Toward a Free-Market Union Law

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F. A. Hayek and W. H. Hutt wrote extensively about the malign economic and social effects of the special privileges and immunities granted by governments to labor unions, but they wrote much less about what a free-market unionism might look like. They argued that all legislation that has conferred coercive powers on unions should be repealed, but they did not propose any specific free-market union legislation to take its place. Perhaps they thought that if all offending legislation were repealed there would be no need for any union-specific legislation. The common law of property, contract, and tort would suffice. Nevertheless, it is difficult in American politics to replace something with nothing. Therefore, I think it is useful, albeit constructivist, to propose a free-market alternative to the Norris-LaGuardia Act of 1932 (NLA) and the National Labor Relations Act of 1935 as amended in 1947 (NLRA). Perhaps the chief value of such a proposal is to make explicit what the ordinary law of property, contract and tort implies for the labor market and the role of unions therein. New Zealand's 1991 Employment Contracts Act (ECA) is a good, but imperfect, guide in this endeavor.

A free market is one in which interactions between people take place in the context of voluntary exchange. The principal role for government in a free market is to enforce the rules of voluntary exchange. In what follows, I will set out my formulation of the criteria for voluntary exchange in any market, including the labor market,

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and consider what these criteria imply for strikes and "yellow-dog" (union-free) contracts. Next, I will show how the NLA and the NLRA violate those criteria. Then I will briefly examine what Hayek and Hutt had to say about voluntary unionism. Finally, I will examine some of the provisions of the ECA as possible components of an American free-market union law. I have examined the usefulness of the ECA as a guide to building voluntary unionism elsewhere (Baird 2001). Here I do so in a bit more depth.

The Criteria for Voluntary Exchange

An exchange is a reciprocal giving and receiving of goods and services among two or more people. An exchange is voluntary if four criteria are met (Baird 1988):

1. *Entitlement*. All parties to the exchange must either own that which they are offering to exchange, or they must be acting as the authorized agent of the owner(s). There is no such thing as voluntary exchange of stolen property.
2. *Consent*. All parties to the exchange must (a) agree to enter into the exchange relationship (i.e., to bargain with each other), and (b) accept the terms at which any actual exchange takes place (i.e., the final outcome of the bargaining). No forced bargaining can result in a voluntary exchange contract.
3. *Escape*. All parties to the exchange must be able to turn down any offers they do not like and walk away without losing anything to which they are entitled. This requirement is really implicit in the consent criterion, but I state it as a separate criterion for emphasis.
4. *No misrepresentation*. No party to the exchange may defraud any other parties (i.e., no one can tell a lie). This stipulation leaves room for honest error. I can make any claim that I believe to be true when I make it, even if it turns out later to be incorrect. Moreover, this criterion does not require the parties to tell all they know. It merely proscribes any person saying something he knows to be false.

Hayek (1960, 1973) often asserted that the primary responsibility of government in a free society is to enforce the "universal rules of just conduct." I suggest that those rules are nothing more or less than the rules of voluntary exchange. In the NLA and the NLRA, the U.S. government not only failed to enforce those rules, it discarded them.

The Voluntary Exchange Right to Strike

If a strike is defined as a collective withholding of labor services by workers who find the terms and conditions of employment offered by an employer to be unacceptable, then there is a legitimate right to strike. It is legitimate so long as no one's voluntary exchange rights are violated. In the absence of an extant employment contract with a worker, an employer has no entitlement to the worker's labor services. Similarly, in the absence of an extant contract, any individual worker has a right to withhold his labor from an employer for whom he does not consent to work.[1] He is free to walk away without losing anything to which he is entitled. Each worker is entitled to his own labor services, not the job. If he chooses to withhold his labor from his employer, the employer is free to sever the employment relationship. The employer owns the job in the sense that he provides the complementary inputs with which labor services of willing workers are mixed in the production process.

