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FREEDOM FROM UNION VIOLENCE

by David Kendrick

Executive Summary

Under the Supreme Court's 1973 Enmons decision, vandalism, assault, even murder by union officials are exempt from federal anti-extortion law. As long as the violence is aimed at obtaining property for which the union can assert a "lawful claim"--for example, wage or benefit increases--the violence is deemed to be in furtherance of "legitimate" union objectives. By the Court's peculiar logic, such violence does not count as extortion.

The result has been an epidemic of union-related violence. The National Institute for Labor Relations Research (NILRR) has recorded 8,799 incidents of violence from news reports since 1975. Those reports show only 258 convictions, suggesting a conviction rate of less than 3 percent. Moreover, local law enforcement authorities often get many more reports of strike violence than journalists can possibly cover.

Many states have taken a cue from the high Court by enacting their own extortion laws with exemptions similar to those established by Enmons. As a result, employees trying to support their families during a violent strike are now denied protection against extortion under both state and federal laws.

Because the federal government for six decades has immersed itself in labor law under the rubric of the National Labor Relations Act (NLRA), federal action is necessary to see that violence does not accompany the exercise of powers created by that statute. One avenue for relief is the Freedom from Union Violence Act (FUVA), which targets all extortionate activity, even if committed by union militants in pursuit of "legitimate" objectives.

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The Rationalization of Union Violence

J. Anthony Lukas penned a revealing subtitle to his book Big Trouble.[1] His account of how a former Idaho governor was probably assassinated by vengeful union chiefs was subtitled: A Murder in a Small Western Town Sets off a Struggle for the Soul of America.

Former Idaho governor Frank Steunenberg was killed by a bomb as he opened the gate to his home in Caldwell on December 30, 1905. Within days, detectives closed in on Harry Orchard, in whose hotel room traces of bomb-making material were found. Investigators soon discovered that he had been active with the Western Federation of Miners (WFM) in Idaho. Under interrogation, Orchard confessed to the Steunenberg murder and pointed to the chief conspirators: WFM president Charles Moyer, adviser George Pettibone, and the WFM's bombastic secretary-treasurer, "Big Bill" Haywood. Their apparent motivation stemmed from their violent confrontation in 1899 with then-governor Steunenberg.

The first round had been fought in 1892, when hundreds of union militants rode through the mining district "warning managers to dismiss nonunion labor or see their valuable machinery blown sky-high."[2] Eventually, both Idaho and federal soldiers restored order. But in 1896, Steunenberg was elected governor on a Populist-Democratic ticket, and was presumed to be more sympathetic to union interests.

Emboldened by the election results, the WFM prepared for the next battle. Two days before Christmas in 1897, a band of masked men rousted a nonunion foreman out of bed, then marched him through the streets of Gem and shot him to death.

Just over a year later, the WFM hierarchy rejected a wage increase and struck the Bunker Hill company's mines, demanding recognition as the sole representative of all the miners.[3] On April 26, 1899, some 150 union militants, many of them armed, "turned workers away from the mine with dire threats."[4] Three days later, hundreds more unionists commandeered a train in nearby Canyon Creek, drove it to Bunker Hill, and blew up a huge concentrator that cost the Bunker Hill company about $250,000.[5]

Steunenberg had become convinced that the local sheriff was colluding with the WFM. Finally on April 26, he asked President William McKinley to send federal troops to restore order. For this act, Steunenberg incurred the

hatred of his former allies in organized labor. "Our revolutionary war for independence had its Benedict Arnold," said American Federation of Labor president Samuel Gompers of Steunenberg's action. After his murder, union official and Socialist party leader Eugene Debs argued that Steunenberg had "simply reaped what he had sown."[6]

The WFM hierarchy was based in Denver, Colorado. There, its penchant for threats, assaults, and murders perpetrated on nonunion miners, along with its political domination of the local mining areas, was so pervasive that "juries couldn't be found that would convict a union man of any serious offense."[7]

In a midnight raid on February 17, 1906, Haywood, Moyer, and Pettibone were kidnapped by Pinkerton detectives in Denver and extradited to Idaho to be tried for Steunenberg's murder. They turned to Clarence Darrow who, Lukas wrote, had gained national fame as a defense lawyer by his appeal to "larger" issues while skimming over his clients' actual guilt or innocence.[8]

Defending Haywood, the first of the three to be tried, Darrow employed that familiar tactic: "I don't care how many wrongs they [unions] have committed--I don't care how many crimes," Darrow proclaimed to the jury in his closing argument. "I don't care how often they fail, how many brutalities they are guilty of. I know their cause is just."[9] Whether moved by Darrow's oratory, or fearful of retaliation by the WFM,[10] the jury acquitted Haywood. Afterward, the cases against Moyer and Pettibone fell apart.

Ironically, correspondence between those in the Socialist camp who were instrumental in the defense effort--including Fred Warren, the foremost defender of Haywood in the press--indicated that they had knowledge of the WFM officials' guilt. "If, four years after the Boise trial, these prominent Socialists wrote freely to one another about the guilt of Haywood, Moyer, and Pettibone, what does this tell us about who struck down the governor on that snowy night in Caldwell?" Lukas finally concluded.[11]

Reviews of Big Trouble, though, did not focus on the WFM's use of violence as a standard tactic in its war with the western mine owners. Even Lukas saw the WFM's tactics in the light of what Darrow might have called "larger issues." "Big Trouble isn't about Bill Haywood's guilt or innocence," Lukas wrote. For him, the Steunenberg assassination and the trial of his reputed assassins was "a

tale . . . that gradually illuminate[d] the fault lines across the face of turn-of-the-century America."[12] For Lukas and many sympathetic reviewers, that fault line was class.

As Lukas reported, the WFM employed threats, assaults, and massive vandalism to shut out miners who refused to join the union. Yet other reviewers concentrated their moral indignation on Steunenberg's efforts to restore order where local authorities had stopped trying. Typical was the review by labor historian Sean Wilentz for the online magazine Slate. While WFM militants were heroically "defend[ing] themselves and their jobs with rifles and dynamite," according to Wilentz, "timber magnates and mine owners deployed armed Pinkertons and strikebreakers as if they were baronial armies."[13]

Lukas acknowledged that most of the nonunion miners involved were already working in the mines, and were chased out by the WFM at the beginning of the strikes. They were not the vanguard of the mine owners' "baronial armies," as Wilentz described them. They were innocent bystanders told to get out of the WFM's way or be crushed.

Steunenberg's response to the WFM's violence was an act of political courage. In asking for federal troops, Steunenberg must have realized that he would be considered a traitor by union officials with whose support he was elected governor on the Populist-Democratic ticket of 1896. Still, acting against his own political interests, he sought help from Republican President McKinley.

Restoration of order by the federal troops was met with moral outrage at least equal to that focused on the WFM. In the New York Times, Richard Lingeman, senior editor at the Nation, contrasted the "violent acts by strikers," which he chose not to focus on, with the acts by federal soldiers "ordered to round up miners--more than 1,000 of them--and herd them into detention centers, the hated 'bullpens' used by militias in previous strikes, where they were held under atrocious conditions."[14]

In his review for the New Republic, New Deal scholar Alan Brinkley mentioned the dynamiting of the mine owners' machinery but did not mention the violence directed toward the nonunion miners. In great detail, however, he described how soldiers "abruptly rounded up nearly 1,000 miners--snatching some of them from family dinners--and herded them into an empty barn and a group of boxcars. Many of them remained there for weeks, even months, without formal charges being filed against them."[15]

For Wilentz, the admittedly heavy-handed use of National Guardsmen to restore order was nothing more than the "paraphernalia of dictatorship" employed against WFM militants merely "defend[ing] themselves and their jobs." Thus, a story of union officials who likely conspired to assassinate a former governor for stopping their violent campaign against nonunion labor becomes a morality play in which both sides were morally equivalent. For Brinkley, speaking on the Newshour with Jim Lehrer on October 24, 1997, the lesson from the Steunenberg case was "the dangers to democracy of rapidly increasing inequality that goes unaddressed for too long."

