract, an employer should have the right to dismiss an employee without cause or compensation.

12. All violence or the threat thereof by any party in industrial relations (not merely in cases of industrial disputes) should be singled out as a separate species of criminal offense and subject to severe penalties. Since in practice all picketing embodies an element of the threat of violence (even though in principle entirely peaceful picketing is conceivable), all picketing should be defined as a riotous assembly (even if only one person is picketing) and made a criminal offense. Sit-ins should be treated according to the normal law of trespass and of conspiracy where no physical damage is done, but according to the law of factory-breaking or burglary, plus conspiracy, where damage ensues.

13. Unions should have the right to set up a fund for political purposes apart from their general funds, but no member should be compelled to contribute to a political fund, and contributions thereto should be by "contracting-in," not "contracting-out." Where, as in the United States, there are general laws governing contributions to political candidates, they should apply to payments and services provided by unions equally with those provided by other bodies or persons.

14. Social welfare payments to the families of workers who have withdrawn their labor should be governed by the normal law relating to cases of self-dismissal from employment, save that where the withdrawal of labor is done with the authority or connivance of a union, any social welfare payments should be chargeable against and recoverable from union funds. Workers who are locked out by an employer should qualify for social welfare payments according to the normal law relating to involuntary unemployment.

15. The constitutions of unions and employees' associations should be subject to a body of law comparable to the law of business corporations, with a view to ensuring proper accountability for the levying of dues, the expenditure of funds, the use of union or association property, the election of officers, the balloting for withdrawal of labor or lock-outs, and other matters of internal government.

16. No plans for profit-sharing, or co-partnership, or co-determination should be imposed upon employers by law, but employers, their workers, and/or their workers' unions, should be free to make such agreements in relation thereto as they may wish.

Most, or perhaps all, of the above suggestions are likely nowadays to be described as "politically impossible." The cry of "political impossibility" is the bane of good government and good social arrangements. To know what ought to be done, whether it is for the time being politically impossible or not, is an indispensable foundation for the solution of political or social problems.

[1]Of course they may seek to tie him by special rebates which he will lose if he buys from other suppliers, but this will be a peaceful arrangement.

[2]This view may be challenged on the ground that, especially in Britain, wildcat strikes are common, thus demonstrating that union members are not subordinate to their leaders. This is a misunderstanding. In the first place, the wildcat strike itself rests upon the power of the union. Suppose that an employer sought to apply punitive measures against wildcat strikers. The union would rush to their defense, and the strikers could count on this. In the second place, if wildcat strikes erupt frequently, it only means that authority in the union army is dispersed. The individual member then fears the local non-commissioned officer (*e.g.* the British shop steward) as much or more than the commissioned officers. He remains effectively an obedient conscripted foot soldier.