pert briefings on national affairs, why the letter was apparently never exposed in advance to the critical scrutiny of experts in labor law — these are fascinating questions which cannot be answered from the outside. One who has written letters for the signatures of Senators, Cabinet members and Presidents — some of which they probably signed without careful reading, on subjects upon which they could only trust the expertise and judgment of their staffs — cannot help being curious about the role of staff, friendships, and influence in the making of Church policy. But an exploration of these questions would be purely speculative. The best this Roundtable can do is to describe the exterior setting for this unusual incident.

## PHILOSOPHICAL, LEGAL, AND PRACTICAL CONSIDERATIONS OF COLLECTIVE BARGAINING IN AN ENTERPRISE SOCIETY

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It seems strange to a student of the economic, political, and legal development of our society and its philosophical underpinnings that, in the middle of the twentieth century, so little is understood generally about the institution called collective bargaining. The failure to appreciate its values implies that people may not understand the elements which make up our society, because collective bargaining is integral to the critical tenets and factors basic to an enterprise society.

A serious look at capitalism, or enterprise society, is a necessary prelude to a consideration of collective bargaining. Fully developed capitalism, flowering in mid-nineteenth century, can be conveniently presented by listing a number of its basic characteristics. High on such a list will be *private property* and its corollary the *profit motive*; *commercialization of economic life* under a system of prices; a *free market*; development of *speculation*, or roundaboutness in production; establishment of *predicable law*; acceptance of *rational technology*; the device of *calculation in accounting terms;* and finally, but not least in importance, *freedom of capital* and *freedom of labor.*[1]

Property was not always privately owned. It took centuries for fee simple ownership to evolve and for property to become rid of encumbrances which restricted free use for private gain. It is obvious that ownership on a private basis without encumbrances was essential to the growth of enterprise. Associated with the development are some significant changes in economic and social relationships. It was an agricultural phenomenon no less than a commercial

[1]It is not assumed that these factors or characteristics are exclusively capitalistic, that is, unique to a capitalistic society, but they are all essential, and taken in conjunction with each other, provide a realistic description and analysis of the essential characteristics of a capitalistic society. It should be acknowledged that I am indebted to Professor Melvin M. Knight for giving me this approach to the analysis of capitalism. Economic historians will recognize that it comes, in large part, from Werner Sombart, Max Weber, and Henri See.

and industrial one. For example, the enclosure movement in England, and the accompanying rise of capitalistic agriculture, was highly significant and helped provide a labor force for the new industrial towns and urban centers.

The revolution in industrial production, often called the "Industrial Revolution" and commonly associated with changes which took place in the nineteenth century, has often been given so much emphasis that people neglect, or are unaware of, the vast changes which took place in commerce, dating significantly from the fifteenth century and even earlier, which paved the way for and created the possibility of the changes in production. The commercialization of economic life — the organization and sale of goods and services under a system of prices — was a development of no mean significance. Associated with it, in fact a natural evolution of liberty to carry on in the field of commerce and along non-traditional lines, was the freeing of the market.

It is difficult for some people in the twentieth century to realize that the market was not always free, that it was highly organized and administered on the basis of privilege until relatively recent times. Outsiders were excluded from choice mercantile activities. Privilege was gradually broken down, in part, by interlopers who helped create and form a "middle class" — a bourgeoisie, capitalistic in origin and spirit.

Although the point is seldom made, even in American history books, it is nevertheless a salient truth that the American Revolutionary War, particularly insofar as New England shippers were concerned, was a struggle to free the market of arbitrary governmental restraints. It is an oversimplification to explain or describe the American Revolutionary War solely in these terms, but it is a serious neglect not to emphasize this central aspect. It may be true that the British were unable to win the war because there were many "revolutionists" in England who sought the same objective that the colonists had in mind, to free the market for enterprising merchants. The overall struggle was won when the laissez-faire philosophy was accepted. It may be a "happenstance" that Adam Smith's *Wealth of Nations* and the American Declaration of Independence are both dated 1776, but it is not simply a coincidence that they both sought, in part, to establish a free market. The demand for a free market caused a revolutionary change which helped set the stage for free enterprise in all economic affairs.