This modern willingness to downplay union violence is not new. It can be traced back to a jury in Caldwell, Idaho, responding to Clarence Darrow's appeal to "higher issues" by acquitting Bill Haywood. From such rationalizations, we have come to the point in this country aptly summarized in 1960 by Friedrich A. Hayek:

> [W]e have now reached a state where they [labor unions] have become uniquely privileged institutions to which the general rules of law do not apply. They have become the only important instance in which governments fail in their prime function--the prevention of coercion and violence.[16]

The failure of local, state, and federal law enforcement to prohibit union officials' extortionate activity during strikes is confirmed by the National Institute for Labor Relations Research in their database of reported union-related violence going back some 20 years. How that state of affairs came to be, the extent of the problem, and the possible remedies are the subjects of this analysis.

History of Judicial Involvement

After several field hearings in 1933, the Copeland special subcommittee of the Senate committee on Interstate Commerce introduced 13 bills targeting organized crime, including the Anti-Racketeering Act. As passed by the House and Senate, the act made it a felony to obtain money or other "valuable consideration" by the use or threat of force, violence, or coercion. Exempt from the act was extortion either unconnected to interstate commerce or involving "the payment of wages by a bona fide employer to a bona fide employee."[17]

After passage of the 1934 Anti-Racketeering Act, Local 807 of the Teamsters union decided to expand its territory outside of New York City. Teamsters members accosted truckers coming into the city with guns and charged a toll equal to one day's union wage. In some cases, the members of Local 807 would drive the trucks into the city. In other cases, the members took the money and departed. In no case of record were the members of Local 807 employed by the out-of-town trucking companies.

Since those tactics at least doubled the cost of transporting goods into New York City, most if not all of the local trucking companies signed contracts with Local 807. However, federal charges were filed against Local 807 and some of its members under the anti-racketeering law. The central issue was whether the Teamsters members were "bona fide" employees of the "bona fide" employers, from whom Local 807 had extorted union contracts. The U.S. Court of Appeals said that a bona fide relationship between employer and employee must be an uncoerced relationship.[18] Since Local 807 had no contract with many of the trucking companies before it began stopping the trucks, that interpretation would seem to rule out the Teamsters as bona fide employees.

But some of the Teamsters had driven trucks into the city and, on that ground, the Court of Appeals ruled, first, that they were bona fide employees and, second, that violent coercion was exempt from prosecution where "the employee really did the work for which he was paid."[19] The court even held that this exception applied when the employer made the coerced payment but refused the services of the union member.[20] Congress had targeted "blackmail," not union violence aimed at "secur[ing] work on better terms," asserted the court. "[A]lthough the means employed may be the same, the end is always different."[21]

Appealing to the U.S. Supreme Court, government prosecutors insisted that making payments with the intention of receiving services was different than simply buying "protection" from further violence. But, argued the Court, it is "always an open question whether the employers' capitulation to the demands of the union [was] prompted by a desire to obtain services or to avoid further injury or both."[22] Figuring that no jury could competently engage in what the Court considered a mind-reading exercise, the majority held that the victim's state of mind was irrelevant in this case.

In reaction to the ruling, Congress made several attempts to amend the Anti-Racketeering Act, finally enact-

ing the Hobbs Act in 1946.[23] This time, Congress eliminated the exception for "the payment of wages by a bona fide employer to a bona fide employee," on which the Supreme Court had based its Local 807 decision.

The Hobbs Act took aim at a wide spectrum of union violence, not just the use of force to obtain payments for unwanted services, as in Local 807. Rep. Jack Anderson (R-Calif.) referred to a dispute in San Francisco where Teamsters militants forced drivers entering the city either to join the union or hand over their trucks while in the city.[24] He also pointed to an organizing drive in which the Teamsters' refusal to carry dairy farmers' milk into San Francisco had resulted in considerable financial losses due to spoilage.

Those acts of "coercion" inhibiting commerce were certainly considered extortion under the Hobbs Act, even though they were intended to achieve an otherwise "legitimate" end, the acquisition of new union members. Rep. H. Streett Baldwin (D-Md.) summed it up this way: "I do not take the position that labor has not the right to organize or to strike, but when they do so they should abide by the . . . laws of decency. If they had done that, we would not have this legislation before the House today."[25]

Reflecting that perspective, the Hobbs Act provides that

> [w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.[26]

That text seems unambiguous. Nevertheless, in defining extortion as "the obtaining of property . . . by wrongful use of actual or threatened force, violence or fear,"[27] Congress left a narrow opening through which the U.S. Supreme Court would push a bulldozer in 1973.

In the Enmons[28] case, three members of the International Brotherhood of Electrical Workers (IBEW) were indicted for firing high-powered rifles at three utility company transformers, draining the oil from a transformer, and blowing up a substation. However, the U.S. District Court in Baton Rouge, Louisiana, dismissed the charges on

the grounds that, in the context of a strike, the militants' actions were not illegal since they were pursuing "legitimate" union objectives. On direct appeal, a divided Supreme Court affirmed, 5-4.

The Court's misreading of the clear legislative history of the Hobbs Act is incredible. Congress in 1946 had eliminated a clause barring prosecution of union violence if such action would impair the "rights of legitimate labor organizations in lawfully carrying out the legitimate objects thereof."[29] Nonetheless, Justice Potter Stewart, writing for a majority of the Court, over a strongly worded dissent by Justice William O. Douglas, decided that Congress retained an ambiguity.

That ambiguity concerned the requirement for the "wrongful" use of force, violence, or fear as an element of the crime. The majority argued that "wrongful" modified not only the use of violence, but also the property gained through the use of force. Thus, not only did the union's means have to be "wrongful," so also did the "property"--that is, the property to which the union had "no lawful claim," according to the majority opinion.[30] That semantic distinction is suspiciously close to the holding in Local 807, in which the Court said that force used to obtain payment for "bona fide" work was different from force used to obtain payment for fictitious services.

Of course, Congress had enacted the Hobbs Act specifically to eliminate the safe harbor for "legitimate" union goals. Nonetheless, the Court noted that the IBEW's destruction of company property was part of a strike for higher wages. Since the demand for higher wages could not be considered "wrongful," neither could the use of violence to gain higher wages. The only seeming justification for that interpretation was to be found in Rep. Samuel Francis Hobbs's statement that the term wrongful "qualifies the entire section" defining extortion,[31] and his claims during the debate that the Hobbs Act was not meant to hamper "any legitimate activity on the part of . . . labor unions."[32]

Relying on those assertions, the majority chose to focus on a few trees to the exclusion of the forest. In particular, the Court ignored a proposed amendment by Rep. Emanuel Celler (D-NY), which would have exempted any "activities which are lawful under" prevailing labor laws, including the National Labor Relations Act.[33] Hobbs vigorously opposed that amendment because of its failure to "require . . . that lawful acts, conduct or activities must be done in a lawful and peaceful way."[34] In short,

lawful strikes must be conducted lawfully. Celler's amendment was defeated in the House. It took the Supreme Court to effectuate the amendment by judicial fiat.

