

# ***UNION REPRESENTATION ELECTIONS: LAW AND REALITY: THE AUTHORS RESPOND TO THE CRITICS***

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In *Union Representation Elections: Law and Reality* (hereinafter *Law and Reality* without cross-reference), we examined the desirability of continued National Labor Relations Board (NLRB) regulation of pre-election campaigning. Our central finding, based upon a study of thirty-one elections, and interviews with over 1000 employees, was that unlawful campaigning has no greater effect on employee voting behavior in a union representation election than does lawful campaigning. Hence, we recommended that the Board should no longer attempt to distinguish between lawful and unlawful campaigning; that the results of an election, once conducted, should be final; and that speech should be wholly free — that the Board should neither set aside elections nor find unfair labor practices based on oral or written communications by an employer or a union.

In place of Board regulation of pre-election campaigning, we suggested that each party be given the opportunity to respond to the campaigning of the other — a form of private regulation. Since the employer can presently hold meetings of employees on working time and premises, we recommended that the union be given a similar opportunity when the employer exercises this right. Finally, we recommended the use of quicker and more effective remedies than are presently available when an employer engages in retaliatory actions against union supporters, particularly during a union organizing campaign.

These recommendations, and the findings on which they were based, have met with a mixed reaction in the various forums in

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which they have been considered — the NLRB, state labor relations boards, the courts, Congress, and the academic journals. In this Article, we shall summarize and comment upon those responses, focusing primarily upon the responses of the Board and the academic critics.

The Board's response to our recommendations has been quite limited. In *Shopping Kart Market, Inc.*<sup>1</sup> a majority of the Board accepted one recommendation, holding over the dissent of Chairman John Fanning and Member Howard Jenkins, that, with few exceptions, it would no longer set aside elections on the basis of misleading campaign statements. Subsequently, however, one member of the *Shopping Kart* majority, Peter Walther, resigned. He was replaced by John Truesdale, who promptly joined Chairman Fanning and Member Jenkins in voting to overrule *Shopping Kart*.<sup>2</sup> None of our other recommendations has yet been addressed by the Board.

Our recommendation that elections not be set aside on the basis of misleading campaign statements has fared somewhat better at the state level. Thus, *Shopping Kart*, which accepted this recommendation, has been adopted by the Connecticut State Board of Labor Relations<sup>3</sup> and the Florida Public Employee Relations Commission,<sup>4</sup> but rejected by the District of Columbia Board of Labor Relations.<sup>5</sup> The Nebraska Court of Industrial Relations, while not formally endorsing *Shopping Kart*, held that a material misrepresentation would not constitute grounds for setting aside an election in the absence of evidence that the misrepresentation influenced the voters or had a substantial effect on the outcome of the election.<sup>6</sup> Since such evidence will rarely be forthcoming,<sup>7</sup> this amounts to a *de facto* adoption of the *Shopping Kart* approach.

The judicial response to *Law and Reality* has been limited. While some courts have noted that the book casts doubt upon the

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1. 228 N.L.R.B. 1311 (1977).

2. See *General Knit of Cal., Inc.*, 239 N.L.R.B. 619 (1978).

3. *City of New Haven*, Decision No. 1760 (Conn. State Bd. of Labor Relations June 1, 1979) (unpublished).

4. *Fort Lauderdale City Employees Benevolent Assn.*, 4 F.P.E.R.C. ¶ 4176 (1978).

5. *Metropolitan Police Dept.*, Decision No. 20 (D.C.B.L.R. 1978) (unpublished). The Florida Board's decision was made before *General Knit*, but was subsequently reaffirmed, in a decision which explicitly declined to follow that case. *Teamsters Local 991 v. Leon County Bd. of County Comms.*, 5 F.P.E.R.C. ¶ 10354 (1979). The Connecticut Board's decision was made after *General Knit*, but did not refer to it.

6. See *Nebraska Assn. of Pub. Employees v. Nebraska Dept. of Educ.* 102 L.R.R.M. 3063 (Neb. 1979).

7. See text following note 29 *infra*.

standards by which the Board regulates pre-election campaigning, they have viewed themselves as obliged to defer to the Board's presumed expertise. Thus, the Ninth Circuit stated:

It is tempting to us to seize upon the study and go farther than the Board did in *Shopping Kart*, holding that we will no longer sustain orders setting aside elections, or set aside orders sustaining them, in cases of threats as well as in cases of claimed misrepresentations in election campaigns. However, we resist the temptation because it is the Board, not the courts, that is presumed to be expert in this field.<sup>8</sup>

The Congressional response to our recommendations has been considerably more wide-ranging. *Law and Reality* was published while the Labor Law Reform Act of 1977 was being drafted, and the Act incorporated several of its recommendations, albeit in modified form.

Both the bill that passed the House,<sup>9</sup> and that which was reported out of the Senate Human Resources Committee,<sup>10</sup> contained provisions designed to lessen the Board's regulation of speech,<sup>11</sup> to increase its remedial powers,<sup>12</sup> and to provide Union access to company premises to respond to pre-election campaign speeches delivered by the employer on working time and premises.<sup>13</sup> To be sure, none of those provisions was as broad as our recommendations, and it would be fatuous to suggest that their inclusion was based solely, or even primarily, upon those recommendations. Still, the recommendations were considered,<sup>14</sup> the Labor Law Reform Act did move the law in the direction of those recommendations, and, at least in that respect, the successful filibuster in the Senate was unfortunate.<sup>15</sup>

The response to the study in the academic journals was extensive, particularly in light of its multidisciplinary nature, which could be seen as calling for reviewers capable of assessing not only the labor

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8. *Oshman's Sporting Goods, Inc. v. NLRB*, 586 F.2d 699, 702 (9th Cir. 1978). See *Peerless of America, Inc. v. NLRB*, 576 F.2d 119, 122 n.3 (7th Cir. 1978). For judicial comments on the results of our preliminary work (Getman, Goldberg & Herman, *The NLRB Voting Study: A Preliminary Report*, 1 J. LEG. STUD. 223 (1972)), see *Harlan No. 4 Coal Co. v. NLRB*, 490 F.2d 117, 123 n.5 (6th Cir. 1974); *Henderson Trumbull Supply Corp. v. NLRB*, 501 F.2d 1224, 1233 (2d Cir. 1974) (Feinberg, J., dissenting).

