

Book Reviews

Goldilocks Apologizes

Forces of Order: Police Behavior in Japan and the United States.
By Davis H. Bayley. Berkeley: University of California Press, 1976.
Pp. xvi, 201. \$10.95.

Reviewed by Gary T. Marx†

Japan presents a fascinating anomaly to the American interested in questions of police and crime. It has undergone rapid social change. It is a heavily industrialized, urbanized, densely populated society with violence in its history and traditions. As such we might expect it to be similar to the United States with respect to questions of crime and police. Yet the crime rate is exceptionally low, police ethics and job satisfaction are high, and there is a remarkable degree of civility in police-citizen encounters. David Bayley seeks to describe this situation and to speculate on what produces it.¹

Students of comparative culture often point out the many difficulties specialists face in studying someone else's society. How much greater the difficulties must be if one does not speak the language, is not an expert on the region, has a mere two summers in which to carry out field work, and is studying a sensitive institution that specializes in secrecy (and one that often has a lot to hide). Given such factors, David Bayley's unpretentious little book is impressive. My skepticism on methodological grounds is more than balanced by an appreciation of the interesting descriptive material offered, the integration and buttressing of Bayley's own firsthand observations with English language secondary sources, and the author's willingness to venture into largely uncharted waters.

Bayley observed a wide variety of police operations and carried out "hundreds" of interviews through an interpreter. He brought to his

† Professor of Sociology, Massachusetts Institute of Technology. Professor Marx recently spent a year as a Guggenheim Fellow studying the police in France and Japan.

1. D. BAYLEY, *FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES* (1976) [hereinafter cited by page number only].

task prior research experience on the police in India and the United States.² The focus is on patrolmen and police-citizen relations, rather than on detectives or police relations with courts, prisons, or other elements of the criminal justice system. Chapters deal with police-citizen interaction and a patrolman's life, discipline and responsibility, community relations, victimless crime, deviance and authority, violence, and the police as an institution. No compelling rationale is offered for the way the book unfolds and the topics it covers and excludes. This, however, is a pedantic drawback. As the only serious study of any breadth on the contemporary Japanese police, Bayley's book is very welcome. It is a useful addition to the limited, and surprisingly not growing, English literature on contemporary police in industrial societies other than the United States and England.

Bayley's major concern is to examine the ways in which social context shapes police institutions. Recognizing that police reflect the society of which they are a part, he holds out little hope for improving American police by importing Japanese administrative practices. Yet his analysis of the Japanese police makes us more aware of what we are and the broad directions toward which we might aim in the future. Bayley offers major contrasts between the United States and Japan with respect to crime patterns, the reaction of citizens to authority, the nature of the police role, means of obtaining accountability, and police-citizen relations. I shall consider each of these briefly in turn.

In Bayley's words, there is a "qualitative difference in civility" between Japan and the United States.³ Japan has less than half the population of the United States; yet in 1973 only 1,876 robberies were known to the police in Japan, while in the United States the comparable figure was 382,680.⁴ In addition, the incidence of reported crime per person in Japan in 1973 was only about one-half that in 1946, while by most measures traditional crimes increased considerably in the United States during that period.⁵

Weapons do not complicate the task of the Japanese police: for practical purposes Japan is a disarmed society. Ownership of weapons has been severely limited for at least 400 years, and even the samurai have been disarmed for 100 years. Firearms, swords, and even knives

2. D. BAYLEY, *THE POLICE AND POLITICAL DEVELOPMENT IN INDIA* (1964); D. BAYLEY & H. MENDELSON, *MINORITIES AND THE POLICE* (1969).

3. P. 9.

4. P. 6. Tokyo had 361, while New York City, with a comparable population, had 74, 381. *Id.* Differences are probably even more pronounced, since rates of underreporting appear to be higher in the United States. P. 7.

5. P. 7.

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must be registered. Handguns are not permitted in private hands. Compared to the United States, there are few rifles and shotguns (about 650,000 versus at least 75 million).⁶

Predictably, then, firearms are not a serious factor in Japanese crime. For example, handguns were used in only 16 of the 80,000 serious offenses committed in Tokyo in 1971. In the United States, by contrast, 65% of all murders, 25% of all aggravated assaults, and 41% of all robberies involve firearms. In Japan detectives and police off duty or on traffic duty do not carry weapons. Fewer than five Japanese officers a year are killed nonaccidentally and these deaths are rarely the product of firearms. In the United States more than 100 officers a year are killed, three-quarters of the time by firearms.⁷

Homicide rates partly reflect the high level of disarmament in Japan. The Japanese homicide rate is 1.9 per 100,000 population; for the United States it is 9.3. The New York metropolitan area, with a population of almost 12 million, had 1,739 murders in 1973, while Tokyo, with a comparable population, had 196.⁸

Nor are drugs a problem in Japan. In Tokyo about 30 persons a year are arrested for offenses involving hard drugs. In New York City 23,000 arrests were made in 1972 for sale and possession. According to Bayley, Japanese narcotics addiction and drug abuse are declining. One-quarter as many violations of drug laws were reported in 1973 as in 1959.⁹

Even when a crime is committed and the perpetrator apprehended the dynamics differ widely from those in the United States. In his chapter on "The Individual and Authority," which I found the most interesting, Bayley considers some of the reasons for the lower Japanese crime rate. In Japan an individual's sense of well-being depends to a much greater extent on group acceptance than in the United States. Japanese are less combative and manifest more submissive attitudes toward authority. Offenders are expected to show contrition and accept responsibility for their wrongdoing (the suspect is to act "like a carp on the cutting board"), and citizens feel a strong obligation to assist in preserving moral consensus in the community.¹⁰ In return, authorities are expected to show benevolence, discretion is legitimated, and sanctions (such as writing a letter of apology) are

6. P. 168.

7. P. 169.

8. P. 5.

9. P. 7.

10. P. 145.

often informal. Bayley argues that "a Japanese accepts the authority of law as he would the customs of his family."¹¹

Folk tales nicely capture the role of apology, repentance, and the Japanese belief that bad character can always be changed. In the American version of the child's tale, Goldilocks runs away. In the Japanese version the story ends with Goldilocks apologizing for her misbehavior and the bears then inviting her back. Similarly, in the Japanese version, when the wicked wolf in Little Red Riding Hood is confronted by the hunter, he falls to his knees, begs forgiveness, and promises not to do it again.¹²

If Japanese police in general face a respectful and law-abiding public, Japanese citizens reciprocally face a seemingly well-behaved and content police force. Patrolmen are more self-effacing and do not swagger or exchange hostile stares with youth and street elements.¹³ As Michael Banton has noted with respect to the police in England, because their authority is less often challenged, police are not always on the verge of asserting it.¹⁴ Policemen in public places are inconspicuous. A tradition exists of avoiding eye contact and preserving privacy in public. Police "see but they rarely take notice."¹⁵

In Japan police are moral as well as legal actors and, like police in England, are oriented toward teaching and guiding the community with respect to correct behavior. The roots of this orientation were in the Meiji Restoration and the Allied Occupation, the two major formative periods for the Japanese police. During the former, the police, along with the schools, courts, and military, were used to move Japan from a feudal to a modern nation. During the Occupation police were one of several demonstration projects in democracy.¹⁶

In contrast, the American police institution took on modern form in the 19th century to deal with the quite specific "problems" of riots, drunkenness, gambling, and prostitution, which were associated with urbanization, industrialization, and rapid immigration. Teachers and politicians might offer instruction in civic lessons; police were to avoid politics and enforce the law. They were to be bureaucratic and legal, rather than moral, actors. True to their respective heritages, American police today tend merely to seek compliance with the law,

11. P. 156.

12. P. 140 (citing Lanham & Shimura, *Folktales Commonly Told American and Japanese Children: Ethical Themes of Omission and Commission*, J. AM. FOLKLORE, Jan.-Mar. 1967, at 33-48).

13. P. 44.

14. M. BANTON, *THE POLICE AND THE COMMUNITY* (1964).

15. P. 44.

16. Pp. 185-86.

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while the Japanese go beyond this to seek acceptance of the community's moral values.

This is not to deny that Japanese police have a distinct occupational culture and a cultivated sense of apartness. But they are not angry, defensive, or frustrated, and they do not feel victimized and unappreciated.¹⁷ In the United States efforts to curb prostitution, homosexuality, gambling, and drunkenness breed police demoralization and corruption, ineffective enforcement, entrapment, and community conflict. In Japan these activities are not seen as problems of morality or law enforcement as long as they are carried on discreetly.

