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Evaluating Unions: Labor Economics and the Law

Michael J. Goldberg
University of Pittsburgh School of Law

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*Michael J. Goldberg**

WHAT DO UNIONS DO?. By *Richard B. Freeman* and *James L. Medoff*. New York: Basic Books. 1984. Pp. x, 293. $22.95.

The National Labor Relations Act[1] celebrated its fiftieth anniversary last year, and that milestone was marked by renewed speculation about the future of the labor movement in this country. In terms of relative size and influence, American unions have been in a state of chronic decline for almost thirty years, and many people wonder whether they are worth saving. *What Do Unions Do?,* an outstanding empirical analysis of the role of unions in the American economy by Harvard economists Richard B. Freeman and James L. Medoff,[2] suggests that they are.

In reaching that conclusion, the authors make no effort to minimize the fact that recent times have been hard times for most unions. For example, the percentage of private sector nonagricultural workers represented by unions dropped from thirty-four percent in 1956 to about twenty-four percent in 1980 (p. 221).[3] Union victories in National Labor Relations Board (NLRB) representation elections have also fallen sharply, from a victory rate of sixty-five to seventy-five percent in the 1950s to about forty-five percent in the early 1980s (pp. 221-22). Not surprisingly, unions have suffered a commensurate loss of political influence. In 1977 and 1978, for instance, the labor movement was unable to secure passage of a relatively modest Labor Law

* Associate Professor, University of Pittsburgh School of Law. A.B. 1971, Cornell University; J.D. 1975, Harvard Law School; LL.M. 1977, Georgetown University Law Center. — Ed. I would like to thank Roger J. Dennis and Lea VanderVelde for their helpful comments on an earlier draft.

1. The Act, as amended, is codified at 29 U.S.C. §§ 151-169 (1982).

2. Freeman is Professor of Economics at Harvard University and Director of Labor Research at the National Bureau of Economic Research. Medoff is also on the economics faculty at Harvard and is a Research Associate at the National Bureau of Economic Research.

3. Unfortunately, I found Freeman and Medoff's discussion of the percentage of the workforce represented by unions to be uncharacteristically imprecise. They cite figures for percentages of workers "organized" without specifying whether they mean workers who are represented by unions or the somewhat smaller percentage of workers who actually belong to unions. Nevertheless, the authors are quite correct that union strength, however measured, has drastically declined. According to the Bureau of National Affairs, the percentage of the civilian workforce who are union members dropped from about 30% in 1950 to 20.9% in 1980 and then to "a new, modern-era low of 17.9% in 1982." BUREAU OF NATIONAL AFFAIRS, UNIONS TODAY: NEW TACTICS TO TACKLE TOUGH TIMES 7 (1985).

Reform Bill[4] in spite of the fact that the Democratic Party controlled the White House and both houses of Congress (pp. 202-04).

The scope of this book, however, goes far beyond its documentation of what the authors call "the slow strangulation of private-sector unions" (p. 221). The book's purpose is to paint "a new portrait of U.S. unionism" (p. 3) based on the analysis of an enormous wealth of economic data drawn from both the authors' own extensive research and that of dozens of other scholars in labor economics. The result of Freeman and Medoff's efforts is the most important and comprehensive treatment of the economics of trade unions to appear in over twenty years.[5]

What Do Unions Do? has already made quite a splash in the industrial relations community[6] and warrants the attention of the legal community as well. In labor law as much as or more than any other field of law, it is crucial that policymakers root their decisions in the economic realities of industrial life.[7] There is a danger, however, that the legal community will allow this essential integration of labor economics and labor law to be shaped and dominated by the conservative, laissez-faire approach associated with the law and economics movement.[8] *What Do Unions Do?,* with its basically positive picture of the labor movement's role in our economy and its call for more, not less, governmental protection for the organizing and collective bargaining activities of unions, can play an important role in reducing that danger. Indeed, that role will undoubtedly be enhanced by the book's readable style, which makes it accessible to a broad audience without extensive background in either economics or labor relations.

This review will be in three parts. The first will present a description and evaluation of the book's principal argument, that unions perform a positive role in our economy that at a minimum cancels out, and probably even outweighs, their negative effects. The second part

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4. S. 2467, 95th Cong., 2d Sess. (1978); H.R. 8410, 95th Cong., 1st Sess. (1977). *See generally* Rosen, *Labor Law Reform: Dead or Alive?,* 57 U. DET. J. URB. L. 1 (1979).

5. Among Freeman and Medoff's leading precursors are H.G. LEWIS, UNIONISM AND RELATIVE WAGES IN THE UNITED STATES (1963), and A. REES, THE ECONOMICS OF TRADE UNIONS (1962 & rev. ed. 1977).

6. *See, e.g., Review Symposium*—What Do Unions Do? *by Richard B. Freeman and James L. Medoff,* 38 INDUS. & LAB. REL. REV. 244 (1985). The book was also the subject of a recent panel discussion at the 38th annual meeting of the Industrial Relations Research Association.

7. As Justice Goldberg once wrote:

> [I]n . . . fashioning . . . a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process. We should not assume that doctrines evolved in other contexts will be equally well adapted to the collective bargaining process.

Humphrey v. Moore, 375 U.S. 335, 358 (1964) (Goldberg, J., concurring); *see also* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 172 (1983).

8. *E.g.,* Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation,* 92 YALE L.J. 1357 (1983); Posner, *Some Economics of Labor Law,* 51 U. CHI. L. REV. 988 (1984).

of this review will focus on some of the book's weaknesses, particularly its superficial chapter dealing with union democracy and union corruption. The review will conclude with a discussion of the book's implications for contemporary labor law scholarship.