Less spectacular, but not less decisive for the growth of capitalism, was the development of a system of commerce and production which involved long-range investment. First in commerce, and then in industrial production, investment came to be more and more roundabout. The development of an enterprise required a considerable outlay of capital and long use before it was certain that the activity would pay off. A willingness to invest and to forego immediate returns in the hope of larger future returns had to be developed.

These things were utterly dependent upon the establishment of stable central governments with determination to make law a constant, predictable thing. The expression "Capitalism and the rise of the national state were Siamese Twins" is a reflection of the importance of predicable law to the rise of capi-

talism. Businessmen had to have assurance of stability in the law as a condition for projecting activities.

Of central importance, too, was the rise of rational technology. Conscious search for better methods of production had difficulty gaining acceptance. Precapitalistic economy frowned upon change. Innovation could not be introduced easily. Besides institutional blocks to development of new methods, there was human fear of change or, more accurately, the fear of failure and inevitable hunger if the customary methods of production were tinkered with. Old methods had been tested for generations; innovations were unsettling and unsure. People who feared disastrous consequences of innovations resisted and, in extreme cases, rioted. Eventually obstructions were overcome and the relatively unencumbered pursuit of a rational technology carried the day. So commonplace nowadays is the acceptance of invention and the conscious search for efficiency that it is hard to realize how relatively recent is the development and how long and difficult was the struggle to clear the field.

Calculation of profit and loss are essential to the efficiency of production. It may seem humdrum, but calculation in accounting terms was an invention which contributed to the rise of capitalism. Double entry bookkeeping, in place of the notarial register or continuous entry bookkeeping, gave a method for continuously determining profitability of the enterprise.

Not least, yet coming to fruition relatively later than some of the other factors, were *freedom of capital* and *freedom of labor.* They were parallel developments.

Freeing of capital is not unrelated to the development of private property (although one can easily realize that private property might exist without unrestricted freedom in its use) and freeing of the market. It is not amiss to trace the freeing of capital to the rise of the corporation. Capitalistic production required that capital be allowed to combine. Large family fortunes could be tapped only to a limited extent to carry the burden of investment. The partnership arrangement had its place, but a more satisfactory arrangement was needed. Incorporation and limited liability were the inventions, but they had to achieve acceptance and legality. An interesting, but intense, struggle to legalize free incorporation can be traced in British history (the nature of the struggle and its importance may be less clear in American history). Development of the law of incorporation came slowly to a summit in the middle of the nineteenth century when, for the first time, any individuals who had the means could combine their capital through incorporation equally with all others and without restraint. For the first time capital was really free. It stimulated the growth of enterprise perhaps as nothing else could. Its rise coincides with the beginnings of really modern large-scale enterprises.

Freedom of labor is sometimes thought of as release of workers from customary and traditional obligations. It was a long and often painful process by which the rights of workers to seek new employment were achieved.

To recount it would involve a discussion of legislation governing apprenticeship, of laws relating to settlement and relief for unemployed or destitute persons, and of systems of poor relief. It would involve the story of the

gradual process of elimination of restrictions on relocation of workers. It would include the story of conflict about freedom of individuals to seek the best employment and roles of local authorities and administration of the laws. The process of change which brought freedom for the worker gained momentum in the late eighteenth century, but it was not until the nineteenth century that a worker really became free to seek any job whatsoever. It was often by ugly means that the labor force of rising industrialism was mobilized; yet, produced in the process was the development of a legal freedom not previously known.