That led Justice Douglas, joined by Chief Justice Warren E. Burger and Justices Lewis F. Powell and William H. Rehnquist, to conclude in his blistering dissent:

> At times, the legislative history of a measure is so clouded or obscure that we must perforce give some meaning to vague words. But where, as here, the consensus of the House is so clear, we should carry out its purpose. . . . The regime of violence, whatever its precise objective, is a common device of extortion and is condemned by the Act.[35]

Thomas R. Haggard and Armand J. Thieblot, in their 1983 work on the legal response to union violence, rightly concluded that the Enmons case "is an affront to American jurisprudence."[36]

Proposed Congressional Remedies

Since 1973, a number of bills have been proposed to overturn Enmons. The latest effort, the Freedom from Union Violence Act (FUVA), was introduced by Sen. Strom Thurmond (R-SC) on January 29, 1997, as S. 230. FUVA would impose a prison term of up to 20 years on anyone who "obstructs, delays or affects commerce, by robbery or extortion, or attempts or conspires so to do, or commits or threatens physical violence to any person or property."[37] That provision is virtually the same as the corresponding provision of the Hobbs Act, but FUVA removes the modifier "wrongful" from the definition of "extortion." No longer would the "use of actual or threatened force, violence or fear" have to be characterized as "wrongful." Finally, FUVA limits the conduct exempt from prosecution to "minor" injury or property damage which "is incidental to otherwise peaceful picketing" and "is not part of a pattern of violent conduct or coordinated violent activity."[38]

On September 3, 1997, Sen. Orrin Hatch (R-Utah) chaired a Judiciary Committee hearing on FUVA. At this writing, the bill is pending in committee, where it awaits a vote to bring it to the Senate floor.

Few if any fair-minded observers dispute that union militants have, on occasion, engaged in extortionate activ-

ity. The prospect for legislation like FUVA, however, depends in part on the frequency and magnitude of strike violence by union officials to gain financial concessions from employers. Senate hearings in 1984 and 1985, occasioned by the violence that occurred in the wake of Enmons, indicate that the problem is quite serious. So does the 20-year database of reported union-related violence maintained by NILRR.

Union Violence: The Record

Senate Judiciary Committee hearings on the Hobbs Act in 1984[39] uncovered new evidence of violence coordinated by union officials. In some cases, union officials facilitated the violence by busing union members to the site of the violence. The Senate Labor and Human Resources Committee also held hearings on the need for changes to the Hobbs Act.[40] In particular, those hearings targeted violence related to a strike by the Cement Workers Union against the Missouri Portland Cement Company.

Testimony at the hearings revealed a pattern of escalating violence that ultimately jeopardized innocent third parties, including firemen who were called after strikers cut down power lines. The manager of a trucking terminal and his wife were fired on repeatedly by high-powered rifles. Their offense was allowing some of Portland Cement's truckers to use the terminal. Throughout the strike, the local's president and vice president encouraged the pickets and personally blocked entrance to the plant. More important, Illinois state policemen watched numerous instances of criminal conduct without responding.

New York Daily News

In 1990, the Tribune Company, owners of the New York Daily News, requested work-rule changes eliminating jobs made unnecessary by technological advances and new distribution practices. A number of the positions targeted for elimination were "no-show" jobs for which persons are paid even though they never show up at the job. Officials of the paper’s 10 unions argued that the News had failed to make capital improvements that would have made the company more competitive.

At first, the Tribune Company was able to publish the Daily News with supervisors, managers, and a handful of other staff. Union officials called for a boycott by readers and advertisers, but to little effect.[41] Violence

began on the first day of the strike, October 26, 1990. Delivery trucks were pelted with stones and bricks. Other trucks were blocked by strikers, and the truck drivers were assaulted with baseball bats. Carloads of strikers pursued delivery trucks. A striking union member was arrested for transporting Molotov cocktails. The violence accelerated rapidly, and by the second day more than 50 delivery trucks had been burned. Rarely did the strikers act alone; they gathered in groups of up to several dozen.

The attacks failed to halt the delivery trucks, however. Security guards with strike experience drove many of the trucks. Most trucks were accompanied by additional guards in cars and equipped with video cameras documenting the union violence.[42] Indicating that the violence was hardly spontaneous, a paper handler told a New York Times reporter, "They may try to get the paper out, but they'll never get it out to the streets. And if they do, we'll drag it off the newsstands."[43]

Although the Tribune Company could guard a few trucks, it did not have the resources to guard all the newsstands in metropolitan New York, and neither did the newsstand owners. So, the unions divided the newsstands into territories and dispatched their promoters of union "solidarity." The union militants fanned out to each newsstand to see if the Daily News was being sold. If it was, additional union activists followed and snatched away any copies, which were tossed into the street, scattered on subway platforms, or burned. Each day thereafter a union representative visited the newsstand to ensure that it no longer took delivery of the News. Sometimes the strikers tracked the delivery trucks and picked up the papers before the news dealer could.

On subsequent days, individuals and small groups of union militants warned the news dealers that their stands were flammable. A vendor in Brooklyn reported that one union representative threatened to "pour gasoline on the newsstand, set the newsstand on fire, and burn him alive." Another vendor watched as "some people came and took all the Daily News and they made a fire outside. There were six people. . . . I don't sell the Daily News because I have four kids and have to watch myself."[44]

The Tribune Company's own staff recorded over two thousand possible legal violations by strikers. The New York City Police Department, which covers only a portion of the paper's delivery area, recorded more than 500 incidents. Police arrested over 150 strikers and 40 nonstriking News employees.[45]

Members of the Newspaper and Magazine Drivers Union (NMDU) who drove for the New York Post and New York Times joined in the threats against the News dealers. According to reports, a Wall Street Journal truck commandeered by the union repeatedly picked up copies of the News to prevent sales. An NMDU official admitted meeting with activists in the Roofers union hall--just a few blocks from the News's printing plant--to coordinate attacks.[46] Advertisers were threatened. Unionized retailers who advertised in the News were threatened with strikes. The owner of Castro Convertibles, a furniture maker, received death threats for continued advertising.[47]

Local politicians turned against the News. Mayor David Dinkins refused to grant the News permission to recruit salesmen in the city's homeless shelters. The News was forced to sue the Metropolitan Transit Authority for the right to sell the paper in subways. Because the police department, courts, public defenders, district attorneys, probation officers and security guards in New York City are all unionized, the institutions of law enforcement were reluctant to condemn or rein in the newspaper unions. Even Governor Mario Cuomo, whose political base was in the city, downplayed the violence and absolved the unions of any conspiracy. The unionized writers at the competing newspapers also gave the strikers great leeway.

The Federal Bureau of Investigation was already investigating the NMDU for racketeering. But citing the constraints of Enmons, the FBI declined to investigate union coordination of strike violence.[48]

Detroit News

On July 17, 1995, the six unions whose members worked for the Detroit News, including the Newspaper Guild and the Teamsters, struck over wage and work-rule issues. From the outset, according to an investigator for the company who spoke to NILRR on condition of anonymity, the newspapers were forced to surround their facilities with security guards toting video cameras to record union assaults.

On the Sunday morning before Labor Day, more than 3,000 union militants prevented delivery of the News and Free Press for more than 12 hours. The police did not intervene. The militants came back on Labor Day, but this time the police used tear gas to disperse the crowd away from the gate. At one point, the union militants rushed

the main gate, trying to knock it down. Finally, as the delivery trucks began leaving, pickets pushed a security guard beneath them, breaking both his legs.[49]

Two months into the strike, a bomb was discovered and defused outside of the company's production facility. One week later, 17 strikers were arrested for assaulting police officers. Three days later, the number arrested climbed by 23. Sixteen of those were described as strikers, the remaining 7 as outside agitators.

Borrowing tactics from the Daily News strike, the Newspaper Guild publicly announced that their members would follow company trucks to prevent distribution of the paper.[50] A company investigator speaking on condition of anonymity confirmed they were good to their word. "Strikers stole papers or set them on fire. They threatened vendors and roughed up nonstriking workers." Retired FBI agents hired to investigate claims of union misconduct estimated that more than 200 misdemeanor complaints were filed in the first nine months of the strike.

