

## **A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation**

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### **Abstract**

Workers are defaulted to being non-union in employment relationships across the world. A non-union default likely has substantial negative effects, consistent with the empirical literature reviewed, on union membership levels, because of switching costs, inertia, social norms, and loss aversion. A union default would likely have positive effects on union membership, and has the additional virtues of partially internalising the public goods externalities of unions, improving the freedom to associate (the right to join a union), and preserving the freedom not to associate (the right not to join a union). A union default would also strengthen the extent and effectiveness of union representation.

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## 1. Introduction

Over the last thirty to forty years union membership levels, though healthy in some parts of Europe, have fallen across much of the world, especially in the many Anglophone countries.<sup>1</sup> For example, membership has nearly halved in Britain since 1979, with density under 23% by 2016 compared to 32% in 1995.<sup>2</sup> Similarly dramatic declines have occurred in Australia, New Zealand, and the US.<sup>3</sup> Although membership and density levels are not the *sine qua non* for union power and influence *vis-à-vis* employers, government and political parties,<sup>4</sup> they do represent the fundamentals of key power resources for their construction and exercise. Yet, surveys from these same countries show nearly half of workers, young and old, express a desire for membership.<sup>5</sup> However, workers have encountered difficulties in exercising their right to join a union for a variety of factors. Amongst these are working in a non-union workplace with no union present to join.<sup>6</sup> This increases the (non-financial) costs of membership, especially with regard to encouraging workers to join and then organise into a body capable of undertaking collective representation. In most countries, employers are relatively unrestricted in maintaining 'union free' workplaces through suppression and substitution strategies.<sup>7</sup>

At the same time, judiciaries and legislatures have increasingly supported the freedom not to associate with unions. In 2006, the European Court of Human Rights, in the *Sorensen and Rasmussen v. Denmark* case, officially recognised a freedom *not* to associate as a crucial element of the freedom of association in Article 11 of the European Convention on Human Rights. In the US, the number of so-called 'right-to-work' states, which prohibit union security (post-entry closed shops, agency shops, fair share) agreements, has grown to include previously pro-union states like Wisconsin and Michigan, and now totals 28 states. In Australia, the Liberal Commonwealth government banned the closed shop with the *Workplace Relations Act 1996*.<sup>8</sup> In New Zealand, the National government banned all forms of compulsory unionism in its *Employment Contracts Act 1991* and the subsequent Labour government adopted a similar policy in its *Employment Relations Act 2000*. And, in Britain both pre- and post-entry closed shops became unlawful under the Thatcher governments' union reform legislation.<sup>9</sup>

In Britain, the introduction of a statutory means for gaining union recognition from 2000 has not changed the propensity for workers to join unions.<sup>10</sup> Attempts to raise the cost of 'free riding' by

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<sup>1</sup> C. Frege. and J. Kelly (eds.), *Varieties of Unionism: Strategies for Union Revitalization in a Globalizing Economy* (Oxford: Oxford University Press, 2003).

<sup>2</sup> Department of Business, Energy and Industrial Strategy, *Trade Union Membership 2016*, (London: HMSO, 2017) 23, 25.

<sup>3</sup> S. Ryall and S. Blumenfeld, *The State of New Zealand Union Membership in 2014* (Wellington, New Zealand: Centre for Labour Employment and Work at Victoria University, 2015).

<sup>4</sup> R. Sullivan, 'Labour market or labour movement? The union density bias as barrier to labour renewal' (2010) 24 *Work, Employment and Society*.

<sup>5</sup> A. Bryson, R. Gomez, M. Gunderson and N. Meltz, 'Youth-Adult Differences in the Demand for Unionization: Are American, British, and Canadian Workers All That Different?' (2005) 26 *Journal of Labor Research*; P. Haynes, P. Boxall and K. Macky 'Switched Off, Beyond Reach or Blank Slates? Young Workers and Trade Unions in New Zealand' (Noosa: Proceedings of the 18<sup>th</sup> AIRAANZ Conference, 2004); J. Teicher, P. Holland, A. Pyman, and B. Cooper, 'Australian Workers: Finding Their Voice?' in R. Freeman, P. Boxall and P. Haynes (eds.) *What Workers Say? Employee Voice in the Anglo-American Workplace*, (New York: Cornell University Press, 2007).

<sup>6</sup> Bryson *et al* above n.5; Haynes *et al* above n.5.

<sup>7</sup> G. Gall, 'British employer resistance to trade union recognition' (2004) 14 *Human Resource Management Journal*.

<sup>8</sup> D. Peetz, *Unions in a Contrary World: The Future of the Australian Trade Union Movement*, (Cambridge, UK: Cambridge University Press, 1998).

<sup>9</sup> R. Undy, P. Fosh, H. Morris, P. Smith, and R. Martin, *Managing the Unions: The Impact of Legislation on Trade Unions' Behaviour* (Oxford: Oxford University Press, 1996).

<sup>10</sup> G. Gall, 'Union Recognition in Britain: the end of legally-induced voluntarism?' (2012) 41. *Industrial Law Journal*.

introducing 'fair share' agreements in Britain and the US – where non-members pay a percentage of the union subscription to take account of gaining the benefits of membership when collective agreements are applied to all workers – have not been successful in reducing non-membership. Few countries now encourage and support union membership through effective public policy and law. Of those remaining ones which do, those countries (Iceland, Sweden, Finland, Denmark, Belgium) practicing the 'Ghent system' of welfare benefits (especially unemployment benefit) being accessed via union membership are the most obvious. They are also all small economies.

State (policy, legislative, judicial) approaches towards support for union membership are held to be of significance because since the mid-1990s, the turn to 'organising' amongst unions has proven to be insufficient to arrest membership decline and, with it, union power and influence. First begun in Australia and the US, 'organising' spread to Britain and other advanced economies. While recruitment and retention are at its heart, 'union organising' as a particular perspective and method (contra 'union servicing') seeks to create more active members as well as self-sufficient and self-sustaining unionised workplaces. Here the emphasis is not just on the 'quantity' of union membership but also, thus, its 'quality'. Notwithstanding that 'organising' has not always been practiced in the way in which its creators envisaged,<sup>11</sup> significant financial and human resources have been ploughed into its implementation. Yet the results have not even allowed unions merely to 'run very fast to stand still'. Opposition from employers and governments as well as the impact of changes in employment practices have blunted the effectiveness of 'organising'. Moreover, and in terms of social equality and justice, the practical consequences of the diminution of membership, when linked to deregulation of labour markets and the unfettering of restrictions upon employer behaviour, have been the growing phenomena, *inter alia*, of rising wage inequality and the prevalence of insecure, low paid work where even collective bargaining has been reduced, some argue, to 'collective begging'.<sup>12</sup>

In this overall context, this paper argues for a switch from the present non-union default, common across the world,<sup>13</sup> to a union default. With a non-union default setting, workers are defaulted to non-union status, irrespective of whether they have chosen this. They then have to take the positive, pro-active step to seek and gain union membership. The proposal to adopt a union default setting would do the opposite. Our analysis suggests applying a union default setting would increase union membership while simultaneously improving workers' freedom to associate and respecting their freedom *not* to associate with a union. It would also provide the basis for unions to be more effective and avoid the primary problems associated with pre- and post-entry closed shops, namely, employment (commencement or continuance) being dependent upon membership and employers having scope to choose an amenable union as the agreements are voluntary ones between employers and unions.

The union default proposal responds to the manifest reality of declining union membership within an environment of voluntary unionism and the ending of any compulsion (see later) in the contemporary legal and political context where neo-liberalism has now ideological ascendancy and social democracy (which encouraged union membership through policy and law) has largely been extinguished as a governing political ideology. In train with, and as part of, the ascendancy of neo-liberalism, the practices of a unitarist-inclined HRM in the workplace have become dominant, supplanting pluralist approaches where unions were formerly key players. Strengthening union membership provides the basis for augmenting currently atrophied worker voice in terms of both

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<sup>11</sup> G. Gall and J. Fiorito, 'The forward march of labour halted? Or what is to be done with 'union organising'? The cases of Britain and the US' (2011) 35 *Capital and Class*.

<sup>12</sup> R. Stutz, 'Employee organizations in public service' mimeograph bulletin (Storrs: Labor-Management Institute, University of Connecticut, 1960); K. Ewing and J. Hendy, *Protect the right to strike: kill the bill* (Liverpool: Institute of Employment Rights, 2015).

<sup>13</sup> P. Weiler, *Governing the Workplace: The future of labor and employment law* (Cambridge, MA: Harvard University Press, 1990) 228.

‘vested interest’ and the ‘sword of justice’.<sup>14</sup> At its core, the union default recognises the increasingly unequal nature of the balance of power between capital and labour in the neo-liberal era and the role of the state, whether in liberal market economies or coordinated market economies, in facilitating this inequality through strategies of labour market deregulation. The union default can help redraw this power imbalance back in favour of labour, using the state.

