

## Introduction

For some time now, union membership has been steadily declining. After reaching a peak of 33 percent in the United States in 1953, unionization hit 10.7 percent in 2016, its lowest level in one hundred years, and it shows no sign of rising.<sup>1</sup> In the United Kingdom, union membership is now half of what it was in 1979, or about the level it was just after World War II.<sup>2</sup> In many other liberal capitalist democracies, unionization rates have been falling steadily as well.<sup>3</sup> In part this decline is due to the success that unions have had in establishing a more just baseline for the treatment of all workers, for this makes joining a union seem less necessary for current employees. In part the decline is due to shifts in the nature of the relevant economies, in which large numbers of union jobs in heavy manufacturing have been shifted to less-unionized countries and replaced by jobs in industries that are more difficult to unionize. In part it is due to local outsourcing of what were high-paying unionized jobs to smaller, exploitive, currently nonunionized contractors who are also more difficult to organize. And in part this decline results from technological advances that have allowed many previously unionized jobs to be performed by robots.<sup>4</sup> But especially in the United States, this decline is also in large part the result of continuous attacks made against the very idea of unionization over the last thirty-plus years,<sup>5</sup> attacks that have been increasing in both frequency and vigor for some time now<sup>6</sup> and which are increasing even further under the administration of President Trump.<sup>7</sup> In any event, regardless of the cause of this decline, union membership is now becoming sufficiently small that unions may soon lose their ability to adequately protect workers from economic and personal abuse (if they haven't already) and may even lose their significance as a political force.<sup>8</sup>

Not surprisingly, this decline in unionization has been accompanied by a dramatic rise in the share of income going to the top one percent, a lengthy stagnation in real wages for everybody else, a steep rise in unemployment followed by

the replacement of high-paying permanent jobs providing good benefits with low-paying temporary ones providing no benefits as the unemployment rate has come down, and various other negative turns in the economic situation of masses of Americans, as well as the citizens of many other liberal capitalist democracies.<sup>9</sup> Of course, this sorry state of economic affairs is the product of many causes, not just one, and identifying all the contributing causes much less the precise contribution of each is a difficult exercise – indeed, the exact causal story behind this negative turn in so many measures of economic well-being may never be entirely clear. But as we shall see, there is strong evidence that many of our current economic problems here in the United States and, by contagion, in other parts of the liberal capitalist world have at least been partially caused by the decline in unionization.<sup>10</sup>

In two previous books, I have discussed these rising economic problems (and particularly the economic problems of inequality and unemployment) and proposed new ways of assessing and implementing our moral obligation to address them.<sup>11</sup> In this book, I turn to the problem of unionization. But the idea is not simply to propose reversing the decline in unionization as an (additional) remedy to the economic problems of inequality and unemployment. Indeed, because it makes wages higher than they would otherwise be, unionization is sometimes claimed to be a cause of unemployment, for employers will hire fewer workers if they are more expensive. Unionization is also sometimes claimed to be a cause of inequality, for if fewer workers have jobs, more people will be poorer, even if the income gap between those who are working and the rich is somewhat smaller.<sup>12</sup> There is a great deal of empirical evidence showing that neither of these consequentialist claims are true (more on this later), but whether they are true is irrelevant to the argument I will be making here. In this book, I will be arguing for unionization in its own right – that is, I will be presenting a moral argument for unionization that does not depend on the effects of unionization on inequality or unemployment, although I shall do my best to outline these effects whenever possible. Instead, I shall be arguing that unionization is required not because it is good, but because it is right. This, after all, is exactly what those who have been arguing against unionization have been doing all these years – defusing the argument that unions raise wages and benefits, create job security, and improve working conditions by claiming that unionization, and especially what they derogatively refer to as “compulsory” unionization, is an infringement of liberty; therefore, the effects of unionization on the good of workers, or even the common good, are morally irrelevant because liberty cannot be justifiably infringed for any of these reasons.