Japanese police see their political environment as benign and their public as supportive. They are critical of neither the courts nor their supervisors. Police strikes or slowdowns are unknown.¹⁸ Indeed, as part of maintaining their image as dedicated public servants, few officers even take the full 20 days of paid holidays to which they are entitled.¹⁹

The major police discipline problems involve off-duty, rather than on-duty, behavior. Involvement in a traffic accident, loss of the police handbook, and improper drinking behavior are the most frequent offenses.²⁰ In 1972, 45 of Japan's 182,000 officers were discharged, and 542 faced departmental punishments.²¹ By contrast, New York City, with 35,000 officers, gave such punishments to 216.²² The number of complaints brought to the Japanese equivalent of a civilian review board (the Human Rights Bureau of the Ministry of Justice) has been steadily declining.²³

Bayley explains the different rates of police misconduct partly by reference to such Japanese administrative practices as lateral entry, longer and probably better training, closer internal supervision, periodic rotation of supervising personnel, and more favorable prospects for career advancement.²⁴ Other factors relate to the police officer's intense identification with the work group. This results in a strong motivation not to offend it, or bring dishonor upon it. Discipline is self-imposed, emerging much more from the dynamics of

17. P. 4.

18. *Id.*

19. P. 23 n.14.

20. P. 2.

21. P. 1.

22. P. 2.

23. P. 3.

24. Pp. 54-71. A larger proportion of Japanese police are promoted, and the command structure is more differentiated.

group membership than from external formal organizational factors as in the United States. Bayley notes:

American policemen too are conscious of belonging to a distinct group. But there is a crucial difference. The Japanese police community has been deliberately created; identity, entailing distance from others, has been fashioned in order to augment pride. Community spirit is fostered to facilitate the carrying out of organization tasks. In the United States, identity is a consequence of perceived resentment and antagonism. It is founded on rejection. American policemen have been driven inward against their will; their communitarian spirit is defensive, like that of a persecuted minority group.²⁵

In the United States, police accountability to nonpolice institutions is given higher priority than developing police initiative. This American reliance on external checks may impede the development of the group pride that could provide the basis for self-discipline. It communicates to the officer the idea that he is not trusted and thus may lower his sense of self-worth. External discipline too easily can be seen as an attack upon the entire occupational group. Bayley even asks "whether so great a reliance on external checks in the United States is not in some measure responsible for the disciplinary problems so often deplored."²⁶

This suggestion raises the ghost of the American police professionalism model advocated by such police officials as O.W. Wilson and William Parker. They saw the need for massive changes within policing, but unlike their liberal critics, they felt that such changes could only come about internally. Self-control was seen as the best form of control. Careful selection and inculcation of a strong sense of duty and pride in occupation were considered the best means for obtaining responsible police behavior. Yet there are dangers of police becoming too isolated and self-protective when exclusive reliance is placed on internal controls. A balance is obviously needed.

Bayley suggests that the Japanese have been rather more successful in providing external accountability than the Americans have been in creating internal responsibility. Following the war the Japanese added external checks to a "pridefully cohesive police force," apparently with positive results. Yet equivalent efforts in the United States may have had unintended consequences. Public criticism of police and

25. P. 77.

26. P. 79.

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efforts at external control may have made police more defensive and lowered their self-esteem. Public criticism acts further to decrease responsible police behavior, which then triggers another round of public criticism.²⁷

The product of all these contrasts, especially that of the organization, style, and ethics of police work, is a rather remarkable difference in the character of police-community relations. Unlike the United States, Japan has one national police force, standardized in its operations. But command operations are decentralized among 46 prefectures, and most police work out of neighborhood offices called "kobans," which are continuously manned with four to twelve people per shift.²⁸ Tokyo has approximately 1000 kobans. The average area covered is .22 square miles with a population of 11,500.²⁹ Police are literally around the corner.

The koban is a place where people may come to unload their burdens and seek help, regardless of whether or not a law violation has occurred. Kobans are accessible and seemingly not very bureaucratic. Japanese patrolmen are said to cultivate one ability above all others: "the art of patient listening." They do not downgrade or resist non-law enforcement activities the way American police often do. Typical activities include giving directions and medication, explaining the law, loaning money to help people get home, finding late night accommodations for those unfamiliar with an area, and dealing with minor crimes.³⁰ Two examples Bayley cites of koban aid are providing distilled water (more healthy than tap water) to two small boys for a just-purchased goldfish in a plastic bag, and lending a pair of needle-nosed pliers to a middle-aged man whose fly zipper would not close.³¹

A major function of the koban is to provide information about house locations. Most smaller streets are unnamed, and since houses are numbered according to the order in which they were built, those built at the same time may well have the same number. Kobans obtain information in a semiannual police "residential survey." This makes it possible for police to "provide directions in an instant to almost every person or business in the area."³² It also potentially provides the

27. P. 82.

28. Detectives and specialists work out of a central police station.

29. P. 13.

30. Pp. 13-22.

31. Pp. 27-28.

32. P. 27.

government with intelligence on its citizens, though this is an example of the kind of issue that Bayley consistently ignores.

Because of the kobans and footpatrols, police presence in Japan is more pervasive than in the United States. Yet it also seems less authoritative, lower key, and less formal. Patrolmen are much more likely to be personally known in the neighborhood in which they walk and work than are their American counterparts, enshrouded in their patrol cars. (Only one-sixth of Japanese patrolmen are assigned to patrol cars.) Bayley notes:

An American policeman is like a fireman, he responds when he must. A Japanese policeman is more like a postman, he has a daily round of low-key activities that relate him to the lives of the people among whom he works.³³

In Japan there is more sharing of policing tasks by citizens, and the boundary between police and citizen is more permeable and vague. Every neighborhood has a crime prevention association made up of volunteers who work in close coordination with police. There are also 8,000 crime prevention associations organized around occupations and work places.³⁴ As a result of this cooperation "both policeman and citizen are responsible for law enforcement and both policeman and citizen are moral actors."³⁵

Americans generally tend to take a more individualized approach to questions of public safety, arming themselves or buying security devices rather than forming police auxiliaries. This grows out of the early American concern with specifying and limiting the role of government.³⁶ The creation of American police with powers and duties in principle carefully circumscribed by law serves to curtail citizen involvement, as well as to limit the range of police activities.

Even when the police and citizenry of Japan conflict, their unique relationship is evident. Mass confrontations such as those seen in the United States during the 1960s have been a common feature of Japanese life for some time.³⁷ Through a process of mutual accommodation, police and demonstrators have evolved tactics that make the loss of human life very unlikely. The fascinating, ritualized character of Japanese police-demonstrator confrontations indicates that group conflicts need not continually escalate in tactics as more destructive

33. P. 91.

34. P. 94.

35. P. 102.

36. P. 101.

37. P. 172.

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technologies become available, and that crowd behavior, rather than being normless and formless, may be very much bounded by shared understanding among participants. Both police and demonstrators implicitly agree not to use firearms and explosives, thus minimizing serious injuries.

Like the French Compagnies Republicaines de Securite (C.R.S.), the Japanese have a special elite riot police, the "Kidotai." They show considerable restraint and patience in the face of mass confrontations. Carefully chosen, trained, and supervised, they always act as a group. On riot duty they are unarmed. The use of guns is seen as unfair and even cowardly. Much emphasis is put on physical conditioning and on the hand-to-hand combat thought to characterize the fighting of real men. Leaders work hard to instill pride and spirit, developing "poise under stress" rather than fierceness. The avoidance of injury on both sides is a prime injunction for police.³⁸

The response of the Japanese police to riots through the use of ingenious formations illustrates their emphasis on tactics rather than on hardware. By contrast, Bayley argues, in the United States available technology tends to determine tactics. For American police the search for solutions begins rather than ends with examination of equipment.³⁹ Bayley sees American police as more ready to adapt exclusively technological solutions to human problems. The Japanese have resisted the economies offered by the patrol car and have opted to continue the neighborhood-centered beat patrolmen, just as they have resisted weapons in dealing with crowds. While American technical "solutions" may sometimes be more "efficient," they often bear heavy social costs such as isolation of police from the public and the escalation of conflict. Some part of the greater success of the Japanese police may lie in a more skeptical attitude toward technical solutions.

Although the contrasts drawn by Bayley are illuminating, as concern with crime in America increases and as our society creeps toward greater homogeneity, these contrasts may become less pronounced. The boundaries between police and citizens in the United States are also becoming more permeable, although perhaps with more mixed consequences. On the one hand, as part of decoy and blending strategies police increasingly are disguising themselves as ordinary citizens.⁴⁰ Increased attention to community relations and crime prevention and

38. P. 178.

39. Pp. 179-80.

40. Marx, *The New Police Undercover Work*, 4 CIV. LIBERTIES REV. July-Aug. 1977 (forthcoming).

new service demands find police involved in an ever-widening array of activities and places—*e.g.*, running recreation and counseling programs in the schools. On the other hand, citizens are increasingly playing quasi-police roles. Anonymous tipster programs, community “radio watch” programs, neighborhood watches, and community police patrols are becoming a more prominent part of American life.

Bayley tells us that in 1973, there was one policeman for every 445 people in the United States, while in Japan this figure was one for every 585 people.⁴¹ Thus on a per capita basis there are 31% more policemen in the United States than in Japan, and Americans spend 21% more on police services.⁴² The author suggests, however, that if Americans spent as much on police *proportionally* to their wealth as do the Japanese, big gains would be forthcoming because “most observers agree that adding personnel does reduce crime and raise arrest rates.”⁴³ Yet as the Police Foundation Kansas City patrol experiment indicates, this is a questionable assumption.⁴⁴

In addition, Bayley makes no mention of the important role of private police in both countries. A more adequate ratio of society's police to citizens must combine the number of both public and private police. Readings and conversations with Japanese students have left me with the impression that private police employed by industry play a significant and rapidly expanding role in Japanese life. Indeed, one reason why public police may be able to be so law-abiding, and are held in such high regard, may be the delegation of some of the dirtier and more difficult law enforcement tasks to private police.