I

The overriding theme of *What Do Unions Do?* is that unions have two "faces," one bad and one good: "a *monopoly* face, associated with [unions'] monopolistic power to raise wages; and a *collective voice/institutional response* face, associated with their representation of organized workers within enterprises."[9] The authors concede that to the extent unions operate as monopoly institutions[10] they can harm a capitalistic economy in several ways:

> First, union-won wage increases cause a misallocation of resources by inducing organized firms to hire fewer workers, to use more capital per worker, and to hire workers of higher quality than is socially optimal. Second, strikes called to force management to accept union demands reduce gross national product. Third, union contract provisions — such as limits on the loads that can be handled by workers, restrictions on tasks performed, and featherbedding — lower the productivity of labor and capital. [p. 14]

On the other hand, the collective voice face of unionism can actually enhance the productivity of enterprises. For example, collectively bargained seniority rules and grievance procedures have the effect of reducing quit rates and thereby lowering hiring and training costs (pp. 104-07).[11] The presence of unions also puts pressure on management to organize production more efficiently in order to preserve profits in the face of higher wages. And apart from their economic role, unions provide an important political voice for working people that makes our political process somewhat more democratic (pp. 15, 18).

But which face predominates? Are critics of the labor movement correct that the inefficiencies and lowered profit margins associated with the labor movement's monopoly face make unions costly and unnecessary relics of an earlier era? Or do the benefits associated with

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9. Pp. 5-6 (emphasis in original). Freeman and Medoff credit A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1971), as an inspiration for their analysis of the union movement's collective voice face. P. 7.

10. They note, however, that "unions are not the simple monopolies of economics textbooks . . . whose sole goal is to maximize profits, regardless of what happens to the number of units sold." P. 6 (footnote omitted). After all, unions often moderate their wage demands to preserve jobs. Moreover, unions are often strongest in industries where unionized firms already operate in a noncompetitive market. Where markets are competitive, unions have much less power to extract monopoly wage gains. P. 7.

11. Union-induced wage increases, of course, also contribute to lower quit rates, so Freeman and Medoff factored out wage levels in order to determine the extent to which the collective voice face alone reduces employee turnover costs. P. 95.

unions' collective voice face reach sufficiently beyond the shrinking membership of the labor movement to outweigh the costs?

Freeman and Medoff's answer is that the economic costs and benefits of unionism roughly cancel each other out. They estimate that "union monopoly wage gains cost the economy 0.2 to 0.4 percent of gross national product, which in 1980 amounted to about . . . $20.00 to $40.00 per person" (p. 57). The benefits of lower turnover rates among unionized employees resulting from unionism's collective voice face, on the other hand, lower employer costs by one to two percent (p. 109)[12] and constitute a benefit to unionized employees that translates into a 0.2 to 0.3% annual increase in the gross national product, or $20.00 to $30.00 per person — nearly the equivalent of the costs imposed by the monopoly face (p. 110).

Moreover, Freeman and Medoff present a persuasive case that the benefits of unionism reach far beyond the ranks of organized workers. Their findings indicate, for example, that when some workers in a firm obtain higher wages and benefits through unionization, management tends to extend similar increases to its nonunion employees (p. 151). This finding is particularly significant because "while only 20 percent of the U.S. work force has joined a union, more than 50 percent work for companies that deal with unions" (p. 34). In addition, many large nonunion firms seek to avoid unionization by paying higher wages and offering more fringe benefits than they otherwise would. The authors estimate these increases to be as great as ten to twenty percent (p. 153). Even failed union organizing drives frequently result in wage and benefit increases for the target employees (p. 155), although these increases are presumably smaller than those that would have accompanied unionization.

Nevertheless, conservative economists often assert that unions achieve high wages for their members at the expense of lower-paid nonunion workers, suggesting that unions are not the egalitarian force they claim to be.[13] Freeman and Medoff concede that the wages of some workers are raised at the expense of other workers, but they argue that this increase in inequality "is dwarfed" by a number of other union wage effects that reduce inequality. Their studies demonstrate, for example, that union wage policies (1) reduce inequality of wages within enterprises;[14] (2) promote equal pay for equal work across enterprises; and (3) reduce the wage gap between white-collar and blue-

12. The authors acknowledge, however, that these savings to employers are smaller than the upward effect unions have on wages, thus "guaranteeing that firms will not invite organization to enjoy the benefits of lower turnover." Pp. 109-10.

13. *See, e.g.*, M. FRIEDMAN & R. FRIEDMAN, CAPITALISM AND FREEDOM 124 (1962), *quoted by* Freeman & Medoff at p. 16.

14. Unfortunately, the authors do not address the recent trend in many industries toward collective bargaining agreements providing for "two-tiered" wage plans. *See* Note, *Two-Tier Wage Discrimination and the Duty of Fair Representation*, 98 HARV. L. REV. 631, 632-35 (1985).

collar workers (p. 78). When these effects are factored into the equation, the evidence indicates that unions reduce wage inequality by about three percent overall (pp. 90-93).

These and many other findings in *What Do Unions Do?* were generated by the authors' extensive computer-assisted analyses of a wealth of raw data collected mostly by others, such as the Census Bureau and the Bureau of Labor Statistics.[15] Although labor economists have been using similar data for years to examine unions' effects on wages, Freeman and Medoff are among the first to attempt to quantify the nonwage effects of unions in order to evaluate unionism's collective voice face (p. 23).