Of course, the anti-union argument from liberty can take a variety of forms. Sometimes it is expressed as a straightforward argument derived from a supposed general right to liberty.<sup>13</sup> As we shall see, however, the concept of liberty is not at all as straightforward as those who make this argument pretend, and those who raise this objection to unionization rarely acknowledge

that various versions of liberty might be involved here or clarify which version they are referring to when they refer to liberty. Sometimes the argument from liberty is expressed as a more particularized argument regarding freedom of association. Here the claim is that even if voluntary unionization may accord with freedom of association (the liberty to associate with whomever we wish), compulsory unionization is contrary to it, and therefore workers cannot be compelled to join a union or pay dues even if they benefit from the activities of the union.<sup>14</sup> In the public sector, the argument from liberty is also sometimes expressed as an argument for free speech (the liberty to speak our mind), the claim being that under the First Amendment, public sector workers cannot be compelled to pay union dues if this compels them to pay for speech with which they do not agree or, even more nefariously, if such a payment would actually *constitute* speech with which they disagree.<sup>15</sup> And finally, in the public sector once again, the argument from liberty is sometimes expressed as a claim that unionization is leading to the runaway growth of government, bankrupting us, and otherwise undermining our democracy, which is said to be the ultimate assurance of our liberty. I shall say much more about each of these arguments from liberty in the pages that follow. But for now, I simply want to point out what all these arguments have in common: because liberty, either in general or in one or more of its constituent parts, is a right, the argument goes, it renders consequentialist arguments for the common good irrelevant, for rights cannot be overridden by consequentialist concerns.

Indeed, this latter argument – the argument that rights cannot be infringed even if the consequences of doing so would be better in some sense than not doing so – enjoys wide support on both sides of the political spectrum. For example, Robert Nozick, one of the leading libertarian theorists of the twentieth century, describes rights as “side-constraints,” meaning they may not be justifiably infringed for consequentialist reasons even if this would make rights violations in general or violations of the specific right in question less common.<sup>16</sup> And on the other side of the political spectrum, John Rawls, one of the leading liberal egalitarians of the twentieth century, and one of the most influential liberal voices on equality and distributive justice ever, criticizes utilitarianism extensively for putting the good before the right and argues that the right must instead be put before the good.<sup>17</sup> So the anti-union argument from liberty, if sound, presents a formidable rebuttal to any consequentialist arguments presented by the union movement.

Note that the anti-union argument from liberty, while not usually denying that workers have a moral right to join unions and that unions therefore have a right to exist, effectively makes these rights largely worthless by blocking compulsory unionization and eliminating mandatory dues and, in the public sector, by barring unions from bargaining collectively. The latter prevents unions from delivering one of the primary benefits that unionization is designed to provide, therefore dramatically reducing the attraction of becoming a member of the union, and the former does the same in both the public and the private sector

by depriving unions of the financial resources necessary to organize workers and effectively advance their interests with employers and with the government more generally.<sup>18</sup> The idea behind limiting what unions can do is to “corral the beast”; the idea behind depriving unions of the ability to collect dues from all those who benefit from union services even if they are not members is to “starve the beast,” a tactic that has already been used by those on the right for some time with much success in an attempt to cut government programs that they don’t like but which are too popular to be attacked directly.<sup>19</sup> Both tactics are designed to ensure that the rate of unionization will drop and remain low in both the private and the public sector and that union influence will become and remain politically inconsequential.<sup>20</sup>