Bayley unfortunately tells us little about the policing of politics or police-minority relations. In a few places he hints at excessive force used against students, student resentment of police, and surveillance of radicals, but this is never developed. Bayley implies that police are not an issue for ethnic minority groups. Ideology rather than ethnic status or social class is the major determinant of police-citizen conflict. Perhaps this is because Japanese minority groups make up no more than three percent of the population.⁴⁵ Yet given the centrality of minority status to American police-community conflict, an analysis of why this is not an issue in Japan would be quite useful.

41. Pp. 54-55.

42. P. 190.

43. P. 191.

44. G. KELLING *et al.*, THE KANSAS CITY PREVENTIVE PATROL EXPERIMENT (Police Foundation 1974).

45. P. 86.

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Someone who spoke Japanese, and gathered data from students, criminals, minorities such as the Burakumin and Koreans, radicals, and police critics, as well as from the police and establishment figures observed by Bayley, would surely have produced a rather different and more critical book. Yet I think the broad contrasts would remain. As with all good research, Bayley's work leaves one with more questions than it resolves. Among the unresolved issues that reading the book raised for me are the following:

Must a society be an island, disarmed, and have a relatively high degree of consensus, integration, and homogeneity to show the enviable police and crime patterns of Japan or England? What was involved in the transformation of Japan (or England too) from an armed and violent society to a relatively nonviolent one? What are the implications for similar efforts in the United States?

What accounts for the apparent tendency of police in countries such as France, Italy, England, and Japan to be disproportionately recruited from less urban areas? What accounts for the more politically conservative attitudes of police in noncommunist countries—job socialization or recruitment screening? Is family inheritance of occupation greater for police than for most other jobs? Are stress-related ailments such as alcoholism generally higher for police than for other occupations?

What is the impact of industrialization? Bayley occasionally hints at how the Japanese police changed as the country industrialized. I saw certain parallels with the United States, England, and France. What accounts for the tendency for police to become more specialized, to have a greater monopoly over the right to use force, and to have their duties and operations more formally defined in law and internal policy? What best explains the greater standardization of police practices, the greater emphasis on crime prevention and redistributive forms of social control?

Regardless of what appear to be important similarities in historical development, what of the future? To what extent are industrialized states, as a result of shared problems and conditions, moving toward common, increasingly centralized, bureaucratic, technologically based forms of policing, regardless of economic system or national characteristics? Is there a long-run trend toward convergence in police systems? As new means for the extension of police power appear, are they invariably, if sometimes subtly, adopted? What new forms of international policing will appear in response to political terror, smuggling, and complex white-collar crimes that increasingly transcend

national boundaries? Are world police systems becoming more interdependent as the nation-state itself recedes in importance?

Many of these questions can be expressed in the form of hypotheses on the effects of police organization and industrialization. It is unfortunate that in his conclusion Bayley stays so close to his observations and does not generalize beyond contrasts between the United States and Japan. Ideally case studies such as his provide the data from which hypotheses applying to a broad array of cases can be tested. For example, future inquiries, using a larger number of countries, might consider hypotheses such as the following:

A. *Police Organization*

1. Centralized forms of police organization are associated with more universalistic standards of enforcement and lesser police corruption, but also with police playing a greater political role and with greater citizen dissatisfaction.

2. Police systems with lateral entry and greater internal organizational differentiation are more effective and better disciplined than those with a system of mobility through the ranks and lesser differentiation.

3. Police abuses are fewer, though police are less efficient, in societies with competing and overlapping police agencies than in those with a more monolithic structure. The same is true where police personnel are recruited from all segments of the society rather than solely from the dominant group.

4. The greater the power and size of public police the lesser the significance of private police.

5. Uniformity in law enforcement standards is greatest when police officers remain in a given position for a length of time sufficient to gain familiarity with an area and least when they are continually rotated or never rotated.

B. *Industrialization*

The more industrialized the society:

1) the greater the emphasis on crime prevention and anticipation rather than on apprehension and reaction after the fact;

2) the greater the ratio of redistributive as against repressive forms of social control;

3) the lesser the array of tasks police are called upon to perform;

4) the greater the presence of specialized police roles;

5) the more distinct the line between police and citizens;

6) the greater the police monopoly over the right to use force;

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7) the less discretion individual police have as their activities, at least in principle, become more limited by rules of a legal and bureaucratic nature;

8) the greater the unification of police organization and standardization of police practices within a country.

Social scientific understanding tends to evolve by finding apparent differences that require explanation. A next step is documenting these in a systematic way with primary data. A final step requires explaining the differences with specific hypotheses and a coherent theory. Bayley makes a major contribution to the first step and offers thoughtful speculation on the meaning of contrasts in police patterns in Japan and the United States.

Children's Policies: Abandonment and Neglect

The Children's Cause. By Gilbert Y. Steiner, with the assistance of Pauline H. Milius. Washington, D.C.: Brookings Institution, 1976. Pp. viii, 265. \$9.95 cloth; \$3.95 paper.

Reviewed by Hillary Rodham†

Reviewing a book about children for a law journal is like talking to W. C. Fields about the subject: one senses that the audience is not enthralled. By and large, the legal profession considers children—when it considers them at all—as objects of domestic relations and inheritance laws or as victims of the cycle of neglect, abuse, and delinquency. Yet the law's treatment of children is undergoing great challenge and change.¹ Presumptions about children's capacities are being rebutted; the legal rights of children are being expanded. As the structure of family life and the role of children within it evolves, the law is likely to become ever more embroiled in social and psychological disputes about the proper relationship between government and family. The task for lawmakers will be to draw the line between public and private responsibility for children.

The task will not be easy, for the rising debate over public intervention in family life has been emotionally charged. To some extent this is unavoidable. The very questions being asked invite fear and confusion, since they touch deeply held and often conflicting convictions about family autonomy and childhood needs. There are as many policy proposals as there are theories of child-rearing. Adults advance opinions about public policy that they consider validated by their own personal experience as children. Professional surrogates for children claim to want "‘everything good for kids.’"² The meandering road toward a comprehensive children's policy is paved with good intentions, most of them "as resistant to translation into legislative policy as [they are] unexceptionable."³

† Member, Arkansas Bar; founder and board member, Arkansas Advocates for Children and Families; formerly associated with the Children's Defense Fund of the Washington Research Project.

1. See Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973).

2. G. STEINER, *THE CHILDREN'S CAUSE* 241 (1976) [hereinafter cited by page number only].

3. *Id.*

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The difficulties in shaping children's policy stem not only from the sentiments that attach to the issues but also from a cultural reluctance to make children's needs a public responsibility. Politicians, not wishing to appear as advocates of interference with the family, balk at turning their Boys Town rhetoric into public commitments on any but the safest of issues. Besides, for most public officials the idea of a federal policy for children is alien. In a recent address to a conference I attended on children's needs, a United States senator admitted he knew nothing about the subject and would have felt more comfortable discussing energy. Policymakers are simply not accustomed to thinking about children's needs in the same ways they think about missile development, dam construction, or even old-age assistance.

Despite the variety of obstacles it has confronted in its infancy, public policy toward children is maturing into a serious political issue. One sign of that maturity is the timely publication of *The Children's Cause*, by Gilbert Y. Steiner, Director of Governmental Studies at the Brookings Institution, with the assistance of Pauline H. Milius. Steiner brings to his inquiry into the origin, organization, and success of children's policies considerable experience in the political analysis of federal programs. If the book were merely a history of certain federal policies toward children, together with substantive information about specific programs, it would be well worth reading. But the book strives for more.

As Steiner describes it, "the book deals with social altruism and self-interest as factors in the development of federal public policy affecting children, with stability and change in intervention policy, with the goals and the techniques of groups in and out of government that are concerned with making and implementing that policy."⁴ By subjecting the last decade of children's programs, as well as their supporters and administrators, to rigorous scrutiny and by treating the subject with the professional respect due serious political issues, Steiner succeeds in stripping away much of the sentimentality, political naiveté, and excuse-making that have served as camouflage for ineffectiveness, waste, and fuzzy thinking.

The book excels as both an introduction to the policy issues surrounding children's needs and a primer for political action that draws lessons from numerous mistakes and a few successes. It is not meant to be a "catalog of federal programs relating to children,"⁵ but it does provide substantive policy information about school feeding, child

4. P. 13.

5. *Id.*

health, and preschool services, especially out-of-home child care. The histories of the Children's Bureau, the Office of Child Development (OCD), and the Senate Subcommittee on Children and Youth are told with insightful commentary on their roles in the development of federal policies. Policymaking by commission, committee, and conference is reviewed and properly criticized for vague recommendations and lack of follow-through. Three private organizations established since 1970 to work on behalf of children are evaluated, and the activities of the most successful of these, the Children's Defense Fund of the Washington Research Project (CDF), and of its director, Marian Wright Edelman, are used to illustrate effective techniques of children's advocacy.⁶

On the whole, the book's conclusions, set forth in a chapter entitled "Is a Children's Policy Feasible?" are sound and probably applicable not only to the children's movement but also to reform efforts generally. For example, Steiner urges activists to build coalitions with groups whose self-interest would be furthered by new policies for children. Steiner draws this recommendation directly from the experience of the school feeding programs, expanded in large part because of the combined pressure of school cafeteria workers and "social altruists[ts]."⁷ By analogy, he suggests that the only route to comprehensive day care services lies along a way built by the teachers' unions, which seek jobs for their members, and those day care proponents who eventually agree to let the schools assume responsibility for whatever program is undertaken.