9. H.R. 8410, 95th Cong., 1st Sess. (1977).

10. S. 2467, 95th Cong., 2d Sess. (1978).

11. See § 9(c)(6)(D)(i).

12. See §§ 10(c)(2)-10(c)(3).

13. See § 6(b)(1)(A).

14. See Report of Committee on Education and Labor on H.R. 8410, H.R. Rep. No. 95-637, 95th Cong., 1st Sess. at 29, 24-35, 38-39 (1977); Report of Committee on Human Resources on S. 2467, S. Rep. No. 411-22, 95th Cong., 1st Sess. 11, 22, 23-24 (1977).

15. For a more extensive comment upon the political maneuvering that led to the defeat of the Labor Law Reform Act, and some possible consequences of that maneuvering, see Mills, *Flawed Victory in Labor Reform*, HARV. BUS. REV., May-June 1979, at 92-102.

law recommendations, but also the data collection methodology and the statistical analysis. One law review dealt with the multidisciplinary nature of the study by inviting a psychologist and a law teacher to write a joint review,<sup>16</sup> and another law review published separate reviews by a lawyer,<sup>17</sup> a professor of labor law,<sup>18</sup> a labor economist,<sup>19</sup> a professor of industrial relations,<sup>20</sup> and a labor reporter and editor.<sup>21</sup> Most legal journals, however, were content with a single review, normally written by a lawyer or labor law teacher.<sup>22</sup> Reviews by persons with a social science research background were published by a number of social science journals.<sup>23</sup> There were also a number of commentaries on the study, and on the Board's brief acceptance of one of its recommendations, in the popular press.<sup>24</sup>

A response to our critics requires a brief recapitulation of our findings and conclusions, to which we turn next. That will be followed by our responses, first to the Board, then to the academic critics.

## I. THE VOTING STUDY: A RECAPITULATION

The purpose of this study was to determine whether unlawful campaigning has a greater effect on voters than does lawful campaigning. For, if it does not, there is little value in the NLRB's

16. Goetz & Wike, Book Review, 25 KAN. L. REV. 375 (1977).

17. Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163 (1976).

18. Eames, *An Analysis of the Union Voting Study From a Trade-Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976).

19. Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195 (1976).

20. Kochan, *Legal Nonsense, Empirical Examination and Policy Evaluation*, 29 STAN. L. REV. 1115 (1977).

21. Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance*, 28 STAN. L. REV. 1175 (1976).

22. See, e.g., Carnes, Book Review, 31 ARK. L. REV. 165 (1977); Cravert, Book Review, 22 VILL. L. REV. 891 (1977); Lopatka, Book Review, 72 NW. U. L. REV. 420 (1978); Martin, Book Review, 32 U. MIAMI L. REV. 501 (1977); Modjeska, Book Review, 26 CATH. U. L. REV. 633 (1977); Peck, Book Review, 53 U. WASH. L. REV. 197 (1977); Roomkin, Book Review, 27 CASE W. RES. L. REV. 1056 (1977); Shapiro, *Why Do Voters Vote?*, 86 YALE L.J. 1532 (1977).

See also Ross, *Afterthoughts on the Short-Lived Experiment in Deregulation of Representation Elections*, 77 MICH. L. REV. 560 (1979); Goussetis, *Misrepresentations in Union Elections: The Death of Hollywood Ceramics*, 9 U. TOL. L. REV. 399 (1978); Sindelar, *Shopping Kart: The Need for a Broader Approach to the Problems of Campaign Regulation*, 56 N.C. L. REV. 389 (1978); Phelan, *The Demise of Hollywood Ceramics*, 46 U. CIN. L. REV. 450 (1977).

23. Krislov, Book Review, 3 INDUS. LAB. REL. REV. 111 (1977); Staudohar, Book Review, 30 PERSONNEL PSYCH. 485 (1977); Strauss, *Bridging the Gap Between Law and Psychology: A First But Difficult Step*, 22 CONTEMP. PSYCH. 833 (1977).

24. See Jacobs, *NLRB Licenses Lying*, *The Nation*, Sept. 3, 1977, at 176; Merry, *Labor Law and Union Organizing*, *Wall St. J.*, Apr. 19, 1978, at 24, col. 4; *Do Representation Elections Need the NLRB?*, *Bus. Week*, Mar. 21, 1977, at 54.

maintaining a regulatory system designed to separate lawful from unlawful campaigning. Consistent with that purpose, we sought to measure the impact of campaigning that is unlawful under the present regulatory scheme.

Most unlawful campaigning consists of efforts by an employer to capitalize on its economic control over employees through threats and acts of reprisal, and promises and grants of benefit. Accordingly, the study was designed primarily to test for the effects of that type of unlawful campaigning. The Board does not, however, limit its campaign regulation to those tactics; it also bars, as "objectionable" under section 9, if not an unfair labor practice under section 8, any campaign practice that it believes will tend to interfere with a reasoned choice, such as a misrepresentation of fact or law,<sup>25</sup> an irrelevant and inflammatory appeal to racial prejudice,<sup>26</sup> or a last-minute campaign speech.<sup>27</sup> These practices are barred because the Board assumes that employees pay close attention to the contents of campaign propaganda, and, wholly apart from any element of coercion, are easily manipulated by such propaganda.<sup>28</sup> Another purpose of the study, then, was to determine the extent to which employees do attend closely to the contents of campaign propaganda, and the extent to which they are influenced by that propaganda.

Because we were interested in determining the effect of unlawful campaigning, we studied those elections in which we predicted that such campaigning might occur.<sup>29</sup> Our prediction of the likelihood of unlawful campaigning was reasonably accurate. Of the thirty-one elections studied, the employer committed unfair labor practices in twenty-two, nine of which were serious enough to warrant a bargaining order.

In each election chosen for study, a sample of employees was interviewed as soon as possible after the direction of election or con-

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25. See *General Knit of Cal., Inc.*, 239 N.L.R.B. 619 (1978).