One of the reasons why this anti-union strategy has been so successful is that while there has of course been much pro-union material generated over the years by those in the union movement and those who are sympathetic to it, the overwhelming majority of the positive arguments for unionization have almost all been presented in purely consequentialist terms. In other words, the argument for unionization typically proceeds by making empirical claims about the positive effects of unionization in both the private and the public sector and then by making the moral claim that these empirical effects promote the good of workers and in turn the common good.<sup>21</sup> Sometimes, of course, the typical argument for unionization also relies in part on an argument from right and not just an argument from consequences, these rights being the right to freedom of association and the right to equality. Freedom of association, however, does not turn out to do much work, for despite the fact that it is widely acknowledged to give workers the right to voluntarily form associations if they want to, it does not give these associations the right to *do* anything, such as bargain collectively, strike, or even collect dues. In any event, the dramatic decline in unionization demonstrates that the minimal protection provided by the right of free association alone is not having much of an effect. The right to equality, in turn, is more of a concept than a right – it is difficult to show how the right to equality should be cashed out. At best, it merely provides a connection between the equalizing effects of unionization on economic inequality and the non-consequentialist moral claim that economic inequality is a moral bad. So while the argument from equality is an argument from right, it is an argument from right that is nevertheless dependent on controversial consequentialist claims.

More importantly, perhaps, those who claim that economic inequality is a moral bad are rarely strict egalitarians – that is, few people claim that economic inequality is *always* a moral bad. Most people are liberal egalitarians – that is, they claim that economic inequality is sometimes a moral bad and sometimes not, and they offer “sorting principles” designed to help us tell the difference. Rawls’s difference principle is one such principle, the various principles offered by those who are collectively described as “luck egalitarians” are another, and there are others still.<sup>22</sup> Under the difference principle, in order to determine

whether a particular form of economic inequality is unjust, we must determine whether it works to the advantage of the worst-off members of society.<sup>23</sup> Under luck egalitarianism, we must determine whether the economic inequality at issue is a product of luck or choice.<sup>24</sup> Whether we are trying to predict the effect on an inequality on the worst off, or trying to determine whether an inequality is caused by luck or choice, however, the relevant borderlines are subject to a great deal of indeterminacy; there is a lot to argue about before we can come to any firm conclusion under either theory about the injustice of any particular inequality. This makes both theories amenable to being hijacked by the anti-egalitarian right through restrictive interpretations of the key working concepts that these theories each employ.<sup>25</sup> Modestly and highly egalitarian interpretations of these theories are, of course, also possible, but the arguments for any particular interpretation is controversial given the indeterminacy inherent in each principle. Even if unionization does reduce economic inequality, this does not by itself establish that the economic inequality that would otherwise prevail is an injustice under either of these theories – this has to be argued for separately. And under either of these theories, the road from the general concept of equality to the applied conclusion that anti-union legislation is unjust because it supports inequality is lengthy and complex.<sup>26</sup>

There is yet another problem with the argument from equality. The argument from equality is not an argument from right in the same way as the argument from liberty, at least when the inequality at issue is economic inequality. Unlike violations of equality such as those that result from various kinds of invidious discrimination based on race, ethnicity, age, religion, or the like, restrictions on unionization would be a *distributive* injustice and not a *commutative* injustice even if they do produce or exacerbate unjust economic inequality. In other words, the injustice here would be a social problem that we as a society have a moral duty to remedy in some broad sense but not one that necessarily imposed a duty on some individual or entity to cease engaging in the conduct that contributed to this problem and remedy past violations. Individuals have a duty to cease committing an injustice and to remedy injustices they significantly contributed to creating only when they commit commutative violations of individual rights. This makes the argument from equality, at least in its economic form, a potentially weaker argument than the argument from liberty, for the latter purports to be an argument from *individual* right – that is, from commutative injustice.<sup>27</sup> It is usually very clear what could be done to prevent a commutative injustice from arising; what could be done to prevent a distributive injustice from arising is much more open to debate. There are probably a variety of possible remedies here, and it is probably the case that no one of these is unquestionably better than the others, leaving the possibility that even if restrictions on unionization contribute to distributive injustice, they may still be able to remain intact because the resulting injustice can be dealt with in some other way.