Steiner makes a number of other informed recommendations. The proponents of programs should set appropriate agendas for action by picking realistic goals from the list of "everything good for kids." The "jurisdictional quandary" in Congress,⁸ where no committee or individual has responsibility for children's programs, needs attention and perhaps could be a subject for congressional reorganization efforts. The Executive Branch should centralize responsibility for children's programs, or at least the children's lobby should monitor the directorship and activities of OCD. These and other more specific recommendations, coinciding as they do with a new Congress, a new President, and new leadership at HEW, will likely find a receptive audience.

The Carter Administration is on record as supporting efforts to

6. Pp. 158-75.

7. P. 244. See pp. 188-97.

8. P. 250.

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strengthen the family unit. Since many of its top policymakers are reportedly inclined favorably toward children's programs, "saving the family" may become the justification for, rather than remain the nemesis of, those programs. If statistics about the declining state of the American family are believed, a widely held perception of national emergency, so helpful to any reform cause, may also be emerging. At any rate, government officials charged with the task of devising programs to reverse the tide toward family disintegration certainly will be reading *The Children's Cause*. Unfortunately, although the book is in many respects useful, it may serve to perpetuate certain views about children's policy in general and about the comprehensive approach toward children's services in particular that demand more critical scrutiny than Steiner provides.

At the outset Steiner posits that "nonintervention serves as a basic guiding principle rather than an absolute."⁹ Steiner's rejection of absolutism is welcome, but it is his cautious attitude toward governmental involvement in child-rearing that implicitly molds his analysis. At critical junctures in the book's evaluation of children's programs that have been or might have been, the noninterventionist principle silently tips the scales, leading ultimately to Steiner's conclusion that it would be unwise to embark on "a far more complex, universal program" than presently exists.¹⁰ Throughout the book Steiner seems to be saying that, on the basis of available evidence, more comprehensive, innovative proposals are politically impractical after the Nixon veto of the Comprehensive Child Development Act of 1971,¹¹ and may be ill-advised on the merits as well. Accordingly, he urges children's advocates to temper their demands, sharpen their practical political skills, and work to improve and expand existing programs for "demonstrably unlucky children whose bodies or minds are sick or whose families are unstable or in poverty."¹²

There is nothing wrong with pressing for better programs for the needy, but Steiner sets his sights too low. Steiner's own arguments do

9. P. 1.

10. P. 255.

11. The Act, § 6(a) of the Economic Opportunity Amendments of 1971, S. 2007, 92d Cong., 1st Sess., 117 CONG. REC. 31248, 31249-56 (1971), was the first attempt to make policy for children and their families on a comprehensive rather than piecemeal basis. After being modified in conference, see *id.* at 43498, 43500-04 (joint explanatory statement of conference committee), the bill was sent to the President. The Nixon veto message, which charged that the Act would "commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach," *id.* at 46059, was a stunning rebuff not only to the Act itself but also to the very concept of a comprehensive approach.

12. P. 255.

not require an exclusive choice between compensatory programs—those that attempt to remedy deficiencies in a particular child population—and comprehensive programs—those that provide services for the entire child population. Indeed, they suggest the need for further efforts in both areas. Regrettably, Steiner's conclusion may well become a self-fulfilling prophecy unless the flaws in his analysis are exposed.

The flaws can be pinpointed by examining two familiar corollaries of the noninterventionist principle, both of which help shape Steiner's evaluation of federal policy toward children. The first corollary is that in order to overcome the noninterventionist impulse the evidence supporting proposed or ongoing children's programs must be greater than that necessary to overcome resistance to change in other areas of public policy. Whether the greater burden borne by proponents of children's programs is appropriate is rarely questioned, though it warrants consideration. After all, no new policy is fail-safe. Legislators and executives take risks of all kinds when they decide to build a nuclear plant or introduce a deadly pesticide or advocate no-fault insurance. There is no way to predict fully the effects of a policy that is ambitious, yet untried, especially one taking shape amidst the conflicting claims of proponents who foresee extraordinary benefits and opponents who see the handwriting on the wall and the dominoes on the table.

Several federal initiatives for children have been dragged down by this special burden of proof. For his part, Steiner seems agreeable, or perhaps oblivious, to this situation; for whatever reason, he does not protest. In discussing the program of early and periodic screening, diagnosis, and treatment (EPSDT), which was mandated as one of several 1967 amendments to the Social Security Act, Steiner first notes that Congress did not fully consider the costs or scope of EPSDT; by default HEW was given considerable responsibility to define and defend the program. Steiner then describes at length "an apparent decision by HEW to flout the law"¹³ by bureaucratic procrastination: final EPSDT regulations were not issued by the Department until seven years after Congress enacted the program. Nevertheless, Steiner concludes that "[t]he obvious lesson [of EPSDT] is that providing health services to poor children is too complex, too expensive, and too consequential a matter to be legislated without a plan."¹⁴ A balanced critique of EPSDT might properly take Congress to task for laying an inadequate legislative foundation for program implementation.

13. P. 224.

14. P. 230.

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Surely, however, there have been instances where an energetic and imaginative administration has overcome poorly drafted legislation. To suggest that EPSDT was doomed by its authorizing legislation is to discount the destructive role of the program's administrators, who never gave it a chance to succeed.

Sometimes even successful children's programs cannot bear the burden imposed by the first corollary. After tracing the rise and fall of maternal and child health project grants, for example, Steiner concludes that the program "seemed to show important success in preventive health care" but it "was never considered for a multi-year extension."¹⁵ Indeed, by 1975 the Ford Administration was proposing "sharp cuts in federal financing of community health services, including the now-unified maternal and child health grants,"¹⁶ based on the unfounded belief that recipients of care and insurers would pick up the difference. Although the disorganization among grants supporters and the lack of concerted congressional action are evidence of the program's political weakness, the first corollary must be given its due in explaining why successful programs for children suffer the same fate as unproven ones.

The second corollary underlying the book's critique is that children's programs, once underway, should be judged more quickly and harshly than other programs. Perhaps because of the initial ambivalence toward the introduction of a new program, support for the program rests on a shaky consensus easily shattered if the promised goals are not speedily and smoothly achieved. That the rush to judgment has occurred in a number of instances is unquestionable. Whether it is appropriate is worthy of more discussion than the book provides.

One of the clearest examples of this second corollary in operation is Steiner's treatment of the Head Start program. Before Head Start, federal support for child care was always linked to national emergencies like the Depression or World War II. Arguments favoring the provision of child care services stressed the need to put women to work in WPA projects or armaments production or remove them from swollen welfare rolls. Before the 1960s, the potential benefits of such services to the children themselves clearly were not a primary consideration. New psychological theories challenging traditional beliefs in fixed intelligence and predetermined development coincided with the Kennedy and Johnson Administrations. In the climate of a society

15. P. 238.

16. *Id.*

discovering hunger and poverty, these theories flourished and assumed political as well as scientific significance. If a child's intelligence could be improved through extrafamilial services, could a government refrain from establishing them? The answer from the generals of the War on Poverty was predictable: they decided to offer unprecedented public services to preschool children, primarily from poor families. Congress and affected parents supported the effort, according to Steiner, largely because of the claims that substantial individual cognitive gains would result.¹⁷ Therefore, when preliminary evaluation of Head Start, especially the Westinghouse study,¹⁸ failed to corroborate those claims, disillusionment dampened the program's widespread popularity.¹⁹

Steiner recognizes that the program commands sufficient political support to resist attempted cutbacks and that it provides "intellectual respectability to out-of-home child care under public auspices."²⁰ Nevertheless, Steiner shares the disappointment of some early Head Start backers and downplays the significance of positive findings about the program's effects in areas other than cognitive development. His uncritical acceptance of the Westinghouse study findings reflects the force of the second corollary, that children's programs may properly be judged more quickly and harshly than other government programs. Head Start embodied a theory about the sources and quality of intelligence whose validity was not confirmed in the first years of the experiment. But this should have been neither surprising nor disillusioning. Analyses in other policy areas presume difficulties in program design and implementation; years may be spent testing and revising a theory. Surely a theory about children's intelligence deserves more time to be tested than either the adherents of the Westinghouse report or Steiner give it. This is especially true in the light of studies completed since Westinghouse, which call into question the Westinghouse conclusion that the full-year Head Start program is only "marginally effective in producing gains in cognitive development."²¹ Apparently we share so

17. See pp. 29-35.

18. Westinghouse Learning Corp. & Ohio University, *The Impact of Head Start: An Evaluation of the Effects of Head Start On Children's Cognitive and Affective Development 2-7* (June 1969) (executive summary). The report presents the results of a study comparing Head Start participants with children in a control group. The study concluded that the summer Head Start program had no significant impact on learning readiness or academic achievement and that, in most cases, the rather small cognitive gains achieved by the children in full-year Head Start programs faded after the children entered school.