United Mine Workers

The United Mine Workers (UMW) strikes after 1983 dramatically illustrate an important truth: Injuries attributable to strikes are inversely correlated with efforts by state and federal law enforcement officials to control union violence. Lax law enforcement increases the number and degree of injuries. Active law enforcement reduces the number and degree of injuries.

The UMW’s history of violence was well documented through 1983 by Haggard and Thieblot.[51] The four-month strike of 1981 had just ended before they published their study. As Haggard and Thieblot reported, the jurisdictions that aggressively policed strikers saw relatively low levels of violence. The jurisdictions that took a hands-off approach saw high levels of violence. In 1984, that pattern was repeated.

The principal unresolved issue was the common ownership clause inserted in 1981 union contracts. The UMW interpreted that clause as obligating nonunionized subsidiaries of holding companies with unionized subsidiaries to pay union wages and seize union dues. The mining companies viewed each subsidiary as an independent employer. As the large mining companies closed unionized mines and expanded operations at nonunionized subsidiaries, the UMW became more irritated.

The mines and miners prepared as they traditionally have. The companies built up stocks of coal and hired security guards. The miners selected targets. The coal fields of Kentucky and West Virginia are hilly and mostly forested. To reach the mines and collieries, employees, suppliers, and coal transports generally have a choice of one road. The road winds back and forth along canyon bottoms. Access can be easily blocked by bands of strikers or a lone sniper.

Kentucky officials had avoided interfering in strike activities during the 1981 coal strike. As a result, the state was roundly criticized for subsequent injuries. This time, Kentucky state policemen were more active in suppressing violence and making arrests. Consequently, A.T. Massey Company's mines in West Virginia became the site of the worst violence. There, according to former Massey attorney Neal Hogan, large numbers of strikers formed the traditional gauntlets along the entry roads to company facilities. Drivers of coal transports were pulled from their trucks and beaten. Cars containing non-striking employees were rolled over with their occupants inside. According to Hogan, all that activity occurred while West Virginia state troopers placidly observed. In many cases, the violence and the troopers' inaction were preserved on videotape.

Property damage was extensive, and militants fired their weapons almost nightly into the homes of mine managers. The companies opted to move the managers and their families every few days. After late-night shootings, more than one processing facility began to look like a food grater. Frequent sightings were reported of a black van nicknamed the War Wagon, after a John Wayne movie. Hogan told NILRR that UMW members boasted of a "War Wagon," bulletproofed and equipped to carry a UMW SWAT team. Unfortunately, the War Wagon was never seized.

The 1984 strike eventually ended with an agreement between the UMW and member companies of the Bituminous Coal Operators Association (BCOA). Pittston Coal, however, objected to the agreement and was struck from April 1989 to January of 1990. During the strike, the UMW recorded 4,000 arrests among its members.[52] In May, a Virginia circuit court fined the UMW $642,000 for 72 violations of an earlier injunction against violence and unlawful picketing.

At the same time, Judge Donald McGlothin announced additional fines of $100,000 for any future violent acts and $20,000 for future nonviolent infractions of his

injunction. In seven subsequent hearings, McGlothin found the UMW in contempt of court for over 400 violations, adding up to over $64 million in fines.[53]

After Pittston and the UMW settled, Pittston asked the circuit court to dismiss the fines. The judge dismissed $12 million in fines intended to compensate Pittston for its financial losses but retained $52 million "payable in effect to the public" to compensate for the "law enforcement burdens posed by the strike."[54] The UMW eventually appealed to the Supreme Court, arguing that the contempt fines amounted to a criminal, as opposed to a civil penalty, which would have entitled the UMW to a criminal trial by jury.

Writing for the majority in his last opinion before retiring, Justice Harry A. Blackmun distinguished between criminal and civil contempt citations. Civil contempt, according to Blackmun, is a "coercive" sanction aimed at forcing the party held in contempt to "comply with an affirmative command," and thereby "purge" the party of the sanction. If the party were imprisoned, compliance would bring release. If he were fined, compliance would end the obligation to pay any more fines beyond those already paid.[55]

Criminal contempt sanctions, on the other hand, are considered a "punitive" measure designed solely to punish past behavior, not to modify future behavior.[56] The Virginia Supreme Court ruled that the prospective nature of the fines, dependent on the UMW's behavior, made them "coercive," and therefore, civil. But in this case, Blackmun wrote, the "union's ability to avoid the contempt fines was indistinguishable from the ability of any ordinary citizen to avoid a criminal sanction by conforming his behavior to the law."[57] Because the fines more closely resembled "retrospective criminal fines," Blackmun reasoned, the UMW would have been entitled to a jury trial. Accordingly, the fines were dismissed.

Blackmun conceded that his decision would "[impose] some procedural burdens on courts' ability to sanction widespread indirect contempts" of court, but concluded that "considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."[58]

How far-reaching the Court's decision was became clear in the next strike during the summer of 1993. In addition to the usual violence, Eddie York, an independent contractor, was shot through the head as he tried to leave a min-

ing work site. Mr. York left a wife and daughter to mourn him. The FBI was able to identify the shooter, a striking UMW member named Jerry Lowe.

The state of West Virginia declined to try Mr. Lowe for murder or even assault. The FBI and U.S. Attorney lacked the authority to bring murder charges except in very limited cases. Enmons foreclosed the possibility of federal extortion charges. Consequently, Mr. Lowe was charged and convicted of nothing more serious than "incapacitating" the driver of a vehicle on a federal roadway while engaged in interstate commerce. Had Eddie York been shot on a state funded road, even that charge would have been blocked.

After the UMW and the BCOA settled, however, the National Labor Relations Board (NLRB) charged that the UMW had violated a 1987 consent decree against further strike violence, and asked a federal judge to fine the UMW $1.3 million and to order U.S. marshals to police any future picket lines. The NLRB went ahead with its suit even though the BCOA, like Pittston, had dropped all of its strike-related claims against the UMW.

One year after the High Court's ruling on the Pittston fines, the NLRB settled, dropping its demand for fines, its request for federal marshals and "agree[ing] not to seek the assessment of coercive fines" for any misconduct in 1993 or "any misconduct that may occur during the next strike."[59]

Greyhound Bus

In March of 1990, Greyhound began using replacement bus drivers after the Amalgamated Council of Greyhound Local Unions called a strike. In the months afterward, snipers shot at the drivers 52 times, according to policy analyst and author James Bovard.60 But in May, Jerry Hunter, general counsel of the NLRB took action, not against the union, but against Greyhound, for hiring replacements.

The National Labor Relations Board is the federal agency responsible for regulating labor-management relations under the National Labor Relations Act, which covers all private sector employees except those working for airlines and railroads. However, the NLRB has consistently turned a blind eye to union violence. As Bovard pointed out, the NLRB has held since 1979 that it will charge union officials with an "unfair labor practice" only if

"the conduct was so violent . . . as to render an employee unfit for future service."[61] In other words, short of killing or crippling a nonstriking worker, the NLRB's position is "hands-off."

In the Greyhound case, the NLRB held that "although the Union's conduct . . . was substantial and widespread," the violence was not "aimed directly at employer bargaining representatives." Since the snipers had shot only at replacement workers, and not at Greyhound management, the strikers' violence was not covered by federal labor law, according to the NLRB.[62]

Chugach Electric Association

Near Anchorage, Alaska, in 1987, a consumer-owned utility was violently struck by members of the International Brotherhood of Electrical Workers (IBEW). The strike involved fewer than 200 workers employed by the Chugach Electric Association. The union sought to close the shop to nonunion workers.