Now, if every worker has a right to withhold his own labor services, each of them can choose to exercise the right simultaneously. But that is the end of it. Each worker can withhold his own services from the strike target; but no worker, or any group of like-minded workers, has the right to withhold, or interfere with, the services of any other worker who chooses to accept the terms of employment offered by the strike target. Nor does any worker, or group of like-minded workers, have the right to withhold or interfere with the strike target's suppliers and customers who choose to continue to do business with him. Informational picketing, not on company property, may be permitted; but since even "peaceful" picketing by large numbers is inherently intimidating, the number of picketers must be strictly limited and their actions must be strictly circumscribed.

When unions claim that there is a right to strike, they mean something very different from the voluntary exchange right to strike. They assert that union leaders, or union members by majority vote, can force workers who do not want to strike to withhold their labor. In addition, they claim the right to prevent employers from hiring replacement workers during strikes and to prevent suppliers and cus-

[1]Even when there is an existing contract, a worker is free to walk away from the job. All the employer can do is sue the worker for breach of contract and let other employers know that the worker is unreliable.

tomers from continuing to do business with struck firms. In other words, they claim the right to prevent people who do not support a strike from exercising their voluntary exchange rights with strike targets. Unions exercise these extraordinary rights claims through picket line intimidation and violence.[2] Current law permits mass picketing of a strike target by striking employees together with huge numbers of people who have no relationship to the target. Such mass picketing is designed to intimidate replacement workers, suppliers, and customers who seek to exercise their voluntary exchange rights.

Yellow-Dog Contracts

A yellow-dog contract is an agreement between an employer and a worker that, as a condition of obtaining and continuing employment, the worker will abstain from any involvement with a labor union (i.e., the worker will remain union-free). Unions, of course, abhor such hiring contracts. They coined the term "yellow-dog" to imply that any worker who entered into such an agreement was cowardly and a traitor to the working class. A more accurate label for such agreements is "union-free" contracts. The NLA made such agreements unenforceable in 1932. Section 8(a)3 of the NLRA made them illegal in 1935. Nevertheless, union-free contracts can be voluntary exchange contracts, and as such they are legitimate exercises of individual entitlements.[3]

Under the rules of voluntary exchange, an employer can make any nonfraudulent job offer to any worker who is willing to listen. A job offer consists of terms of compensation and a job description. The job description includes time, place, and manner rules in accordance with which the worker works. These rules include what must be done and what must not be done. A rule that requires a worker to remain union-free is merely part of the job description. So long as there is no misrepresentation, and the worker is free to accept or reject the job offer, no one's voluntary exchange rights are violated. A worker may count the union-free requirement as a negative, but if he accepts the job offer it must be that he is willing to trade that neg-

[2]Thieblot, Haggard, and Northrup (1999) provide a thorough documentation of such intimidation and violence and the disgraceful failure of government to do anything about it.

[3]As we will see below, union-only hiring (closed shops) can also be consistent with the rules of voluntary exchange.

ative off against other components of the job offer he finds attractive. In fact, as revealed by the record in *Hitchman Coal and Coke Co. v. Mitchell* (245 U.S. 229 [1917]), sometimes employees themselves asked their employers for union-free agreements as a way of insulating themselves from union harassment. In its decision the Court wrote, "The employer is as free to make non-membership in a union a condition of employment, as the workingman is free to join the union, and . . . this is a part of the constitutional rights of personal liberty and private property" (at 251). This was when the Court still enforced the understanding of rights as enunciated in the *Declaration of Independence*—that rights are antecedent to government, and it is the duty of government to enforce those rights. The NLA and the NLRA trample on those rights.