19. For example, a planned endorsement of Head Start by President Nixon was diluted. Pp. 32-33.

20. P. 35.

21. Westinghouse Learning Corp. & Ohio University, *supra* note 18, at 7. See, e.g., A. Mann *et al.*, *A Review of Head Start Research Since 1969: Working Draft* (Social Re-

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much apprehension about potential harm to cherished, albeit fantasized, family values that programs for children must demonstrate immediate success or risk extinction, even in the face of subsequent evidence of achievement.

The book's comparison of fledgling proposals for day care services with the well-established school lunch program exemplifies the folly of judging developments in this field too hastily. Steiner calls the national school lunch program "the success story of the children's cause."²² He observes that "[w]hile comprehensive child development, child-care centers, and child welfare services have floundered, school lunch has flourished."²³ Steiner traces the school lunch program's development from a form of farm relief to a middle class subsidy with nutritional justifications to a broad-based feeding effort giving priority to needy children and providing breakfast and summer feeding services as well. Farmers, congressmen, school cafeteria workers, private lobbies, and citizens concerned about the effect of malnutrition on school achievement formed a coalition over a number of years. The coalition gradually built toward the legislative activity between 1970 and 1975 that resulted in an expanded feeding program. During these five years the number of free and reduced-price lunches and breakfasts increased despite the declining school population.²⁴ Now that most of the children who need a *free* lunch have access to one, Steiner concludes that reformers should turn their attention to the "timely and politically realistic" goal of broader access to reduced-price lunches and breakfasts.²⁵ This goal may be timely and realistic today, but it took *40 years* of incremental, sometimes uncertain progress to reach this point. The feeding programs once had to overcome congressional concerns about "further federal participation in 'providing food, clothing, and the other necessities of life.'"²⁶ It is premature to suggest that current proposals for child care, which face the very same concerns, cannot likewise surmount them.

Steiner's predisposition toward nonintervention distorts not only his evaluation of past and present children's policies but also his assessment of the prospects for a comprehensive approach to children's needs in the future. The need for a comprehensive child care program was

search Group, George Washington University Dec. 1976). Remarkably, although the Westinghouse findings have been challenged repeatedly since their publication, Steiner does not mention any post-1970 studies of Head Start's impact on cognitive gains.

22. P. 176.

23. *Id.*

24. P. 198.

25. P. 205.

26. P. 183.

accepted by a majority of Congress just six years ago. The legislative purpose was to assist the American family to meet children's needs, not because Congress questioned the traditional role of the family but because it perceived unprecedented challenges to many families' abilities and resources.²⁷ Within Congress there was much disagreement about the appropriate system for delivering services, but very little about the propriety of or necessity for extending them.²⁸

Steiner attributes passage of the bill not to its merits but to its disorganized opposition, which coalesced too late to secure any action short of a presidential veto. But the lack of organized opposition and the other favorable circumstances Steiner cites to explain the bill's success do not refute the case for the bill made in weeks of investigation and testimony. Had serious and timely questions been raised, the case could have been sharpened and the flaws in the bill corrected, but the Nixon veto message was totally unexpected. When it came, according to Steiner, it proved embarrassing even to some Republicans.²⁹

If Steiner's information is correct, the veto was not really a rejection of child development policy but merely a sop to opponents of the President's new China policy.³⁰ Nevertheless, Steiner seems to regard the veto as a true measure of enduring political opposition to comprehensive children's policies. But before assuming that the veto message nailed the coffin on comprehensive children's policies, changes in the political constellation since 1971 should be surveyed. Richard Nixon is no longer President; James Buckley, the force behind the veto message, has been replaced in the Senate by Daniel Patrick Moynihan, who was, while serving in the Nixon Administration, a supporter of the comprehensive services approach. These changes will not in themselves guarantee the passage of a comprehensive child development bill or other sweeping legislation, but they are indicative of a much more favorable climate than Steiner discerns.

Even if a full-fledged comprehensive program were not immediately feasible or desirable, surrender to a piecemeal approach would be unwarranted. Given the legislative and administrative inexperience with comprehensive children's programs, it might be wise to begin on a limited, experimental scale. Proponents of different types of programs could assume responsibility for testing them under competent govern-

27. Statement of Findings and Purpose, Comprehensive Child Development Act of 1971, S. 2007, 92d Cong., 1st Sess. § 6(a), 117 CONG. REC. 31248, 31249 (1971).

28. See pp. 105-13.

29. P. 114.

30. Pp. 114-15.

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ment auspices. If Albert Shanker wants the teachers to control day care programs, let him have an experimental grant for a few years to explore how he and those with whom he works would administer the program and what benefits would accrue to children. Bettye Caldwell's landmark child development project is part of the Little Rock, Arkansas school district and might provide a model for similar efforts in other environments. The Children's Defense Fund could be given financial support to coordinate projects under various community control models, thereby affording an opportunity to evaluate the claims CDF makes for that form of public intervention. If these kinds of experiments were adequately funded and patiently observed, they would do much to generate the reliable evidence needed to make informed assessments of alternative public policies.

Refinement of established programs, such as Head Start, may provide another avenue for experimentation in child development policy. Recent evidence indicates that Head Start is achieving not only its original purpose, namely cognitive gains, but also improvements in children's social behavior, parental attitudes, community involvement, and children's health.³¹ This successful evolution suggests that the program should be strengthened and expanded within its present structure with an eye to testing the comprehensive approach.

In light of these opportunities for change, Steiner's failure to endorse a comprehensive approach to children's policies is disappointing. In advocating more of the same compensatory programs, Steiner fails to recognize that the compensatory and comprehensive approaches are complementary and should be pursued simultaneously. By the same token, incremental programs can be expanded into more comprehensive ones, and even limited comprehensive programs like Head Start may form a unified framework within which both established and emerging programs can flourish. Nevertheless, despite Steiner's unnecessarily cautious recommendations his book is a welcome addition to the all too limited body of literature in this field. It will be of significant assistance to children's lobbyists and policymakers, as well as to citizens ready to join the debate about the future of children's policy.

31. See A. Mann *et al.*, *supra* note 21, at 8, 21-29 (cognitive gains); *id.* at 9, 34-35 (children's social behavior); *id.* at 12, 38-39 (parental attitudes); *id.* at 15, 42-43 (community involvement); *id.* at 16, 45-46 (children's health).

Why Do Voters Vote?

Union Representation Elections: Law and Reality. By Julius G. Getman, Stephen B. Goldberg, and Jeanne B. Herman. New York: Russell Sage Foundation, 1976. Pp. xvii, 218. \$7.00.

Reviewed by David L. Shapiro†

Despite the emphasis on considerations of social policy in modern jurisprudence, many legal rules are based upon assumptions about human behavior that have yet to be sustained or refuted by systematic empirical study. In addition to such awesome questions as the deterrent effect of the criminal laws and the fairness of the adversary system,¹ there are countless, more modest questions that may be asked. For example, are jurors consciously or subconsciously influenced by pre-trial publicity despite their willingness to swear under oath that they are not? How effective are the *Miranda* warnings² in making those in custody aware of their rights? Is the rule excluding unlawfully seized evidence the best way to deter law enforcement officials from violating the Fourth Amendment? Are voters in National Labor Relations Board (NLRB) representation elections affected by the campaigns conducted by unions and employers, and in particular, are they influenced by threats or promises about the consequences of their votes?

It is to this last question, and a number of related ones, that the authors of the present book have addressed themselves.³ In a study of representation elections that took about a decade from conception to publication and that must have cost a small fortune, the authors set out to test many of the assumptions on which the NLRB based its rules; proceeding from their conclusion that most of those assumptions

† Professor of Law, Harvard University.

1. For an interesting study in a simulated setting, which is, unfortunately, almost impenetrable to the uninitiated like me, see LaTour, Houlden, Walker & Thibaut, *Procedure: Transnational Perspectives and Preferences*, 86 YALE L.J. 258 (1976). See also *id.* at 259 n.5 (citing other authorities).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966). For a study of the *Miranda* warning in one context, see *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

3. J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter cited by page number only].

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are unsound, the authors have recommended a sweeping revision. The study is an invaluable one, not only because it raises serious questions about the wisdom of the Board's rules, but also because it makes us think about the desirability of undertaking such studies, about what to do with the results, and about the extent to which rules purportedly based on assumptions that are not empirically supported may nevertheless be justified on other grounds. These questions are all complicated by the fact that the study, like almost every similar investigation I have ever come across, can be and has been criticized for its methodology and conclusions.⁴

I

In the opening chapter, the authors set the stage by summarizing the Board's rules governing representation elections⁵ and the assumptions underlying those rules. To ensure the unimpeded exercise of free choice by employees, the Board decided that elections must be conducted under "laboratory conditions."⁶ Since employees were thought to be attentive to the campaign, to be unsophisticated about labor relations, and to be easily swayed, the Board has held that campaign statements by employers that might be interpreted as threats of reprisal or promises of benefit are grounds for setting aside an election and holding a new one, as are such other reminders of employer power as interrogations and meetings with employees in small groups. And, at the time of the study, certain material misrepresentations and inflammatory appeals, though unrelated to employer or union power, were also grounds for setting an election aside because "[t]hey create conditions which make impossible a sober, informed exercise of the franchise."⁷

The authors' exposition, only partially summarized here, is on the whole a fair one, but there are some gaps and one puzzling statement

4. See *Symposium—Four Perspectives on Union Representation Elections: Law and Realty*, 28 STAN. L. REV. 1161 (1976). The four reviews in this symposium, though each praises the book in many respects, also contain numerous criticisms of the authors' methodology and conclusions. The dissenting opinions in *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705, 1709-12 (1977) (discussed in Part II *infra*), also criticize the study.