26. See *Sewell Mfg. Co.*, 138 N.L.R.B. 66 (1962).

27. See *Peerless Plywood Co.*, 109 N.L.R.B. 427 (1953).

28. See *Law and Reality* at 2-4. "The Board has said that in election proceedings it seeks '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.' Where for any reason the standard falls too low the Board will set aside the election and direct a new one." *Sewell Mfg. Co.*, 138 N.L.R.B. 66, 69-70 (1962).

29. This prediction was based upon the following criteria: (1) the strength of the employer's opposition to unionization; (2) whether the law firm representing the employer had a reputation for representing employers who campaigned strongly and sometimes unlawfully; (3) whether the employer had engaged in unlawful practices in prior elections; (4) whether the employer appeared willing to abide by counsel's advice in conducting the campaign; (5) the views of employer and union representatives as to the likely nature of the campaign.

sent election agreement. In this interview, employees were asked a number of questions, including how they intended to vote. A second interview with the same employees was held immediately after the election. At this interview, employees were asked a number of questions about the content of the campaign. They were also asked how they had voted. After interviewing the employees, we interviewed those representatives of the employer and the union who had been in charge of the election campaign. The primary purpose of this interview was to determine the content of the campaign.

As a result of these interviews, we knew what had taken place in the campaign. We knew what parts of the campaign had made an impression on employees, and what parts had not — what they remembered of the campaign, and what they did not. Finally, we knew which employees voted as they had intended prior to the campaign, and which had not. Thus, we were in a position to study the relationship between voter intent, different types of campaigning, and actual vote.

Our findings, summarized briefly, were these: Most employees, as a result of their views about working conditions and their attitudes toward unions, form an early and stable voting intention. Ninety percent of the employees we interviewed had a firm intent to vote for or against union representation at the time the election was directed, and only six percent were undecided. Of those who had a firm intent, eighty-seven percent voted in accordance with that intent, despite vigorous, frequently unlawful campaigning in nearly every election. For the great majority of employees, then, the effect of the campaign, if any, must be to cause them to vote consistent with their original intent.

There was no evidence that unlawful threats and acts of reprisal (hereinafter reprisals), or promises and grants of benefit (hereinafter benefits) had a greater effect on vote than did lawful campaigning. While the union tended to lose support between the time the election was directed and the time it was held, that loss was not significantly greater when the employer's campaigning contained unlawful benefits or reprisals than when it did not. Furthermore, those potential union supporters who did switch and vote against the union were not significantly more likely to report unlawful benefits or reprisals than were those who voted for the union.

Our explanation for the apparent lack of differential impact between lawful and unlawful campaigning is two-fold. First, employees do not draw the same distinctions between lawful and unlawful campaigning that the Board does. Employees reported unlawful

benefits and reprisals in all elections, and the frequency of such reports was not related to a Board finding that such conduct had occurred. Second, those employees who were initial union supporters appear to have been prepared for, and to have discounted, the employer's recourse to his economic power over them. Threats and acts of reprisal simply confirmed their belief in the necessity of union protection; promises and grants of benefit were regarded as untrustworthy or inadequate.

Because there were some elections in which the employer utilized unlawful benefits and reprisals, and others in which it did not, we have direct evidence of the lack of differential impact of this type of unlawful campaigning compared to that of lawful campaigning. And, since unlawful benefits and reprisals had no greater effect on voting than did lawful campaigning, we concluded that there is no justification for Board regulation designed to separate the lawful from the unlawful.

The evidence as to the effect of objectionable, albeit not unfair labor practice, campaigning is less direct. There were no elections in which either party used racial campaigning, made last-minute speeches, or engaged in any of the other campaign practices proscribed under the "laboratory conditions" concept of *General Shoe*. Nor was it practicable to examine the campaigns for misrepresentations of the type proscribed by *Hollywood Ceramics* and *General Knit*. In brief, then, we could not compare elections in which there was a violation of "laboratory conditions" short of a section 8(a)(1) violation with those in which there was no violation of "laboratory conditions," and conclude, on the basis of such a comparison, that currently objectionable campaigning has no greater impact than that campaigning that is not objectionable.

Nonetheless, we conclude that currently objectionable campaigning is so unlikely to have a greater impact than unobjectionable campaigning that retaining the existing regulatory scheme for the sole purpose of ferreting out objectionable campaigning is unwarranted. This conclusion rests on the following analysis: The view that campaigning other than unlawful benefits and reprisals may interfere with free choice is based on the assumption that employee choice is fragile, and easily altered by campaign propaganda, contrary to the employee's true wishes. This view also rests, particularly to the extent that misrepresentations of fact or law are regulated, on the assumption that employees pay careful attention to the contents of campaign propaganda. If they do not, they would be unaffected

by misrepresentations, and there would be little point in barring such misrepresentations.

Neither of these assumptions is supported by the data. Employee choice, as has already been pointed out, is made early in the campaign, is firmly rooted in pre-campaign attitudes, and is not altered by subsequent campaigning. Part of the reason for this lack of effect is that once employees have decided to vote for one party, they appear to reject, as unworthy of belief, the campaign propaganda of the other. If this disbelief is sufficiently powerful to cancel out unlawful benefits and reprisals, as it appears to be, there is every reason to suppose that it will also cancel out less intrusive elements of the campaign.

This conclusion is further buttressed by the evidence that employees do not pay careful attention to the contents of campaign propaganda. Only two to three issues per campaign were remembered at all,<sup>30</sup> and fewer than twenty-five percent of the employees could recall with any accuracy such a central issue as the amount of wages the union claimed to have obtained for employees it represented elsewhere.<sup>31</sup>

Finally, there was no evidence that those employees who switched from an undecided or union intent to a company vote were influenced by the content of the company campaign. There was evidence that those employees who switched in the other direction — from an undecided or company intent to a union vote — may have been influenced by the content of the union campaign, but the number of employees in this category was miniscule (forty-three employees switching to the union out of a total of 1057).

For all of these reasons, we concluded that the likelihood that the content of campaign propaganda substantially affects vote is so slim that its regulation cannot be justified, either on the ground that such propaganda will coerce employees into voting contrary to their free will, or that it will so confuse or mislead them that they will be unable to make a reasoned choice.