The Norris-LaGuardia Act

In *American Steel Foundries v. Tri-City Central Trades Council* (257 U.S. 184 [1921]), the Court held that (a) mass picketing, even in primary strikes, and even if peaceful, was inherently so intimidating that pickets must be limited to one picket per entrance; (b) pickets had to be actual employees on strike, they could not be strangers sent from union headquarters or anywhere else; and (c) the right to conduct a business is a property right, entitled to the same protection against trespass as any other property right. This decision was made on statutory grounds (interpreting the 1914 Clayton Act) so Congress could reverse it simply by adopting another statute or amending an existing one. Unions tried to get Congress do so throughout the 1920s. They were not successful until 1932 when Herbert Hoover, trying frantically and fecklessly to do something about the beginning of the Great Depression, made yet another colossal blunder by signing the NLA.

The NLA made five significant changes in the law as applied to labor unions. First, it made union-free (yellow-dog) contracts unenforceable in federal courts. The voluntary exchange right of employers to enter into binding contracts with willing workers who promised to refrain from unionization was expunged. Workers who wanted to escape harassment from union organizers lost one of the most important means by which they could do so.

Second, the NLA prohibited federal judges from issuing any injunctions to interrupt strikes, even violent strikes. Section 7(c) of the

NLA says that an injunction cannot be issued unless the court has taken testimony, with witnesses subject to cross examination, and has found "that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief." In other words, the NLA forbids courts to stop aggression unless the damage to the victim is larger than the damage suffered by the aggressor as a result of the order to stop the aggression. The most basic function of government in a free society is to protect people against trespass, aggression, and violence, yet to this day the Section 7(c) is the law of the land.

Third, the NLA gave blanket immunity to labor unions against prosecution under the antitrust laws. Nothing done by labor unions, even if violence were involved, could be enjoined as illegal combinations in restraint of trade. Under present law, unions are legal combinations in restraint of trade. Strike targets, their suppliers, their customers, and replacement workers are restrained from exercising their voluntary exchange rights.

Antitrust laws can be challenged on grounds of voluntary exchange. Armentano (1982) has demonstrated that, in practice, antitrust laws are usually used to protect particular competitors from competition rather than to protect competition itself. In a free society neither employers nor unions would be subject to antitrust regulation. As Kirzner (1973) argues, free-market monopolies, ones not supported by government, are always fleeting. When an entrepreneur creates something new—for example, a new product, a new production technique, a new marketing strategy, a new organizational architecture, or a new mode of labor representation —he will naturally be a monopolist, but only for a while. If an innovation is successful it will soon be imitated and the innovator's monopoly will gradually erode. If it is unsuccessful it will not be imitated, and it will collapse. Government is the only institution that can erect durable barriers to entry.

Fourth, the NLA gave legal standing to strangers in labor disputes. Thus, a company with 150 employees on strike and 700 employees that wish to continue to work can be forcibly shut down by 5,000 picketers sent from union headquarters.[4] So much for voluntary exchange rules regarding property rights, trespass, and contract.

[4]This happens all the time. For example, see Baird (1992).

Fifth, the NLA insulated labor unions as organizations from any prosecution for any acts committed by any individual members and officers. If picketers murder or maim a replacement worker who crosses a picket line, the on-strike union cannot be blamed. If the perpetrators are apprehended by local officials and convicted by local courts, no punishment may be imposed on the union. In other words, the common-law doctrine of *respondeat superior*, or vicarious responsibility, was made inapplicable to unions.

The consequences of the NLA are illustrated in *Apex Hosiery Co. v. Leader* (310 U.S. 409 [1940]). Apex hired both union workers and union-free workers on a nondiscriminating basis. The union wanted to capture all 2,500 employees. Eight employees who were union members, joined by members of the same union who were employed by other firms, undertook a sit-down strike. They occupied the Apex plant, prevented willing employees from working, and proceeded to destroy machinery on the shop floor. The company applied for an injunction against the union on Sherman Act grounds of a violent combination in restraint of trade including trespass on private property. The U.S. Supreme Court decided against Apex by claiming that the NLA protected unions from any antitrust prosecution. In the words of the Court, "Restraints not in the [Sherman] Act when achieved by peaceful means are not brought within its sweep merely because, without other differences, they are attended by violence" (at 513).