5. The NLRB's authority to conduct union representation elections derives from § 9 of the National Labor Relations Act, 29 U.S.C. § 159 (1970).

6. The phrase was first used in *General Shoe Corp.*, 77 N.L.R.B. 124, 127, 21 L.R.R.M. 1337, 1341 (1948). In the same opinion the Board explained, "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *Id.*, 21 L.R.R.M. at 1341.

7. P. 18 (quoting *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 71, 50 L.R.R.M. 1532, 1534 (1962)).

about the law. In suggesting the possibility that threats by employers might be neutralized by the union, the authors say:

If the employer threatens to close the plant contingent on a union victory, the union organizer presumably will respond that *the employer cannot do so as a matter of law*, will not do so as long as the plant is profitable, and that the union has no intention of making it unprofitable.⁸

If the authors are suggesting that the italicized union response is an accurate statement of the law, they are not correct, in view of the Supreme Court's unfortunate decision in the *Darlington* case.⁹ A total shutdown, even if motivated solely by hostility to the union, is not unlawful, and a partial shutdown is only unlawful if the employer is motivated by a desire to influence his remaining employees. Even a plant relocation based on hostility to the union, though unlawful, may not be subject to a remedy that will make the injured employees whole.¹⁰ And of course, problems of proof in such cases are enormous. All this casts some doubt on the rather facile suggestion that unions can effectively counteract those threats, especially when they are thinly veiled by the argument that it may be economically necessary to move or to shut down if the union wins.

Moreover, the authors make no effort in this chapter to explore in any depth some of the arguments that might be made for and against the Board's rules and that have little to do with assumptions about voter behavior. Remarkably, the First Amendment is not even mentioned, although it surely plays a role in determining how far the Board may go in regulating campaign propaganda.¹¹ Nor is there discussion of whether any of the rules here described are warranted by the need to preserve the appearance of fairness in the election,¹² or to reduce or eliminate the bitterness that may poison the bargaining relation if the union wins.

Finally, although the authors do indicate that the Board has wavered in its policies over the years, and that the Board's rules have met a

8. P. 13 (emphasis added).

9. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

10. See A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 282 (8th ed. 1977).

11. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 66-106 (1964).

12. The authors do refer to a few rules, such as that prohibiting fraternization by Board agents with either side, as "designed to protect the impartial atmosphere," and to other rules, like that prohibiting distribution of a facsimile of an official ballot in a manner suggesting Board endorsement of a particular choice, as reflecting the Board's "desire to protect its processes." P. 18.

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mixed reception in the courts, they give neither the full flavor of the Board's oscillations nor any sense of the dissension within the Board that has almost always existed.¹³ Perhaps these shortcomings are the result of the authors' desire to present the premises to be tested in as uncluttered a way as they can without delaying the discussion of the results.

Chapter 2 describes in detail the methodology of the study. Thirty-one elections were selected for the project, with "the primary consideration . . . the likelihood of vigorous, possible [sic] unlawful campaigning."¹⁴ Two waves of voter interviews were conducted, the first beginning as soon as possible after an election had been ordered and a list of eligible voters obtained from the Board. (One of the notable byproducts of the study was a landmark opinion holding that the authors were entitled to these lists under the Freedom of Information Act.¹⁵) The purpose of this first interview was to obtain information about the voter, his voting intentions, and his attitudes towards his work, his employer, and the union. The second wave of interviews, conducted after the election, was designed primarily to determine how the voter voted and why, his recollection of the issues raised by both sides, and his perception of threats, promises, or other practices that might justify setting the election aside or even requiring the employer to bargain with the union despite the results.

I have little training in survey techniques; even so, I was generally impressed with the meticulousness of the study plan. But I was struck with the failure to include in the project any elections in which a vigorous campaign was *not* foreseen. (And I later discovered that I was not alone in raising this question.¹⁶) If judgments are to be made about the effect of vigorous campaigns on the voters, is it not essential to have a control group in which such campaigning does not occur?

13. For examples of disagreement within the Board during recent years in the area of campaign practices, see, *e.g.*, the cases discussed in 41 NLRB ANN. REP. 65-70 (1976); 40 NLRB ANN. REP. 78-81 (1975); 39 NLRB ANN. REP. 65-69 (1974); 38 NLRB ANN. REP. 73-77 (1973); 37 NLRB ANN. REP. 72-74 (1972). For even more recent disagreements, see *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (1977); *Information Magnetics Corp.*, 227 N.L.R.B. No. 216, 94 L.R.R.M. 1313 (1977); *GTE Sylvania, Inc.*, 227 N.L.R.B. No. 14, 94 L.R.R.M. 1086 (1976).

14. P. 34. The authors state in Chapter 2 that 31 elections were studied, although at various points, *e.g.*, p. 75 (Table 4-1), 33 elections are referred to. Two elections are omitted from the tables; I am sure there is an explanation of the discrepancy somewhere, but I was unable to find it.

15. *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971).

16. See Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181, 1182 (1976). Professor Eames and I seem to be at odds about the significance of this failure with respect to the authors' critical conclusions in Chapter 5. See pp. 1539-40 *infra*.

The authors tell us only that they limited their selection because they "wanted to test the effect of the campaign, particularly unlawful campaigning, on voting behavior."¹⁷ Although this may be an explanation if the authors' *sole* purpose had been to study the effects of unlawful campaigns, it is hardly an explanation for the lack of a control group in studying the effects of campaigns in general. The authors were evidently quite successful in their efforts; they report that in 20 elections both parties campaigned vigorously after the Wave I interview and that in 28 at least one party engaged in vigorous campaigning.¹⁸ At another point they report that there was no election in which the company raised less than 8 issues or the union less than 11;¹⁹ and at still another they relate that in every election "the employer made statements that could be interpreted as threats of reprisal or promises of benefit."²⁰

There is at least one strong clue that the elections studied were atypical because of the vigorous campaigning. NLRB annual reports for the last several years, including the years covered by the study, show that unions win approximately 50% of one-union representation elections;²¹ but in the study itself, unions won only 8 or approximately 25%. This may in part have been the result of the fact that the authors selected units that were, on the average, larger than the average size of units in which Board elections are conducted,²² since the Board's reports show that unions tend to do better in small units than in large ones.²³ But we do not know whether and to what extent the campaign itself made a difference.

In the third chapter, the authors begin their report and analysis of the results of the study. The principal theme of this chapter is that despite the Board's assumptions about the fragility of voter choice,

17. P. 34.

18. P. 35.

19. P. 75 (Table 4-1). This table also shows that the average number of company issues raised was 29.79 and that in only 5 elections did the number of company issues raised fall below 20.

20. P. 128.

21. See, e.g., 41 NLRB ANN. REP. 236 (1976) (Table 13); 38 NLRB ANN. REP. 231 (1973) (Table 13); 37 NLRB ANN. REP. 248 (1972) (Table 13).

22. The authors state: "While only 13 percent of all NLRB elections conducted during fiscal 1973 were in units of more than one hundred employees, 45 percent of the elections we studied during that period were in units with more than one hundred employees." P. 35.

23. The Board's statistics for the same year, fiscal 1973, show that of 7687 representation elections involving units of less than 100 employees, unions lost 3545, or 46%. Of 1229 elections involving units of 100 or more employees, unions lost 723, or 59%. See 38 NLRB ANN. REP. 246 (1973) (Table 17). The authors' study covered units ranging from 4 to just under 400, with an average of 96. P. 35. Thus the results in the elections studied were atypical, even taking into account the size of the units involved.