The paper proceeds as follows: first, the factors explaining current non-union membership are examined; second, the nature of defaults, including the non-union default, is outlined; next, the empirical effects of defaults are discussed. Then two types of explanation of these effects are discussed: those of ‘rational choice’ models and those of behavioural economics. Thereafter, the paper discusses the likely negative membership effects of the non-union default, contrasting these with the possible positive effects on membership of a proposed union default. We then consider why a union default would be better. Pen-ultimately, the paper outlines how a union default would work in practice. It concludes by suggesting some lessons for theory and practice in prosecuting a union default.

## 2. Non-membership

Amongst the many studies considering why workers cease to be or never become union members are economic, social, political and ideological concerns. Some of the most obvious factors are the impacts of sectoral workforce composition, social background, parental and peer influence, demographic characteristics (like age and gender), job characteristics and satisfaction, employer behaviour and characteristics (including employer attitudes towards unionisation and provision of alternative voice mechanisms) and state policy. However, and given the decisions of workers about taking up, maintaining or ceasing membership are based upon largely instrumental concerns, the issue of union effectiveness is one that is seldom given sufficient attention.<sup>15</sup> Unions can be considered to be effective when they not only provide ‘voice’ in terms of articulating members’ grievances but are also able to prosecute these and the interests underlying them.<sup>16</sup> Of course, differing (subjective) perceptions of effectiveness play a role as much as (objective) assessments (on union wage mark-ups) do in influencing workers to join, stay or leave. Both perceptions and assessments inform workers’ cost/benefit calculations (in financial and non-financial terms) about membership. Judged by declining union effectiveness on an array of issues, the extent of the union ‘premium’ has not unsurprisingly declined in the last twenty to thirty years in most countries. Thus, if union effectiveness declines the propensity to join or maintain membership will also decline with the consequence that, all other things being equal, union effectiveness will further decline and so on and so forth. Contrastingly, if union effectiveness could be enhanced and increased, there are grounds for believing membership would also increase, with positive knock effects on union effectiveness in a virtuous upward spiral.

In terms of the propensity to increase union membership and effectiveness and their inter-relationship, two salient considerations are desire for membership and union representation. In Australia, Britain, Canada, New Zealand and the US, strong evidence exists for there being unfulfilled demand for union representation.<sup>17</sup> For example, Freeman commented: ‘if workers were provided

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<sup>14</sup> See A. Flanders, *Management and Unions* (London: Faber and Faber, 1970)

<sup>15</sup> A. Bryson ‘Working with dinosaurs? Union effectiveness in Britain’ in G. Gall (ed.) *Union recognition: organising and bargaining outcomes* (London: Routledge, 2005).

<sup>16</sup> G. Gall and J. Fiorito, ‘Union Effectiveness: In Search of the Holy Grail’ (2016) 37 *Economic and Industrial Democracy*.

<sup>17</sup> Bryson *et al* above n.5; A. Charlwood, ‘*The anatomy of union decline in Britain: 1990-1998*’, 601 (London: LSE Centre for Economic Performance, 2003); R. Freeman, ‘Do workers still want unions? More than ever’ Briefing Paper 182 (New York: Economic Policy Institute, 2007); W. Diamond and R. Freeman, ‘Young Workers and Trade Unions’ in H. Gospel and S. Wood (eds.) *Representing Workers: Union Recognition and Membership in Britain* (London: Routledge, 2003); R. Freeman and J. Rogers, *What workers want* (New York:

the union representation they desired in 2005, then the unionization rate would be about 58% - almost eight times higher than the actual rate of 7.4%, and considerably higher than the 44% found in polls from the mid-1990s'.<sup>18</sup> Often the questions posed were formulated around the likes of 'would you like union representation?', 'would you vote for a union?' or 'would you join a union if asked?' But without either employer willingness to recognise the union of workers or workers being asked by unions in non-union workplaces such potential has not been realised. This highlights the importance of employers being compelled to recognise unions to give fuller effect to value of membership. In this regard, Bryson and Gomez found the 'biggest single factor determining the probability of never-membership is whether or not an individual is employed in a workplace with a recognized union. Employees in unionized workplaces had a 40 per cent lower probability of never-membership than similar employees in non-unionized work-places. ... [T]he decline in workplace unionization has contributed very significantly to the rise in never-membership in the economy'.<sup>19</sup>

This brief consideration highlights i) there is strong evidence a union default would not compel unwilling workers into membership, ii) without a union default, many workers will be unable and/or unwilling to join a union, and iii) in order to facilitate acquisition of fuller membership benefits (as per union effectiveness), workers require lawful means to compel employers to recognise their union. The latter is particularly important given employer resistance to conceding recognition is widespread even where statutory mechanisms do exist,<sup>20</sup> suggesting effective mechanisms require stronger laws, enforcement and penalties.

### 3. The nature of the non-union default

A default is the option that automatically applies wherever a decision-maker proceeds without having actively chosen an alternative.<sup>21</sup> It is '... what happens when individuals take no action with regard to a choice opportunity'.<sup>22</sup> It is typically established by a default setter to deal with such situations.<sup>23</sup> Defaults are pervasive in modernity. 'Impersonal, default rules, chosen by private and public institutions, establish settings and starting points for countless goods and activities – cell phones, rental car agreements, computers, savings plans, health insurance, websites, privacy, and much more'.<sup>24</sup> Defaults also '... constitute the law of contract, much of which is in the following form: Unless the contracting parties say otherwise, the rules that govern their relationship will be as follows'.<sup>25</sup> Indeed, defaults are inevitable and even highly desirable.<sup>26</sup> One option in any selection of

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ILR/Cornell/Russell Sage Foundation, 2006); Haynes *et al* above n.5; Teicher *et al.* above n. 5; J. Waddington and C. Whitson, 'Why Do People Join Unions in a Period of Membership Decline?' (1997) 35 *British Journal of Industrial Relations*.

<sup>18</sup> Freeman above n. 17, 6.

<sup>19</sup> A. Bryson, and R. Gomez, 'Why have workers stopped joining unions? The rise in never membership in Britain' (2005) 43, *British Journal of Industrial Relations* 87.

<sup>20</sup> L. Cohen and R. Hurd, 'Fear, conflict, and union organizing' in K. Bronfenbrenner, S. Friedman, R. Hurd, R. Oswald and R. Seeber (eds.) *Organizing to win: New research on union strategies* (Ithaca: ILR Press, 1998); Gall above n. 7; G. Gall, 'Statutory union recognition provisions as stimulants to employer anti-unionism in three Anglo-Saxon countries' (2010) 31 *Economic and Industrial Democracy*.

<sup>21</sup> C. Brown and A. Krishna, 'The Skeptical Shopper: A Metacognitive Account for the Effects of Default Options on Choice' (2004) 31 *Journal of Consumer Research*.

<sup>22</sup> S. Davidai, T. Gilovich, and L. Ross, 'The meaning of default options for potential donors' (2012) 109 *Proceedings of the National Academy of Sciences* 15201.

<sup>23</sup> R. Thaler and C. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, (New Haven: Yale University Press, 2008).

<sup>24</sup> C. Sunstein, 'Deciding by Default' (2013) 162 *University of Pennsylvania Law Review* 1-2.

<sup>25</sup> C. Sunstein, *Choosing Not to Choose: Understanding the Value of Choice* (New York: Oxford University Press, 2015) 3.

<sup>26</sup> C. Sunstein, 'Nudges, agency, navigability, and abstraction: a reply to critics' (2015) 6 *Review of Philosophy and Psychology*.

options must be specified as the default wherever choosers are not able or willing to choose. For instance, most people do not want to choose the basic settings on their computers - they have neither the inclination nor capacity to do so. Appropriate defaults, thus, often save time and money, while conserving cognitive resources for other, more pressing and relevant tasks.

The decision to join or not join a union involves an unacknowledged default. In all known countries, the default is 'non-union'. So, if employees do *not* actively choose to be either in or out of a union, they will *not* be union members.<sup>27</sup> The starting position in the employment relationship, in the absence of consciously choosing to be a union member or not, is 'no union membership'.<sup>28</sup> This results from unions being 'secondary' or 'intermediate' organisations<sup>29</sup> because, and flowing from employer ownership and control, workers are already organised by employers into units of organisational association. However, this also results from employers' conscious choice not to have union membership as a default due to attitudes ranging from hostility to, and agnosticism about, unions. The consequence is that many employees, probably most, have never actively or consciously chosen their non-union status (even if the extent of the impact of this does vary by country). They have simply been defaulted to it. Yet, their non-union status is often assumed to be a product of deliberate choice.