One of the book's great strengths is the authors' candid acknowledgment of the limits of their discipline's methodology. They claim no ability to generate controlled experiments with their data that would permit them to alter one factor while holding all else constant (pp. 23, 44-45). They are careful to qualify their findings when appropriate and they freely admit when the data (or their modes of analysis) are simply insufficient to yield meaningful answers to some of their inquiries.[16] Moreover, they repeatedly test their findings against those of other economists who may have used different models, data, or statistical procedures, explaining that "[i]n the social sciences, it is not exact duplication of 'experiments' that confirms a finding, but rather similarity of findings under different specifications" (p. 98). Freeman and Medoff's refreshing pragmatism contributes greatly to their work's overall credibility.[17]

A common feature of many empirical studies is that much of what they prove is the intuitively obvious, and this is certainly true of some of Freeman and Medoff's findings. For example, they confirm one of the labor movement's most basic assumptions, that the larger the proportion of workers that is organized in a particular market, the greater the impact on wages the union is likely to have (p. 51). Another predictable finding is that unions are more likely to make wage concessions when existing wage packages threaten the employment of substantial numbers of union members (p. 56).

But empirical research has its greatest impact when it disproves — or at least calls into question — poorly documented but commonly

15. The book's appendix provides a description of the fourteen data sources most heavily relied upon. Pp. 253-59.

16. For example, they concede their inability to resolve the debate over the relationship between the union wage differential and the product market power of employers. P. 52. Similarly, they offer a "guess" that union seniority rules, from an economic standpoint, are on balance socially beneficial, but they acknowledge that the quantitative evidence is inconclusive. P. 134.

17. In a good example of Freeman and Medoff's nondogmatic approach, they describe two competing methods of measuring company or industry profitability and then report that they examined the effects of unionism on both, "on the principle that when one cannot measure the theoretically correct concept, one does better to look at several indicators, rather than to debate over which imperfect indicator is 'best.'" P. 182.

held beliefs. *What Do Unions Do?* accomplishes this on numerous occasions. For example, it is commonly assumed that union wage gains are a major cause of inflation, but Freeman and Medoff demonstrate that union wage increases accounted for only "a minuscule share" of the inflation between 1975 and 1981 (pp. 58-59).[18] They are careful not to overstate their conclusion, however, noting that to the degree nonunion employers emulate union wage patterns, unions are indirectly responsible for some of the inflationary pressures generated in the nonunion sector (p. 59).

By the authors' own admission, the most controversial — and, to some commentators, the most counterintuitive[19] — of their conclusions is one noted earlier,[20] that productivity is frequently higher in unionized establishments than in otherwise comparable nonunion establishments (p. 180). And, as the authors anticipated, a number of commentators have criticized either the methodology or the volume of data relied upon to reach that conclusion.[21]

Not being an economist, I am reluctant to enter that fray, but there is one factor that both Freeman and Medoff *and* their critics seem to have overlooked, which could lend some support to Freeman and Medoff's position. That factor is the role unions must play, given the constraints of modern labor law,[22] in maintaining production by preventing wildcat strikes and slowdowns and by otherwise helping to maintain a disciplined workforce. As the Senate committee report on

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18. According to the authors' calculations, union wage gains added only "2.3 percentage points of inflation to the observed 68-point increase in the GNP deflator" during that period. P. 59.

19. *E.g.*, Posner, *supra* note 8, at 1000-01 (commenting on Freeman and Medoff articles that first reported many of the conclusions later incorporated into *What Do Unions Do?*).

20. *See* note 11 *supra* and accompanying text.

21. *E.g.*, Ashenfelter, Book Review, 38 INDUS. & LAB. REL. REV. 245 (1985); Hirsch, Book Review, 38 INDUS. & LAB. REL. REV. 247 (1985); Mitchell, Book Review, 38 INDUS. & LAB. REL. REV. 253 (1985).

22. *See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (concerted activity by minority employees unprotected if undertaken outside contractual grievance procedure); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970) (grievance strike in violation of no-strike clause may be enjoined); Atkinson v. Sinclair Ref. Co., 370 U.S. 238 (1962) (union that authorizes or participates in strike in breach of no-strike clause may be liable for damages); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (no-strike clause will be implied where contract provides for grievance arbitration); Elk Lumber Co., 91 N.L.R.B. 333 (1950) (work slowdown an unprotected activity under the NLRA); Ford Motor Co., 3 Lab. Arb. (BNA) 779 (1944) (Shulman, Arb.) (employees must obey even unauthorized employer commands pending completion of grievance process — "obey now, grieve later"). *See generally* J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983); Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 65 (D. Kairys ed. 1982); Lynd, *The Right to Engage in Concerted Activity After Union Recognition: A Study of Legislative History*, 50 IND. L.J. 720 (1975); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981). For a discussion of the effects of these constraints on a Teamsters local with a militant and surprisingly democratic history, see S. FRIEDMAN, TEAMSTER RANK AND FILE: POWER, BUREAUCRACY, AND REBELLION AT WORK AND IN A UNION (1982).

the Taft-Hartley Act[23] put it, "The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement."[24]

The long and often violent history of labor protest in this country demonstrates that even without unions and without the protection of federal labor law, aggrieved workers will often strike or otherwise disrupt production in efforts to resolve their grievances and obtain more control over their workplaces.[25] Thus, the role of modern unions in curtailing those disruptions must be examined before a complete evaluation of their effect on productivity can be made.[26] Unfortunately, any effort to quantify that role would necessarily be speculative; simply comparing contemporary strike costs between the union and nonunion sectors would not provide reliable data, because those sectors which are now heavily unionized may have become unionized precisely because their potential for disruption was great.[27]

II

Overall, I found the economic analysis presented in *What Do Unions Do?* to be exhaustive, persuasive, and — perhaps most important for noneconomists — comprehensible. Unfortunately, when the authors venture beyond economics into labor law, their work is less satisfactory. For example, they correctly point out that a major factor contributing to the decline of the labor movement in this country is the National Labor Relations Act's inability to deter wholesale violations of the Act by companies seeking to defeat union organizing efforts (pp. 230-43). To make this point, however, they slightly overstate their case by mistakenly assuming that all workers illegally fired for union activity are fired during or shortly after organizational

23. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141-188 (1982)).