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“[t]he data indicate . . . that employees have strong and stable predispositions to vote for or against union representation.”²⁴ Indeed, “[t]he votes of 81 percent of the employees could be predicted from their pre-campaign attitudes and intent.”²⁵

That most employees stick to their intentions throughout the campaign and into the voting booth is not particularly surprising. What is surprising, and what seems downplayed by the authors, is that “[p]re-dispositions [*i.e.*, predictions based on attitude and intent] failed to predict vote accurately for 19 percent of the employees interviewed.”²⁶ This seems rather high to me. How does it compare with other kinds of elections? How would it compare with union representation elections in which vigorous campaigns are not conducted? One can only guess, but it seems significant (though the authors mention it only in passing) that a much higher percentage of those who did not vote in accordance with their expressed intent switched away from the union than switched to it.²⁷ Has the Board really been so off base in proceeding on the assumption that employees’ choices are fragile if the percentage of switchers in vigorous campaigns is so high? Perhaps it has, since the authors also report that expressed intent in Wave I was an accurate predictor of outcome in 29 of 31 elections. But after all, application of that margin of error to the total number of NLRB representation elections held in the last fiscal year would indicate that of 8,638 elections, initial intent would not be an accurate predictor of the outcome in 557 cases.²⁸

Chapter 4 is the first of the two major chapters documenting the results of the study. Here the authors deal generally with the effect of the campaign on the vote and make a number of important points:

1. Despite the Board’s assumption that employees are attentive to the campaign, “[t]he average employee . . . could remember only 10 percent of the company campaign issues and 7 percent of the union issues.”²⁹

2. There was no significant difference between the familiarity of company voters with the issues and that of union voters. (Compare point 6 below.)

24. P. 72. The authors contribute to the preservation of the purity of the language by consistently using “data” as a plural noun.

25. *Id.*

26. P. 70.

27. P. 64. The authors state that “94 percent of the employees intending to vote for the company did so, as did 82 percent of those intending to vote for the union.” *Id.*

28. *See* 41 NLRB ANN. REP. 236 (1976) (Table 13).

29. P. 109.

3. Written materials, meetings, and personal contact increase voter familiarity with the issues.

4. There is a high correlation between the reasons given for voting and the campaign issues, suggesting that the campaign serves to "awaken or strengthen" voter predispositions.³⁰

5. The authors "could find no characteristics that served to distinguish the successful employer [or union] campaigns from those less successful."³¹

6. Voters who switched to the union were more familiar with the union's issues and more likely to have attended union meetings than those who did not switch.

7. Voters who switched to the company were no more familiar with the company's issues than voters who stayed with the union.

In short, though the campaign, especially the union's campaign, may make a difference, voters do not pay much attention and it is impossible to tell what makes for a successful campaign.

This is all quite interesting, especially the authors' confession that they could not tell what makes a campaign succeed. But I am left with some queasiness about it all. Would we not have learned more about the effect of the campaign, and perhaps even about what makes a "successful" campaign, if there had been a control group of elections in which no significant campaign had been waged, at least by the company? And was familiarity with campaign issues really so low when, for example, 40% of employees reported "improvements not dependent on unionization" as an issue in elections in which the issue was used, 35% reported "plant closing/moving may follow unionization (nonretaliatory)," and 30% reported "loss of benefits may follow unionization (nonretaliatory)"?³²

Moreover, although the authors stress that more union voters than company voters reported a "job loss theme" as a campaign issue,³³ it would also be interesting to know how those company voters would have voted had there been no such theme—a determination admittedly difficult if not impossible to make. And though I cannot argue with the conclusion that no discernible characteristics distinguished successful from unsuccessful campaigns, I cannot help thinking that there must be useful data in view of the fact that the average loss in union support in all 31 elections was only 4%, yet in the five most successful

30. P. 97.

31. P. 101. *See also* p. 103.

32. P. 78 (Table 4-2).

33. P. 88.

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company campaigns, the loss averaged 35%.³⁴ Finally, the conclusion that familiarity with the union's campaign did make a difference suggests that familiarity with the company's campaign may have as well, at least for some voters, even if company voters as a group demonstrated no more familiarity than did union voters. Would the company have done as well without conducting a campaign?

The authors, then, do not shrink from reporting results that seem at odds with their thesis, but their conclusions tend to downplay the contradictory findings, or at least fail to give them full recognition.

Chapter 5 is, to my mind, the crux of the book and in many ways its most persuasive part because there was a control group for that part of the study. In exploring the effect of "unlawful campaigning" on the vote, the authors determined that in 22 of the 31 elections, the employer engaged in unlawful conduct, and that in 9 of those 22, the conduct was sufficiently serious to warrant an order to bargain.³⁵ Thus, the 31 elections could be divided into 3 categories: "bargaining order" elections, "unlawful" elections in which company conduct warranted setting aside the election but not the extreme sanction of an order to bargain, and a control group of "clean" elections.

Against this background, the authors concluded: (1) In none of the three categories did a significantly greater percentage of "potential union voters" vote against the union. (2) About one-third of employees interviewed reported unlawful tactics by the company, but the percentage was as high in clean elections as in the other categories! (3) Union voters more frequently reported unlawful tactics than did company voters. (4) Any discharge of a union supporter was likely to be perceived by employees as unlawfully motivated, whether it was or not, but such discharges did not appear to have a coercive effect on those employees. (5) Unlawful interrogation did not appear to have a coercive effect either on the employees interrogated or on other employees.

Were I an employer, I would read this chapter several times. It certainly suggests that staying within the law is one way of doing well by doing good. Chances of winning at the polls are at least as great, if not greater, than if unlawful acts, threats, or promises are used, and

34. P. 100.

35. These conclusions were reached by the authors on the basis of the Board's disposition of any unfair labor practice charges or objections to the election in those cases in which such charges or objections were filed, and on the informal conclusions of an NLRB administrative law judge in all other cases where arguably unlawful speech or conduct occurred. "The judge reviewed this speech and conduct as he would have done if they had been submitted to him in his official capacity." P. 111.

of course the results of the vote will stand up against challenge. Since employees seem to get the message of possible loss of jobs or benefits in any event, there is no point in being blunt about it.

As a more neutral observer, I am also impressed with the findings, and I note only a few reservations to what seems a most significant set of conclusions. First, if the lid were really off, if an employer could say anything and could do many things he cannot now lawfully do, would the results be the same? My guess is that they would, but is it worth taking the risk to find out? Second, although the authors deny that it is statistically significant (and I am in no position to say otherwise), it is interesting to note that of the originally undecided voters, 60% voted for the company in clean elections, 65% in unlawful elections, and 79% in bargaining order elections.³⁶ Third, even though potential union voters who voted for the union reported unlawful company campaigning more often than did potential union voters who switched to the company, one still wonders what the conscious or subconscious effect of unlawful conduct was on the voters who did in fact switch.

In a brief sixth chapter, the authors conclude, on the basis of substantial evidence, that card signing is an accurate indication of employee choice and an accurate predictor of the ultimate vote. My only comment on this chapter is that employees who sign union representation cards seem to be a different breed from law school students who signed petitions during the golden era of such documents and who frequently disavowed any knowledge of their contents after signing them.

In the seventh and final chapter, the authors summarize their conclusions and set forth their recommendations for change. The Board's assumptions about voter behavior are unsound; in reality, employee predispositions are critical and the campaign not all that significant. Moreover, the factors that do cause loss of union support are unrelated to employee perceptions of unlawful activity or to Board determinations that such activity has occurred. Although switches to the union are evidently related to the receipt of information about the union, switching to the company "is more likely to be due to the intensification of currently held attitudes than to new information

36. P. 115 (Table 5-3). (This point is also raised, somewhat more aggressively, in Eames, *supra* note 16, at 1188-89.) According to Table 5-3, 9% of union card-signers voted for the company in clean elections and 16% in unlawful elections, a difference which the authors say is statistically significant. P. 116. But since only 11% of card-signers voted for the company in bargaining order elections, the authors conclude that there is no significant difference between clean elections on the one hand, and unlawful and bargaining order elections combined, on the other. *Id.*

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conveyed in the employer's campaign,"³⁷ even information apparently intended to coerce.

Accordingly, the authors propose that the Board should revise its rules to provide, *inter alia*, that threats, promises, misrepresentations, or other statements are not grounds for setting aside an election, nor are interrogation of employees, the granting of benefits, or resorting to reprisals, although the last should continue to be an unfair labor practice. Some rules (like that prohibiting agents of the Board from fraternizing with agents of the parties) may be necessary, however, to preserve the appearance of fairness; and certain practices such as unlawful discharges may warrant bargaining orders not because of the effect of discharges on voters, but because the remedy would serve as a powerful deterrent. Finally, steps should be taken to give unions greater access to employees during campaigns, both because such access does appear to make a difference and because equal opportunity to communicate is "fundamental to the democratic process."³⁸ The risks involved in the proposed deregulation would be far outweighed by such gains as the savings in administrative costs that would result from less Board involvement in election challenges.

Since many of these recommendations are derived from the data in the fifth chapter, they seem well based and persuasive. They gain additional support from the argument (not explicitly made by the authors) that deregulation of campaign propaganda is consistent with First Amendment values, and from the argument that the costs of regulation are an inefficient use of limited resources. I do wish, however, that we knew more than the study tells us about the differences between elections in which there is an active campaign and those in which there is not, and about the factors which cause voters to switch and which make for a successful campaign—factors which in the end seem to elude the authors. And I cannot escape the conclusion that in their enthusiasm for their own empirical data, the authors have belittled the importance of considerations not grounded in those data. While suggesting that some marginal rules may be warranted by the need to preserve the appearance of fairness, and urging that greater union access is justified by "fundamental" principles, the authors do not really consider whether no-holds-barred campaigns, in which employers may threaten, promise, and in general do what they will, may so poison the air and polarize the community that, if the company wins, the losers will, rightly or wrongly, attribute their defeat to

37. P. 145.

38. P. 157.

the company's tactics and, if the company loses, a satisfactory bargaining relationship may never develop. Perhaps we should take the plunge, but at least we should be aware of all the possible consequences.