#### 4. Default effects: the empirical evidence

The non-union default could have a substantial negative impact on the numbers of employees joining a union as a consequence of the default effect. This refers to the increased probability an option will be selected just because it has been specified as the default. Thus, specifying non-unionism as the default increases the probability workers will remain non-union, effectively by default. The default effect is an empirically substantiated finding across many experimental and observational studies in a wide range of decision-making contexts. These include charitable donations,<sup>30</sup> car insurance purchases,<sup>31</sup> consumer product selections,<sup>32</sup> medical decisions,<sup>33</sup> green electricity choices,<sup>34</sup> internet privacy settings,<sup>35</sup> organ donations,<sup>36</sup> healthcare plans,<sup>37</sup> savings

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<sup>27</sup> The sole exception involves those situations in a few countries like Canada, where union security clauses, union shops and closed shops, still compel union membership. For employees covered by such security clauses in collective agreements, there is no default at all. They must join the union.

<sup>28</sup> P. Weiler, *Governing the Workplace: the future of labor and employment law* (Cambridge, MA: Harvard University Press, 1990).

<sup>29</sup> W. Müller-Jentsch, 'Trade unions as intermediary organizations' (1985) 6 *Economic and Industrial Democracy*.

<sup>30</sup> J. Everett, L. Caviola, G. Kahane, J. Savulescu and N. Faber, 'Doing Good by Doing Nothing? The Role of Social Norms in Explaining Default Effects in Altruistic Contexts' (2015) 45 *European Journal of Social Psychology*; I. Goswami and O. Urminsky, 'When Should the Ask Be a Nudge? The Effect of Default Amounts on Charitable Donations' (2016) 53 *Journal of Marketing Research*.

<sup>31</sup> E. Johnson, J. Hershey, J. Meszaros, and H. Kunreuther, 'Framing, Probability Distortions, and Insurance Decisions' (1993) 7 *Journal of Risk and Uncertainty*.

<sup>32</sup> C. Brown and A. Krishna, 'The Skeptical Shopper: A Metacognitive Account for the Effects of Default Options on Choice' (2004) 31 *Journal of Consumer Research*; D. Goldstein, E. Johnson, A. Herrmann, and M. Heitmann, 'Nudge Your Customers Toward Better Choices' (2008) December *Harvard Business Review*; Y. Huh, J. Vosgerau and C. Morewedge, 'Social Defaults: Observed Choices Become Choice Defaults' (2014) 41 *Journal of Consumer Research*.

<sup>33</sup> S. Malhotra, A. Cheriff, J.T. Gossey, C. Cole, R. Kaushal, J. and Ancker, 'Effects of an e-Prescribing Interface Redesign on Rates of Generic Drug Prescribing: Exploiting Default Options' (2016) 23 *Journal of the American Medical Informatics Association*; C. Probst, V. Shaffer, and Y. Chan, 'The Effect of Defaults in an Electronic Health Record on Laboratory Test Ordering Practices for Pediatric Patients' (2013) 32 *Health Psychology*.

<sup>34</sup> I. Dinner, E. Johnson, D. Goldstein, and K. Liu, 'Partitioning Default Effects: Why People Choose Not to Choose' (2011) 17 *Journal of Experimental Psychology*; C. Ghesla, 'Defaults in Green Electricity Markets – Preference Match not Guaranteed' (2016) Social Science Research Network, available at SSRN: <https://ssrn.com/abstract=2732662>; M. Vetter and F. Kutzner, 'Nudge Me if You Can – How Defaults and Attitude Strength Interact to Change Behaviour' (2016) 1 *Comprehensive Results in Social Psychology*.

plans,<sup>38</sup> and pension plans.<sup>39</sup> However, other than for pension plans, there is currently little work on default effects in employment.

Default effects are generally sizeable: they have a large influence on what people ‘choose’, and the courses of action they end up taking, even when there are major financial consequences at stake. In 2000, when Sweden introduced substantial elements of private provision into its social security system, citizens were encouraged to choose one of 456 private funds for their pension accruals.<sup>40</sup> Despite heavy advertising from the private pension companies, only 67% actively made such a choice and the remaining 33% went with the default pension scheme.<sup>41</sup> Only 4% selected the next most popular option, the Robur Aktiefond fund.<sup>42</sup> As private pension companies cut back on advertising and those newly joining a pension plan increasingly involved younger workers, reliance on the default rose further. By 2003, 92% of new entrants were opting to stay with the default as their plan, with only 8% actively choosing some alternative.<sup>43</sup>

The default effect is perhaps most apparent in parallel situations with opposite defaults. For example, 80% of New Jersey drivers stayed with car insurance policies where there was only a *limited* right to sue specified as the state default.<sup>44</sup> Meanwhile, 75% of Pennsylvania drivers stayed with car insurance policies where a full right to sue was specified as the state default.<sup>45</sup> Opposite defaults were similarly ‘sticky’. An experiment involving 136 staff with limited and full rights to sue alternately provided as the default had similar effects on car insurance choices. The default remained ‘sticky’, in that it was likely to be chosen irrespective of whether it was the limited or full right to sue.<sup>46</sup> Defaults even influence selections in situations where strong moral and ethical positions would normally be anticipated, such as green electricity,<sup>47</sup> organ donation,<sup>48</sup> charitable giving,<sup>49</sup> and end-of-life decisions.<sup>50</sup>

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<sup>35</sup> M. Steffel, E. Williams, and R. Pogacar, ‘Ethically Deployed Defaults: Transparency and Consumer Protection through Disclosure and Preference Articulation’ (2016) 53 *Journal of Marketing Research*.

<sup>36</sup> Davidai *et al.* above n. 22; E. Johnson and D. Goldstein, ‘Do Defaults Save Lives?’ (2003) 302 *Science*; E. Johnson and D. Goldstein, ‘Defaults and Donation Decisions’ (2004) 78 *Transplantation*; C. McKenzie, M. Liersch and S. Finkelstein, ‘Recommendations Implicit in Policy Defaults’ (2006) 17 *Psychological Science*.

<sup>37</sup> A. Sinaiko and R. Zeckhauser, ‘Forced to Choose, Again: The Effects of Defaults on Individuals in Terminated Health Plans, in I.G. Cohen, H.F. Lynch, C.T. Robertson (eds.) *Nudging Health: Health Law and Behavioural Economics*, (Maryland: John Hopkins University Press, 2015).

<sup>38</sup> J. Blumenstock, M. Callen, and T. Ghani, ‘Mobile-izing Savings with Automatic Contributions: Experimental Evidence on Present Bias and Default Effects in Afghanistan’ *Discussion Paper 11400*, (London: Centre for Economic Policy Research, 2016).

<sup>39</sup> J. Brown, A. Farrell, and S. Weisbenner, ‘Decision-Making Approaches and the Propensity to Default: Evidence and Implications’ (2016) 121 *Journal of Financial Economics*; M. Butler and F. Teppa, ‘The Choice Between an Annuity and a Lump Sum: Results from Swiss Pension Funds’ (2007) 91 *Journal of Public Economics*; J. Choi, D. Laibson, B. Madrian, and A. Metrick, ‘Optimal Defaults’ (2003) 93 *American Economic Association Proceedings*; and H. Cronqvist and R. Thaler, ‘Design Choices in Privatized Social-Security Systems: Learning from the Swedish Experience’ (2004) 94 *American Economic Association Proceedings*. This can include choosing the pension plan and/or the contribution rate.

<sup>40</sup> Cronqvist and Thaler above n. 39, 425-27.

<sup>41</sup> Cronqvist and Thaler above n. 39, 425-27.

<sup>42</sup> Cronqvist and Thaler above n. 39, 425-27.

<sup>43</sup> Cronqvist and Thaler above n. 39, 425-27.

<sup>44</sup> E. Johnson, J. Hershey, J. Meszaros, and H. Kunreuther, ‘Framing, Probability Distortions, and Insurance Decisions’ (1993) 7 *Journal of Risk and Uncertainty*.

<sup>45</sup> (Johnson *et al.* above n. 44.

<sup>46</sup> Johnson *et al.* above n. 44, 46-7.

<sup>47</sup> Dinner *et al.* above n. 34; Ghesla above n. 34; Vetter and Kutzner above, n. 34.

<sup>48</sup> Davidai *et al.* above n. 22; Johnson and Goldstein above n. 36; McKenzie above n. 36.

<sup>49</sup> Everett *et al.* above n. 30; 2015, Goswami and Urminsky above n. 30.

<sup>50</sup> L. Kressel and G. Chapman, ‘The Default Effect in End-of-Life Medical Treatment Preferences’ (2007) 27 *Medical Decision Making*.

## 5. Rational choice explanation of default effects

The conventional explanation of default effects from rational choice theory focuses on the switching costs<sup>51</sup> of moving from the default to some other option.<sup>52</sup> The central premise is that the costs of switching from the default can outweigh any increase in benefits associated with an alternative. Switching costs include those of searching and analysing information about various options, together with those of actually making the switch (e.g., registration, postage, lawyer fees, filling out forms). Switching costs are not always, or even usually, important. In many experiments and field studies of default effects, these costs have been close to nil. Nothing more than ticking a box on a form or clicking a computer button is regularly required to actively choose an alternative to the default.<sup>53</sup> Likewise, the decision scenarios usually present the default as just one option among others, where choosers have not yet chosen. The default is not a genuinely *status quo* position, the result of some past choice. Thus, when no choice has yet been made, the search and information costs of accepting a default are essentially the same as those involved in rejecting it. In short, these costs are not truly avoided by choosing the default. Yet, substantial default effects are still observed in such studies. We now move to explain these.

