

UNDER COVER

Laws and Liberties

The decision of the Reagan administration to dismiss the air traffic controllers looked very much like the first maneuver in a strategy of cowing, if not destroying, the public service union. The government invoked its most severe penalties because it clearly intended to set an example, and it chose its time to get tough with considerable care. PATCO is a small, relatively middle-class union. It inspires very little sympathy in union circles; after all, union people are inclined to say, PATCO supported Reagan in 1980. And the union suffers from a terrible tactical weakness: Those it hurts most by striking—the airlines—are not its employers.

Nevertheless the administration claimed to be acting from much higher motives. The controllers, the government pointed out, swore an oath not to strike. In firing them, the administration asserted it acted out of concern to protect public institutions, the sanctity of oaths, and respect for law. I do not find this very convincing, but the *New York Times* was persuaded, and the argument deserves some attention.

Notably, the president and his aides seem surprisingly cavalier about their own oaths to enforce the anti-trust laws. The merger of Dupont and the Continental Oil Company (Conoco) was striking enough in itself. It was even more salient that the Justice Department said nothing to discourage Mobil Oil's unsuccessful bid for Conoco. Wall Street could not believe that the government would allow Mobil to acquire a major domestic energy company without some challenge, and it discounted Mobil's offer because of the danger of prolonged anti-trust litigation. Next time the Street will be less hesitant: Mobil still has the billions of credit it arranged, and other corporate giants have their own war chests. The word is out: The administration believes that bigness is not bad, that oligopoly is not unhealthy, and that corporate concentration is part of the logic of the free market rather than a danger to it.

The economic theory behind this position is controversial, to say the least, and its fondness for great corporations that dwarf local and state governments is another proof that the administration's commitment to local regimes is a "shell game," as Jerry Brown called it. It is much more important, however, that the anti-trust laws do presume that bigness is suspect, that oligopoly is dangerous, and that competition requires many sellers and many buyers. The idea of competition espoused by the anti-trust acts may be outdated or wrong, but it is still the law. An administration that decides to interpret laws out of existence cannot really complain if workers are casuistic about contracts.

The administration does, however, have a consistent theory of the law. It turns on the proposition that liberty of contract is the essence of a free society, a notion popular with the courts at the turn of the century. Agreements between private persons (including corpo-

rations) are the foundation of social life, in this view of things; and constitute the barrier between us and the "state of war." Accordingly, contracts must be carried out. Similarly, the freedom to contract as one chooses—to sell one's property or labor where one wills and to buy whatever one can afford—is held to be more ancient and natural than political institutions. Legislatures can interfere with that liberty only for the most compelling of reasons. Hence, for the administration, the burden is on the anti-trust acts to *prove* their validity.

In *Lochner vs. New York* (1905) a similar holding occasioned Justice Holmes's comment that the Constitution "does not enact Mr. Herbert Spencer's *Social Statics*." No more does it do so today. The Constitution and the laws of the United States are more than the traffic regulations of some village market. If we are to restore respect for law, we had better begin in high places.

Yet the Reagan administration is sometimes no worse than its critics. The Justice Department and the American Civil Liberties Union have even agreed, according to one report, to return Walter Polovchak to the Soviet Union. Walter wants asylum here, and he would probably get it except for the fact that Walter is thirteen. The ACLU, ordinarily so maddeningly protective of any putative right of the individual, in this case represents Polovchak's parents, who are asking to have the boy returned to Russia. It seems a little hard, on the face of it, to see how the civil liberties of the parents would be violated if Walter were allowed to stay here. This view makes sense only on the assumption that a child is an extension of his or her parents. Granted that most parents feel this way, is their feeling binding on the law? Would the ACLU defend the right of parents, for example, to veto their daughter's abortion? (In my own view, parents have a much better claim in such cases than the Polovchaks do.) As regards the Polovchaks, at any rate, the ACLU takes the position that the relation of parents and children is prepolitical, and it quotes the Polovchaks as saying that they "do not understand how the government is to decide where the child is to live," though these libertarian sentiments do not exactly gibe with their preference for life in Soviet Russia.

The ACLU seems blind to the fact that political societies exist, in part, because they have ends that are higher than those of families and markets. We properly appeal to the government against injustice in economic and social life; the disadvantaged rightly expect government to balance the scales. Walter Polovchak is still a child, but that rather strengthens his claim to our protection. As an adult, he may decide that his desire to remain here was only an adolescent rebellion, but it is more than possible that he will congratulate himself on his preference for life in a democratic polity. We owe him whatever chance we can afford to *make* that decision, yea or nay—something he could not do in Russia. He has given us his allegiance and asked for our protection, and the most benighted chieftain of the Dark Ages would recognize the obligations that creates for us.

Wilson Carey Williams