One further finding must be set out to understand fully our package of recommendations. While familiarity with the content of both company and union campaigns was low for most employees, there was a strong and significant relationship between attendance at meetings and campaign familiarity. Employees who attended company meetings were significantly more familiar with the company

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30. *Law and Reality* at 74-76.

31. *Id.* at 82.



campaign than were employees who did not; employees who attended union meetings were significantly more familiar with the union campaign than were employees who did not. However, a far higher proportion (83%) of employees attended company meetings than union meetings (36%). Furthermore, most of those employees attending union meetings were already union supporters, while company meetings were attended by the undecided and union supporters as well as by company supporters. The union, then, was at a disadvantage in communicating with the undecided and those not already committed to it. There was, moreover, evidence that attendance at union meetings was associated with switching from an undecided intent, or even a company intent, to a union vote. This switch was associated with increased familiarity with the content of the union campaign.<sup>32</sup>

In order to assure the union an equal opportunity to present its views to the voters — particularly the undecided and those initially planning to vote against union representation — we recommended that whenever an employer holds campaign meetings on working time and premises, that employer should be required to allow the union to hold such meetings on working time and premises. We also noted:

An opportunity for unions to respond on company premises to anti-union campaigning on those premises is particularly important if the Board, as we recommend, is to cease regulating speech. [The absence of] [c]ampaign regulation in political elections is based on the assumption that each party will be able to point out to the voters those aspects of the other party's campaign it believes to be untruthful or unfair. Unions will have that ability only if they have the opportunity to campaign on equal terms with the employer on company premises.<sup>33</sup>

Finally, we recommended that the existing scheme of Board regulation be altered to provide stronger sanctions against retaliation for union activity, and to deter employers from engaging in those practices that may discourage many employees from ever giving serious consideration to exercising their section 7 right to organize.

Thus, we suggested that the Board impose on employers the burden of proving the absence of discriminatory motive for any discharge during a union organizing campaign, that the Board institute immediate injunctive proceedings to obtain reinstatement of any em-

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32. The Court of Appeals for the District of Columbia Circuit recently relied upon this finding in sustaining the Board's authority, in appropriate circumstances, to grant a union broad rights of access to company premises. See *United Steelworkers v. NLRB*, 106 L.R.R.M. 2573, 2579 (D.C. Cir. 1981).

33. *Law and Reality* at 157.

ployee discharged during this period, and that any employee discriminatorily discharged be reinstated with treble back pay. We suggested that the bargaining order, if retained, be triggered automatically by the conduct it is intended to deter, without the necessity of a Board finding that that conduct has made a fair election unlikely or impossible. We also suggested that persistent violators of the Act might be declared ineligible for government contracts.<sup>34</sup>

While each of these recommendations is capable of being evaluated and implemented independently of the others, they are best viewed as an integrated package, capable of being substituted, in toto, for the existing regulatory scheme. In place of direct government regulation of speech, which is based on invalid assumptions and results in extensive litigation, we proposed that: (1) speech be wholly free of government regulation; (2) unions be given the opportunity, through equal access to employees, to respond in their own fashion to employer speech; and (3) meaningful sanctions be imposed to deter the coercive use of employer economic power.

## II. THE LABOR BOARD'S RESPONSE TO *LAW AND REALITY*

Harvard University President Derek C. Bok, in his foreword to *Law and Reality*, speculated on the Board's response to the study. He stated:

[O]ne must recognize at the outset that the Board is singularly ill-equipped to evaluate the study. Neither the members of the Board nor its staff are social scientists, and the research unit established in the early years of the NLRB was long ago dismantled by Congress as a result of repeated charges that it was infested by persons of Communist persuasion. . . . [T]he present study must be received by a Board that is poorly prepared to evaluate its findings and ill-disposed at this late date to accept a body of conclusions that calls in question a whole multitude of rules that have been in force for many years.<sup>35</sup>

Unfortunately, President Bok's fears were well founded. We had hoped that by collecting and reporting data on how employees actually respond to employer and union campaigning we would succeed in raising the level of the debate about campaign regulation from the trading of unverified assumptions and rhetoric to a serious search for a rational regulatory scheme. At least, we had hoped to stimulate

34. These particular suggestions for strengthening the Board's power to remedy and deter coercive conduct were not intended to preclude other remedies that would accomplish that goal. Thus, we also favor the proposals in the Senate and House versions of the Labor Law Reform Act to make employees whole for losses sustained by them as a result of an employer's unlawful refusal to bargain. See H.R. 8410, 95th Cong., 1st Sess. § 8(3) (1977); S. 2467, 95th Cong., 1st Sess., § 8(3)(a) (1978).

35. *Law and Reality* at xii.

the collection of still further data on which a rational regulatory scheme could be based. Neither of these hopes has been fulfilled. Board members continue to parade their assumptions as fact, and no effort has been made by the Board to collect any additional data that would shed light on the validity of those assumptions.

A majority of the board did, as has been noted, refer to the study in *Shopping Kart*, but, wholly apart from the prompt overruling of *Shopping Kart*, the Board's treatment of the study in that case did little to improve the quality of the debate. As Professor Shapiro pointed out:

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. . . . 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.<sup>36</sup>

Furthermore, both *Shopping Kart* and its successor, *General Knit*, dealt with only one of the study's recommendations, rather than examining the recommendations as an integrated whole. Finally, in neither case did the Board make an effort, in view of its own lack of social science expertise, to subject the study to a broader range of criticism, either by utilizing its rule making powers, or by calling for *amicus* briefs from interested groups. Instead, the study was debated by the Board within the confines of its normal adjudicatory approach.