## 6. Behavioural economics explanations of default effects

Behavioural economists argue default effects often originate in the way humans think. Kahneman explained humans have two cognitive systems.<sup>54</sup> System 1 is fast, automatic, reliant upon habits and heuristics, and drives humans to action, often on the basis of 'fight or flight' impulses. System 2 is much slower, more deliberate, more careful, more mindful of long- and short-term consequences, and more focused on costs, benefits, probabilities, and contingencies. System 1 thinking is relatively effortless and easy, whereas System 2 thinking is effortful and difficult. Default effects can be explained with reference to both cognitive systems, as the result of both thinking avoidance (System 2) and mental short-cutting (System 1). First, default effects can reflect *inertia*, where people stay with the default because they want to avoid any serious thinking (System 2) about the various alternatives. Second, default effects can also arise from a default perceived as a social norm. A *social norm* default provides a mental short-cut to estimating what is likely to work best or be most favoured, without having to engage in a difficult, time-consuming comparative assessment of the options' costs and benefits. Third, default effects can also stem from using the default as a reference, or starting, point, from which moves to other options are assessed in terms of gains and losses. This mental short-cut enables people to make easier, one-by-one comparisons of each option with the default. All three of these explanations are likely to affect the decision to join or not join a union.

### *Inertia*

Various inertia-based explanations of default effects stress an active choice, involving at least some cognitive effort, is required to reject a default and accept some alternative. Effort must be first exerted to understand the nature of the decision-making problem or opportunity. It must then be applied to form a preference regarding the different alternatives, often in a comparison with the default. Understanding a problem and evaluating the various options can be mentally taxing,

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<sup>51</sup> Switching costs are a specific type of transaction costs. Another 'rational' explanation focuses on network effects, but these are relevant to corporations rather than individuals.

<sup>52</sup> C. Wilson, L. Garrod and A. Munro, 'Default Effects, Transaction Costs, and Imperfect Information' (2013) 119 *Economic Letters*.

<sup>53</sup> Note that all participants in most of these studies must ordinarily complete a survey or fill out a form, online or offline, irrespective of whether they opt for the default or not.

<sup>54</sup> D. Kahneman, *Thinking: Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).



especially if the problem is complex, there are many options, and the person is too fatigued and/or busy to want to exert the cognitive effort.<sup>55</sup> The evidence shows that choice deferral can occur and the default then applies in the absence of any active choosing.<sup>56</sup> Postponing a decision might then lead to long-term inaction inertia, where people stay with the default because the options in subsequent decision rounds are less attractive than those in the first.<sup>57</sup> If it takes too much cognitive effort to ascertain whether an option is better or worse than an undesirable default, people are likely to exhibit an omission bias in preferring to make mistakes through their inactions, passively staying with an unappealing default.<sup>58</sup> Inactions (staying with the default) resulting in negative consequences are generally seen as less morally culpable than actions (actively choosing another option) with the same negative consequences.<sup>59</sup> Thus, inertia can explain why many people stick with a default rather than change options.

### *Social Norms*

Defaults can also affect choices through their role as perceived social norms. Social norms are what individuals generally believe to be the most prevalent and/or acceptable behaviour in a particular group situation.<sup>60</sup> Most comply with social norms and rely on them to guide their behaviour.<sup>61</sup> There are two basic kinds of social norms: descriptive and injunctive.<sup>62</sup> Descriptive refers to what individuals perceive as the most common behaviours within a group: what most people actually do in a given situation. Injunctive refers to what individuals perceive as the most appropriate behaviours within a group: what all should do in a given situation. Empirical evidence shows a default can be interpreted as indicative of either a descriptive or an injunctive norm.<sup>63</sup> When viewed as a descriptive norm, a default is seen as having been set in accordance with majority preferences: what most would normally choose in the circumstances. When viewed as an injunctive norm, the default is seen as having been endorsed as the 'right thing to do'. More specifically, individuals might see the default as an implicit recommendation from experts and/or policy-makers.<sup>64</sup> In either, the default is seen as conveying important information about what works best and/or what would win public approval.<sup>65</sup> Consequently, a default perceived as a social norm is more likely to stick.

### *Loss aversion*

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<sup>55</sup> Sunstein above n. 25.

<sup>56</sup> C. Anderson, 'The Psychology of Doing Nothing: Forms of Decision Avoidance Result From Reason and Emotion' (2003) 129 *Psychological Bulletin*; R. Dhar, 'Consumer Preference for a No-Choice Option' (1997) 24 *Journal of Consumer Research*.

<sup>57</sup> O. Tyskocinski, T. Pittman, and E. Tuttle, 'Inaction Inertia: Foregoing Future Benefits as a Result of an Initial Failure to Act' (1995) 68 *Journal of Personality and Social Psychology*; H. Arkes, H., Y. Kung, and L. Hutzler, 'Regret, Valuation, and Inaction Inertia' (2002), *Organizational Behavior and Human Decision Processes*, 87.

<sup>58</sup> I. Ritov and J. Baron, 'Reluctance to Vaccinate: Omission Bias and Ambiguity' (1990) 3 *Journal of Behavioral Decision Making*.

<sup>59</sup> B. Bartling and U. Fischbacher, 'Shifting the Blame: On Delegation and Responsibility' (2012) 79 *Review of Economic Studies*.

<sup>60</sup> R. Cialdini and M. Trost, 'Social Influence: Social Norms, Conformity, and Compliance' in D. Gilbert, S. Fiske, and G. Lindzey (eds.) *The Handbook of Social Psychology* (New York: McGraw-Hill, 1998).

<sup>61</sup> M. Deutsch and H. Gerard, 'A Study of Normative and Informational Social Influence Upon Individual Judgment' (1955) 51 *Journal of Abnormal and Social Psychology*.

<sup>62</sup> Everett *et al.* above n. 30.

<sup>63</sup> Everett *et al.* above n. 30.

<sup>64</sup> S. Halpern, P. Ubel and D. Asch, 'Harnessing the Power of Default Options to Improve Health Care' (2007) 357 *New England Journal of Medicine*.

<sup>65</sup> Everett *et al.* above n. 30.

Human beings generally ‘... dislike losses more than they like corresponding gains’<sup>66</sup> and, so, are much more motivated to minimise losses than maximise equivalent gains. Defaults commonly establish reference points in people’s minds, a *status quo* position, against which losses and gains are assessed.<sup>67</sup> Active choosing of some other option is, thus, perceived as a departure from the default reference point, where rejecting the default involves losses and accepting an alternative involves gains. Since losses have a magnified significance in people’s minds relative to gains, any alternative to a default must generally be perceived as much more attractive, in terms of potential gains, to prompt switching. It follows, unless an alternative is viewed as obviously much superior, the default is likely to remain the preferred option. The combination of loss aversion and a default reference point helps to ensure defaults remain ‘sticky’.

## 7. Negative union membership effects of a non-union default

No research has attempted to quantify the magnitude of the effects of a non-union default on union joining. The effect is likely to be large, given that all four explanations (switching costs, inertia, social norm, and loss aversion) for a default effect could apply, either singly or in combination. First, switching costs of moving from non-union to union status would be comparatively large, especially where there is no established and/or certified/recognised workplace union to join. Total switching costs are generally high, especially in the US, where union certification is adversarial, complex, expensive, time-consuming and uncertain.<sup>68</sup> For American workers, direct switching costs of transferring to union membership are relatively low for most members during an organising drive. They comprise little more than time costs of signing a card and paying, in most cases, a nominal fee.<sup>69</sup> In contrast, the indirect costs of making such a switch can be substantial: the stresses and strains of a management backlash manifested in harassment, victimisation, and even dismissal.<sup>70</sup> In the absence of an outside union running an organising drive, even the direct costs of switching can be very substantial, because a group of workers must typically band together to found and operate their own workplace union and recruit members. This involves major time commitments as well as money for administrative, legal, and other costs.

Second, there would be *inertia* in a non-union default, because the decision to join a union is cognitively demanding and not easy to make for two reasons. First, it involves many ‘purchase’ dimensions, since unions typically perform a variety of services such as negotiating collective agreements, lobbying governments, representing members in personal grievances, and providing free or discounted financial products.<sup>71</sup> In addition, each one of these services can be stratified further into yet more ‘purchase’ dimensions. For instance, collective agreements commonly comprise a broad array of terms and conditions of employment. Some of the union’s ‘purchase’ dimensions are also intangible and, thus, hard to quantify in any concrete way. How does a worker value a union as a cohesive community of colleagues, from whom he or she can seek solace in the bad times and with whom he or she can celebrate in the good? The number and complexity of these

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<sup>66</sup> Sunstein above n.24, 21.