The union established roving picket lines wherever repair crews went. The local president admitted that the union monitored radio repair calls in order to head off the trucks. When the repair crews arrived, they were prevented from leaving their trucks by the pickets who arrived first. The utility's general manager was rammed twice in his car. Additional company vehicles were rammed on subsequent days. Ultimately, the pickets caused the outages that struck four entire communities serviced by the utility. One nonstriking employee was forced to relocate his family after pickets threatened to rape and murder his wife.

On the second day of the strike, a rifle bullet fired into a transformer left homes without electricity during a cold Alaskan March. When replacement workers attempted to restore power, they were blocked by strikers who slashed the tires of the repair vehicles. On the following day, strikers again threatened a repair crew attempting to restore power to 1,000 homes. The utility suffered four suspicious power outages during the first four days of the strike.

Despite assertions of peaceful intentions by the union president, another union militant threatened the utility's Board of Directors: "You settle it [the strike] or we'll bring this town down."[63] In all, IBEW militants deprived 400,000 Alaskans of power in March.[64]

Simplex Wire & Cable

Although union officials suggest that strike-related violence springs from the heated emotions of the picket line, IBEW members have shown a calculated willingness to track potential victims. In 1986, some nonunion employees of Simplex Wire & Cable were followed home and beaten by three members of IBEW Local 2208. The IBEW members were arrested and convicted.[65] Two other Local 2208 members, including a shop steward, were charged with assaulting a police officer. Later one evening, IBEW strikers dented and broke the windows of 65 cars leaving the Simplex plant. The Local's leadership watched nearby without moving to stop the violence.[66] The Local's business manager demonstrated his control over the strikers by sending them home in exchange for the release of four arrested union members.[67]

International Paper

In June 1987, the United Paperworkers union struck an International Paper plant in Androscoggin, Maine. After 16 weeks on strike, Tom Cummings chose to return to work. In an October 27 "Guest Column" for the Bangor Daily News, he described what he and other paper workers had experienced: "Houses have been painted with obscene words, tires have been slashed, windows broken, etc. . . . We've had death and arson threats, and my wife even received a rape threat over the phone."

The company reported $750,000 in damage due to sabotage. According to the Central Maine Morning Sentinel of July 31, "The alleged acts of sabotage ranged from draining oil out of dump truck engines to shutting down the mill's power plant, mislabeling gauges to opening a drain valve on a tank of poisonous liquid chlorine."

On July 22, Linda Kennedy's house was firebombed after several days of harassing telephone calls accusing her of being a scab. Mrs. Kennedy and her 11-year-old son escaped. The bomb landed in the bedroom of her eight-year-old son, who might have died or been seriously burned had he not been spending the night at a neighbor's house. Ironically, Mrs. Kennedy was the victim of mistaken identity because she had never worked at the mill or applied for a job there as a replacement worker.[68]

Boise Cascade

In early 1989, Boise Cascade Corporation picked a mostly nonunion contractor to expand a paper mill in International Falls, Minnesota. After several tense months of nonunion and union workers at the same site, the union workers walked off the job on July 18, 1989. The strike was marked by sporadic incidents of violence during the summer; then the strikers rioted on September 9. They overran the company guards and all but destroyed a camp for about 1,000 of the nonunion workers. The rioters, many of whom were bused in from Michigan,[69] overturned cars and set fire to several buildings. One reporter recorded what he saw:

> [A]ssault in plain sight of police; arson in broad daylight. . . . Frequently could be heard the thud of a rock smashing through a car's window, as protesters attacked the vehicles of Boise security guards or employees of the nonunion BE&K construction company. . . . The yelling was punctuated by the alarming crack of large firecrackers, after which the grim-faced police were taunted with jeers of "Hey, somebody's trying to shoot you."[70]

The company estimated property damage to be at least $1.3 million. The police chief of International Falls confessed that, "People have been threatened. They are afraid. For the first time in my 34 years as a cop, I'm not sure I can protect them."[71] Governor Rudy Perpich, elected with strong union backing, responded to the strike "by threatening to withdraw a $16 million tax break awarded to the new plant. The governor also ordered state agencies to increase their monitoring of every aspect of Boise's operation."[72]

Ravenswood Aluminum

In Ravenswood, West Virginia, the Ravenswood Aluminum Co. (RAC) locked out Steelworkers Local 5668 in November 1990. Company and union officials disagreed over a profit-sharing plan that union officials saw as less valuable than the bonus plan already in place.[73] By April 1991, the company had reported more than 700 incidents of violence directed at replacement workers. Among the incidents, RAC reported 2 attempted murders, 2 house bombings, 6 house shootings, 5 arsons, 29 assaults, and 43 death threats.[74]

On March 26, U.S. District Judge Charles Haden issued an injunction against union violence and harassment. Initially, RAC officials said, the violence declined. But later the violence resumed. By September, the number of violent incidents had risen to over 2,500.[75] The list now included 115 threatening phone calls, 43 death threats, 112 persons stalked, 164 homes with nails left in the driveways, and one incident involving chemicals thrown at a guard's face.

When RAC and Steelworkers officials finally settled in June 1992, the replacement workers who had been the targets of most of the violence were given severance pay. The company agreed to drop all legal action, including a federal racketeering lawsuit, and rehire the unionized workers.[76]

Quality Tool

In October 1989, talks broke off between Quality Tool Co. and the International Union of Electrical, Salaried, Machine and Furniture Workers (IUE). Union officials demanded a 3 percent wage increase, while the company proposed merit increases for selected employees. After the strike began, IUE militants threw tacks onto the company's driveway, which blew out the tires of several police cars called to the scene. The response of local police? "It's not our job to take sides," said Lieutenant Bob Fletcher, but "I had a short discussion with the strikers about damaging property." There were no arrests.[77]

Most of the company's windows were broken by rocks. Some of the replacement workers received telephone threats and, later, a dead cat was left at a company door. That same day, a picket played a song on a tape recorder about killing a cat. According to Cliff Schwanke, the union steward, that was just a "coincidence." What about the cat, whose stomach had been sliced open? "The cat could have been hit by a car," Schwanke said. As for the broken windows, Schwanke shook his head. "One day they were there and the next day they weren't," he told the Minneapolis Star-Tribune.

Just two days after those comments, a replacement worker who had been followed to his home and threatened on the phone died in a mysterious car crash. According to the police, a truck collided head-on with the worker's small car after a third car swerved in front of the truck, forcing it into the employee's lane.[78]

United Brotherhood of Carpenters

On June 1, 1992, nearly 1,800 drywallers affiliated with the United Brotherhood of Carpenters walked off their jobs over wage and benefit provisions. Many of the drywallers were also hoping to force the mostly nonunion subcontractors to sign union contracts. The walkout shut down construction projects all over southern California.[79] Over the next few weeks, area newspapers would report the same mode of attack:

> One North County drywall subcontractor, who wished to remain anonymous, said 150 pickets stormed a job site in Carmel Mountain Ranch on Monday and stole more than $3,000 worth of tools. . . . Strikers kidnapped one worker off a site in Temecula, said one drywaller who preferred not to be identified.[80]

On July 7, 1992, Michael Flagg and Gabe Martinez of the Los Angeles Times reported that

> workers were arrested en masse Thursday morning in Mission Viejo after a drywall company called sheriff's deputies and said the men had rushed onto a housing tract, punched holes in drywall and abducted workers. . . . Sheriff's deputies caught up with a 14-truck-and-car caravan a few minutes later. The six men allegedly abducted were released unharmed. Deputies arrested the 148 men . . . [and] decided to charge the men with felony conspiracy to commit kidnapping.