24. S. Rep. No. 105, 80th Cong., 1st Sess. 16 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 422 (1948). *See generally* Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CALIF. L. REV. 663, 764-71 (1973).

25. *See generally* I. BERNSTEIN, TURBULENT YEARS: A HISTORY OF THE AMERICAN WORKER, 1933-1941 (1970); J. BRECHER, STRIKE! (1972).

26. Of course, the savings resulting from the role of unions in preventing disruptions must be reduced by the costs imposed by strikes called by unions. One critic faulted Freeman and Medoff for failing to give sufficient weight to the costs of union-called strikes, but he too overlooked the savings resulting from the prevention of disruptions that might have occurred without the union presence. *See* Mitchell, *supra* note 21, at 255 n.11.

27. *Cf.* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS 96-175 (1977) (analyzing the importance of violent labor protests in the trucking, longshore, auto parts, and other now heavily unionized industries in bringing about the passage of the National Labor Relations Act); Leigh, *Risk Preference and the Interindustry Propensity to Strike,* 36 INDUS. & LAB. REL. REV. 271 (1983) (industries with high injury rates — such as the heavily unionized mining and construction industries — experience a disproportionate number of strikes).

campaigns (pp. 232-33).[28]

Similarly, the book treats rather superficially the argument that collectively bargained seniority systems often have a discriminatory impact on women and minorities.[29] According to Freeman and Medoff, black male blue-collar workers have an average of one year less seniority than their white counterparts, suggesting some disadvantage, but black women have nearly one year *more* seniority than white women, implying some advantage. These and other figures lead the authors to conclude that "[t]he charge that seniority is injurious to minority economic interests is wrong, because large numbers of minority workers have accrued sufficient seniority to be its beneficiaries" (p. 135). These findings are certainly encouraging, but they are incomplete. They ignore the fact that the jobs in which all too many women and minorities accumulate that seniority are at the bottom of the economic ladder,[30] and that restrictive interpretations of Title VII of the Civil Rights Act of 1964[31] permit the operation of many seniority systems proven to effectively limit minority and female access to, or tenure in, more desirable jobs.[32]

Freeman and Medoff's examination of the problems of corruption and undemocratic practices in the labor movement is even more unsatisfactory. I have no doubt that the conclusions they ultimately reach

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28. Freeman and Medoff appear to have borrowed much of their analysis of the NLRA from Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 HARV. L. REV. 1769 (1983), cited by Freeman & Medoff at p. 282 n.12 [hereinafter cited as Weiler, *Promises to Keep*], but they fail to note Weiler's reference to NLRB figures indicating that approximately 10% of the discharges in violation of the Act were unrelated to union organizing efforts. *Id.* at 1781 n.35. In a more recent article, Weiler cites a General Accounting Office study indicating that as many as forty percent of the NLRB's discriminatory discharge complaints were unrelated to union organizing campaigns. Weiler, *Striking A New Balance: Freedom of Contract and the Prospects for Union Representation,* 98 HARV. L. REV. 351, 356 n.13 (1984) [hereinafter cited as Weiler, *Striking a New Balance*].

29. *See, e.g.,* W. GOULD, BLACK WORKERS IN WHITE UNIONS (1977); U.S. COMMISSION ON CIVIL RIGHTS, LAST HIRED, FIRST FIRED: LAYOFFS AND CIVIL RIGHTS (1977). This criticism is not meant to deny or minimize the important fact that unionization has shown some tendency to reduce wage disparities between black and white workers, and between male and female workers. Pp. 48-50.

30. For example, in the generally higher-paying precision production, craft, and repair occupations, blacks hold 7.2% of the jobs and women hold 8.5%. In lower-paying operator, fabricator, and laborer occupations, however, blacks hold 14.3% of the jobs and women hold 26%. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, EMPLOYMENT AND EARNINGS 178, 179 (Jan. 1985). Similarly, in the health care field, blacks hold only 7.6% of the registered nurse jobs but 29% of the nursing aid, orderly, and attendant positions. *Id.* at 176, 178.

31. 42 U.S.C. § 2000e (1982).

32. *E.g.,* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (a seniority system adopted without the intent to discriminate does not violate Title VII even if it perpetuates the effects of pre-Act discrimination); American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) (protection of *Teamsters* decision extended to seniority systems adopted after effective date of Title VII); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (court may not modify Title VII consent decree to override operation of seniority system that results in disproportionate layoffs of minority workers recently hired pursuant to decree's affirmative action provisions).

are valid: that "[t]here is a great deal of democracy . . . throughout the labor movement" and that "the amount of union corruption is no more than, and probably less than, business corruption" (p. 220). But this should not be to deny that there are still frequent and serious cases of autocratic and corrupt rule that affect hundreds of thousands of union members.[33] Unfortunately, the authors' analysis seems to do just that, by presenting the reader with a superficial and unjustifiably rosy picture of the internal affairs of American unions.