Another way of looking at freedom of labor is found in the legislation of concerted action, that is, the right of workers to form and join unions and to seek collectively for protection and improvement of their working conditions. It is in respect to this concept of freedom of labor that the legalization of collective action among workers runs parallel to the legalization of capital to incorporate. Both involve unions, the one of capital and the other of labor. Both may have been an affront to the nineteenth century liberal who opposed any combination whatsoever. The fact remains, however, that combination was inevitable under capitalism and the corporation and the labor union are integral parts of its development.

The freeing of workers to organize came in Great Britain only with legislation from 1869 to 1875. In the United States, while there was an earlier formal discarding of the doctrine of criminal conspiracy, organized labor did not obtain freedom to pursue its interests as early as did labor in England (that is, freedom to pursue any objective not unlawful when pursued by an individual and by any means not unlawful to the individual).

These remarks, as well as showing the substance of capitalistic development, indicate also the variety and fluidity of institutional adjustment. The detailed history is long and full of heroic struggles to achieve freedom and liberty. Throughout, when stripped of surface manifestations and self-rationalizations of interest groups, the common denominator, the essence of the whole, is a basic struggle for sufficient power to pursue economic self-interest.

The rise of labor unions and collective bargaining must be viewed in this context. They are a phase of universal struggle for power in the pursuit of economic self-interest. This was not necessarily the power to dominate; but it was fortunate in the British and American economies that there was a multitude of separate, pluralistic forces and an early development of a large and well established middle class. Many different groups have always been involved in the struggle. Because of them and the large middle class whose individual members had a multiplicity of interests, an important stability was created. As a result, large masses of people seldom, if ever, took polar positions. Countervailing forces checked development of power. Progress was made as institutional adjustments gradually worked out accommodations. Hence, although progress was piecemeal, it was solid. Democracy had a safe climate within which to function.

Trade unionism and collective bargaining had to make their way and establish themselves in this teeming context of pluralism. It is little wonder that both were simultaneously criticized by opponents and praised by pro-

ponents. Confusion and misunderstanding could, and did, prevail, apart from the direct conflicts of interest which were sometimes colored by militance before being soothed by compromise and accommodation.

If one still questions whether collective bargaining is a basic institution of an enterprise society, it need only be said that it is found in no other. Something basic in our enterprise system gives rise to it, accommodates it, and justifies it. The justification is found in the very thing that justifies competition. But what justifies competition? Sometimes we say that it is because competition makes for the greatest efficiency and highest standards of living. This is only a materialistic, economic justification, whereas, there is an important complementary legal justification. We did not enact a law to create or justify competition, although we have enacted laws to protect it or to sharpen it. The justification evolved in a principle of the common law and we must look to it for understanding.

The justification of competition is found in the "prima facie theory of torts" or the "just cause" doctrine. If you are asked whether you agree with the principle that says "the intentional infliction of harm is actionable," your answer will most likely be "yes." For example, if someone decides to go out and do harm to someone else and perpetrates the harm, the injured person should be permitted to sue for damages. But, let us ask, "How, then, do we justify competition?" Surely, when one enterpriser decides to establish a business where one is already flourishing, the gain which is made by the new enterpriser may be at the expense of the enterpriser who is already in business. Why is that not a cause for an action to recover damages?

The full statement of the "prima facie theory of torts" is: "the intentional infliction of harm is actionable, unless justified." The real question hinges on justification. In business competition the justification is found in the general good enjoyed from competition, that is, we believe free pursuit of economic self-interest produces the best for society as well as the individual. When economic self-interest is the objective, and harm to others is incidental, the infliction of harm is privileged. The harm is not inflicted for its own sake but is incidental to "the battle for trade," to the free pursuit of economic self-interest.

We emphasize that free pursuit of economic self-interest is conducive to the most efficient and productive ordering of society. If it is based upon survival of the fittest, if it has its harsh side, it is, nevertheless, the motive force of our enterprise system.

From this certain things follow. In such a society, one's pursuit of economic self-interest may run into conflict with another's pursuit. Also, one who does not have the power to pursue his economic self-interest effectively is, for all practical purposes, hardly in the system. Unless submerged by economic, political, social, or psychological conditions, the human spirit will try to improve its position. At least we believe an individual, or a group, should strive to assert itself and should have equal freedom to do so.