More recently, in *United States v. Enmons* (410 U.S. 396 [1973]) the Court even refused to apply the terms of the Hobbes Act—a federal anti-extortion statute—to overt union violence against persons and property during a strike against a public utility company. In that decision the Court opined that the Hobbes Act did not prohibit acts of violence committed by unionists striking to obtain "legitimate union objectives" (Thieblot, Haggard, and Northrup 1999: 340). In a free society government is suppose to have a monopoly on the legal use of force, and it is supposed to use that force only to protect the voluntary exchange rights of everyone. In this respect, the United States is not a free society.

The National Labor Relations Act

The NLRA violates the rules of voluntary exchange in several ways. Among them are exclusive representation and its concomitant

union security, mandatory good-faith bargaining, and its proscription of company unions.

Exclusive Representation

Section 9(a) of the NLRA imposes "exclusive representation" (monopoly bargaining) on employees and employers. If, in a certification election, a majority of workers in a bargaining unit vote to be represented by Union A, then all the workers who were eligible to vote must submit to those representation services. Union A, by force of law, represents the workers who voted for it; but it also represents the workers who voted for another union, the workers who voted to remain union-free, and the workers who did not vote. It is a winner-take-all election rule. Individuals are prohibited even from representing themselves on terms and conditions of employment and other matters that come under "the scope of collective bargaining." Employers may not deal directly with individual workers. Individual workers have no voice. Only a certified union may speak.

Unionists justify exclusive representation by analogy to elections of politicians. In a congressional election, the winning candidate is the exclusive representative of all voters in the district. Those who voted against her and those who didn't vote must accept the winning candidate as their exclusive representative in the House of Representatives. By analogy, unionists argue, it is proper to force all workers to accept the representation services of a union selected by majority vote. It is simply "workplace democracy."

To the contrary, unions are not governments. The Framers of the Constitution drew a bright line separating rules for decisionmaking in government and rules for decisionmaking in the private sphere of human action. Governments are natural monopolists of the legal use of force in their respective jurisdictions. Like all monopolists, they are prone to abuse their power. Democracy is a means by which the governed have some (very imperfect) control over those who wield governmental power. According to the Framers, it is legitimate to override individual preferences in favor of majority rule only with respect to the enumerated, limited powers of government. Everything else should be left to individuals to decide irrespective of what a majority of others may prefer. An individual is not forced to submit to the will of a majority in the choice of religion, nor should he be in the choice of a representative in the sale of his labor services.

Exclusive representation is a violation of the entitlement condition for voluntary exchange. It implies that an individual does not own his labor. Rather, a majority of his colleagues own it. It is a violation of a dissenting worker's freedom of association. Freedom of association in private affairs requires that each individual is free to choose whether or not to associate with other individuals, or groups of individuals, who seek to associate with him. Freedom of association forbids any kind of forced association, even by majority vote. The sale of one's labor services to a willing buyer is a quintessentially private act.

People often freely choose to affiliate with private groups that make decisions under majority rule, but they are not coerced into doing so. They are assured that they have an easy escape without losing anything to which they are entitled. Under exclusive representation, the only way one may avoid the majority-rule decision to unionize is to lose his job. But he is entitled to the job so long as both he and his employer are willing to continue the employment relationship. The only reason a third party (union) has any say is because of government force.

For government to force a minority of workers to subject themselves to the will of a majority of their colleagues in the sale of their labor services is bad enough. Worse yet would be for government to allow unions to gain the exclusive representation privilege simply by collecting a majority of workers' signatures. The deceptively named Employee Free Choice Act, now under consideration in Congress, would do exactly that. Signatures would be collected in face-to-face confrontations between union organizers and individual workers. The potential for coercion and violence is obvious.

Union Security

Section 8(a)3 of the NLRA states that it is an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization [except the employer may] require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment." In other words, employers may not encourage or discourage membership, they may only agree with a union to require it.