For example, Freeman and Medoff correctly report that "judicial decisions obligate unions to represent all members fairly" (p. 208), but they fail to note that in collective bargaining, those decisions give unions almost unlimited discretion to allocate benefits among different groups of workers, so long as choices are not based on such invidious criteria as race or sex.[34] In grievance handling, the union's duty of fair representation is ostensibly more demanding,[35] but my own empirical research has confirmed the suspicions of a number of commentators[36] that the duty "is little more than an empty promise which ultimately fails to provide workers with meaningful protection from arbitrary, discriminatory, or perfunctory union conduct."[37]

The authors are aware, of course, that paper promises of fair and democratic treatment, whether contained in statutes, judicial precedents, or union constitutions, do not necessarily guarantee that such treatment will be delivered (pp. 207-08). Accordingly, they report other evidence of union democracy, such as survey data indicating reasonably favorable opinions of unions by their members and surprisingly high levels of membership participation in union affairs (pp. 208-10).[38] The authors fail to note the findings of another study, however,

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33. Freeman and Medoff note, for example, that most union corruption is confined to a small handful of unions. Pp. 216-17. They fail to point out, however, that one of those unions — the Teamsters — alone represents nearly ten percent of the unionized, private sector workforce. DIRECTORY OF U.S. LABOR ORGANIZATIONS, 1982-83 EDITION 2-3 (C. Gifford ed. 1982). For a recent analysis of the extent and nature of union corruption in this country, see PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE EDGE: ORGANIZED CRIME, BUSINESS, AND LABOR (1986).

34. *E.g.*, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & N.R.R., 323 U.S. 192 (1944). *See generally* Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980).

35. *See, e.g.*, Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling*, 1979 U. ILL. L.F. 35, 43; VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983).

36. *E.g.*, Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation*, 5 U. TOL. L. REV. 514 (1974).

37. Goldberg, *The Duty of Fair Representation: What the Courts Do In Fact*, 34 BUFFALO L. REV. 89, 96 (1985). My study found that plaintiffs prevail in fewer than five percent of the duty of fair representation cases they file, in part because such procedural obstacles as a short limitations period and common requirements that internal union remedies be exhausted preclude plaintiffs from obtaining a hearing on the merits of their claims in approximately 45% of the cases. *Id.*

38. For example, the data indicate that within a two-year period, 76% of the union members

which indicates that self-reported participation in union affairs is frequently exaggerated and is more reliable as a psychological, rather than a behavioral, variable.[39]

Leadership turnover is another factor Freeman and Medoff use to measure the extent of democracy in the labor movement, and they are correct that turnover rates are relatively high at the local level (p. 211). They are unable to tell us, however, the extent to which this turnover results from successful challenges to incumbents (or their designated successors), on the one hand, or merely from the retirements or deaths of the prior officeholders, on the other. In any event, bargaining, and in some unions even final resolution of grievances,[40] is frequently controlled by the national leadership,[41] and at that level, as Freeman and Medoff acknowledge, officer turnover is lower (p. 211).

Moreover, even what turnover occurs at the national level is typically far removed from membership control. For example, most unions elect their top officials by votes of convention delegates (who themselves are usually officeholders at some level of the union hierarchy) rather than by membership referenda.[42] In addition:

> The filling of unscheduled vacancies in the top post often plays a key role in the continuity of an administration's power. In the large majority of our American unions, either the executive council appoints a successor until the expiration of the term of office, or a specified national officer takes over for this period. . . . [T]he new or acting president may be very well entrenched by the time of the next presidential election.[43]

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surveyed had attended a union meeting; 73% had voted in a union election; and 16% had been nominated for, elected to, or appointed to a union office. P. 209. These figures, from the 1977 Quality of Employment Survey conducted by the Institute for Social Research at the University of Michigan, seem especially high in light of the fact that local officers are typically elected for three-year terms, and national officers for five-year terms. If the elections and offices referred to in the survey include such lower level union positions as shop stewards and membership on various union committees (that information is not provided), the figures seem more reasonable.

39. Strauss, *Union Government in the U.S.: Research Past and Future,* 16 INDUS. REL. 215, 224 (1977). Other studies have indicated that union members are less likely to participate in union affairs when they perceive the union as satisfying their needs. Anderson, *Local Union Participation: A Re-examination,* 18 INDUS. REL. 18, 26 (1979). This raises the possibility that the survey data relied upon by Freeman and Medoff overstate either the level of membership participation in union affairs or the level of members' satisfaction with their unions' performance.

40. *See, e.g.,* art. 8, § 1(a), National Master Freight Agreement (between the Teamsters union and most unionized trucking companies, adopted April 1985).

41. *See, e.g.,* J. EDELSTEIN & M. WARNER, COMPARATIVE UNION DEMOCRACY: ORGANISATION AND OPPOSITION IN BRITISH AND AMERICAN UNIONS 20-21 (1975); Roomkin, *Union Structure, Internal Control, and Strike Activity,* 29 INDUS. & LAB. REL. REV. 198, 199 (1976).

42. D. MCLAUGHLIN & A. SCHOOMAKER, THE LANDRUM-GRIFFIN ACT AND UNION DEMOCRACY 24 (1979). For a discussion of the impact of this system on the level of democracy in the Teamsters union, see Goldberg, *Teamsters: More Oligarchy Than Democracy,* Philadelphia Inquirer, May 23, 1983, at 11-A, col. 1.