A suspicious thing happened on the way to the court, however. Deputy District Attorney Wallace J. Wade decided "that there was insufficient evidence to tie anyone to the alleged kidnapping," and declined to press the kidnapping charges. Later, John DeCarlo, an attorney representing the various carpenters unions involved, gloated that after the violent strike, "dozens of formerly nonunion drywall contractors sign[ed] union pacts."[81]

WCI Steel

Two steelworkers locals struck the WCI Steel plant in Warren, Ohio, on September 1, 1992. The company began operating the plant with replacement and salaried workers. Soon, the salaried workers began receiving threatening telephone calls, and many saw their homes vandalized. Company officials alleged that a union letter encouraged

such behavior. The letter, labeled "Solidarity Alert," declared victory over the resignation of WCI's president, then went on to say, "he is not the only one that we need to get rid of. There are more, and we know who they are." Referring to salaried employees as the real scabs, the letter blamed them for the ongoing strike.[82]

As the strike dragged on, a local judge ordered security guards to keep away from picket lines and limited the number of pickets at the company gates. In response, union militants began forming what the local police chief called a "gantlet" along streets adjacent to the plant during shift changes to throw rocks, bricks, and nails. The chief also said that "supplies of bricks and bags of rocks have been dropped along the road at night."[83] Clearly frustrated with the increasing violence, the police chief told the local media that the "violence would diminish if the company stopped operating with replacement workers." He said that he asked the company early in the dispute not to use replacement workers because they intensify labor conflicts.[84]

On October 24, WCI and the local unions settled the strike. One union supporter pleased with the pension provisions of the new contract "believ[ed] workers would not have received the contract that was offered without the violence."[85]

The Extent of Strike-Related Violence

The reports cited are a small sample of the nearly 9,000 violent events that occurred anywhere in the United States since 1975. The NILRR has collected and electronically maintains these events in its Violence Event Data File. Each entry in the file involves union members or union officials. Although most of the violence was inflicted by union militants, a few of the recorded events entailed violence against union members. Usually, such incidents involved strikers hit by the cars of nonstriking workers trying to go to work. In some cases, nonstriking workers struck back after suffering attacks themselves.

The Violence Event Data File is organized into individual records, with each record summarizing a separate violent event. The information about each event is gleaned from newspaper and magazine articles, television news transcripts, and trade journals. The events can be accessed by various criteria, such as the union involved, where and when the violence occurred, and whether the violence involved property damage and/or personal injury.

For example, a researcher could search the data file for all incidents involving the Teamsters union in Arizona. Each record in the file is cross-referenced to the original source material from which information on the incident was extracted. All source material is retained for confirmation purposes and to facilitate more detailed analysis.

The Institute has recorded 8,799 incidents of union-related violence since 1975, but only 1,963 arrests and 258 convictions have been reported. The local news media that covered the original violence could be expected to follow up on subsequent legal action. But the relatively few follow-up reports suggest that barely 3 percent of the violent incidents recorded in the Institute's data file have led to convictions.

On the basis of the following reports cited in this paper, it is not hard to understand the discrepancy.

- In 1984, union miners pulled drivers from coal transports and beat them, then turned over cars still occupied by nonstriking employees--all under the watch of West Virginia state troopers.

- In 1985, militant cement workers used violence while trying to shut down the Missouri Portland Cement company, as Illinois state policemen watched.

- In 1989, construction unionists staged a full-scale riot, destroying a camp for nonunion workers and taunting police in International Falls, Minnesota. The governor responded by ordering increased government monitoring of the <u>contractor</u>.

- In 1992, drywallers stormed a construction site and kidnapped nonstriking workers. Despite apprehending the drywallers with the workers, Los Angeles prosecutors refused to prosecute anyone for kidnapping.

- In 1992, the police chief of Warren, Ohio, all but blamed WCI Steel's use of salaried employees and replacement workers for the rock throwing and telephone threats they suffered.

Often overwhelmed by a level of violence never before experienced in their small communities, local authorities may share the sentiments of the International Falls police chief: "For the first time in my 34 years as a cop, I'm not sure I can protect them."

Moreover, the figures presented here are based on reported injuries. These figures dramatically understate the actual volume of strike-related acts of violence.

To illustrate: In the Daily News strike, the number of reported incidents was 71. Yet in that strike alone, the New York Police Department recorded more than 500 incidents and the Tribune Company recorded over 1,000. In the Detroit News strike, there were more than 200 misdemeanor complaints filed--more than double the 83 incidents reported in local newspapers. In the International Paper strike, NILRR collected 21 accounts of violence. International Paper reported 111 separate incidents of vandalism. In the Ravenswood strike, the Institute documented 71 acts of violence by Steelworkers militants. The company reported over 2,500--a ratio of 35 to 1.

Many towns have just one daily newspaper and perhaps a weekly paper or magazine covering local news. The few reporters assigned to a strike cannot be expected to witness every rock hurled at the plant or cars of nonstriking workers. Not every obscene threat delivered to nonstriking employees can be overheard by the few reporters who cannot be at the picket line all day. Journalists cannot follow every worker home to witness the vandalism there. Nor can they be present to hear every threatening phone call late at night. And without legal action to provide a "peg" for reporters to follow up, there will be no final accounting of the violence associated with the strike. In short, the epidemic of union-related strike violence far exceeds the ability of local news media to fully chronicle it.

FUVA: Is It Constitutional? Is It Necessary?

The Freedom from Union Violence Act (FUVA), S. 230, sponsored by Sen. Thurmond, adds federal anti-extortion law to the arsenal of weapons available for prosecuting unions engaged in strike violence.

The provisions of FUVA respond to a Supreme Court bent on carving out exceptions for union violence. As reported earlier, the Court held in Local 807 that the exception in the 1934 Anti-Racketeering Act for payments to "bona fide employees" barred prosecuting union members for extortion. The Hobbs Act tried to remove that exception by deleting the clause pertaining to bona fide employees. But the act specified that only "wrongful" violence was subject to prosecution. On that one word, the Court hinged its ruling in Enmons that violence in the

pursuit of "legitimate" union goals was exempt. FUVA retains an exemption for some conduct, but makes clear which conduct is exempt and which is not.

For instance, FUVA exempts "minor bodily injury or minor damage to property" from prosecution for extortion. It is not difficult to distinguish between an occasional bloodied nose or a single broken window and the misconduct described in this paper. International Paper suffered $750,000 in damage to its Androscoggin, Maine, plant due to sabotage by local paperworker unionists. Boise Cascade in International Falls, Minnesota, lost $1.3 million in a riot by ironworker union militants. Ravenswood Aluminum, which suffered more than 2,500 acts of violence, would not reveal their financial damages.

Since 1975, at least 181 Americans have died as a result of union violence, according to the NILRR's data file--hardly the "minor bodily injury" exempted under FUVA. There have also been more than 5,600 assaults, kidnappings, and threats--almost all committed by striking union militants.

FUVA also exempts union violence "not part of a pattern of violent conduct or of coordinated violent activity." The violence cited here can hardly be dismissed as spontaneous or uncoordinated. Newsstands were targeted in the Daily News strike only after attacks on delivery trucks failed to stop circulation. In the Detroit News strike, Newspaper Guild officials announced their intention to follow company trucks to stop distribution of the paper. In the Boise Cascade riot, the union militants who attacked the nonunion camp were bused to the site. Time and time again, one sees nonstriking workers stalked, kidnapped, threatened at their homes and on the telephone, and sometimes firebombed or shot at. Such actions cannot be characterized as lacking in forethought.

Even with its exceptions--more important for what they do not exempt than for what they do--FUVA would finally enable federal prosecutors to try union militants and officials for extortionate behavior. Opponents of FUVA have objected to that authorization.

