Ep yths

Guest: Mark Pulliam

WOODS: Let's get out of the way the natural question that might be on people's minds, which is that, with the more or less withering away of the labor union movement at least in the private sector in the US, doesn't it seem perhaps anomalous to give it this kind of attention in the year 2020?

PULLIAM: Well, it's very ironic that, as the fortunes of organized labor have declined, so has the public attention and academic attention that used to be devoted to it. And as a result, basically organized labor is ignored for all intents and purposes as if it had gone extinct. And while membership in the private sector has declined, they have a very strong hold of certain aspects of the economy, certain manufacturing elements, the auto industry, and they will never lose that. And at the same time, they have flourished in the public sector. And now, there are virtually as many union members who are government employees as there are union members who work for a private sector corporation, and the membership rate is many times higher in the public sector.

Labor unions remain very powerful, very influential institutions in our life, yet because they no longer pose a threat to many segments of the private economy, trade associations that used to oppose it, academic centers that used to study it, they've all lost interest and moved on to other things. And a lot of this has happened literally in the last 20 years, and I can remember when this was an active topic in conservative publications, in the scholarly literature. People used to write books, articles about it. And the fact that I'm talking about it almost is a novelty, but that in itself is highly ironic.

WOODS: I want to run through some of the myths that you take on in this piece, because they're myths that I'd say at least four or five of them, everybody's heard, and I would say if you're even slightly into this literature, you've heard all seven. And I've written about some of these myself, but even I feel like I walked away with more knowledge, thanks to this article. So let's try and run through them. And I'm ambitious enough to want to hit all of them, so you can give us a summary overview and then for people who want more information, I'll link them. Now by the way, I got a PDF of the whole issue of the *Independent Review*. Is this article generally available?

PULLIAM: If you go to the Independent Institute website, this article is available for viewing. It is not behind a paywall.

WOODS: Okay, so I'll link to it. So my show notes page is TomWoods.com/1573 for the episode number, so we'll have it available there. All right, so the first one is the one that most people think about, which is inequality of bargaining power, that the worker doesn't have any real bargaining power because most of them have little in the way of savings. They can't hold out very long. The owner of capital can hold out forever. The worker can't afford to starve to death, so he has to go and take some contract, accept a contract that maybe he might not accept if the bargaining power were more equal. That's considered to be one of the primary rationales behind labor unionism. Is there something wrong with it?

PULLIAM: Well, actually, you've given it even a more sophisticated rationale than the Congress that enacted the Wagner Act in 1935 gave it. Literally the rationale for the collective bargaining under federal law in the National Labor Relations Act is that because

shareholders can organize together as corporations, that employees need to be able to organize into unions, because otherwise, the very fact that it's worker-versus-corporation is inherently exploitative. And this is straight out of Karl Marx.

WOODS: You have a myth number two about capitalism oppressing workers. Let's come back to that one. But myth number three: employers were wrong to resist unionization. Well, that's a value judgment, but that does seem I think plausible to most people, that the workers are just trying to improve their situation, and employers want to pay them the least possible, so my sympathy should be with the underdog, so of course they're wrong to resist unionization.

PULLIAM: Well, and that's why you have to go back to first principles and look at the economics of the labor market and also sort of the philosophical assumptions of freedom of contract, of the right to associate privately. And a lot of these assumptions that we have about workers need to do this all go back to: because otherwise they would be helpless. Now if you think about it, you could say the same thing about somebody selling coffee, a humble product, they need government help. They need to be able to organize into cartels. They need to be able to be allowed to engage in price fixing and to even force customers to buy their product, because otherwise, who would buy a cup of coffee at anything other than an exploitive a price? Well, then you look at, we have Starbucks. They're on every street corner. They charge $3 for a cup of coffee. You cannot make assumptions just because, oh, a product is just a warm, flavored cup of water, or that an employee is just an individual.

Individuals have skills and ability, and employers will pay them whatever those skills and ability are worth. Some individuals, athletes, can command salaries of tens of millions of dollars. Others need minimum wage in order to earn even that. So there's nothing inherent in the employment relationship that makes it exploitative or not exploitative. It's like any other transaction in a free enterprise economy.