43. J. EDELSTEIN & M. WARNER, *supra* note 41, at 101-02. This scenario is by no means uncommon, as illustrated by the recent mid-term changes in leadership in three of the largest and most important national unions, the Teamsters, Steelworkers, and AFSCME (public employees). Serrin, *Ohio Leader Named Teamsters' Chief,* N.Y. Times, Apr. 22, 1983, at A20, col. 1; Serrin, *Strategist at Helm of Public Employee Union,* N.Y. Times, Dec. 19, 1981, at 32, col. 2; *Steelwork-*

Indeed, the incumbents' overwhelming advantages in contested campaigns for national union office have been well documented.[44]

The most serious flaw in Freeman and Medoff's treatment of internal union affairs is their facile assumption that all union elections not successfully challenged by the Department of Labor pursuant to Title IV of the Landrum-Griffin Act[45] are untainted by improper practices (pp. 211-12). In fact, Title IV's enforcement procedures are too cumbersome and the Department of Labor's enforcement efforts too passive to justify such a conclusion. The Act vests nearly exclusive authority in the Secretary of Labor to enforce Title IV,[46] and grants to the Secretary broad prosecutorial discretion in deciding when to exercise that authority.[47] Unfortunately, the Secretary's enforcement responsibilities are often at odds with his roles as industrial peacemaker and Administration liaison with organized labor. As a result, political considerations frequently influence decisions not to prosecute apparent violations.[48]

Moreover, in many cases the Labor Department may be willing but unable to prosecute, for a number of reasons. For example, enforcement efforts begin only when a union member, after exhausting internal union remedies, files a complaint with the Department alleg-

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ers' Secretary in Charge Until Union Election on March 29, N.Y. Times, Nov. 18, 1983, at D18, col. 6.

44. *See generally* James, *Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections,* 13 HARV. C.R.-C.L. L. REV. 247 (1978) (pointing out that "non-elite [rank and file] challenges to national union officials are rarely successful even with federal legislation regulating union elections").

45. Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) §§ 401-403, 29 U.S.C. §§ 481-483 (1982). Title IV requires, *inter alia:* (1) elections of specified union officers at regular intervals; (2) the eligibility of all members in good standing to run for office, subject to "reasonable qualifications, uniformly imposed"; (3) reasonable opportunities for every member to nominate candidates for office; (4) equal opportunities for all candidates to distribute campaign literature (at their own expense) through use of union membership lists; and (5) fair procedures for casting and counting votes, including the use of the secret ballot. In addition, all candidates are prohibited from using union or employer funds or resources in their campaigns. For a comprehensive discussion of Title IV's substantive provisions, see Levy, *Electing Union Officers Under the LMRDA,* 5 CARDOZO L. REV. 737 (1984).

46. *See* LMRDA §§ 402(b), 403, 29 U.S.C. §§ 482(b), 483 (1982). There are two principal exceptions to the Secretary's otherwise exclusive power to remedy election violations. First, Title IV permits candidates to bring preelection suits to enforce their reasonable requests concerning the mailing of campaign literature. LMRDA § 401(c), 29 U.S.C. § 481(c). Second, members may seek preelection relief for certain election-related violations of Title I of the Act (*e.g.*, discriminatory application of eligibility requirements), LMRDA §§ 101-105, 29 U.S.C. §§ 411-415. *Cf.* Local No. 82, Furniture & Piano Moving v. Crowley, 467 U.S. 526, 550 (1984) ("If the remedy sought [for violation of Title I] is invalidation of the election already being conducted with court supervision of a new election, then union members must utilize the remedies provided by Title IV.").

47. *See* Dunlop v. Bachowski, 421 U.S. 560 (1975).

48. *See* D. MCLAUGHLIN & A. SCHOOMAKER, *supra* note 42, at 48-50; James, *supra* note 44, at 294-313; Rauh, *LMRDA—Enforce It or Repeal It,* 5 GA. L. REV. 643 (1971); Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 YALE L.J. 407, 499-504, 512 (1972).

ing election irregularities.[49] If the complainant fails to exhaust internal remedies — perhaps due to missing a short filing deadline[50] — the Department is unable to proceed no matter how serious the alleged violation. Similarly, many election-related violations are never prosecuted because the Landrum-Griffin Act requires a finding that a violation "may have affected the outcome of an election" before relief may be granted.[51] As one critic of this policy explained:

> The final irony is that the greater the damage, the greater the margin of the incumbent's victory, and the harder it is to ever convince the Secretary that the violations "may have affected the outcome." Thus, there is reason to advise an incumbent that if he is going to violate Title IV, he should violate it early and often.[52]

My problem with Freeman and Medoff's treatment of internal union affairs goes beyond its dependence upon unreliable indicators of union democracy. The authors appear completely insensitive to the fact that, as "one-party states," unions are inherently prone to oligarchy unless special care is taken to maintain and promote democratic processes.[53] Much of Freeman and Medoff's favorable analysis of the collective voice face of unionism rests on the "[g]iven that union decisions are based on a political process in which the majority rules" (p. 16). But as an important article by Alan Hyde has demonstrated, union decisions in collective bargaining — which for Freeman and Medoff's purposes are the union decisions of greatest significance — are quite often made without extensive or meaningful rank and file input.[54] Indeed, a substantial proportion of unionized employees have no right to vote on the collective bargaining agreements governing their jobs,[55] and those that do often find that right difficult to enforce.[56]

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49. LMRDA § 402(a), 29 U.S.C. § 482(a) (1982). Section 601(a) of the Act, 29 U.S.C. § 521(a), authorizes the Secretary to investigate suspected preelection violations even without a union member's formal complaint, but as a general rule that power is not exercised. *See* D. MCLAUGHLIN & A. SCHOOMAKER, *supra* note 42, at 56-58.