Unions justify this coercion on the grounds that under exclusive representation they are required to represent all workers in their respective bargaining units whether individual workers want such

representation or not. Thus, it is only fair that every worker must be forced to pay for that representation. Otherwise, some workers would be free riders. So unions need security from free riders. However, this alleged free-rider problem could be eliminated simply by repealing exclusive representation. If unions bargained only for their voluntary members and no one else, there could be no free riders. Unions fought long and hard to get the exclusive representation privilege. It is disingenuous for them now to say that since the law forces them to represent all workers, all workers should be forced to pay whether they want the representation or not.

Mandatory Good-Faith Bargaining

Sections 8(a)5 and 8(b)3 of the NLRA impose on employers and unions, respectively, a duty to bargain. Section 8(d) adds that the duty is a requirement to bargain "in good faith." Case law has established that, in practice, "good-faith bargaining" means that each side must compromise with the other. Mandatory bargaining obviously violates the consent condition for voluntary exchange. Under ordinary contract law if any party to the contract is forced to bargain, the contract is null and void. No contract reached under the forced-bargaining rules of the NLRA can be a voluntary exchange contract.

Proscription of Company Unions

A company union is one formed and administered by an employer. In the 1920s several company unions were set up as a means of giving voice to workers in some workplace decision-making. At the time, these company unions were considered very progressive, and employers who used this form of labor relations were considered enlightened. Goodyear Tire & Rubber Company, Filene Co., and the Colorado Fuel & Iron Co., for example, were pioneers in cooperative labor-management relations. In 1922, the Leeds and Northrup Cooperative Association, a company union, instituted the nation's first unemployment insurance plan (Nelson 1982).

In 1933 the National Industrial Recovery Act was enacted. Section 7(a) of NIRA said that employers had (a) to allow their employees to join unions "of their own choosing" and (b) to bargain with those unions. To meet the requirements of 7(a), many employers formed company unions and bargained with them. Independent unions, such as the American Federation of Labor, saw these newly formed com-

pany unions as "shams" that were set up just to prevent workers from joining independent unions. When the NLRA became law in 1935, it outlawed company unions. Section 8(a)2 of the NLRA forbids employers to form or support any labor organizations that deal with management on terms and conditions of employment.

Recently, under the pressure of global competition, American companies, both union-free and union-impaired, have been forming labor-management cooperation committees to give employees more voice in decisionmaking. These committees are sometimes called "quality circles" or "employee involvement teams." In 1992, in the *Electromation* case, the National Labor Relations Board declared these cooperation committees to be illegal company unions. Because of that decision, the law in the U.S. today is that labor-management cooperation which is not union-management cooperation is illegal (Baird 1993). We will see below that a free-market union law would not proscribe company unions.

Hayek and Hutt on Voluntary Unionism

F. A. Hayek and W. H. Hutt, both free-market economists, strongly condemned the coercive features of the NLA and the NLRA and explained why such coercion leads to regrettable outcomes (Hayek 1960, [1980] 1984; Hutt 1973, [1930/1975] 1998). I have examined these contributions extensively (Baird 1988, 1997, 2007, 2008). Here I will address what little Hayek and Hutt had to say about the possible roles of voluntary unions in a free-market setting.

Hayek ([1980] 1984: 51) was forthright in his endorsement of voluntary unionism:

> I do not, of course, deny the trade unions their historical merits or question their right to exist as voluntary organizations. Indeed, I believe that everybody, unless he has voluntarily renounced it, ought to have the right to join a trade union. But neither ought anyone to have the right to force others to do so.

Earlier (1960: 275) Hayek penned this perhaps startling statement:

> It can hardly be denied that raising wages by the use of coercion is today the main aim of unions. Even if this were their sole aim, legal prohibition of unions would, however, not be

> justifiable. In a free society much that is undesirable has to be tolerated if it cannot be prevented without discriminatory legislation.