So when you look at businesses, do businesses have a moral or legal obligation to negotiate with their employees, to recognize employees' unions, to honor picket lines, and so on? No. Employers have a right to operate their business however they like as long as they don't defraud people or coerce people. So a lot of these things that we assume are good things because we've been trained to think that way — and in recent decades, nobody has pushed back by questioning the value of labor unions.

And then we also assume that all of the benefits that have occurred in the economy with elimination of child labor, wage rates going up, benefits being provided, the work week being reduced to 40 hours, and so forth, now we have minimum wages — a lot of people assume that this was a result of collective bargaining of labor unions. But it's not. These things were done because competition in a free market economy required employers to treat employees better in order to get employees to work for them. And also, some of these things are a result of the passage of legislation, which were not primarily due to collective bargaining. These are policies that progressives favored.

And so I think we assume and many people assume that unions have improved the lot of workers, and I think other forces have been at work, including the free market economy, that have improved the lot of workers, and that what labor unions have done to a very large degree is use compelled dues to participate in political campaigns and have fostered enormous amounts of corruption.

WOODS: Now, it goes beyond corruption, because myth number four has to do with the issue of violence. And in American classrooms, the way the situation is portrayed is that the wicked owners of capital unleashed violent attacks on peaceful strikers. Now, the question is, looking empirically at the situation, what was the general story of where the violence came from? Not the outline examples, but what was the general narrative? And really, it turns out that the reality is quite the opposite of what people have been led to believe.

PULLIAM: And this has always been true. You can go back to common law, the British common law. You can look at a jurisprudence in the United States prior to the passage of the Wagner Act when it was all regulated by state law. And the thing that has triggered violence from the time labor unions began is not employers beating up employees simply because they belong to a union. It's what happens when the unions decide to withhold their services from an employer as a tactic to coerce higher wages, shorter work week, greater benefits. And that's called a strike. And the way that workers engage in a strike is they leave the workplace, unless they conduct an illegal sit-down strike like the UAW did against General Motors, but they form a picket line outside the business. And in a free society, there's nothing wrong with that. You can't be required to work against your will, and you're allowed to engage in assembly as long as you do so peacefully.

The crux of the matter is that the employer has the right to hire other people who are willing to work on terms that the striking workers refuse. And when those workers try to cross the picket line is where 90% of all union violence occurs. And they will be beat up. Their cars will be vandalized. In some cases, scabs' houses are bombed, shots are fired, etc. And employers, this is when employers used to be able to go to court and get an injunction against the violence so that they could hire the workers on mutually acceptable terms. And sometimes they had to hire, before we had big public police forces, Pinkertons and similar detective agencies to serve as basically security guards to protect the employer's premises from vandalism, violence, arson, etc.

In the mythology, the Pinkertons are rogue agents clubbing workers into submission and so forth, but this is a fiction. And if you go and put on your historian hat and go back and look at these various incidents throughout the American labor movement, some of them are quite appalling, that union mobs in West Virginia went on a rampage so severe that troops had to be called out to suppress it. So there is a record of violence in the American labor movement. And employers are not always blameless, but in general, the violence has been engaged in by unionized workers against scabs crossing picket lines. And if you're honest, there is no reason why people shouldn't be allowed to go to work, even during a labor dispute.

WOODS: Well, the general principle that I think held sway in the courts, at least through the 19th century and early 20th century, was that you are free to say, I will not work for that amount of money, but you are not free to say that guy over there will not work for that amount of money. That's not your decision to make.

PULLIAM: And that's been the rule going back into the 1840s, the *Commonwealth v. Hunt* case out of the Supreme Judicial Court of Massachusetts, and that represents the common law rule — again, in the mythology, we needed to federalize labor relations because states were prohibiting unionization per se and granting injunctions against unionization per se. No injunction was ever granted to prevent employees from peacefully organizing. Injunctions were granted to stop union thugs from threatening and harming workers who were trying to earn a living.