II

Given a study of this thoroughness and importance, the question for the Board is what to do about it. The Board's first public response, in April 1977, has been to modify its "laboratory conditions" standard by overruling its own *Hollywood Ceramics*³⁹ decision on the effect of misrepresentations. Members Penello and Walther stated in *Shopping Kart Food Market, Inc.*⁴⁰ that misrepresentations will no longer be grounds for setting aside an election in the absence of deceptive practices involving the Board or the use of forged documents. Relying heavily on a law review article by Getman and Goldberg that preceded their book and that summarized the data and conclusions relating to misrepresentations,⁴¹ these members said that "Board rules in this area must be based on a view of employees as mature individuals who are capable of recognizing campaign propaganda for what it is and discounting it."⁴² While suggesting that the study supported their view that "ours is the more accurate model of employee behavior,"⁴³ these two members gave the assurance that "[w]e shall, of course, continue our policy of overseeing other campaign conduct which interferes with employee free choice outside the area of misrepresentations."⁴⁴

Chairman Murphy, whose concurring vote was critical to the result, made no mention of the study although she did note that employees should be treated as "mature adults capable of recognizing and evaluating campaign rhetoric for what it is."⁴⁵ She expressed agreement with the basic purpose of *Hollywood Ceramics*—the assurance of free choice—and voiced regret that the case had been badly misapplied and expanded. She then reserved the right to vote to set aside elections in "the most extreme situations" where there was an "egregious mistake of fact,"⁴⁶ and emphasized her continued willingness to set an election

39. *Hollywood Ceramics Co.*, 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962).

40. 228 N.L.R.B. No. 190, 94 L.R.R.M. 1705 (1977). A recent comment on this 3-2 decision suggests that, since it is favorable to employers, it may well be "the 'last hurrah' of the Nixon-Ford Board." Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441, 1448 n.36 (1977).

41. Getman & Goldberg, *The Behavioral Assumptions Underlying NLRB Regulation of Campaign Misrepresentations: An Empirical Evaluation*, 28 STAN. L. REV. 263 (1976). Several other sources were also cited.

42. 94 L.R.R.M. at 1707.

43. *Id.* at 1707.

44. *Id.* at 1708.

45. *Id.* at 1708 (concurring opinion).

46. *Id.*

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aside “in the event of misconduct involving threats, promises of benefits or similar improprieties.”⁴⁷

Member Fanning, in his dissent, took direct issue with the study on some grounds that have been mentioned here and some that have not. In addition, he referred to the appearance of fairness in the election as lending stability to the bargaining process, made the somewhat startling argument that the high degree of voter participation in NLRB elections may have been “encouraged by the long-standing policy that Hollywood Ceramics represents,”⁴⁸ and hinted darkly that the majority may be taking only the first step “in dispensing with time-honored election safeguards.”⁴⁹ In an angrier dissent, Member Jenkins sharply criticized the logic and conclusions of the study, argued that the authors drew inconsistent conclusions, and ended by pointing to the “inescapable fact” that many card majorities have been lost, and bargaining orders required, after unlawful conduct by employers.⁵⁰

With all respect, it seems to me that whatever position one may take on the merits, it is hard to view the Board’s approach in the *Shopping Kart* case as anything but misguided. On the one hand, the majority simply referred to the study without any consideration of its strengths and weaknesses; the dissenters, on the other hand, tried only to score debaters’ points against it without any pretense at objectivity. And the crucial swing voter did not explicitly address herself to the study at all. Moreover, the case was one in which all five members evidently agreed that the representations made by the union were not grounds for setting aside the election even under the *Hollywood Ceramics* test.⁵¹ Since it dealt with one of the less important rules governing campaign practices, *Shopping Kart* was not in any event the best vehicle for considering the study’s significance, and simply led to an unexplained affirmation of other existing rules—an affirmation justly called in question by the dissent. And the dissenters, while defending their own assumptions about what may influence a voter’s decision, made only a halting attempt to support the *Hollywood Ceramics* rule on grounds quite unrelated to those assumptions.

There could hardly be a better illustration of the inappropriateness of squeezing considerations of legislative policy into the unaccom-

47. *Id.*

48. *Id.* at 1711 (dissenting opinion).

49. *Id.*

50. *Id.* at 1712.

51. The Regional Director and the two dissenters believed that the election should not be set aside because the union official who made the misrepresentation would not have been perceived by employees as a credible source. *Id.* at 1709.

modating mold of an adjudication. Instead of a full and open discussion, by all those concerned, of the study's methodology and conclusions, of its relevance to all of the Board's rules in the area of campaign practices, and of the question whether some or all of these rules may find their justification on other grounds, we have little more than an endorsement of the study by two members of a three-member majority in a case in which it may not even have been addressed by the litigants and in which its conclusions were in no way essential to the result. Moreover, I believe the majority purported to commit itself to following existing authority in other areas involving campaign practices more on the basis of the need to reassure the Board's constituency than on the basis of reason or policy.

The Board appears to be one of the last holdouts against the pressures from courts and commentators to develop policy through rule-making rather than adjudication.⁵² Whatever the scope of the Board's power to define unfair labor practices by rule, there seems little doubt that it could promulgate rules, in accordance with the notice and comment procedures of the Administrative Procedure Act,⁵³ defining its policies with respect to the setting aside of elections. Yet even when it decided to require employers to turn over the names and addresses of employees to unions after elections had been ordered, and to make its requirement effective not in the case at hand but only thirty days after its decision, it chose to do so in an adjudicatory proceeding.⁵⁴ Although it had its wrist slapped by the Supreme Court for choosing this course,⁵⁵ the rule survived, along with the Board's continuing refusal to formulate policy in rulemaking.

Perhaps the Board's reluctance to follow the rulemaking route results in part from the view that its frequent changes in policy would be more visible, and thus more embarrassing, if such changes were made by amending an outstanding regulation. But surely the Board is wrong if it thinks that changes in direction are less likely to be

52. See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *Operating Engineers Local 49 v. NLRB*, 353 F.2d 852 (D.C. Cir. 1965); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). Even since the *Wyman-Gordon* decision, the Board has resorted to rulemaking in only one substantive area—the Board's jurisdiction over certain classes of employers. See A. Cox, *et al.*, *supra* note 10, at 159. And recently a committee of the NLRB Task Force dealing with representation proceedings decided to reserve for future consideration the question of "greater use of formal rulemaking by the Board." 94 LAB. REL. REP. (BNA) 66, 68 (Jan. 24, 1977).

53. 5 U.S.C. § 553 (1970).

54. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 61 L.R.R.M. 1217 (1966).

55. *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

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noticed, or resented, by those affected by them if the changes are buried in an adjudication rather than presented openly in a regulation. Those who toil in the Board's vineyards are too sophisticated for that.

That shifts in the substance of Board policy often follow shifts in the Board's political complexion is well known. Indeed such shifts may be desirable—so long as the policies remain within statutory bounds—if the administration of federal labor law is to reflect in some degree the prevailing political climate. It is far harder, I believe, to accept the idea that such political factors in themselves may justify a rule that purports to be based on assumptions that have been refuted by an empirical study. And if there are good reasons why that idea should not be accepted, there is no reason for the Board to shrink from a rulemaking proceeding.

What would be the advantages of a rulemaking proceeding in considering whether any changes in the Board's election policies should be made? A full answer would only rehearse points that are illustrated in the *Shopping Kart* case and that several commentators have already made.⁵⁶ I simply note here that there would be considerable value in subjecting a specific proposal to comment by all interested persons, in allowing free discussion of the authors' data and conclusions and their application to *all* relevant Board rules unimpeded by the confines of a particular case, and in being able to consider submissions without the restrictions of the rules of evidence applicable in a trial-type adjudicatory hearing.⁵⁷ Furthermore, if the Board itself had its own unit capable of assessing empirical data and of conducting research, as a persuasive recent article has suggested,⁵⁸ such a unit could make a valuable contribution to the rulemaking proceedings.

Whatever questions one may have about particular aspects of the study, or about its broader significance for the NLRB and for all policymaking agencies, it is too important to receive anything less than the fullest and fairest consideration. Its fate may well influence the extent to which scholars and their mentors will make commitments to similar projects in the future.

56. See, e.g., Bernstein, *supra* note 52; Peck, *supra* note 52; Shapiro, *supra* note 52.

57. Insofar as such submissions related to "legislative" rather than "adjudicative" facts, they would presumably not be subject to all these restrictions, though the issues in the case would still set the boundaries of relevance.

58. See Roomkin & Abrams, *supra* note 40. Interestingly, although the authors concede that a rulemaking format would be more appropriate for the consideration of such data, they conclude that "there is no reason to believe that the [proposed] unit's input cannot be tailored to fit" the Board's preference for adjudication. *Id.* at 1463 n.89. I disagree. Such submissions in the course of an adjudication are likely to distort the adjudicative process. See Shapiro, *supra* note 52, at 937-40.





ROBERT MAYNARD HUTCHINS
(c. 1925)