FOREWORD

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Every person interested in the law and public policy of employment relations in the last decade of this century will profit from careful study of the essays collected in this issue of the *Journal*. These essays raise an important and consistent challenge to comfortable assumptions and worn-out shibboleths of the pro-union forces in this country. In particular, the leadership of organized labor would do well not to dismiss the rather disagreeable contentions presented here; the unions' ability to offer a service and a conception that anyone will be interested in depends fundamentally on a willingness to abandon these assumptions and shibboleths.

I suspect that what is presented here may not be much more than half the story, but it is a half that serious academicians and public policy experts have not been particularly interested in hearing, much less in incorporating in their work. The unspoken but powerful premise of "mainstream" thought holds that unionism as we know it is not only a good thing, but the natural condition of working men and women. It is that premise that leads so many scholars and publicists to assume that the spectacular decline in private sector union membership and density (overall number of members and percentage of the work force who are union members) is some kind of a problem to be solved, a baleful trend to be reversed. Perhaps it is like the decline in vaccinations for small-pox instead: The medicine is no longer apt for any disease from which the patient is likely to suffer.

The most dramatic examples of this myopic kind of analysis are the demonstrations that these declines are attributable almost entirely to the sinister phenomenon of "employer opposition." Professor Troy's paper in this collection challenges the statistical basis for these analyses.[1] I am in no position to judge who has the better of this technical argument, but it is palpable

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1. *See* Troy, *Will a More Interventionist NLRA Revive Organized Labor?*, 13 HARV. J.L. & PUB. POL'Y 583 (1990).

that the Weiler[2]-Freeman-Medoff[3] "employer opposition" analyses beg some important questions before they even begin. Employer opposition, after all, can take a number of forms. It can range from goons and private armies of the sort familiar in the heroic age of union history to the careful and reasoned letter President Bok sent to Harvard clerical and technical workers in a belated and unsuccessful attempt to head off an organizing drive at his university.[4] In many of the countries with which the "employer opposition" school compares the American experience, even the latter kind of intervention would be avoided as at least not being in good, progressive taste. That is not our situation because Taft-Hartley employers have been allowed to enter the debate[5] (subject to some quite arcane and even incomprehensible limits that are administered by a Labor Board of, shall we say, variable ability and objectivity). There may have been a time when any such employer intervention—any suggestion that the union or no-union choice might have two sides—would have been seen as an intolerable employer threat. Anyone who still believes that should bring forward evidence to support the premise. I suspect that such proof is not offered because it is thought unnecessary; it is assumed that employees will rarely make a rational choice against the union. That is the unspoken assumption that needs to be exposed.

Similarly, the contrast between private sector unionism and the public sector, where unionization prospers and grows, may

2. *See* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) [hereinafter Weiler, *Promises to Keep*]. In a more recent article summarizing the forthcoming book, P. WEILER, THE LAW AT WORK: LABOR AND EMPLOYMENT IN THE LEGAL SYSTEM (forthcoming 1990), Professor Weiler cites impressive statistics to the effect that 10,000 of the 100,000 workers fired from their jobs annually in the 1980s secured reinstatement by the NLRB because of illegal employer tactics. Yet the main thrust of his paper emphasizes more general factors leading to a decrease in demand for the services unions provide and suggests alternative devices to supply workers' needs for participation and representation. *See* Weiler, *The Representation Gap in the American Workplace*, in 2 AMERICAN PROSPECT — (forthcoming Summer 1990) [hereinafter Weiler, *The Representation Gap*].

3. *See* R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? (1984).

4. *See* Letter from Derek Bok to Harvard Staff Members (Apr. 21, 1988) (on file at *Harvard Journal of Law & Public Policy*).

5. *See* National Labor Relations (Wagner) Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-187 (1982)). Congress amended the Wagner Act in 1947. *See* Labor-Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1982)). The next major amendment to the NLRA occurred in 1959. *See* Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (1982)).

suggest that today unions do best in heavily regulated, inefficient, monopolistic environments. Politics, not the pressures of the market and free choice, determine the governing regimes in such an atmosphere.[6] Professor Northrup suggests this answer in this symposium in his discussion of the Railway Labor Act[7] and the regime it has authorized.

Professor Northrup illustrates that, even today, government bureaucracies administering the labor laws view their institutional mandate as requiring not neutrality but a discernible bias in favor of unionization. What else can explain the refusal of the National Mediation Board to include a "non-union" line on the ballots of the elections they supervise under the Railway Labor Act?[8] What else can explain the presumption—that can only be described as fatuous but is nevertheless sanctioned as official policy by the National Labor Relations Board (NLRB)—that strikebreakers will support the union whose strike they came in to break and thus must be counted without balloting towards that union's majority in the event of a challenge?[9] What else can explain the truly remarkable fact that the NLRB's official notices to employees still fail to make clear that employees subject to union security clauses may not lawfully be compelled to assume full union membership as a condition of continued employment—a matter on which the Supreme Court ruled definitively in 1963?[10]

So long as declining union density is assumed to be the work of Satan and his angels, rethinking and adaptation will be delayed by the unions and their champions in the public policy and academic communities. Professors Bellante's and Porter's

6. Professor Weiler seeks to rebut the hypothesis that unionism does not suit what he calls "the quintessential female, white-collar knowledge worker" by pointing to the high degree of unionization among American schoolteachers. *See* Weiler, *The Representation Gap*, *supra* note 2.

7. 45 U.S.C. §§ 151-188 (1982).

8. *See* Northrup, *The Railway Labor Act—Time for Repeal?*, 13 HARV. J.L. & PUB. POL'Y 441, 497-99 nn.195-206 (1990).