WOODS: Now, again, I'm going to skip ahead to one that people may be more likely to have heard of than the injunction one when we get to the end. But you talk about "the model of collective bargaining used in the Wagner Act is beyond reproach." This idea of exclusive representation, which I don't believe is the norm in the Western world, but most Americans, never having been exposed to another system, think this is the only way it can work. So can you talk to us about that?

PULLIAM: Yes. And again, we only know what we're taught. We only know what we've been exposed to. And so we have a model of collective bargaining in the United States, which a lot of people assume that's the way unionization works. How else could you do it? And this model gives unions enormous power in the workplace by exclusive representation. It's basically a classic economic definition of a cartel, a mandatory cartel.

So in a particular unit within a corporation, let's say a warehouse, that the warehouse employees decide we want to belong to a union. Again, there's never been anything that prevents employees from belonging to a union unless they've agreed with their employer, they promised not to. But so they join a union, and they go to the employer and say we want to talk to you about giving us better working conditions. Under the Wagner Act, this is transformed into an arrangement where a majority of the employees in the warehouse, if they vote in an election to select a union as their representative, that union becomes the exclusive representative for all of the employees in the warehouse even in a scenario where 51% favored union representation and 49% opposed it, the 49% would have to surrender control over the terms and conditions of their employment to the union spokesperson. And the employer, conversely, is stripped of his ability to deal with that 49% minority directly. So, those 49% cannot ask for a raise, cannot talk to the employer about things that concern them at work. The union becomes the exclusive representative for all of the employees in the bargaining unit.

Now, back during a period of Jim Crow and up until civil rights laws were passed in the 1960s, this gave unions, which were racist institutions at the time, the ability to suppress minority employees, to treat them very poorly. So the Supreme Court, as these cases percolated up to the Supreme Court, basically invented a doctrine, duty of fair representation, to prevent unions from disenfranchising black employees. And then the same thing when union dues were being collected and used for political purposes against the wishes of the minority, the courts had to invent these rights of rebates and so forth to allow dissenting employees to get some of their union dues back. And this whole line of cases has been going on for decades and culminated a couple of years ago with the [*Janus* case]. But all these things would be unnecessary if employees were not forced into surrendering control of labor relations to an exclusive union representative.

WOODS: What was the name of the case? You cut out briefly.

PULLIAM: *Janus*.

WOODS: Yeah, that was maybe two years ago?

PULLIAM: Yeah. And what we're seeing is the court now is moving forward in restricting compelled membership in the public sector, but compelled membership, at least in a non-right-to-work state, is still the rule in the private sector.

WOODS: And now let's use that as a segue into your discussion of so-called public sector unions, which would seem to run counter to the narrative about unions, which is that they exist to fight against private sector exploitation.

PULLIAM: Yes. And I kind of save this in the article as the final myth, the seventh myth, starting out with the inequality of bargaining power. So a lot of people, if you do not use rigorous critical thinking, they say, well, a government employee is an employee, and why should a government employee have less legal protection than a private sector employee — without remembering that the whole rationale for allowing unionization and collective bargaining in the private sector is that supposedly corporations are evil and that individual employees, as a result of this Marxist notion of exploitation, will be shortchanged, that the capitalist will be extracting his unearned premium from this transaction.

And if you think about it, that whole model has no application whatsoever in the public sector. Government employees are public servants. They are providing the goods and services that the political process has decided is the appropriate allocation of taxpayer resources. Even FDR, who was president when the National Labor Relations Act was adopted, recognized that government workers shouldn't have the right to organize, should not have the right to strike. And this is why the National Labor Relations Act excluded government workers and still does: that public employees who are organized into unions in 2021 have that right pursuant to state or local law, and it's not something that federal law requires.

And it's just a matter of interest group politics. It's rent seeking. So you have teachers and public safety employees and other government workers, of whom there are quite a few, and they have an interest in increasing their compensation levels. And so they organize into these unions and then negotiate with the very politicians that they help elect with their dues, and then have these negotiations where the taxpayer is essentially unrepresented. And in the states where you have a high degree of unionization of government employees, you have the most grotesquely overly-generous pension plans that are underfunded, and states have enormous liabilities on the books because you have these rent seeking employees engaged in plunder without any of the market discipline that exists in the private sector, where employers very vigorously oppose unionization and resist demands at the bargaining table because it could put them out of business. Well, unfortunately, governments don't go out of business, and so unions get what they ask for, and it's just a matter of more and more and more.