<sup>67</sup> W. Samuelson and R. Zeckhauser, ‘Status Quo Bias in Decision Making’ (1988) 1 *Journal of Risk and Uncertainty*; D. Kahneman, J. Knetsch, and R. Thaler, ‘Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias’ (1991) 5 *Journal of Economic Perspectives*.

<sup>68</sup> K. Bronfenbrenner, S. Friedman, R. Hurd, R. Oswald and R. Seeber (eds.) *Organizing to win: New research on union strategies* (Ithaca, NY, ILR Press, 1998); B. Bruno, ‘Unions Facing and Suffering Neo-liberalism in the United States’ in Gall, G. Hurd, R. and Wilkinson, A. (eds.) *The International Handbook of Labour Unions: responses to neo-liberalism* (Cheltenham: Edward Elgar, 2012); J. Godard, ‘Do labor laws matter? The density decline and convergence thesis revisited’ (2003) 42 *Industrial Relations*.

<sup>69</sup> This assumes, of course, that the workers are not actively participating in the attempts to recruit members.

<sup>70</sup> Godard above n. 68; G. Gall, ‘Employers against Unions: the British experience of union victimization’ in Gall, G. and Dundon, T. (eds.) *Global anti-unionism – nature, dynamics, trajectories and outcomes* (Basingstoke: Palgrave, 2013).

<sup>71</sup> Gall and Fiorito above n.16.

various value dimensions make accurately assessing the utility of membership difficult. Moreover, value is hard to ascertain because it is partly contingent on future circumstances, unknown at the time of joining. Some workers may regularly require representation to, for example, make a health and safety complaint, file a personal grievance or rely on clauses in the collective agreement to exercise various rights or qualify for entitlements, such as parental leave or accident insurance. Others may not. Reliance upon a union can vary considerably and somewhat unpredictably, in accordance with members' life circumstances (e.g., illness, accidents, parenthood) and those of the organisation (e.g., redundancy, hazards). Workers cannot easily estimate the probabilities of these events at the time of joining. Faced with such cognitive complexity, it can be easier for workers to stay with the non-union default than to choose whether to join a particular union. Even if employees favour unionism for ideological or other reasons like parental influence, they might still engage in *choice deferral* and *inaction inertia* and, therefore, remain non-union because of the difficulties associated with choosing whether to join a particular union in the present or a different, possibly more appropriate, union in the future.

Third, a non-union default might be perceived as a social norm and, therefore, be relied upon to reject unions. As a descriptive social norm, workers would believe that policy-makers had established a non-union default because most workers preferred not to join, i.e., a non-union default would be interpreted as evidence most workers had rationally concluded membership costs outweighed benefits. As an injunctive social norm, workers would believe that policy-makers had established a non-union default because they felt that workers *should* be non-union, i.e., a non-union default would convey a strong message about what is socially acceptable and desirable for economy and society. In either case, workers might conclude being non-union is 'more normal' or 'better' than being a member.

Finally, the non-union default might define a reference point for workers' thinking about costs and benefits of membership. More specifically, it might establish that being non-union is effectively the *status quo* position. Any deviation from this would involve so-called gains and losses, where the losses loom more heavily than the gains in workers' minds. 'Gains' would be associated with the benefits of moving to membership: improved contractual terms and conditions, stronger advocacy and additional benefits (e.g., insurance discounts) available directly from the union.<sup>72</sup> 'Losses' would be associated with what workers relinquish in moving away from being non-union, particularly any favourable treatment from management and the money for union fees/dues which would otherwise have been available for other purchases. Since humans are loss averse, a non-union reference point, defined by the default, amplifies the significance of seemingly 'losing' these latter benefits. Thus, paying dues would appear, in the minds of many workers, to be a major sacrifice, but only when the default is non-union. Thus, perspective matters here. If membership were the default, 'losing' the benefits of union membership would be viewed as the big sacrifice while 'gaining' favourable treatment from management and pocketing dues would count for much less. The empirical evidence from meta-studies indicates the human mind normally assigns twice the value to losses as equivalent gains.<sup>73</sup> With a non-union default, 'gains' from membership would, thus, have to be more than twice as high as the 'losses' to induce workers to join a union. It follows that workers would be unlikely to switch to a union unless the overall case was compelling.

## **8. Positive membership effects of a union default**

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<sup>72</sup> These are only gains if the workers feel that non-union is the initial reference point for making any assessment of gains or losses.

<sup>73</sup> J. Horowitz and K. McConnell, 'A review of WTA/WTP studies' (2002) 44 *Journal of Environmental Economics and Management*; S. Sayman and A. Onculer, 'Effect of study design characteristics on the WTA-WTP disparity: A meta analytical framework' (2005) 26 *Journal of Economic Psychology*; T. Tuncel and J. Hammitt, 'A new meta-analysis on the WTP/WTA disparity' (2014) 68 *Journal of Environmental Economics and Management*.

Introducing a union default could have major positive effects on membership levels via switching costs, inertia, social norms, and loss aversion. First, a union default would encourage workers to join by reducing switching costs. Switching costs are low when a union is present in the workplace to join. A union default makes it easier to establish and maintain a union presence through the passive recruitment of a critical mass of members needed to achieve economies of scale and assure effectiveness. Operationalising this is examined below. Second, there is also likely to be *inertia* in a union default, because of the on-going complexities associated with any decision to join or not join a union. Specifically, the choice of the default does not make it less difficult to assess the various ‘purchase’ dimensions of membership. Uncertainties about whether joining a union is going to be beneficial overall are likely to result in choice deferral and inaction inertia, where at least some workers, unsure of what choice to make, temporarily or permanently avoid making any choice at all. However, with a union default, inertia would mean continued membership in a default union, until a worker actively chose to affiliate with a different union or no union at all. Third, a union default might also communicate new information about social norms, which would then affect membership levels. It might be seen as an indication the state, and society, favour union membership as a choice that people ought to make. It might also be viewed as signalling most workers favoured unionisation, perhaps on a reassessment that benefits outweighed costs. In either case, a union default might convey strong positive messages about the general desirability of membership, which would prompt more to join. Finally, a union default might help redefine the reference point for estimating ‘gains’ and ‘losses’ in any decision about membership. A union default defines membership as the *status quo* and non-union status as a change from this. Thus, moving to non-union status involves ‘gains’ and relinquishing union membership involves ‘losses’, where losses are typically given twice the importance of equivalent gains. With this perspective, workers would be reluctant to sacrifice the ‘loss’ of union services in return for the ‘gain’ of dues available for other spending. Any ‘gains’ would have to be roughly twice as high as the ‘losses’ to justify a switch to being non-union, and so most workers would stay with their default union.

Out of these benefits, further benefits could be expected. A union default would help reduce the costs of re-recruiting members who lapsed membership when moving employment. Also, a positive experience of membership via enhanced effectiveness might render workers easier to recruit if they move to other employment where no union default has been established – indeed, they might seek out membership – or they might be less likely to opt out if they moved to a workplace with a union default. The extent of this benefit to individual unions would depend upon whether lapsed members regain employment in the same sector or different sectors organised by other unions. Nevertheless, these resources could then be used for other purposes and, as intimated earlier, with enlarged membership economies of scale could also be gained, helping facilitate union effectiveness. Another potential benefit is that a foundation for occupational and industrial unionism could be furnished. Such forms of labour unionism are generally held to be more effective than general unionism. The extent to which such a potential could be realised would be influenced by the organising choices made by unions as well as the policy of labour relations boards in recognising particular unions as the default union in a particular sphere.

## **9. Why is a union default better?**

Aside from raising membership levels, the union default has many potential advantages likely to appeal to a diverse range of political views amongst interested parties.

### *Freedom to associate with a union*

A union default would improve the freedom to associate by increasing the opportunities to join a union. The empirical evidence from several Anglophone countries indicates an *effective* freedom to

associate critically depends upon the availability of a union present in the workplace to join.<sup>74</sup> Otherwise, costs of switching from non-union to union status are too high to make this feasible most of the time for most people. The proposed low threshold membership level for establishing a default union (see later discussion) would make it relatively less difficult for unions to establish a workplace presence. Once established, the union default would then make it easy to become a member. Workers could actively choose membership, using the formal enrolment opportunity provided by the employer, or simply allow themselves to be defaulted to that status. Either way, they would have a greatly enhanced freedom to associate with a union than via any of the highly restricted, often bureaucratic, costly and adversarial processes available under current employment relations regimes in Anglophone countries.<sup>75</sup>

#### *Freedom not to associate with a union*

The combination of union default and active choosing, what Sunstein<sup>76</sup> refers to as ‘simple active choosing’, would preserve and protect the freedom *not* to associate with a union. A default would allow anyone who had any aversion to unions to opt out of membership on their own initiative, though possibly subject to some restrictions.<sup>77</sup> Availability of active choosing would also mean that employers would be formally obliged to present workers with at least one opportunity to select what they want either at the start of their employment or when a union first obtained default status. The active choosing process would also make the default transparent: workers would be informed of being defaulted to membership if they did not exercise a choice. As a result, anti-union workers would be less likely to feel duped into becoming members and paying dues.