50. In the Teamsters union, for instance, election protests must be filed within 72 hours of the election. INTERNATIONAL BHD. OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, CONSTITUTION art. XXII, § 5(b) (adopted 1981) [hereinafter cited as TEAMSTERS CONSTITUTION]. For an excellent discussion of the obstacles to effective Title IV enforcement from the perspective of rank and file unionists, see H. BENSON, DEMOCRATIC RIGHTS FOR UNION MEMBERS: A GUIDE TO INTERNAL UNION DEMOCRACY 69-122 (1979).

51. LMRDA § 402(c)(2), 29 U.S.C. § 482(c)(2) (1982). *See* D. MCLAUGHLIN & A. SCHOOMAKER, *supra* note 42, at 61-62. For an interpretation of this provision that would permit more aggressive enforcement by the Department of Labor, see Summers, *Democracy in a One-Party State: Perspectives from Landrum-Griffin*, 43 MD. L. REV. 93, 112-13 (1984).

52. James, *supra* note 44, at 304.

53. *See generally* Summers, *supra* note 51 (illustrating how the Landrum-Griffin Act has been, and should be, construed to meet the special need to provide democracy in a one-party system).

54. Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984).

55. *Id.* at 805.

56. *Id.* at 810-19. Even when employees can vote on their contracts, the outcome is not

Freeman and Medoff's superficial and uncritical treatment of internal union affairs is not unusual among supporters of the American labor movement, many of whom believe that public exposure of union corruption and autocracy can only play into the hands of the labor movement's opponents.[57] In my view, anti-union forces will continue to exploit these shortcomings whether or not supporters of the labor movement choose to confront them directly. Indeed, it is only by acknowledging and working toward the elimination of these problems that the labor movement will be able to prevent their further exploitation by anti-union forces. Freeman and Medoff would have done well to heed the advice of Herman Benson, the executive director of the Association for Union Democracy:

> What we are talking about here is the great paradoxical character of the American labor movement: on the outside, it is the force for democracy, social justice and human freedom; but on the inside, it tends to be autocratic. These are the two different sides of the American labor movement. One cannot ignore the realities on the inside, by pointing to the great things that unions are accomplishing on the outside. There is no reason for those of us who support the American labor movement to fall into that trap.[58]

III

The shortcomings I have just described are serious, but they should not be blown out of proportion. Most of them are confined to only one of the sixteen chapters that comprise *What Do Unions Do?*, and it may be no coincidence that that chapter is the only one not based at least in part on earlier work by Freeman or Medoff.[59] In fact, one of the book's strengths is precisely that most of it does draw heavily on earlier articles by the authors and a number of their collaborators. As a result, many of its arguments and much of the supporting data have been carefully reevaluated and refined over time.

What Do Unions Do? will undoubtedly have a significant impact on labor law scholarship in coming years. Indeed, it is already evident that scholars purporting to bring economic analysis to bear on labor law issues must at least acknowledge and respond to the book's treatment of unions, even if they choose not to embrace it fully. A recent

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always decided by simple majority rule. In the Teamsters, for example, an employer's final offer can only be rejected by a two-thirds vote of the membership. TEAMSTERS CONSTITUTION, *supra* note 50, art. XII, § 1(b), art. XVI, sec. 4(b).

57. *See, e.g.*, Goldberg, *A Trade-Union Point of View*, in LABOR IN A FREE SOCIETY 102 (M. Harrington & P. Jacobs eds. 1959); Wyle, *Landrum-Griffin: A Wrong Step in a Dangerous Direction*, 13 N.Y.U. CONF. ON LABOR 395 (1960).

58. Benson, *Union Democracy and the Landrum-Griffin Act*, 11 N.Y.U. REV. L. & SOC. CHANGE 153, 184 (1982-83).

59. One wonders whether the chapter was a last minute addition pulled together after the authors realized that their book would be incomplete without a discussion of internal union affairs.

analysis of labor bargaining units, for example, posits three economic models of union activity and then examines the relationship between each of those models and the criteria developed by the NLRB for determining appropriate bargaining units under the National Labor Relations Act.[60] One of the three models examined is Freeman and Medoff's.[61] This is a significant advance over an earlier article by the same author, which expressly declined to examine "various theories that challenge the traditional model by suggesting that some union activity enhances productivity."[62] Even Richard Posner, a strong adherent of the price-auction model of labor markets[63] and the traditional monopoly view of unions, recognizes the need to respond to Freeman and Medoff's very different approach.[64]

Economics aside, *What Do Unions Do?* also serves as a timely reminder to labor law scholars that empirical research can play an important role in complementing the doctrinal and theoretical work more commonly pursued by legal academics.[65] For example, one of the great strengths of Paul Weiler's recent proposals for the fundamental reform of the National Labor Relations Act is that they are soundly rooted in an extensive record of empirical evidence — much of which was initially collected or analyzed by Freeman and Medoff — documenting both the failure of the present statutory scheme and the likely ineffectiveness of less drastic reform alternatives.[66]

Indeed, even readers who disagree with Freeman and Medoff's analysis will undoubtedly find their book an invaluable source of data — assuming, of course, that such readers have an interest in reality that goes beyond "some theoretical construct the real world has yet to witness" (p. 247). To those who do not,[67] the book provides a useful

60. Leslie, *Labor Bargaining Units,* 70 VA. L. REV. 353 (1984).

61. *Id.* at 354-60.