The result of the Board's lack of social science expertise, its failure to seek the assistance of experts, and the obvious hostility of some Board members to a study that challenged the very foundation of a large part of their work, is that both its criticisms of the study and its approach to the misrepresentation issue are, on the whole, pedestrian. Initially, both the Fanning-Jenkins dissent in *Shopping Kart*, and their majority opinion (with Member Truesdale) in *General Knit* contain erroneous factual assertions about the study's methodology and findings. In *Shopping Kart*, they state that

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36. Shapiro, *supra* note 22, at 1543.

precampaign voting intent was determined after the election,<sup>37</sup> at which point it might have been affected by the election outcome; in fact, voting intent was determined before the election.<sup>38</sup> They state that five percent of the voters “appear to have admitted changing their minds due to the campaign”;<sup>39</sup> there were, in fact, no such admissions. Finally, they state, in *General Knit*, that “this study indicates [that] a substantial minority of employees are influenced by the campaign”;<sup>40</sup> there was no such indication.

Other portions of the Fanning-Jenkins-Truesdale opinions state the data correctly, but indicate that they did not understand the data. For example, they say in *General Knit* that Member John Penello erred because “he discounts the study’s recognition that the mere existence of an employer campaign may have influenced employees, on the grounds that the influence was not from any factual assertions. Yet how could the employer’s campaign have been free of factual assertions?”<sup>41</sup>

The answer to this question is clear, and was spelled out in *Law and Reality*. Of course, the employer’s campaign is not free of factual assertions. The point, however, is that while the employer’s *opposition* to unionization, as evidenced by its mounting a campaign against the union, may influence some employees to vote against union representation, there is no evidence that the *factual assertions* made by the employer during that campaign contribute to whatever influence the campaign may have.

The *General Knit* majority made another statement, also based on the data, which requires some unravelling to reveal its analytic flaw. They state, again taking issue with Member Penello, that:

He asserts that the study’s findings did not support a conclusion that 19 percent of the voters were affected by the campaign information, but rather that, at most, the 5 percent who ultimately voted for the union were affected. His position, in contrast to our view, gives little weight to the study’s observation that those who voted for the union had greater exposure to the union’s campaign information than did those who voted against the union — a finding which suggests that if the others had similar exposure, they, too, might have voted for the union.<sup>42</sup>

The Board majority apparently is referring to our finding that

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37. 228 N.L.R.B. at 1315.

38. *Law and Reality* at 33.

39. 228 N.L.R.B. at 1315-16.

40. 239 N.L.R.B. at 622.

41. 239 N.L.R.B. at 622 n.24.

42. 239 N.L.R.B. at 622 n.24.

among the undecided and those who intended to vote against union representation, those who attended union meetings were more likely to vote for the union than were those who did not attend such meetings. There was also a strong relationship between attending union meetings and familiarity with the union campaign. Hence, the majority appears to conclude, if more of the undecided and those planning to vote for the union had attended union meetings, they, too, might have acquired more familiarity with the union campaign and voted for the union. Since more of the undecided and those planning to vote against union representation might, on occasion, attend union meetings and so become familiar with the union campaign, the Board is justified in regulating that campaign.

The flaw in this analysis is that unions have been able to attract to their meetings only a small proportion (36%) of the undecided, and an even smaller proportion (16%) of those intending to vote against union representation.<sup>43</sup> Nor is there any reason to suppose that unions will be more successful in this respect in the future — at least not without the Board's assistance. The Board, however, has declined to compel employers to allow union meetings on the employer's premises during working hours, when more employees would attend. Under these circumstances, for the Board to justify regulation of the union campaign on the ground that more employees might attend union meetings, and so acquire meaningful exposure to the union campaign, is the nicest form of *Catch 22* reasoning.

The failure of the study to alter the Board's approach to questions of employee behavior is also evident in the Board's repetition of the same type of rhetoric that triggered the study. Thus, Fanning and Jenkins state in *Shopping Kart* that "the ballot can be directly and significantly affected by the campaign propaganda of the employer and the union."<sup>44</sup> No factual basis is provided for this assertion, other than the following statement from *General Knit*:

The results of forty-three years of conducting elections, investigating objections, and holding hearings at which employees testify concerning their recollection of campaign tactics convince us that employees are influenced by certain union and employer campaign statements.<sup>45</sup>

One might respond to this statement by pointing out that: (1) Board members do not normally conduct elections, investigate objections, or hold hearings at which employees testify; (2) the Board's regional personnel do perform those functions, but they were not in-

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43. *Law and Reality* at 104-06.

44. 228 N.L.R.B. at 1317.

45. 239 N.L.R.B. at 622.

volved in the overruling of *Shopping Kart*; and (3) although it is difficult to understand how the regional office personnel who do perform these functions can be convinced of the effect of particular campaign statements on employee choice, even if they can, the only current Board member with regional office experience, John Penello, voted *against* overruling *Shopping Kart*. Perhaps a more satisfactory and surely a more literate response to the Board's approach was that of Professor Kochan, who wrote: "[I]n a 1935 essay on 'The Nature of Legal Nonsense' Felix Cohen . . . drew an analogy between this approach and the notion of the Bellman in Lewis Carroll's *The Hunting of the Snark*, stating that courts and administrative agencies seem to operate on the theory that if they cite some argument or principle often enough it must be true."<sup>46</sup>

The Board also set out some new assumptions in *Shopping Kart* and *General Knit*, assumptions no less intriguing for their substance than for their novelty. Fanning and Jenkins state in *Shopping Kart* that the lack of objections in ninety-five percent of Board elections shows that the Board's rules regarding campaigning are nearly always followed.<sup>47</sup> A failure to object, however, can be attributed to a host of factors other than the absence of objectionable conduct. There may be no objections because it was the loser, not the winner, who violated the Board's rules, in which event there would be no point in filing objections. Even if the winner violated the rules, the loser may not know of the objectionable conduct, or may not know that the Board would regard it as objectionable. Finally, the loser may believe that the margin by which it lost was too great to expect victory in a re-run election. In each of these situations no objections would have been filed, but one could not say, as the Board did, that its rules deterred the conduct it regards as objectionable.

Not as demonstrably wrong, but perhaps more startling, is the Fanning-Jenkins assertion in *Shopping Kart* that:

We think it can fairly be said that the high degree of voter participation in our elections is encouraged by the longstanding policy that *Hollywood Ceramics* represents and, indeed, that voters in political

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46. Kochan, *supra* note 20, at 1115 (footnotes omitted). Lewis Carroll has written:

"Just the place for a Snark," the bellman cried,  
As he landed his crew with care;  
Supporting each man on the top of the tide  
By a finger entwined in his hair.  
"Just the place for a Snark." I have said it twice:  
That alone should encourage the crew.  
"Just the place for a Snark." I have said it thrice:  
What I tell you three times is true.