9. *See* Buckley Broadcasting Corp. and Broadcast Employees Local 51, 125 L.R.R.M. (BNA) 1281 (1987), *enforced*, 891 F.2d 230 (9th Cir. 1989); National Labor Relations Bd. v. Curtin-Matheson Scientific, Inc., 58 U.S.L.W. 4407 (U.S. Apr. 17, 1990) (No. 88-165).

10. The official NLRB "Notice to Employers" advises that "the union and employer, in a state where such agreements are permitted, [may] enter into a lawful union security clause requiring employees to join the union." Form NLRB-666 (8-83). In light of the Supreme Court's decision in National Labor Relations Bd. v. General Motors Corp., 373 U.S. 734 (1963), an equally incomplete statement in a stock prospectus circulated to investors would probably constitute securities fraud.

analysis here of government-mandated employee benefits from the relentlessly subjective-individual choice premises of Austrian economics,[11] as well as an essay about freedom of contract and unionism some years ago by Professor Richard Epstein,[12] pose the extreme theoretic challenge to the common wisdom. They are interesting and valuable for that reason, and also for the thought they provoke. They do seem to miss the point, however, that certain working conditions, income levels, and degrees of insecurity are intolerable (and will not be tolerated) in any decent society rich enough to avoid them. Unionism has been and continues to be an important engine in procuring some measure of decency and thus perhaps staving off the disaster of full-blown socialism that (until very recently) has devastated the economies and shackled the spirits of a large portion of humanity. Any analysis and prescription that disregards these issues will be utterly useless. Similarly useless is any analysis that ignores the need for workplace organizations to increase employee satisfaction and thus release the kind of intelligence, loyalty, and enthusiasm necessary to a productive economy in the late Twentieth Century.

I would guess that labor organizations of some sort have a significant role to play in creating and maintaining these conditions. There is no reason that present labor unions should not be the ancestors from which at least some of this progeny will spring. If this is to happen, however, they must abandon their addiction to legalized coercion, exclusivity, and reliance on the ultimate monopolist, the government. I would make the further guess that the biggest reason younger and better educated workers today shun unions is a general (and I think quite healthy) distaste of being brigaded under anyone's banner of solidarity. The growth of government protections of working conditions, health benefits, pension rights, employment security, and even the individually enforceable duty of fair representation have in a certain sense set the individual worker free to pursue his interests and entitlements as an individual.[13] This puts the levers of redress in the worker's own hands and makes progressively irrelevant the model of exclusively collective ac-

11. *See* Bellante & Porter, *A Subjectivist Economic Analysis of Government-Mandated Employee Benefits*, 13 HARV. J.L. & PUB. POL'Y 657 (1990).

12. *See* Epstein, *In Defense of Contract At Will*, 51 U. CHI. L. REV. 947 (1984).

13. For an analogous contention, see Weiler, *Promises to Keep*, *supra* note 2; Freeman & Medoff, *supra* note 3.

tion celebrated in the *J.I. Case v. NLRB*[14] opinion quoted in Professor Heldman's essay in this collection.[15]

In this respect it was counterproductive for the unions to have fought so tenaciously for their right to impose even ruinous fines on workers who would break ranks and return to work during a strike.[16] It is in this connection that we should understand Rex Reed's characteristically vehement account here of his victory in *Communications Workers v. Beck*.[17] In *Beck*, the Supreme Court closed the circle and ruled that under the Taft-Hartley Act,[18] like the Railway Labor Act[19] and the United States Constitution, union dues paid under compulsion of collective bargaining agreements may only be used for collective bargaining, not political purposes.[20] I am personally quite familiar with this case because, as Solicitor General, I responded to the Supreme Court's request for the views of the United States by stating that neither the Constitution nor the Taft-Hartley Act precluded such distasteful arrangements. On this technical legal point I continue to believe that I was right, and I draw some consolation from the fact that not only Justice Blackmun but such legal rigorists as Justices O'Connor and Scalia dissented from Justice Brennan's free-form handling of the legal materials. As a matter of policy, however, Mr. Reed is entirely correct.[21] Indeed the more sensible and fair-minded unions had for years voluntarily refunded political exactions to dissident dues-payers. More fundamentally, however, the use of union dues for political causes with which individual members do not agree is a striking example of the kind of enforced solidarity that modern men and women fear and despise. It is the union predilection for such devices—far more than "employer opposition"—that I believe scares workers away from union membership.

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14. 321 U.S. 332 (1944).

15. *See* Heldman, *Unions, Politics, And Public Policy: A (Somewhat) Revisionist Approach*, 13 HARV. J.L. & PUB. POL'Y 517, 580 n.190 (1990).

16. *See* Pattern Makers' League of N. Am. v. National Labor Relations Bd., 473 U.S. 95 (1985).

17. 108 S. Ct. 2041 (1988).

18. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-197 (1982).

19. 45 U.S.C. §§ 151-188 (1982).

20. For Rex Reed's analysis, see Reed, *Revolution Ahead: Communications Workers of America v. Beck*, 13 HARV. J.L. & PUB. POL'Y 635 (1990).

21. I collaborated in a Department of Justice proposal to amend the basic labor relations statutes should our contention—most reluctantly arrived at—regarding the correct interpretation of the present law have prevailed.

Ironically, the National Right to Work Legal Foundation may have done the unions a favor in *Beck* by nudging them towards a regime of truly voluntary unionism. It is only through such changes, which comport with the desires of many in the work force, that unions will be able to continue to thrive through the 1990s.