The argument from liberty, in contrast, is much more simple, direct, and quick. Whereas the argument from equality arguably takes the utilitarian conception of the common good and puts a controversial conception of equality in its place, the argument from liberty seems to depend on empirical claims (to the extent it depends on empirical claims at all) that are far easier to understand and not controversial at all. That is, while the argument from equality is an argument from right, the right here depends on a conception of what equality is with inherently controversial empirical contentions built into it. The argument from liberty, in contrast, is far less controversial, for it seems to be relatively clear what liberty is and is not, and in any event, the assertion that liberty is infringed does not seem to depend on disputed empirical claims to the same extent. Many people no doubt find this appealing, which is why the argument from liberty is so often used to attack progressive proposals based on the argument from equality, no matter what the subject matter of those proposals may be.<sup>28</sup> But for present purposes, the most important feature of the argument from liberty is that it constitutes a direct argument against unionization in general and against the mandatory payment of the dues even if some form of unionization is allowed. None of the arguments for unionization that I have mentioned so far – not the argument from consequences nor the argument from freedom of association nor the argument from equality – constitute an argument for the contrary position.

I should note, however, that my own theory of exploitation does present a more determinate conception economic inequality and defines exploitation as both a distributive and commutative injustice, so not all conceptions of economic inequality suffer from the disadvantages I have outlined above.<sup>29</sup> But my point here is not that the argument from equality is inherently disadvantageous, merely that the currently most used arguments from equality have problems that are difficult to uncontroversially overcome. And while I could derive an argument for unionization and even for the mandatory payment of dues from my theory of exploitation, perhaps one that is even more direct than the usual arguments from equality, I will not attempt to do so here because, even if I did so, all the only thing this would establish in the eyes of most of those who are anti-union is that, in this instance, equality and liberty happen to conflict.

Establishing such a conflict has long been a tactic of the right,<sup>30</sup> and it has been a mistake by those on the left to cede the argument from liberty to those on the other side. For if equality and liberty do conflict, it is difficult to explain why equality and not liberty should be given priority in our moral deliberations. Even Rawls concedes that liberty – or at least certain “basic” kinds of liberty – has priority over equality.<sup>31</sup> In fact, Rawls goes even further than this, for he contends that protecting basic liberty from infringement has *lexical* priority over addressing economic inequality, meaning that *no* amount of basic liberty, no matter how small, may be traded off for an improvement in economic inequality, no matter how large.<sup>32</sup> Moreover, even if we were to

reject the Rawlsian position and claim that all forms of equality and all forms of liberty are to be given equal weight, it would still be difficult to explain why the argument from equality should be treated as decisive in determining what we should do. At most, relying on the argument from equality and the consequentialist claims on which it is effectively, although not expressly, based to counteract an argument from liberty produces a moral standoff. Such a lack of moral clarity is simply not sufficient if we are going to convince anyone whose mind may still be open that supporting unionization is a moral imperative in the circumstances in which we now find ourselves.

Accordingly, my objective in this book is to reclaim the argument from liberty from the anti-union movement. This means that my main focus in this book is the right to liberty and the various subsidiary rights that the right to liberty is said to generate. I will, of course, be talking about the right to equality too, as well as exploring the usual consequentialist claims about the effects of unionization and the relationship between these effects and the good of workers and the common good. But the primary focus of each of the essays in this book is the right to liberty and how we might derive a right to unionization from it. And when I speak of a right to unionization, I mean a right to *universal* unionization, not merely a right to unionization when certain contingencies are met. That is, I will be arguing that justice, and especially that component of justice that protects liberty, requires all private and all public sector workers to be unionized – this is not something that is open to resolution by majority vote of either workers or the electorate at large and does not depend on whether the employer has agreed to this as part of the collective bargaining process once a workplace has been unionized.