62. Leslie, *Principles of Labor Antitrust,* 66 VA. L. REV. 1183, 1185 n.8 (1980).

63. For a critique of that model, see L. THUROW, DANGEROUS CURRENTS: THE STATE OF ECONOMICS 173-215 (1983).

64. *See* Posner, *supra* note 8, at 1000-01.

65. For more explicit discussions of the importance of empirical research in labor law, see Dworkin & DeNisi, *Empirical Research in Labor Relations Law: A Review, Some Problems, and Some Directions for Future Research,* 28 LAB. L.J. 563 (1977); *Empirical Data and Statistical Analysis in Labor Law,* 1981 U. ILL. L. REV. 1.

66. Weiler, *Promises to Keep, supra* note 28 (proposing that representation elections be held immediately upon a union's presentation of authorization cards demonstrating substantial employee interest, thereby minimizing employer opportunities to interfere illegally with union organizing efforts); Weiler, *Striking a New Balance, supra* note 28 (proposing arbitration of the first collective agreement for newly organized workers as a remedy for egregious bad-faith bargaining, and proposing that prohibitions against secondary boycotts in bargaining disputes be partially lifted). Weiler's work also includes a short but effective defense brief on behalf of collective bargaining which draws heavily upon the economic research of Freeman and Medoff. Weiler, *Promises to Keep, supra* note 28, at 1823-27.

67. *See, e.g.,* Epstein, *In Defense of the Contract at Will,* 51 U. CHI. L. REV. 947 (1984); Epstein, *supra* note 8 (both arguing on libertarian and efficiency grounds for deregulation of the employment relationship). For commentary on these articles highlighting Epstein's failure to

antidote.

On the other hand, the limitations of empirical research must be recognized. As Freeman and Medoff succinctly put it, "Age-old debates do not often end with a bang, even with computerized evidence" (p. 180).[68] To be sure, *What Do Unions Do?* is a major achievement, and its findings provide supporters of the labor movement with the facts and figures they need to respond to the oft-repeated claim that unions are a drag on the economy that society can no longer afford. But in the end, the strongest case for unionism has never been that unions pay for themselves. Efficiency is not the only value in the employment relationship, and to give it too much weight is to allow the proponents of the law and economics movement to monopolize the debate over the future of American labor law.[69]

Freeman and Medoff's greatest achievement is in identifying the features of unionism's collective voice face; their effort to quantify the value of those features is in my view less successful but also less important. After all, unions at their best seek to bring to the workplace not only improved wages and working conditions but a model of industrial democracy and human dignity that is impossible to measure in dollars and cents. Thus, suggestions that workers would be just as well off under a system that established decent standards of employment through social legislation alone, without collective bargaining,[70] overlook completely the value of enabling workers to participate collectively and effectively in the decisions controlling their working lives.

Equally important, unions provide a collective voice to workers

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address the empirical and historical evidence contradicting his argument, see Finkin, *"In Defense of the Contract at Will"—Some Discussion Comments and Questions,* 50 J. AIR L. & COM. 727 (1985); Getman & Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein,* 92 YALE L.J. 1415 (1983); Verkuil, *Whose Common Law for Labor Relations?,* 92 YALE L.J. 1409 (1983).

68. Certainly the authors of *Union Representation Elections: Law and Reality,* one of the best-known and most controversial empirical studies in labor law, would agree with this statement. *See* J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976). Ten years after publication of their study, the debate still rages over the validity of its conclusions. *Compare* Dickens, *The Effects of Company Campaigns on Certification Elections:* Law and Reality *Once Again,* 36 INDUS. & LAB. REL. REV. 560 (1983); Freeman & Medoff, pp. 236-37; *and* Weiler, *Promises to Keep, supra* note 28, at 1782-86, *with* Goldberg, Getman & Brett, *The Relationship Between Free Choice and Labor Board Doctrine: Differing Empirical Approaches,* 79 NW. U. L. REV. 721 (1984).

69. *Cf.* Peritz, *The Predicament of Antitrust Jurisprudence: Economics and the Monopolization of Price Discrimination Argument,* 1984 DUKE L.J. 1205 (describing and criticizing the domination of one aspect of antitrust analysis by the law and economics approach). The literature critiquing the law and economics movement is extensive. *See, e.g.,* Baker, *Starting Points in Economic Analysis of Law,* 8 HOFSTRA L. REV. 939 (1980); Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?,* 8 HOFSTRA L. REV. 671 (1980); Horwitz, *Law and Economics: Science or Politics?,* 8 HOFSTRA L. REV. 905 (1980); Leff, *Economic Analysis of Law: Some Realism About Nominalism,* 60 VA. L. REV. 451 (1974); Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?,* 98 HARV. L. REV. 592 (1985).

70. *See, e.g.,* Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects,* 51 U. CHI. L. REV. 1012 (1984).

not only in the workplace, but in the political arena as well (pp. 191-206). Along with the civil rights movement, the labor movement is the most important and best organized segment of the polity that has struggled consistently for a more equitable distribution of wealth and power in this society. True, the traditions of bread and butter unionism in this country are a far cry from the political unionism of western Europe,[71] but as one commentator has put it: "The AFL-CIO may be . . . relatively weak and relatively nonideological . . . , but there is no doubt that in its absence the pressures by corporations and affluent individuals to widen tax privileges still further, extract government subsidies, and assist the unneedy, would be entirely successful, instead of only mostly successful."[72]

71. *See generally European Labor and Politics* (pts. 1 & 2), 28 INDUS. & LAB. REL. REV. 3, 203 (1974-75).

72. R. LEKACHMAN, ECONOMISTS AT BAY 204 (1976).