Unions should not be abolished, even if they use coercion in pursuit of their goals. They should, however, be subject to the rule of law as applied to everyone else. In a free society all types of coercion would be prohibited and punished on a nondiscriminatory basis. The problem under present law is not that unions exist. It is that their acts of coercion have been immunized from punishment.

Hayek (1960: 276) then writes:

> As truly voluntary and non-coercive organizations, [unions] may have important services to render. It is in fact more than probable that unions will fully develop their potential usefulness only after they have been diverted from their present antisocial aims by an effective prevention of the use of coercion.

This is in keeping with Hayek's ([1968] 1978) view of the competitive market process as a "discovery procedure." Hayek does not try to list what voluntary unions would do in a free-market setting because, as he sees it, no one can know what activities voluntary and peaceful unions might discover, under a free-market union law, to be beneficial to their members and others. Unions have never had to embark on that journey of discovery. It is time they did.

Hutt published the 2nd edition of *The Theory of Collective Bargaining* in 1975. It consists of the original Parts I and II, which constituted the first (1930) edition, and a new Part III. Hutt discusses what unionism without coercion might look like in Part III under the rubric "Reforms: 'Collective bargaining' without strikes":

> All fundamental changes in human institutions which have come about without bloodshed have retained old forms while new realities have emerged. The initial step towards reform could permit the retention of existing union organizations and their officials. "Collective bargaining" would, however, presumably come to mean that union managements would begin to act entrepreneurially on their members behalf, finding better paid employment for "underpaid" members, or jobs with better prospects. Any worker may be held to be "underpaid" if his earnings are less than he could command else-

> where if he were better informed. Unions would have the expert task of taking the initiative in these circumstances. Moreover, in the event of an alleged general underpayment of workers by a firm, the union would have the function of warning management of an imminent gradual outflow of personnel (not to threaten a collusive and simultaneous withdrawal) to superior jobs.
>
> The intention of such a policy would be to force the firm to compete effectively with alternative employment outlets. And the unions would retain the right and duty to ensure the effectiveness of their members' legal rights (such as the enforcement of wage contracts not accepted by managements under duress), or suing for damages in the event of alleged managerial misrepresentation [Hutt 1998: 115].[5]

In sum, Hutt imagines that a principal role for peaceful unions is to lower its members' information costs about alternative employment opportunities and to help enforce voluntary exchange employment contracts.

Hutt explicitly argues that all strikes must be prohibited. Any threat of simultaneous withdrawal of labor, even by like-minded workers who each individually choose to withhold labor is abhorrent to Hutt. He explains why:

> The argument [against peaceful strikes] would stand even if the civil and criminal immunities of the unions were abolished. Some people believe that, if the prospects of physical violence could be eliminated from the strike-threat, and anti-monopoly law (anti-trust) were applied to labour without discrimination, the trade union organization, otherwise more or less in its existing form, could usefully survive. Such an experiment might be revealing, but the truth is that it was the power wielded by union hierarchies in Western countries through the right to strike "peacefully" that enabled them to win such immunities for their organizations [Hutt 1998: 114].

[5]In 1998, the Free Market Foundation in Johannesburg, South Africa, reprinted the 1975 edition. The FMF volume includes a preface by Duncan Reekie and two afterwords by Charles Baird and Henry Kenney. I quote from the FMF volume.

To the contrary, it was large-scale picketing involving trespasses on company property and intimidation of those who chose to continue to do business with strike targets, that got cowardly politicians to grant such immunities. Even in the absence of physical violence, such picketing cannot be characterized as peaceful. However, a rule against simultaneous withholding of labor, per se, makes no sense at all. How could it be enforced? Would like-minded people who want to quit have to form queues? How many would be permitted leave each day? Perhaps the key word is "quit." Hutt could be objecting to a collective withholding of labor wherein the workers presume that they have some sort of claim to the jobs they refuse to do. The voluntary exchange right to strike includes no such presumption.