Testifying against FUVA last year, labor law professor Michael Gottesman argued that the "intentional commission of a crime against person or property is a crime in every state. . . . Not a single wrong would be made a federal crime by S. 230 that is not now a state or local crime everywhere today."[86] The Georgetown professor's objection might carry more weight if any evidence could be produced

that state and local laws were systematically enforced in strike situations. But with a conviction rate of less than 3 percent, the failure of overwhelmed or politically neutralized police and prosecutors to enforce the law against union militants is clear.

FUVA, Gottesman complains, is unfair. "When employees are seeking higher wages, that's not extortion."[87] His rationalization of union violence is uncomfortably close to the notion that the "legitimate" ends of unions justify any and all means to achieve them. Despite finding favor with the highest court in the land, that logic is nonetheless toxic to a free society--defined by Hayek as a society free from violence and coercion.[88]

There is only one principled objection to FUVA, to which we now turn. The U.S. Constitution creates a federal government with enumerated powers, beyond which that government may not extend its reach. Given that each of the 50 states has a law dealing with extortion, on what constitutional basis can FUVA's supporters defend this expansion of federal power?

Is FUVA Constitutional?

Nowhere in the Constitution is there a power conferred upon Congress to interfere with the rights of individuals to voluntarily contract with one another. But as the country grew and some believed that labor-management issues had to be addressed by the national government, Congress sought to earmark a specified constitutional power that would justify its ambitious regulatory agenda. The Commerce Clause became the vehicle of choice.[89]

The power of Congress to regulate commerce is not, however, the power to regulate anything and everything. As set out in Article I, Section 8, the Constitution authorizes the federal government to "regulate Commerce . . . among the several States." Under the Articles of Confederation, states had enacted tariffs and other protectionist measures that crippled the free flow of trade. "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."[90]

Lamentably, Congress has expanded the Commerce Clause to a general regulatory power. And the Court--especially after Franklin Roosevelt's notorious Court-packing scheme--has facilitated federal overreaching by condoning legisla-

tion that has no basis whatever in the Constitution. For nearly 60 years, Congress had virtually plenary authority; then, finally, in the Lopez[91] case, a bare majority of the Court took a modest step toward reining in the federal government. But as Justice Clarence Thomas said in his concurrence, the Court did not go far enough when it allowed congressional regulation of activity that "substantially" affects interstate commerce.

Applied to the matter at hand, it is not enough to proclaim that labor strife substantially affects interstate commerce. To legitimately invoke the commerce power, Congress must show that a labor-management dispute somehow gave rise to a state-enforced barrier to trade. Moreover, any federal statutory remedy must be both necessary (i.e., essential) and proper (i.e., respectful of other rights) in providing a means by which the barrier will be removed.

There has been no such showing by Congress with respect to the NLRA. Nor could there be. An act that controls virtually every aspect of labor relations cannot be said to have as its objective the removal of trade barriers. And an act that systematically violates the rights of association and contract is in no sense "proper" as required under Article I, Section 8. Accordingly, it is fair to conclude that the federal government was not constitutionally authorized to enact the NLRA, which endorses "exclusive representation" of employees who never asked for representation, and prohibits those employees from negotiating the terms and conditions of their own employment.

That said, the NLRA is indeed the law of the land--without this author's blessing but most assuredly with the indulgence of the Supreme Court.[92] In light of the federal government's 60-year immersion in labor law, Congress has an affirmative obligation to see that the powers, however illegitimately created by that law, are not abused. Violence accompanying the exercise of those powers must not go unpunished, and the federal government, as promulgator of the law and creator of the attendant powers, is authorized to remedy such violence under FUVA or a similar statute.

Between the unconstitutional NLRA and the Enmons ruling, there is a curious double standard, which former attorney general Edwin Meese discussed in the Senate FUVA hearing. On the one hand, Congress has "thoroughly preempted the field . . . [of] labor relations between private employers and their employees." On the other hand, the Supreme Court has left to ineffectual "state and local

authorities alone the task of punishing serious, extortionate violence" by union officials in the pursuit of "legitimate" bargaining goals.[93]

Still, as Gottesman said, all 50 states have laws against vandalism, threats, assaults, and other kinds of extortionate activity. Is it necessary to amend federal law where state laws already apply?

Is FUVA Necessary?

The answer, in short, is a resounding "yes." Evidence from the NILRR data file indicates that there are few arrests and convictions relative to the number of violent incidents. From the police chief in Minnesota who questioned his ability to protect local residents, to the Pennsylvania chief who publicly blamed the use of replacement workers for the violence, it is clear that local law enforcement authorities are frequently overwhelmed or politically immobilized. Although each state has a statutory extortion offense, ultimately they all are subject to a common frailty: political reality.

Unions are effective political machines. In urban areas, they may be the most effective political organizations, as demonstrated in New York by the Daily News strike. But union influence is not limited to urban areas. The UMW strikes in West Virginia and Kentucky confirmed that a statute is meaningless where it is ignored by police, prosecutors, and the courts. Indeed, when gun battles broke out during the 1981 UMW strike, Kentucky Governor John Y. Brown--sworn to uphold the law--offered this incredible explanation of his strict neutrality: "We're not going to camp on one side or the other."[94]

Political influence, though, is not the only explanation for state and local inaction. A large number of states base their extortion statute on provisions of the Model Penal Code (MPC), which creates an exclusive list of threats that are considered extortion.[95] Yet, the MPC grants union officials the same exemptions from prosecution as the U.S. Supreme Court's Enmons ruling. For instance, the MPC applies to strike violence only "if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act." Recalling the decision in Enmons--i.e., that violence in pursuit of "legitimate" union objectives is exempt from federal prosecution--the MPC establishes "compensation for property or lawful services" as "a defense to the prosecution" of union violence under

its extortion statute. Other states include additional requirements for the offense. A handful of states require malicious intent.[96]

Thus, whether due to lack of resources, lack of will, or by statute, millions of citizens can expect no protection under anti-extortion laws from vandalism, harassment, kidnapping, threats, and assaults if such offenses are committed by union militants on strike for what they perceive as better working conditions. Indeed, the ineffectiveness of state extortion laws as applied in cases of union violence provides yet another basis upon which to argue that FUVA is both constitutional and necessary.

Section 1 of the 14th Amendment bars states from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] to any person within its jurisdiction the equal protection of the laws." Although that provision is enforceable through the courts, the Supreme Court has abdicated its responsibility by conferring on unions an exemption from the Hobbs Act. Nonetheless, the Congress under Section 5 of the 14th Amendment can "enforce, by appropriate legislation, the provisions" of Section 1. And because Congress created the statutory ambiguity that the Court has seized on, it is imperative that Congress remove that ambiguity at once.

Absent a congressional remedy, one can anticipate that the Court will continue to turn a blind eye to victims of union violence. Events at the AA Cross Construction Co. are an unhappy reminder.

In 1974, Cross contracted with the U.S. Army to build a pumping station near Port Arthur, Texas. The company began hiring both union and nonunion workers, which aroused controversy in Port Arthur, where a large of number of union workers lived. On January 15, 1975, a protest was planned at a meeting of the Executive Committee of the local Building and Construction Trades Council. Two days later, the "protest" commenced as "the mob swarmed over the construction site, brutally beating Cross and his employees with iron rods and wooden boards, overturning and setting fire to the trailer that served as the construction site office, smashing automobile and truck windshields, and vandalizing company tools and equipment."[97] The violence eventually forced Cross to default on its contract with the Army.