#### *Freedom not to choose*

Active choosing with a union default fundamentally respects workers’ right *not* to choose due to, for example, choice deferral or action inertia. If workers did not *actively choose* to associate or not associate with a union, they would be automatically defaulted to union membership. The same is true of the current non-union default, where the right *not* to choose is also respected, but the worker is defaulted to non-union status instead. The main alternative to active choosing with a default is what Sunstein calls ‘required active choosing’,<sup>78</sup> but this involves its own special kind of compulsion. In the absence of a default, workers would have to be either penalised for not choosing, or rewarded for choosing, to ensure that they decided to join or not join a union. This would effectively transform the freedom to (not) associate, a right workers can freely exercise if they wish, into a duty.

#### *Internalising third party union effects*

A union default helps to ensure that workers who benefit from unions also help to pay for them. Unions provide public goods that cannot be solely restricted to members. A tragedy-of-the-commons situation can develop, where members depart from a union, dues rise to cover the ensuing cash shortfall, the incentive to free-ride correspondingly increases, and yet more members depart, until representation collapses completely. Public goods like those provided by a union are, thus, ordinarily under-supplied and this is obviously inefficient. Union security clauses, covering pre-

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<sup>74</sup> Bryson *et al* above n.5; Haynes *et al* above n.5.

<sup>75</sup> See A. Bogg, ‘The Death of Statutory Union Recognition in the United Kingdom’ (2012) 54 *Journal of Industrial Relations*.

<sup>76</sup> Sunstein above n.25; C. Sunstein, ‘Choosing Not to Choose’ (2014) 64 *Duke Law Journal*.

<sup>77</sup> Unions could be provided with greater membership security by restricting opt out opportunities to, for example, a period before a collective bargaining round or after a minimum period of union membership.

<sup>78</sup> Sunstein above n. 25.

and post-entry closed shops and fair share and agency shop agreements,<sup>79</sup> have traditionally provided a solution to free-riding by mandating membership and/or the payment of dues, but the problem is that the compulsion in these arrangements negates the freedom not to associate. A union default helps to mitigate free-riding while preserving freedom of choice because defaulting workers to membership would almost certainly raise membership levels to a more sustainable level via the positive defaulting effect discussed earlier. For instance, if defaulting workers to membership helped sustain membership levels at, say, 70%, union dues and the resultant incentive to free-ride could be kept low. Alternatively, if defaulting workers to non-union status produced membership levels of, say, 40%, union dues would have to be higher, the incentive to free-ride correspondingly greater (and prone to rising), and effective union representation harder to maintain. However, there is no principled obstacle to combining a union default with agency shops or fair share agreements. Indeed, these policies would reduce free riding and augment unions' financial resources.

### *Public acceptance*

Surveys from several countries suggest that people are generally approving of defaults, especially in some conditions.<sup>80</sup> Defaults are more likely to be favoured when '... people approve of their ends and think that they are consistent with choosers' values and interests',<sup>81</sup> either their own or a majority of the public's. A union default is consistent with preferences for union membership expressed by approximately half the workforce in Anglophone countries.<sup>82</sup> An even higher proportion would see a union default as protecting the interests and rights of all workers: those who do want to associate with a union, those who do not, and those who would rather not have to choose. Defaults are also more likely to be supported when people can actively affirm their consent to any major losses involved, for they prefer to be more deliberative about choices with a personal impact.<sup>83</sup> As an example, most people approve of organ donation but would prefer to be directly asked, via a process of active choosing, whether they want to be donors rather than automatically defaulted to donation status.<sup>84</sup> Since joining a union entails paying dues, there is some initial personal loss. It follows that workers are more likely to be positively disposed to the union default in the current proposal, because of the opportunity, via *active choosing*, to explicitly agree/disagree with joining a union and paying dues.

## **10. Operationalising a union default**

The first part of this section examines the policy and practical issues in operationalising a union default. The second part considers issues of law and jurisprudence. There are aspects of implementing a union default which would be relatively straightforward in workplaces already partially or fully organised. In Britain, 41% of workplaces in 2016 had a union presence.<sup>85</sup> All new employees would default to membership of the existing union, unless they *actively chose* not to be. If two or more unions represented different workers in the same bargaining unit, new employees

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<sup>79</sup> An agency shop normally requires that non-members pay the equivalent of a full union subscription while a fair share agreement does not. Typically, the payment in the latter is around 75% of a full union subscription.

<sup>80</sup> C. Sunstein, 'People Prefer System 2 Nudges (Kind of)' (2016) 66 *Duke Law Journal*.

<sup>81</sup> C. Sunstein, 'Do People Like Nudges?' (2016) 68 *Administrative Law Review* 184.

<sup>82</sup> Bryson *et al* above n.5; Haynes *et al* above n.5; Teicher *et al.* above n. 5.

<sup>83</sup> G. Felsen, N. Castelo and P. Reiner, 'Decisional enhancement and autonomy: public attitudes towards overt and covert nudges' (2013) 8 *Judgment and Decision Making*; L. Reisch and C. Sunstein, 'Do Europeans like nudges?' (2016) 11 *Judgment and Decision Making*; C. Sunstein, 'Nudges, Agency, Navigability, and Abstraction: A Reply to Critics' (2015) 6 *Review of Philosophy and Psychology*; Sunstein above n. 81.

<sup>84</sup> Sunstein above n. 81.

<sup>85</sup> Department of Business, Energy and Industrial Strategy above n. 2, 36.

would default to joining the union representing the most members there.<sup>86</sup> Following acceptance of employment, employers would inform new employees via letter and/or other means of the default and the right to choose the non-union or union alternatives within a specified period. In order to reduce employers' latitude to influence which unions were available to join or suggesting which union should be joined (as per 'sweetheart', 'yellow' or 'company' unions), a legislatively standardised process<sup>87</sup> could be used. The union or unions would be guaranteed workplace access rights to approach any employees in the bargaining unit at a reasonable time and in a reasonable way to discuss any matters relating to union business such as membership recruitment.

How would a union default be implemented in non-union workplaces? And, which union would non-union employees be defaulted to in the absence of any existing union? A union could earn the right to be the default union in a non-union workplace by organising a minimum number of members in that workplace. This threshold could be set at a low level to make it easy to introduce a union default.<sup>88</sup> Any union satisfying this criterion could then apply to a labour relations board<sup>89</sup> to become the default union. Prior to this, unions could be certified as being eligible to become default unions by having their independence and *bona fide* functions verified. If two or more unions recruited at least the minimum number of members in the same bargaining unit, the board could award default status to the one with the most members.<sup>90</sup> Once granted default status, the employer would inform each employee, along the lines described earlier for unionised workplaces, about both the defaulting process and the right to choose the non-union or union alternatives.

In effect, application for default status could become another avenue for unions to obtain representation and bargaining rights. Union membership could be tied directly to union recognition, with unions legislatively guaranteed the right to bargain collectively on behalf of their members. In New Zealand, for example, anyone who joins the union automatically joins the corresponding collective agreement that covers his or her work.<sup>91</sup> If a collective agreement does not yet exist, a union automatically has the right to bargain for one on behalf of its members. Good faith rules require employers to recognise the union employees have chosen, in exercising their freedom of association, and bargain accordingly.<sup>92</sup> If the employer acts in bad faith and undermines efforts to negotiate a collective agreement, the Employment Relations Authority may impose all or part of a first contract.<sup>93</sup>

Freedom of association does require protection from employer interference. There are many ways this could be done. Various forms of interference could be constituted as unfair labour practices but heftier penalties than those currently available could be levied. In addition, it could also be made unlawful to discriminate against workers for their 'union activities' or office holding.

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<sup>86</sup> Of course, this raises issue of individual choice for the majority union may not always be the union of choice for all workers.

<sup>87</sup> This standardised process could also involve a standardised form to avoid any employer interference in framing the respective choices.

<sup>88</sup> See also Bogg above n. 75.

<sup>89</sup> These bodies could be those existing institutions which deal with union certification/recognition issues, namely, in the US, this could be the National Labor Relations Board, in Britain the Central Arbitration Committee, in Australia the Fair Work Commission, in New Zealand the Employment Relations Authority, and in Ireland, the Labour Court or Labour Relations Commission.

<sup>90</sup> A default union policy could be applied in different ways to reflect variance in existing employment relations institutions across nations. In North America, for example, default status could be awarded to a single union, in order to preserve and protect the policy of exclusive representation. Alternatively, multi-unionism could be allowed but under new rules to facilitate or even require various forms of multi-union collaboration, such as joint collective bargaining. Peak bodies like the TUC in Britain could act as an 'honest broker' in laying out spheres of influence and resolving disputes (as it has historically tried to do under the so-called 'Bridlington rules').