Therefore, it must be said that one is in an enterprise society in a meaningful way only when one has the ability and power to function in it. His-

torically, under the impact of industrialization and the remorseless working of the market, workers, for the want of power to protect their interests, found themselves, as a practical matter, outside the system; and they wanted to get in to enjoy their fair share of the fruits. At an earlier time would-be merchants and capitalists wanted to get into the system — to gain freedom of the market and freedom of capital — and they gathered power and used it to get in, but they had to challenge entrenched power — in England the landed Tories — to succeed. Similarly, workers had to struggle through organization and economic action to get into the system effectively.

We must underscore the fact that unions in our society, like corporations, are bargaining institutions and that because competition is basically a power process so is collective bargaining. Our enterprise society is, in reality, a bargaining society. All the important transactions in the economic world are negotiated, or are bargained. It is a simple fact, worth reiterating, that unless one has the power to bargain, one must stand aside or be pushed aside or ignored. Hence, the genesis of unionism was a struggle to get into the society in meaningful pursuit of economic self-interest; a struggle to get power in the interest of gaining manhood and self-respect, as well as economic improvement.

Militancy, though necessary, was sometimes misinterpreted and characterized as revolution, socialism, and the like. Unions appeared to challenge the basic institution of private property, but fundamentally they were not doing so. Unionists, except for extremists on the fringes, have always accepted the system. Once in, their true conservatism came forward. Unions in the United States are not revolutionary. They necessarily are militant, however, until they gain security, until they become reasonably free from institutional assault.

While unions were originally opposed because they were considered to infringe upon rights of property, today the argument has shifted to the newer theme. They are often considered an encroachment upon management functions.

Do unions challenge management control? Of course they do under some circumstances. Collective bargaining entails a "sharing of management." It produces a bilateral rule-making process in the place of a unilateral one with respect to the subjects which fall within its scope. However, although the right to manage is challenged when the union appears, does this mean that management need lose control? Experience in labor and management relations says "no." One would be hard pressed to identify what management control General Motors has lost because of the presence of unions, although the Company does share some of its decision making and it must conform to negotiated rules.

A common misunderstanding about union challenge to management control rests on the mistaken belief that complete managerial control was exercised prior to the appearance of unions, that there was an array, or "lump," of management decisions which added up to complete management. Hence, when unions demanded collective bargaining, it was argued that management control was threatened. Each time the scope of issues under collective bargaining was enlarged — the customary historical experience whether achieved by the increasing power of the new union or by directive of the National Labor

Relations Board — it was lamented that unions were engrossing a larger and larger share of the managerial field.

Many students and practitioners of industrial relations and personnel administration argue, to the contrary, that management has improved in quality and become more efficient under the pressure of unionism.[2] It is also generally recognized that unions have no interest in taking over management. Unions want to share, and as well as they can, in the proceeds of industry, but they do not want responsibilities of management. This is not because they are irresponsible but simply because it would divert them from the reason for their being. Unions are foremost, and primarily, protest organizations. They exist to protect the interests of workers. They protest and protect against unfairness and insecurities. They need, and they want, no other functions.

Without revolutionary aims, which have been of minor and relatively insignificant importance among unions in this country, militancy has often been misunderstood. It is mostly a product of institutional insecurity and is directed to achievement of a viable organization. Once such organization is achieved and accommodated, militancy subsides. This is not to say that unions do not exert power to achieve their ends, because they do. Collective bargaining, as we have already stated, is a power process, in which both parties use power to achieve or protect their goals.

Although institutional accommodation has long since settled the controversy over union security in many quarters, the struggle continues in others. The political controversy over repeal of "14(b)" is, in part, a phase of this continuing conflict.