A Free-Market Union Law

New Zealand's ECA was the boldest attempt taken anywhere in the 20th century to strip unions of their illicit privileges and coercive powers and make them subject to the rule of law. From its inception in 1991 to its repeal by a resurgent Labour Party in August 2000, it had strongly positive economic consequences. Employment grew, unemployment declined, real economic growth accelerated, personal incomes rose, and labor union membership sharply declined because workers were free to choose (Kasper 2000).

Under the rubric "Title," the ECA states that its purpose is to provide for freedom of association for both employees and employers. Specifically, employees can choose, on an individual basis, whether to have anyone represent them in employment matters. They can also choose, on an individual basis, whether to enter into individual or collective contracts with willing employers.

Part I of the ECA covers the details of freedom of association. Section 5 states:

> (a) Employees have the freedom to choose whether or not to associate with other employees for the purpose of advancing the employees' collective employment interests.
> (b) No person may, in relation to employment issues, apply any undue influence [coercion], directly or indirectly, on any other person by reason of that other person's association or lack of association, with employees.

Section 6 forbids anyone, or any group, to require any worker

> (a) To become or remain a member of any employees organisation; or
> (b) To cease to be a member of any employees organisation; or
> (c) Not to become a member of any employees organization.

Taken together, Sections 5 and 6 seem to affirm that any association between a worker and a union is mutually voluntary. Union affiliation is to be on the basis of a willing worker associating with a union that is willing to receive him. No worker can be forced to join, or pay dues to, any union against his will. So far, so good.

However, the ECA goes astray in Section 7 under the rubric "Prohibition on Preference":

> Nothing in any contract or in any other arrangement between persons shall confer on any person, by reason of that person's membership or non-membership of an employees organisation—
>
> (a) Any preference in obtaining or retaining employment; or
> (b) Any preference in relation to terms or conditions of employment.

Section 7 precludes union-free and union-only employment contracts. Earlier I explained why union-free (yellow-dog) employment contracts can be voluntary exchange contracts. As such, there is no justification for government either to impose or to ban them. The same is true of union-only contracts. If an employer wishes to operate on a union-only basis he should be free to agree with a union to require that each worker, as a condition of obtaining and maintaining employment with him, become a member of the union. No worker would be forced to acquiesce to such terms against his will because any worker would be free to accept or reject any job offer that includes such a requirement. I doubt that any employer would want to enter into such an agreement with a union, but any employer should be free to choose to do so. The market will determine whether operating on a union-only (or union-free) basis is a wise choice. Success will be imitated, and failure will be shunned.

Part II of the ECA sets up the rules for representation and bargaining. It begins with Section 9(a), which states unequivocally that, "Any employee or employer, in negotiating for an employment contract, may conduct the negotiations on his or her own behalf or may choose to be represented by another person, group, or organisation." Coincidentally, it is Section 9(a) of the NLRA which creates and imposes exclusive representation on American employees and employers. The ECA really does allow each worker, on an individual basis, to designate a representative of his own choosing. He is also free to choose to represent himself.

However, the ECA appears to forbid exclusive representation. The problem with exclusive representation in the NLRA is that the government imposes it by force of law when a majority of workers votes to be represented. A free-market union law should neither impose nor forbid exclusive representation. If an employer chooses to decide the issue of union representation by majority vote, so be it. It would simply be part of the job offers he makes. Individual workers would be free to choose to accept or reject such offers. Again, I doubt that many employers would make this choice, but they should be free to do so.

The ECA makes no mention of company unions, but a free-market union law would have to permit them. Again, it is a question of freedom of contract. An employer should be free to adopt any sort of employee relations he chooses. Workers should be free to accept or reject any job offer that includes affiliating with a company union. As long as government neither compels nor prohibits company unions, they are consistent with voluntary exchange. The market will reveal the circumstances under which they are a good or bad idea.