L. CARROLL, *The Hunting of the Snark*, in COMPLETE WORKS 680 (1939).

47. 228 N.L.R.B. at 1316.

elections may refrain from voting to the extent they do partly because they are reluctant or unable to rely on the representations made where there is no satisfactory method of review of campaign conduct. The very fact of high voter participation in Board elections counsels the continuance of Board effort in the area of informed free will voting.<sup>48</sup>

The Board's view that the higher rate of voter participation in NLRB elections than in political elections is due, even in part, to the absence of governmental regulation of campaign propaganda in political elections is supported by neither political theory nor empirical evidence. A more likely explanation for the higher voting rate in Board elections than in political elections is, quite simply, the greater ease in getting to the polls in Board elections, which are nearly always held on company premises during working hours with paid time off to vote.<sup>49</sup>

Finally, the Board states in *General Knit* that:

Even if this particular study were clearly supportive of all of the authors' conclusions, however, we would still not find it an adequate ground for rejecting a rule which had been well established for 15 years. While we welcome research from the behavioral sciences, 1 study of only 31 elections in 1 area of the country — although it may provide food for thought — is simply not sufficient to disprove the assumptions upon which the Board has regulated election conduct, especially since, in our experience, statements made b[y] either side can significantly affect voter preference.<sup>50</sup>

If our study has given the Board food for thought, there is no evidence of digestion. Not only has the Board ignored the study in subsequent opinions, but it continues to apply, without debate or a hint of self-doubt, the very assumptions challenged by the study.<sup>51</sup> Surely, the study merits more recognition than is implied by the Board's current effort to pretend that it does not exist. Despite the Board's pious assertion that it welcomes research from the behavioral sciences, its approach neither encourages others to engage in such research, nor takes advantage of whatever insights may be suggested by this research.

Equally disturbing is the reluctance of some Board members to utilize our study simply because they find its conclusions inconsistent with their view that some speech should be unlawful. Thus, the dis-

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48. 228 N.L.R.B. at 1317.

49. Perhaps even more significant than the unlikely nature of this assumption is the evidence it provides of the Board's tendency to support its regulation by relying, in the total absence of empirical support, on the most extraordinary behavioral assumptions.

50. 239 N.L.R.B. at 622.

51. See *Wilker Bros.*, 236 N.L.R.B. 1371, 98 L.R.R.M. 1456 (1978); *Durango Boot*, 247 N.L.R.B. No. 46, 103 L.R.R.M. 1171 (Jan. 3, 1980); *Louis Gallet, Inc.*, 247 N.L.R.B. No. 13, 103 L.R.R.M. 1125 (Jan. 3, 1980).

senters in *Shopping Kart* attacked the majority's reliance on our findings in part because, regardless of the validity of the findings, their acceptance would logically lead to a more extensive de-regulation of speech.<sup>52</sup> Similarly, Member Truesdale, explaining his vote in *General Knit*, stated that he was "disturbed . . . by the direction in which Board decisions would go if the Board were to rely completely on the conclusions the authors drew from their data."<sup>53</sup> In short, the study is to be ignored because to do otherwise would force the Board to confront the lack of any empirical foundation for its regulation of speech.

How *should* the Board deal with this study? One approach, suggested by several reviewers, would be to conduct a rulemaking proceeding to reconsider the Board's election policies in toto, as well as the relevance of the study to those policies. Such a proceeding would be open to all interested persons, so that the Board could benefit by the comments of social scientists, lawyers, and legal scholars on the study's methodology, findings, and recommendations. This discussion need not be addressed to the facts of any particular case, and would not be limited by the rules of evidence applicable to a judicial proceeding.<sup>54</sup> Furthermore, as a perceptive student commentator noted:

A rulemaking approach would also have enabled the Board to consider each facet of its election controls within the context of a comprehensive and complementary regulatory scheme. Comprehensive policy examination of this nature is impelled by the Getman study and by the fact that the Board's regulation of other campaign practices has produced many of the same problems as its now-discarded controls over misrepresentations. Moreover, the Board's policies in various areas of campaign regulation are intimately connected and therefore should be considered together. For example, the policy of providing unions limited access to employer premises serves a goal similar to that of the Board's regulation of campaign misconduct: both policies have as their overriding purpose the effectuation of a free and informed voter choice. Abandonment of controls over misrepresentations might have been more justifiable had the Board concurrently taken positive action to provide unions with equal access to employer premises — a step supported both by considerations of fairness and by the desirability of maximizing the opportunity to rebut misinformation. Significantly, in *Shopping Kart* the Board ignored the fact that the Getman study's recommendations with regard to deregulation were made in the context of other proposals advocating equal access to company premises and

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52. 228 N.L.R.B. at 1318.

53. Truesdale, *From General Shoe to General Knit*, 30 LAB. L.J. 67, 74 (1979).

54. Shapiro, *supra* note 22, at 1545. See Peck, *supra* note 22, at 198, 213.



stronger remedies for other types of campaign misconduct.<sup>55</sup>

Since the Board viewed the study as too limited in scope to be relied upon (“one study of only 31 elections in one area of the country . . . is simply not sufficient”), it should take steps to increase the data available to it. One way in which this might be accomplished would be through the creation of an empirical research unit within the Board.<sup>56</sup> Alternatively, the Board could commission studies by independent researchers — if necessary, requesting additional funding from Congress to carry out such studies. The Board could also support the efforts of qualified researchers to obtain funding from other agencies, public and private, to support research that would be useful to the Board in resolving important policy questions.