Given my objectives, it is important to understand that this book is a work of political theory. Although there is an enormous amount of literature available on unionization, and there is obviously a very strong connection between unionization and political activism and various aspects of public policy, very little of the literature available on unionization consist of works of political theory, at least among liberal political theorists (and by “liberal” here I mean all political theorists who draw their inspiration from the Enlightenment, including those on the moderate right as well as the moderate left).<sup>33</sup> Instead, liberal political theorists mostly treat unionization as a specialty reserved for those in other disciplines, such as industrial relations or labor economics. There is certainly much about unionization that these specialties can explore and help us to explain, and I will rely on a great deal of this literature in making my argument in this book. But given the direct relevance of both equality and liberty (two of the principal concerns of political theory) to unionization and vice versa, we have reason to be concerned that there is relevant expertise here that has not been sufficiently brought to bear, especially because the specialties of industrial relations and labor economics are each driven primarily by empirical questions and not by questions of justice, equality, and liberty. These latter questions have empirical elements too, of course, but they

also require a sophisticated understanding of how to reason about political morality and how questions about these various aspects of political morality should be understood. Much confusion has been generated and continues to persist as a result of the general neglect of the issue of unionization by liberal political theorists. As I will attempt to show in this book, there is much that the approach and techniques of political theory can contribute to an understanding of unionization on both the theoretical and the practical level, and without such contributions, it is unlikely that any society will ever have enough information and understanding to get the issue correct.

Given my approach, it may be helpful to say a little more at this point about the role that empirical arguments will play in the essays in this book. I have said that I will primarily be making an argument from right – the right to liberty – rather than an argument from consequences, when arguing for universal unionization. But I am not suggesting that we can distinguish between acts and omissions that are morally right and those that are morally wrong completely independent of their actual, expected, or possible effects. Consequences always matter. As Rawls noted in the course of articulating his own argument from right, “All ethical doctrines worth our consideration take consequences into account in judging rightness. One which did not would simply be irrational, crazy.”<sup>34</sup> Indeed, it is difficult to imagine how one could even think, much less derive an ethical position, without some consideration of how the available courses of action might affect the existing state of affairs, and to consider this, it requires not only an understanding of human nature and circumstances but also an understanding of the principles of causation and how those principles might operate in the particular case at hand. The difference between an argument from right and an argument from consequences is therefore not that one considers consequences and the other doesn’t – it is simply that, in an argument from right, the expected consequences are not the *only* factor to be considered. Certain pre-existing principles matter too. An argument from right will therefore sometimes recommend we do or refrain from doing something even though we are fairly certain some other course of action would, in some sense, produce “better” consequences.

Nevertheless, it is also important to realize that rights are not *a priori* conceptions that exist independently of facts about the world. If we are to determine whether a right has been infringed, for example, we must take into account various facts about causation, about human nature, and about the state of the world. But one of the most important benefits of employing an argument from right is that even when questions about these various empirical matters are vigorously disputed and these disputes are not likely to be resolved to a reasonable degree of certainty anytime soon, an argument from right can still provide categorical recommendations on what to do. In other words, arguments from right can give us recommendations on what to do under what game theorists call “conditions of risk and uncertainty,” whereas arguments from consequences can only do this when the relevant probabilities of the

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various possible outcomes – that is, the consequences – are not themselves reasonably disputed.<sup>35</sup> When these are reasonably disputed, basing a recommendation for action or belief on an argument from right may make it seem like consequences do not matter, but they do matter. They are still taken into consideration, they are simply not treated as determinative. Whatever argumentative power they may have or would have if they could be resolved one way or the other is accordingly supplemented and, in certain cases, overcome by an argument derived through some other method.<sup>36</sup>