Cross and a number of nonunion employees led by Paul Scott sued the unions under what is commonly known as the "Ku Klux Klan Act" of 1871. In language quite similar to

the 14th Amendment, section 1985 (3) of the act allows for damage awards against anyone depriving "either directly or indirectly, any person or class of persons of the equal protection of the laws."[98] Scott won the claim at both the district and appellate levels, but Carpenters Local 610 appealed to the Supreme Court, which decided in 1983 that the act did not apply. First, the majority held that Scott had to "prove[ ] that the State is involved in the conspiracy" to deprive people of their civil rights.[99] State and local authorities may not have enforced the law, but unless they actually participated in the violence, the majority seemed to say, no civil rights violation occurred.

The Court also reasoned that the act targeted conspiracies aimed at Negroes and their supporters in the southern states after the Civil War. The majority claimed to "find no convincing support in the legislative history . . . that the provision was intended to reach conspiracies motivated by bias towards others on account of their economic views, status or activities."[100]

In his dissent, Justice Blackmun held that the Court had misinterpreted the legislative history of the act. Section 1985(3) was added to the bill, according to Blackmun, only after some legislators objected that the original bill would "extend[ ] federal jurisdiction to cover [all] common crimes" in the states.[101] Speaking to that potential overreaching of federal authority, then-congressman James Garfield asserted that only rights guaranteed by the 14th Amendment were a federal responsibility. But whenever the states failed, by mere "neglect or refusal to enforce" the laws equally, Garfield maintained, Congress was required to act.[102] The day after Garfield's speech, the provisions in today's § 1985(3) were introduced. Thus, while limiting the reach of federal criminal jurisdiction in the states, the act was also intended to address the failure by local officials to enforce civil rights.

The legislative history also showed, according to Blackmun, that the act was designed to protect the rights, not only of Negroes, but also of northerners who had come to do business in the south. Citing Rep. William Kelly (R-Pa.), Blackmun described the "Klan problem" targeted by the act as "one of Southern resistance to economic migrations of Northerners."[103] Blackmun then pointed out that "Port Arthur, Tex., was a self-professed union town. Respondents were threatened because of petitioners' view that nonunion workers were encroaching into an area that petitioners desired to keep union dominated."[104] Blackmun

and three other dissenting justices saw no relevant difference between the aims of union violence and those of Klan violence.

Whatever the merits of those arguments, the Court was no more willing to apply civil rights law to the problem of union violence than it has been to apply the Hobbs Act. The majority reasoned this way: "The National Labor Relations Act . . . addresses in great detail the relationship between employer, employee and union in a great variety of situations, and it would be an unsettling event to rule that strike and picket-line violence must now be considered in light of the strictures of § 1985(3)."[105] Thus has the Court declined to hold union officials accountable for strike violence. That puts the matter squarely in the hands of Congress. "Unsettling" or not, the victims of strike and picket-line violence demand and deserve accountability.

Conclusion

"Public policy concerning labor unions has, in little more than a century, moved from one extreme to the other," wrote Friedrich A. Hayek in 1960. "From a state in which little the unions could do was legal"[106] at the turn of the 19th century, we now have precisely the opposite perspective at the turn of the 20th.

> [T]hat it is legitimate for unions to try to secure higher wages has been interpreted to mean that they must be allowed to do whatever seems necessary to succeed in their effort. In particular, because striking has been accepted as a legitimate weapon of unions, it has come to be believed that they must be allowed to do whatever seems necessary to make a strike successful.[107]

In 1907, Clarence Darrow cleverly exploited that sentiment in Caldwell, Idaho. In that case, the injustice was to acquit three union officials. Today, however, the Supreme Court has solemnized the Idaho debacle as judicial precedent. As a result, thousands of acts of union violence have gone unpunished. Legislation such as FUVA may be the only way of reining in the Court’s excessive deference to "legitimate" union objectives.

Notes

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3. Ibid., p. 111.

4. Ibid.

5. Ibid., p. 114.

6. Ibid., pp. 152, 361.

7. Ibid., p. 223.

8. Ibid., p. 316.

9. Ibid., p. 710.

10. Ibid., p. 725.

11. Ibid., p. 754.

12. J. Anthony Lukas, "The Making of Big Trouble," Idaho Yesterdays 41, no. 2 (1997): 9.

13. Sean Wilentz, "The Wild West: Anthony Lukas' Big Trouble," Slate, http://www.slate.com/ BOOKREVIEW/97-09-30/BOOKREVIEW.ASP, September 30, 1997, p. 2.

14. Richard Lingerman, "Frontier Justice," New York Times Book Review, October 26, 1997, p. 12.

15. Alan Brinkley, "Who Killed Frank Steunenberg?" New Republic, October 27, 1997, p. 35.

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19. Ibid.

20. Ibid.

21. Ibid. at 688 (emphasis added).

22. United States v. Local 807, 315 U.S. 521, 532-33 (1942).

23. 18 U.S.C. § 1951.

24. 91 Congressional Record 11,904 (1945).

25. Ibid. at 11,918.

26. 18 U.S.C. § 1951(a).

27. 18 U.S.C. § 1951(b)(2) (emphasis added).

28. United States v. Enmons, 410 U.S. 396 (1973).

29. 18 U.S.C. §§ 420a-420e-1 (1940).

30. Enmons at 399-400.

31. 91 Congressional Record 11,908 (1945).

32. Enmons at 400.

33. 89 Congressional Record 3,220 (1943).

34. Ibid. at 3,220-21.

35. Enmons at 418.

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37. Freedom from Union Violence Act, S. 230, 105th Congress § 2(a) (1997).

38. Ibid., § 2(c)(1).

39. Hearings Before the Senate Committee on the Judiciary, 98th Congress 1009 (1984).

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42. Ibid., p. 219.

43. John Kifner, "Picket Signs and Cheers as Drivers Go on Strike," New York Times, October 26, 1990.

44. John Kifner, "Dealers Cite Warnings Against Selling the News," New York Times, October 10, 1990.

45. Vigilante, pp. 221-22.

46. Ibid., pp. 224-25.

47. Ibid., pp. 231-32.

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88. Hayek, p. 267.

89. For a succinct overview of the theory of the matter, see Roger Pilon, "A Government of Limited Powers," in The Cato Handbook for Congress: 104th Congress (Washington, DC: Cato Institute, 1995), pp. 17-34.

90. Gibbons v. Ogden, 9 Wheat. 1, 231 (1824) (Johnson, J., concurring).

91. United States v. Lopez, 514 U.S. 549 (1995).

92. See, for example, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937).

93. Testimony of Edwin Meese III Before the Senate Judiciary Committee, September 3, 1997, pp. 2, 7 (not yet published, copy available from the author).

94. Haggard and Thieblot, p. 114.

95. Model Penal Code, §223.4; AK, 11.51.520 & 11.41.530; CT, CGSA §53a-119; HI, Hi Pen. C. §707-64; IA, §711.4; KY, Ky. Pen. C. §514.080; MD, Ann. C. Md. Art. 27, §562B; MT, Mt. C. Ann. §45-2-107; NB, Neb. Rev. Stat. §28-513; NJ, NJ Stat. Ann., §2C: 20-5; NY, Consol. Laws of NY, Ann., §155.05(e); PA, Penn. Consol. Stat., Ann., §3923; SD, SD Codified Laws, §22-30A-4; UT, Utah C. Ann. §76-6-406. Colorado has taken a broader approach by striking down its extortion statute because it would have reached

Enmons-type activities found to be constitutionally protected. Whimbush v. People, 869 P.2d 1245 (Colo. 1994).

96. RI, Gen. Laws of RI, §11-42-2; VT, Stat. Ann. T. 13 §1701; WI, Wisc. Stat. Ann. §943.30.

97. Scott v. Moore, 680 F.2d 979, 984 (5th Cir. 1982).

98. 42 U.S.C. § 1985(3).

99. United Brotherhood of Carpenters v. Scott, 103 S. Ct. 3352, 3357 (1983).

100. Ibid. at 3361.

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