The Board should carefully evaluate all studies that supplement the limited body of data bearing on the behavioral assumptions that underlie its regulations. Behavioral evidence is not inherently more compelling than the testimonial or documentary evidence that the Board is accustomed to dealing with, but neither is it inherently less compelling. Just as the Board carefully evaluates the latter evidence, so should it carefully evaluate the former.<sup>57</sup>

### III. THE ACADEMIC CRITICS’ RESPONSES TO *LAW AND REALITY*

The academic critics, in contrast to the Board, have treated this research seriously. While there were comments on nearly every aspect of the research, the most frequent criticism was that the study’s findings were the product of a flawed sample of elections. If, it was suggested, we had used different criteria for selecting elections to study, we might have found campaigning in general, or particular types of campaigning, to have had a greater impact.<sup>58</sup>

The broadest version of this criticism was that there were so few elections in which vigorous campaigning did not take place that we were unable to determine whether campaigning per se had an effect on vote.<sup>59</sup> This criticism is based on a misunderstanding of the study’s purpose. It was not our purpose to determine whether campaigning per se has an effect on vote, and one cannot conclude

55. Note, 56 N.C. L. REV. 289, 405-06 (1978) (footnotes omitted).

56. See Roomkin & Abrams, *Using Behavioral Evidence in NLRB Regulation: A Proposal*, 90 HARV. L. REV. 1441, 1459 (1977).

57. The Board would be greatly assisted in carrying out this task by the creation of the type of empirical research unit proposed by Professors Roomkin and Abrams. *Id.*

58. See Eames, *supra* note 18, at 1182; Kochan, *supra* note 20, at 1119-20; Peck, *supra* note 22, at 206-08; Shapiro, *supra* note 22, at 1535-36, 1538.

59. See Shapiro, *supra* note 22, at 1535-36, 1538.

from the data we collected that it does not. What one can conclude, however, is that the content of the campaign — what the parties say and do — does not have a significant effect on vote. It is, of course, the content of the campaign that the Board regulates, not its existence. The Board does not decide whether a party may campaign, but what it may lawfully say and do in the course of that campaign. And, because we can find no evidence that unlawful campaigning has a significantly greater impact on voting than does lawful campaigning, we conclude that there is little value in the Board's efforts to distinguish between the two.

Another criticism of the sampling of elections was set out by Professor Eames. She stated:

My threshold problem is that I believe that the authors have made a fundamental error in performing a study exclusively of "hotly-contested" cases "with a high potential for illegal behavior." If one wants to study the impact of coercion, of unfair labor practices, on the process of employee choice, it is absolutely essential to have a control group of employees who are *not* subjected to coercion and unfair labor practices.<sup>60</sup>

This statement is somewhat confusing because it suggests that Professor Eames believes that all the elections we studied were characterized by "coercion and unfair labor practices," *i.e.*, unlawful campaigning. In fact, there was a control group of elections in which no illegal campaigning took place, and Professor Eames recognizes this. The gravamen of her criticism is that in all elections the employer made statements that were perceived by some employees as constituting unlawful threats or promises, even though the Board, under current law, would not find those statements to be unlawful. She characterizes the employees in those elections as "subject to coercion," and concludes that the study provides no data indicating how employees would act in the absence of such "coercion." To answer that question, she calls for a different study — one with a control group of elections in which no employee will perceive the employer's conduct as containing unlawful threats or promises.

It is doubtful whether the study that Professor Eames proposes could be carried out. The data indicate that some employees will perceive unlawful threats or promises whenever the employer makes predictions about the future of the enterprise with or without a union. Since it is difficult to imagine a campaign in which the employer makes no such predictions, it may be impossible to find elec-

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60. Eames, *supra* note 18, at 1182.

tions in which the employer does not behave “coercively” in the sense in which Professor Eames uses that term.

Let us assume, however, that one could carry out the study that Professor Eames proposes, and that one were to find, as she obviously anticipates, that whenever an employer makes statements that could be interpreted as unlawful threats or promises, some employees who would or might otherwise vote for union representation will switch to a vote against the union.<sup>61</sup> What would be the implications of such a finding? If any employer statement that predicts a bright future in the absence of a union, or a grim future with a union, “coerces” employees into voting against union representation, and if one views “coercion” of this type to be undesirable, there would appear two possible alternatives. The first alternative would be to forbid the employer from making any statement, however phrased, that casts doubt on the value of unionization. The second alternative would be to minimize the opportunity for such statements by providing for certification on the basis of union authorization cards. For, if a union with a majority of authorization cards were entitled to certification, many unions would organize secretly, in the hope that the employer would be unaware of their organizing efforts and unlikely to discuss the value of unionization while these efforts were taking place.

Neither of these alternatives is satisfactory. The first — an official ban on employer speech critical of unionization — has been held unconstitutional.<sup>62</sup> The second — union certification on the basis of a card majority — might, as a practical matter, prevent the employer from being heard, and so would be contrary to the value that each party should have a reasonable opportunity to present its case to the voters. An employer is unlikely to accept the election process as legitimate, and its outcome as a valid representation of employee choice, if it has not had an opportunity to communicate the management position to the employees. The policy of encouraging peaceful acceptance of the results of Board elections thus counsels against denying the employer this opportunity.

Denial of this opportunity to the employer would also be contrary to the employee interest in freedom of choice. Not many of the employees may be influenced by the specific content of the employer’s campaign, but the campaign may have some effect. The employer campaign may affect choice by activating or reinforcing

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61. Professor Eames believes that our data support precisely this finding. *Id.* at 1191. We disagree. See text at notes 29-31 *supra*.

62. *NLRB v. Virginia Elec. & Power Co.*, 314 U.S. 469 (1941).

existing attitudes toward working conditions or toward unions. It also may demonstrate that the employer is aware of the dissatisfaction that led to the union organizing drive. Thus, the employer's campaign may promote a more considered, if not more informed, choice. This possibility supports the conclusion that the employer ought not be denied a reasonable opportunity to communicate with employees after the union organizing drive has resulted in a card majority.

In sum, we disagree with the assertion that we should have attempted to study the effect of "coercive" versus "non-coercive" campaigns, rather than the effect of "lawful" versus "unlawful" campaigns. The former study may not be feasible, and could not yield useful data; the latter is feasible, and provides a data base for determining whether unlawful campaigns have a greater effect on vote than lawful campaigns. For, if they do not (as our data show), there is little value to devoting time and money to the task of attempting to distinguish lawful from unlawful campaigning.