<sup>91</sup> Ss 18, 56 *Employment Relations Act 2000*, New Zealand.

<sup>92</sup> Ss 4, 32 *Employment Relations Act 2000*, New Zealand.

<sup>93</sup> S 50J *Employment Relations Act 2000*, New Zealand.

Yet aside from hostile employer opposition, unions would still face logistical and organisational challenges in attaining default status – even with a low threshold - in the non- or weakly unionised sectors. The fragmentation of employment structures (through demerging and outsourcing in particular) means potential bargaining units are smaller and more numerous. To avail themselves of the possibility of gaining default status, unions would – at least initially - need to switch some resource from representing existing members to recruiting members and/or raise membership fees (which may be acceptable if union effectiveness had already increased) in order to generate the required resource to cover the additional recruitment work. (Thereafter, a virtuous upward spiral might develop as increased union membership facilitated union effectiveness and vice-versa, possibly leading to lower overall fees.) These challenges are exacerbated by the erosion and/or abolition of suitable institutional machinery for default extension, as, for example, with the ending of statutory industry awards in Australia and sectoral wage setting councils in Britain, the collapse or downgrading of employer federations, and decentralisation of bargaining from industry to enterprise and then to establishment level.

Implementing a union default with active choosing would likely have varying effects on membership, in accordance with differing national conditions. Perhaps most obviously, opting out of union membership would be more prevalent in countries where employer opposition to unions was more active and aggressive, and state regulation of that opposition was more limited. Opting out would also be more common in countries like France and South Korea, where union density is low and membership is not the sine qua non for collective mobilisation. However, even in these countries, opting out would be less pronounced, if workers felt that unions, as a beneficial public good, should be supported. Opting out would also be widespread in countries like China, Cuba, and North Korea, where unions have traditionally been dependent, and thus compromised, organs of the state. Finally, the non-union alternative would also be more appealing in countries where workers have extensive individual rights, guaranteed in legislation, and thus feel little need for the additional benefits of unionisation. Much would depend, of course, on whether these same workers felt unions were necessary to enforce their statutory, individual rights. Only in the US would there likely be significant opting out as a result of ideological, rather than instrumental, hostility to unions. Of course, in all these scenarios, switching costs, inertia, social norms and loss aversion would still reduce opting out.

We now turn to issues of law and jurisprudence. First, there is no compulsion in a union default system, given the opt out, which would violate Article 11 of the European Convention on Human Rights (ECHR) or Convention 87 of the International Labor Organisation (ILO).<sup>94</sup> Second, and helpfully, the idea of defaults that favour worker and union rights is not entirely novel in legal scholarship.<sup>95</sup> The discussion of default mechanisms for recognition and collective bargaining by the aforementioned legal scholars remains helpful for teasing out the salient issues.

Weiler acknowledges ‘... the tacit assumption that the ‘natural’ status for a workplace is nonunion, with management exercising on behalf of the shareholder-owners the prerogatives of property and contract law to establish the firm’s terms and conditions of employment ...’.<sup>96</sup> In other words, an implicit non-union default acts as an injunctive social norm to normalise the exercise of unilateral managerial authority and discourage unionisation. Three solutions are proffered for the US case. The first two solutions, the ‘regulatory’ and ‘reconstructive’ models, emphasise strengthening the Wagner model to reduce management opposition to unions. Proposed reforms include: stiffer punishments and regulatory responses to unfair labour practices, snap elections that allow less time

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<sup>94</sup> See also E. McGaughey, ‘A Twelve Point Plan for Labour and A Manifesto for Labour Law’ (2017) 46 *Industrial Law Journal*.

<sup>95</sup> See, for example, Weiler above n. 28; B. Sachs, ‘Enabling employee choice: A structural approach to the rules of union Organizing’ (2010) 123 *Harvard Law Review*; A. Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford: Hart Publishing, 2009) and n. 75; E. McGaughey, ‘Behavioural economics and labour Law’ (2014) 20 LSE Legal Studies Working; McGaughey above n. 94.

<sup>96</sup> Weiler above n. 13.



for anti-union campaigning, and no permanent replacement of striking workers. Essentially, the focus is on reducing the switching costs of unionisation, but without changing the non-union default. However, Weiler admits that such approaches still treat organising as a contest in which employers may legitimately participate, subject to certain restrictions. His third and preferred option for the US, the 'constitutive' model, is a German-style works council system with a guaranteed right to establish employee participation committees. However, this proposal still takes 'no representation' as the implicit default, and under-estimates the difficulties (e.g., the high switching costs) workers have in establishing and maintaining such a system, especially given employer opposition.<sup>97</sup>

Sachs, in his analysis of the US, recognises that it may be more difficult to 'depart' (e.g., higher switching costs) from one default than another.<sup>98</sup> For instance, collective action problems and management opposition make it harder to 'depart' from a non-union default than a union one.<sup>99</sup> Legal theory suggests that, to maximise the chances choosers 'select' what they really want, legislatures (or courts) should set defaults to minimise switching costs.<sup>100</sup> However, Sachs<sup>101</sup> rejects reversing the default for entire bargaining units, as unpalatable to a potentially hostile US Congress and as impractical: a bargaining unit that voted 'non-union' would face prohibitively high switching costs in shifting back to 'union'. Moreover, a union default for enterprise-level bargaining units would also facilitate company unionism.<sup>102</sup> Sachs<sup>103</sup> instead advocates reducing the asymmetry in switching costs between non-union and union defaults by adopting new 'asymmetry-correcting altering rules'. For example, an internet-based variant of the Canadian 'card check' procedure would allow individuals to signal support for a union from their homes, with neither union nor management present. A variant of the 'rapid elections' idea would allow secret early voting via an offsite polling station or mail, again to minimise intervention by third parties.

Sachs' proposals have strengths, including innovative suggestions to lower switching costs, but there are weaknesses. First, the complex, demanding requirements of certification, even in worker-friendly Canadian versions, inherently involve high switching costs: organising via a statutory process is difficult and expensive, even with the successful muzzling of management opposition. Second, quite apart from switching costs, inertia, social norms, and loss aversion could also reinforce the 'stickiness' of the non-union default. For example, the inertia of rising 'never membership' in the UK has almost certainly increased the 'stickiness' of the non-union default.<sup>104</sup> Third, a union default need not be based on a reverse Wagner Model, in applying to an entire bargaining unit, as suggested by Sachs (2010). Our proposal for a union default would involve some organising by a *bona fide* union, but the threshold membership number required to establish union default status would be easier to meet and more respectful of individual choice.

Like Sachs<sup>105</sup> in the US, Bogg<sup>106</sup> identifies inadequacies in the statutory union recognition procedure in Britain and proposes various radical reforms. He acknowledges the importance and power of the non-union default, but does not propose reversing it. Bogg argues that weaknesses in the statutory procedure in Britain (and the US) arise from using majoritarian consent and a representational model of bargaining as a private market activity. Although persuasive, this argument only has particular force when based upon a non-union default, and fails to account for the disaggregating effect of management and state-led decentralisation and deregulation of

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<sup>97</sup> U. Jirjahn and J. Mohrenweiser, 'Owner-managers and the failure of newly adopted works councils' (2015) 54 *British Journal of Industrial Relations*.

<sup>98</sup> Sachs above n. 95.

<sup>99</sup> Sachs above n. 95. 685-691.

<sup>100</sup> Preference-eliciting default theory (statutory interpretation law) and reversible default theory (corporate law).

<sup>101</sup> Sachs above n. 95, 695, 694.

<sup>102</sup> Sachs above n. 95. 695.

<sup>103</sup> Sachs above n. 95.

<sup>104</sup> Bogg above n. 75, 416.

<sup>105</sup> Sachs above n. 95; B. Sachs, 'Law, Organizing, and Status Quo Vulnerability' (2017) 96 *Texas Law Review*.

<sup>106</sup> Bogg above n. 95.

industrial relations systems. To highlight the point, the current British recognition system would have functioned better for unions in the 1960s and 1970s than in the 2000s and 2010s. Thus, Bogg correctly understands the theoretical underpinnings of the recognition procedures but eschews contextual considerations. The non-union default is accepted, though, in Bogg's words, '... it is highly doubtful that an improved 'choice architecture' would be sufficient as a regulatory response to the spectacular collapse in recognition applications in the UK ...' and 'the non-union default and the rise of 'never-membership' display sheer gravitational inertia that is difficult to displace, however smart the 'choice architecture''.<sup>107</sup> In fact, Bogg admits that a union default 'is only unrealistic on a representational conception of collective bargaining ...' and that '... for many workers in continental Europe, there is a union default rule given the extensive reach of regulatory bargaining at the sectoral level'.<sup>108</sup> The latter rather puts the 'cart before the horse', for introducing sectoral collective bargaining without a union default could constitute something of a 'house built on sand' (see below). Nonetheless, as with Sachs, Bogg<sup>109</sup> does offer useful suggestions for reforming the recognition procedure, especially regarding staged recognition and escalating representation rights, tied to different thresholds of membership support.<sup>110</sup>

The key lessons from Sachs, Bogg, and Forsyth *et al.*<sup>111</sup> arise from their more worker- and union-friendly proposals for establishing recognition and collective bargaining. This includes a collective bargaining default that operates in a similar way to a union default, with opt out and threshold criteria. We view such proposals as helping to ensure, along with union security clauses (agency shops and fair share agreements) and law prohibiting employers from using financial inducements to encourage opting out from collective bargaining, that a union default system is supported and effective interest representation is accordingly developed.