One such other method (there might be others still) involves beginning with something we embrace as what we might call a fundamental presupposition – something that establishes the framework for moral reasoning to take place rather than something that is derived by using that framework once it is in place.<sup>37</sup> All moral argument has to begin somewhere, but this starting point cannot be argued for morally, it can merely be accepted, for at this point there are no moral arguments to make. Liberty is such a fundamental presupposition, one that is accepted by both the pro-union left and the anti-union right. The argument from liberty therefore provides a basis on which each side can meaningfully engage the other. Of course, fundamental presuppositions are general concepts, not detailed conceptions,<sup>38</sup> and therefore need to be given further specificity to be operationalized; that is, they need to be further refined before they will generate recommendations as to what we should actually do about the problems that confront us in the real world. This can often if not always and perhaps even almost always be done in various ways. We therefore need to know more about what the concept means and what our understanding of its demands entails before we apply it. And this, in turn, means we often have to make judgments about the effect of certain kinds of acts and omissions on certain aspects of our lives. This is another sense, then, in which even an argument from right, like the argument from liberty, must contain elements of an argument from consequences. But once again, this does not make the two forms of argument equivalent. In an argument from consequences, we have to assemble our conception of the common good from a great many components of that good. What to include in this assemblage and how to prioritize different elements of it when they happen to conflict is often highly controversial. In an argument from right, we have only one particular aspect of individual life in mind. We call this an individual right because we judge it important enough to pursue regardless of the effect of this on the common good. While empirical matters may be relevant when deciding whether this right is being infringed or whether something further must be done to protect it, this does not make the underlying grounds of the argument consequentialist. Accordingly, saying that I am making an argument from right does not mean that I have strayed from this approach whenever I consider empirical matters, especially those that are not reasonably disputable, in constructing that argument or defending it from attack. Facts of this nature are indeed commonly included in arguments from right of all sorts.

I also want to say something about the distinction between what is called “ideal” and “non-ideal” theory, for this also has an effect on the extent to which empirical matters are relevant to my argument. All moral theories, whether they are arguments from right or arguments from consequences, have to consider basic facts about human nature, circumstances, and the methods of human reasoning. These include a scarcity of resources, the fact that we tend to care more about ourselves than other people (usually referred to as “limited altruism”), our tendency to rely on certain irrational heuristics and to harbor certain biases when evaluating our reasons for action or belief, and the resulting difficulty this all presents for successfully organizing collective action and producing public goods. These basic facts about human nature, circumstances, and reasoning are in some sense contingent; that is, they could be different if humans were to transform their basic nature or circumstances or methods of reasoning. Sometimes such a transformation might be possible, at least in small ways, without making us into different kinds of beings living in a different kind of world altogether. Because of this, philosophers often do what they call “ideal theory,” that is, they assume some kind of transformation has or at least could take place. Sometimes this kind of theory is entirely unrealistic given where we are now and therefore provides no real guidance as to how we should behave in or what we should believe about the world in which we currently live. But sometimes we can derive important insights into our world from considering what would happen if we or our world were more ideal in certain ways.<sup>39</sup> In these cases, the ideal does not have to be attainable; it is simply used to clarify our thinking on certain problems that present themselves to us in the real world. The first essay in this volume is an attempt to derive such insights from a hypothetical thought experiment about a world that does not exist and is not likely to exist anytime soon, which makes it, I suppose, an exercise in ideal theory. The other two, in contrast, are exercises in “non-ideal” theory; that is, they take the world as we find it. Describing how the world operates is accordingly more important in these later essays, but that does not make the arguments presented in them any less arguments from right – the unfortunate judgmental overtones of the label “non-ideal” notwithstanding. Each of these essays looks at fundamental principles to which we claim to be committed and derives what I believe are feasible and practical recommendations as to how we should think about universal unionization. Consequences matter in these essays, and it is important to get our understanding of these correct, but this is not the only thing that matters. Therefore, the arguments presented in these latter essays are still arguments from right that are meant to have real purchase even if some of the connections between the right to liberty and various kinds of conduct raise empirical questions. In cases where the answers to these empirical questions are not reasonably disputable, however, there is nothing about taking these facts as given that transforms an argument otherwise based on right into something else. What I avoid in these essays is relying on consequentialist