Section 12(2) of the ECA states:

> Where any employee or employer has authorized a person, group, or organization to represent the employee or employer in negotiations for an employment contract, the employee or employer with whom the negotiations are being undertaken shall . . . recognise the authority of that person, group, or organisation to represent the employee or employer in those negotiations.

No worker has to be represented by any third party; but if he chooses such representation, and if his employer wishes to bargain

for his labor services, the employer must bargain with the chosen representative. The employer is free to choose not to bargain for a represented worker's labor services and simply walk away. There is no duty to bargain in good faith.

The ECA goes astray again in Section 14(1), which states:

> Where any employee has authorized [a representative] in negotiations for an employment contract and the employee is employed on premises that are under the control of the employee's employer, that [representative] may, for the purpose of those negotiations, enter those premises at any reasonable time when employees are employed to work on the premises, to discuss matters with that employee relating to those negotiations.

This is a clear violation of the property rights of employers. A worker and his designated representative can meet off the employer's premises in a public place, the worker's home, or the premises of the designated representative. The actual bargaining between the employer and the designated representative can take place in any mutually agreeable venue.

Part V of the ECA deals with the issues of strikes and lockouts. It begins with Section 61, which defines a strike:

> In this Act the term "strike" means the act of any number of employees who are or have been in the employment of the same employer. . . .
>
> (a) In discontinuing that employment, whether wholly or partially, or in reducing the normal performance of it; or
> (b) In breaking their employment contracts; or
> (c) In refusing or failing after any such discontinuance to resume or return to their employment; or
> (d) In refusing or failing to accept engagement for any work in which they are usually employed; or
> (e) In reducing their normal output or their normal rate of work—
>
> the said act being due to any combination, agreement, common understanding, or concerted action, whether express or implied, made or entered into by any employees.

This is a reasonable list of the various actions that constitute a collective withholding of labor. More to the point, the last three lines make clear that a strike involves people choosing, on an individual basis, to act in concert with others. This definition is consistent with the voluntary exchange right to strike.

Section 62 defines a lockout. Section 63 defines illegal strikes and lockouts. Importantly, strikes over the individual rights of workers as defined in Part I of the ECA are illegal. So, too, are strikes that take place while an existing collective employment contract is in effect. The sanctions that may be imposed during illegal strikes are listed in Section 73. They include suits for the torts of breach of contract, conspiracy, and intimidation. Section 64 defines legal strikes and lockouts in which none of the Section 73 sanctions are applicable.

Sections 65(3) and 65(4) of the ECA run afoul of the voluntary exchange right to strike because they make clear that an employer may not terminate the employment of strikers. The employment relationship continues; and, when a strike ends, a striker's "service shall be deemed to have been continuous for the purpose of any rights and benefits that are conditional on continuous service, notwithstanding the period of suspension." The voluntary exchange right to strike does not prohibit an employer, in the absence of an extant contract to the contrary, from terminating a striker's employment. There may be good economic and public relations reasons not to do so, but an employer should be free to choose whether or not to do so.

There is nothing in the ECA that defines legal and illegal picketing during strikes. Overt acts of physical violence are prohibited, but there is nothing that prohibits mass picketing or picketing by people who have no employment relationship with the strike target. There is nothing that protects employers' property from trespass by picketers. A free-market union law must address those questions, and I think the Supreme Court's decision in the 1921 *Tri-City* case provides sound guidance on how to do so.

Conclusion

It is politically impossible, at this time in America, to repeal the Norris-LaGuardia Act and the National Labor Relations Act and replace them with any sort of free-market union law. Nevertheless, it is worthwhile to prepare the ground now for doing so in some future, more enlightened time. W. H. Hutt (1973: 23) once wrote,

"The Norris-LaGuardia and Wagner Acts will, I predict, come to be regarded by future historians as economic blunders of the first magnitude." I hope this article is a useful contribution to that outcome.

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