Arguments marshalled for and against "union security" often are largely self-serving and emotional. Unions fight to survive in the name of freedom while the bitter opponents of unions justify their position in the name of freedom also. Institutional security, both for management and for labor, is a prerequisite to successful collective bargaining.

It is paradoxical that in those situations where the union least needs special mechanisms for security, the employer is least adverse to granting them. The question of freedom is not a burning issue because each party, in fact, enjoys freedom from institutional assault. Such situations are sometimes characterized as mature relationships. Opposite this, where an employer will not accept a union, the union will most likely be pressing vigorously for security. Though the employer often clouds the basic issue by arguing that he is protecting the individual worker's freedom, he is obviously arguing for liberty to conduct his business by his own rules and without restraints. The latter is a legitimate objective. If the controversy is fought out at this level, no one should complain. But, in the name of fairness, the issue should not be confused by claiming loftily that the only desire is to protect the individual worker's right to freedom of employment, his right to work. Yet unions similarly use clichés to bolster their objective of freedom from institutional assault.

One need not argue the question of the legality of either union security

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[2]M. Ways, "Labor Unions are Worth the Price," *Fortune*, May 1963.

measures or their Right-to-Work antitheses. The government is entitled to set the rules for a fair fight – by defining unfair practices of employers and unions. But it might be argued that the government should leave the field open as much as possible for the exercise of freedom in the market place, that is, at the bargaining table. In theory and practice, the government went beyond protection of the process of collective bargaining when it enacted the Taft-Hartley Act and set up proscriptions and prescriptions about the process of negotiations. The irony is that those who sponsored government intervention in the substance of collective agreements and the procedures of negotiation were those who, philosophically, desire to keep the role of government otherwise to a minimum. In sending the government down a new road of intervention into the substance and procedures of collective bargaining, they restricted freedom by government fiat.

But what of the worker's freedom to join or not join a union? If a union and an employer agree across the collective bargaining table to a "union shop" as a condition of employment, it is hard to make this control different from a variety of other sanctions that confront workers. The people who rail against a "union shop" are seldom heard to say much about seniority agreements; but a seniority agreement may have a greater compulsive restraint and economic impact upon a worker than the payment of union dues. It sets up a system of personal priorities to jobs and forces workers to comply with it. The worker is compelled to accept employment under its terms. The only choice is not to accept employment with that employer; the same choice afforded when there is a "union shop." How is the one more or less an infringement upon freedom than the other? Furthermore, the seniority principle was not a creation of unions although it was widely adopted by them. Many employers had imposed such a principle in work assignments before they dealt with unions. Many employers who do not deal with unions unilaterally adopt seniority or other rules governing the employment relationship. Workers have to accept them to retain their employment. How is it different in impact upon the individual when rules are imposed by an employer from the situation where rules are imposed through collective bargaining?

Some unions have gained security through control of work assignments under seniority rules. Employers – before the arrival of unions and sometimes to avoid having unions – imposed (some offered rather than imposed) pension and welfare plans, and bonus and profit sharing plans, upon their workers. No one objected about denial of freedom; the employers were being humanitarian. But the simple fact is that employers were imposing their notions and requirements upon their employees without giving them a choice except to reject the employment under the terms dictated by the employer. An individual worker might have preferred to have included in his current wages the money which was utilized to support these various programs. He might have thought of himself as an individualist, able to take care of himself, and have been resentful of the inroads upon his freedom. What choice did the worker have? When these things are established through collective bargaining, the result is similar, except that as a member of a union there is a procedure for participa-

tion (often exercised in the breach) and of representation under the "majority rule" principle which runs through our democratic, constitutional government.

Although some unions could not exist effectively if denied the legal contractual right to security, it must be conceded that there is an argument for non-compulsory unionism. It is not always good for a union when it gains its members through compulsion. Unwilling members are not good members. As a matter of fact it might be good for some unions to have to sell themselves. Non-compulsory unionism might keep some union leaders on their toes. Also, there is a widespread rejection of compulsion in our social order, and, when compulsions occur, they must be justifiable in order to prevail. The issue, of course, is always one of degree. Compulsions we will always have. They are inherent in a pluralistic, enterprise society. We can strive only to avoid the most distasteful ones.