WOODS: I think we'll wrap up with the one on injunctions, because I think a lot of people may not know about this aspect of it. But this is actually the most controversial part of the story, I think, of labor union history, because the question is — well, maybe you can describe first what the question is, but the gist of it is that the courts were unfairly interfering with labor union activity, whereas somebody like you would say no, the courts were behaving entirely appropriately.

PULLIAM: Well, and this shows the power of a slogan. So before the New Deal, when the Industrial Revolution came to the United States and we had the advent of factories and so forth, employees organized into unions and engaged in violent labor disputes, tried to restrict the right of replacement workers, or so-called scabs, from crossing picket lines to go to work with violence and threats of violence. Employers would go to state court and get injunctions against this, on the ground said it was a restraint of trade, it constituted tortious conduct under state law, which it did. And this was a great impediment to unions getting what they wanted. If unions could not engage in a strike and bring an employer to its knees, then the labor union is basically ineffectual as an organization.

So they recognized that they needed to prevent employers from asserting their legal rights, and they came up with a catchy slogan. And they their slogan was that this was "government by injunction," that when employers go in front of a court to get an injunction preventing a violent labor dispute, that that was [inaudible]. And the Democratic Party organized around this. It became part of their platform, and progressives adopted it. Felix Frankfurter, when he was a teacher at Harvard Law School, wrote a book about it, and he helped draft this Norris-LaGuardia Act, which would prevent federal courts from granting injunctions.

And like all myths, if you want to believe it, you adopt it. So this became part of the rationale for taking the adjudication of labor disputes out of the hands of state courts by turning it into a matter of exclusive federal law and taking it out of the hands of federal courts by banning the granting of injunctions and creating an administrative agency — this was one of the first of the swamp-type administrative state entities — the National Labor Relations Board. So now unions can engage in labor violence with impunity, and the only remedy that employers have is to file an unfair labor practice charge with the NLRB. And by taking away the remedies that employers used to have, you basically have conferred on labor unions a privilege.

And this is not an original idea on my part. Sylvester Petro, a great labor law scholar at NYU and later at Wake Forest, wrote a series of very meticulously researched articles back in the '80s. And his research has never been refuted, but people don't talk about it anymore because in the eyes of many people, labor unions have lost their relevance, and so scholars have moved on to other issues. But this idea that injunctions were routinely granted without justification to prevent legitimate union activities is a completely discredited canard.

WOODS: Wow. Okay, that is about as thorough an answer as you can get. And really, the specialized studies of it that I've seen just leave really no room for question on this one. If I

were a labor union sympathizer, I would look for some other avenue of argument. I wouldn't try to pursue that one any further. Well, this is the —

PULLIAM: But when the myth withstands that type of academic challenge, you just go with the myth. So they've sort of won the war with PR, even if there's no basis for it. And it's really kind of a sad testament for — and of all of the academic disciplines, labor law and labor history have been taken over in a very one-sided fashion by socialists, progressives,, so there's really very little objectivity. Nobody wants to study labor law except for people who are union advocates.

WOODS: That's true. And if you look at labor history in academic departments, it's all advocacy. There's no attempt to look at it in a balanced way. And I come from a background where my father was a teamster, so it's not like I'm just inclined to be belligerent. But I recognize that there have to be two sides of it, and I want to know both sides of it. Before we wrap up, give us your website and what people will find there.

PULLIAM: So I have a website, Misrule of Law, and it basically collects all the things I write. I do some blogging just for my website, but also links to other things I write for *City Journal*, for *Law & Liberty*, this article for *Independent Review*, and elsewhere. And it's basically public policy and legal commentary from a conservative or right-of-center perspective. And particularly in the legal commentary, a lot of it is very far left, so I try to be a voice to balance out some of that bias.

WOODS: All right, well, excellent. I'll link to that, as well as to the article we've been talking about, at TomWoods.com/1573. And Mark, thanks for your time on this neglected topic.

PULLIAM: Thanks for having me on.