McGaughey<sup>112</sup> argues that auto-enrolment (union default) clauses in collective agreements are already permitted under section 146(1c) of the United Kingdom's *Trade Union and Labour Relations Act 1992*. He claims that, given an opt out, there is no compulsion in such clauses which would violate the Act. McGaughey's proposal, though novel among the various legal scholars in proposing a reversal of the non-union default, is substantially different from ours in two key respects. First, it relies on unions to prioritise auto-enrolment in their bargaining and employers to consent to such terms. Here, the state plays no role in requiring active choosing with a union default. Second, the proposal has no implications for auto-enrolment in non-union workplaces, because it only applies to 'brownfield' and 'in-fill' situations where unions are already recognised. Its overall impact on union membership levels and power resources would thus be relatively modest. Nevertheless, the proposal has the major advantage of not requiring any major law change to operationalise.

And, while there are similarities between our proposal and the *Pensions Act 2008* in Britain (which created auto-enrolment in employer pension schemes (with employers making substantial contribution) unless workers chose to opt out),<sup>113</sup> there are also profound differences. The Act indicates that new defaults (with opt outs) can be created in law and that the state can impose its will upon capital. However, the differences in relation to creating the political will to create a union default (and in doing so overcome resistance) are telling. In other words, the scale of the challenge for the pension default was far less than it will be for a union default. First, the state had a vested interest in increasing independent pension provision in order to guard it against the cost of it having to take remedial action on pensioner poverty in the absence of the default. Second, although the

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<sup>107</sup> Bogg above n. 75, 416.

<sup>108</sup> Bogg above n. 75, 416-417.

<sup>109</sup> Bogg above n. 95.

<sup>110</sup> Bogg *The Democratic Aspects of Trade Union Recognition*, 208.

<sup>111</sup> A. Forsyth, J. Howe, P. Gahan, and I. Landau, 'Establishing the Right to Bargain Collectively in Australia and the UK: Are Majority Support Determinations under Australia's Fair Work Act a More Effective Form of Union Recognition?' (2017) 46 *Industrial Law Journal*.

<sup>112</sup> McGaughey above n. 95, 29-30; McGaughey above n. 94, 175-6.

<sup>113</sup> See McGaughey above n. 95, n. 94.

numbers covered by auto-enrolment are significant, there are not nearly as large as those potentially covered by a union default, indicating that not all employers were affected. Third, the pension default was a delimited action and did not provide workers with the (potential) means to challenge the managerial prerogative - and where employers have shown historical antipathy to unions. Fourth, on the pension issue there was a certain amount of political convergence - and long-term alignment - of interests between capital, labour and state. Fifth, the historical default for the political levy paid by union members is now being phased out under the *Trade Union Act 2016*. New members must now opt in to the levy.

## 11. Conclusion

At the most general level, this paper seeks to provoke discussion of a problematic but far too often taken-for-granted default arrangement. Confounding neo-liberalism's political and ideological domination, the proposal is to change the non-union default to a union default. The arguments for doing so are many and multi-layered but at their core is recognition of the growing imbalance in power between capital and labour. In making this proposal, the necessity of also having statutory mechanisms to give effect to the fuller benefits of union membership was recognised. Of course, while default union membership systems and statutory mechanisms for union recognition are necessary, they are not in themselves sufficient to facilitate union effectiveness. This requires appropriate union choices *vis-à-vis* their bargaining objectives and attendant strategy and tactics as well as unfair labour practice clauses to prevent employer resistance through obfuscation, stonewalling and surface bargaining. To provoke this discussion, insights from behavioural economics were imported into industrial relations, providing an additional reason to question 'rational choice' theories of behaviour. Thus, the paper argued the widespread existence of the non-union default in legal systems is likely to have had a greater effect on union membership levels than is generally recognised, given the operation of four factors.

While a limitation of the paper is that no empirical testing has been carried out, a more significant obstacle is the ideological and political opposition that would arise to any public proposal to extensively study the case for a union default, let alone introduce one. Offence would be taken by certain vested interests, with criticism cloaked in the subterfuge of an affront to individual liberty and a backdoor route to socialism. We are in no doubt about the scale of the political and ideological tasks involved in implementing a union default. A labour regulation index for western countries for the period to 2013<sup>114</sup> shows that the majority have never had or do now not have any constitutional clauses or pieces of legislation which may facilitate or permit a union default (with opt out). This is judged by examining the section 'D. Employee Representation' and especially the category '29. Closed shops' within the index to determine the existence of such rights and legal infrastructure. While the closed shop system is not synonymous with a union default system given the element of compulsion and absence of opting out, it is still the closest available cousin to it. The rights and legal infrastructure associated with closed shops are capable of helping to facilitate a union default system in that they represent the setting of a precedent in regard of establishing in law and public policy a societal default which is operationalised at the enterprise or workplace level. Only Canada, Iceland, Ireland, Japan, the Netherlands, Norway and South Africa have some varying degree of rights and legal infrastructure by which a union default system could be established while Australia, Belgium, Denmark, Finland, France, Germany, Italy, New Zealand, Portugal, Spain, Switzerland, the UK and USA do not. So the majority of these countries - and the larger ones at that - do not have any such compatible rights and legal infrastructure - with some presently and specifically protecting the right not to associate. This indicates the scale of the political project required to create the conditions in which compatible rights and legal infrastructure (even with opt out) can be generated.

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<sup>114</sup> Z. Adams, L. Bishop, and S. Deakin, *CBR Labour Regulation Index (Dataset of 117 Countries)*, (Cambridge: Centre for Business Research, 2016).

Yet the qualitative arguments, we believe, are sufficiently persuasive as to be worthy of unions and other pro-labour organisations, such as social democratic parties, foundations and think tanks, expending their energies and resources problematizing the issue in order to evaluate it because it creates an opportunity of the exercise of choice. The example of the radical *Manifesto for Labour Law*<sup>115</sup> from the Institute of Employment Rights in Britain is instructive for two reasons. The first concerns understanding how a proposal becomes a policy in mainstream polity due to the alignment of principles and political opportunity.<sup>116</sup> So, after winning the support of all the major unions and unions affiliated to Labour and then the new party leadership, the *Manifesto* was adopted as Labour Party policy in 2016 and formed the basis of Labour's 2017 general election manifesto on employment rights. With the help of that manifesto, Labour was able to prevent the Conservatives from gaining a majority for government. Second, although it conceives of various means to support unions, union recognition and collective bargaining, these proposals are built upon unnecessarily weak foundations because they do not consider changing the default status from non-union to union. Yet, such a default is essential to provide unions with the means to take advantage of the reforms the *Manifesto for Labour Law* proposes. For example, the compulsion upon employers to engage in sectorial bargaining could result in two unintended outcomes, these being collective bargaining coverage (by company) not increasing and unions not having any greater membership resource with which to exert leverage over the employers. We believe the spirit and intention of a union default is not only compatible with the *Manifesto for Labour Law* but essential to it.<sup>117</sup>

Therefore, if the conclusion to the problematizing was found to be positive, as with the *Manifesto for Labour Law* the next step would be to set out a policy proposal and to consider how and by what means the proposal could be prosecuted on the journey towards becoming legislation and public policy. In doing so, an ideological struggle would need to be waged in order to re-interpret and re-imagine what 'freedom from constraint' means and represents, namely, that the atomisation of workers under a non-union default provides opportunities for capital to subjugate labour while the collectivisation of workers under employer union default provides opportunities for labour not to be subjugated by capital. The political prospects for creating a union default setting would revolve around – but also be part and parcel of - the retrenchment of neo-liberalism and a resurgence of social democracy.

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<sup>115</sup> K. Ewing, J. Hendy and C. Jones (eds.) *A Manifesto for Labour Law: towards a comprehensive revision of workers' rights* (Liverpool: Institute of Employment Rights, 2016).

<sup>116</sup> See also McGaughey above n. 94, 170.

<sup>117</sup> Despite our criticism, that is why McGaughey's (n. 94) suggestion of auto-enrolment, especially as the first point in his 'Twelve Point Plan for Labour', has significance.