Problems of protection of the individual from abuse in the union are not to be minimized either, but, like poor conduct in business, poor union conduct is a spotty matter. Most unions do serve their members in a representative way. Those which offend rights of individuals need to be subject to controls. The problem is a difficult one because of the long-standing respect that has been given to the internal processes of private organizations — emanating from our conception of freedom and long antedating unions. However, standards of acceptable performance can be imposed and efforts to impose them have already been made.

To round out other dimensions of the field of controversy it must be noted that once unions have gained institutional security and employers no longer seek to oppose them, other problems may arise. In fact, in the dynamism of our society new problems are always arising. But once unions are accepted, problems of collusion with employers may emerge where the two parties enter into a conspiracy against consumers, or where, without conspiracy, the parties by virtue of their positions can exert a monopolistic power over the market. In the field of labor and management relations, this is as yet an unresolved problem where suggested remedies often would produce results worse than the disease.

Unions and collective bargaining have to be accommodated in an enterprise society. Otherwise, the principle of freedom would be whittled into — to the detriment of the principle of competition. This, of course, leaves power as the arbiter. However, as long as we believe in free enterprise we have to accept the power factors inherent in it. We should not seek for the government to tamper with the process nor to involve itself in settling disputes, except as a mediator. It is a mistake to propose compulsory arbitration as a peaceable way of avoiding open conflict and work stoppages. It would destroy too much of the principle of freedom. Nor should we expect the parties to collective bargaining not to use their power. It is of the essence of our society that they do so. We should not yearn for a dispassionate laying of the facts on the table for analysis. Our economic society is not structured to work that way. Business is not carried on that way, but by negotiating.

Persons with strong religious convictions about the importance of humility

and brotherliness may be confronted with a paradox when they strive to accommodate their religious views with the realities of our economic system. It is a curious thing that the factors which make western society different from other societies are the principles of competition and enterprise, on the one hand, and the religious conceptions of humility and brotherliness on the other. Take either away and our society would be different. The question is whether they continuously can be kept compatible. They have existed side by side for some time, with all sorts of rationalizations and accommodations having been devised to keep harmony. If they do not come from the same roots, and this may be the case, and if they are basically incompatible, we are confronted with an ultimate paradox. Meanwhile, as long as we accept the principle of competition we must accept power — not brotherliness or humility — as the arbiter of economic differences. It is the people who have the power to compete and who use their power who are materially successful.

If we really want freedom of enterprise, we must accept it universally. We cannot be consistent if we preserve it for some and deny it to others. Labor unions have their place in our society. Collective bargaining will last as long as the enterprise principle prevails. We are entitled, of course, to have rules but the rules should be fair and, hopefully, based upon intelligent understanding of our society. If they can be tempered by good will, so much the better.

It is in this context that the "14(b)" issue can best be understood. Its supporters as well as its opponents have varying agendas. Most students of labor market institutions endorse collective bargaining as a desirable and even necessary mechanism for making and administering the rules required for fair and stable employer-employee relations in an enterprise society. They view "14(b)" not as a threat to collective bargaining but as a symptom of lack of understanding and acceptance of the institution (Right-to-Work laws appear to exist where the general environment is unfavorable to unions rather than being responsible for their weakness). Most American employers appear to agree in principle, as much as they object to specific union demands. Many of the supporters of "14 (b)" and the Right-to-Work laws which rest upon it, though they stress freedom for the worker, are really more interested in rendering unions ineffective in pursuing the economic self-interest of workers. Those who support Right-to-Work laws on honest philosophical grounds, as many do, are unlikely to be either students of or participants in the workings of the labor market. Such a position is perfectly respectable but the one who holds it should be extremely careful to be clear as to the issues and his own motives.