Another criticism of our sampling procedure was that:

The indicators which the authors used to identify companies as likely to engage in vigorous campaigning<sup>63</sup> were probably also known to the employees of those companies, who were thereby sensitized to problems of unionization. The "card signing drive" necessarily involved a substantial amount of personal contact (which the authors found to be a particularly effective campaign tactic for both sides). This could have shaped and rigidified the pro-union attitudes of the employees with a result that later overt and public campaigning had little effect on the predispositions existing at the time of the Wave I interviews. Those employees who had been intimidated or coerced by the known hostility of the employer might already have succumbed to that pressure, resolving the problem of the cognitive dissonance between their view of themselves as persons of integrity and independence and their fear of employer reprisals by concluding that they were in basic and fundamental agreement with the employer. For these employees, the subsequent pre-election campaign accordingly would be of little importance. Those persons who successfully resisted the employer's pressure remained true to their convictions, and the campaigning would likewise be of little significance.

This analysis suggests that the study might be valid only for employers whose prior conduct suggests the likelihood of vigorous and possibly unlawful campaigning.<sup>64</sup>

This criticism assumes that pre-campaign indications by the employer that it will engage in vigorous and possibly unlawful

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63. See note 29 *supra* (footnote added).

64. Peck, *supra* note 22, at 207-08.

campaigning may be necessary to create powerful attitudes for or against union representation, and to weed out, prior to the commencement of actual campaigning, those employees who fear the employer's use of its economic power. We think that this assumption is invalid, and that the existence of strong attitudes toward unionization, as well as the pre-campaign weeding out of employees susceptible to coercion, are general phenomena that are not limited to the employees of those employers whose prior conduct suggests the likelihood of vigorous, possibly unlawful campaigning.

Well-developed attitudes toward unionization exist before any union organizing effort occurs, and before any indications of the employer's likely response to such an effort. In a recent nationwide study, ninety-five percent of the employees in nonunion firms that were *not* the current object of a union organizing effort had an opinion about whether they would vote for or against union representation if a representation election were held in their firm.<sup>65</sup> Since such opinions are a function of employee attitudes toward working conditions and their views of unions in general, and since those attitudes develop over an employee's entire working career, it is likely that they are generally strong, and not easily susceptible to change regardless of whether or not vigorous campaigning is anticipated.

Furthermore, the card signing drive — which preceded the first wave of interviews in the elections we studied, and which Professor Peck suggests could have played a role in shaping and rigidifying employee attitudes — precedes every election, not merely those in which vigorous and possibly unlawful campaigning is anticipated. In this respect, too, there is no reason to suppose that the existence of well-developed attitudes is limited to those elections in which a vigorous, possibly unlawful, campaign is anticipated.

Nor is there any reason to suppose that employees are not generally aware that their employer may be opposed to unionization and may use, or threaten to use, economic force to discourage unionization. It is common knowledge that many employers are opposed to unionization, and that some employers have resorted to economic force to prevent unionization.<sup>66</sup> Hence, the employees of any em-

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65. Kochan, *How American Workers View Labor Unions*, 102 MONTHLY LAB. REV., Apr. 1979, at 23, 25. Of the 1038 respondents employed in nonunion firms, 28.4 percent (295) indicated they would vote for unionization, 66.2 percent (688) indicated they would vote against unionization, and 5.3 percent did not know how they would vote. (Personal communication from Thomas A. Kochan to Stephen B. Goldberg, Nov. 4, 1980).

66. See T. KOCHAN, COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS 182-83 (1980) (“[T]he dominant policy of U.S. employers has historically and currently been strongly to oppose efforts to unionize a heretofore unorganized company or work force.”).

ployer have reason to suspect that their employer, too, will be opposed to unionization. To be sure that employees believe that their employer may be opposed to unionization does not necessarily mean that they anticipate the possible use, or threatened use, of economic power. A capable union organizer will, however, mention this possibility so that employees can develop psychological defenses that prevent an apparent union majority from crumbling in the face of the employer's economic threats. Indeed, in two thirds of the union campaigns we studied, the union warned employees that the employer would seek to persuade or frighten employees into voting against the union. In sum, the combination of what employees may reasonably anticipate based on common knowledge of how many employers respond to unionization, and what the union may warn them of, makes it unlikely that the faint of heart are not weeded out of the ranks of potential union supporters in advance of the employer's anti-union campaign, regardless of whether the employer's pre-campaign conduct suggests the likelihood of vigorous and possibly unlawful campaigning.<sup>67</sup>

Another general area of reviewer comments focused on our findings that some voters did change their minds during the campaign, that those changes tended to be in the direction of the company (a substantial majority of the undecided and the switchers voted against union representation), and that the number of switchers was substantially greater in some elections than in others. Thus, the average loss in union support from card sign to vote was four percent; but in the five most successful company campaigns the average loss was thirty-five percent.<sup>68</sup> Furthermore, the votes of the undecided and the switchers were necessary for victory in nine of thirty-one elections.

We concluded that neither the fact of change in the direction of the company, nor the rate of that change, was related to the use of unlawful campaign tactics, but we could go no further. We could find no characteristics that distinguished the more successful campaigns from the less successful. Nor, except for those few employees who switched to a union vote, could we find an explanation for switching.

Our inability to document the factors that cause voters to switch, particularly to the company, created a substantial intellectual vac-

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67. Professor Peck concedes that "[i]f employees generally anticipate hostility and use of economic force, the study is valid despite its use of elections in which such conduct was predictable." Peck, *supra* note 22, at 20.

68. *Law and Reality* at 100.

uum — and book reviewers abhor a vacuum. *Something* must take place that causes voters to switch more often in some elections than others, and the critics were eager to speculate as to what that something might be. Former NLRB Chairman Edward Miller suggested that the answer might lie in the subtle pressure exerted by employees' knowledge of the views of a "really good supervisor" or a "well-liked employee."<sup>69</sup> Professor Flanagan focused on the firmness with which initial voting intentions are held,<sup>70</sup> and Professor Eames stated that the data suggested, contrary to our conclusion, that the key to vote switching was the employer's use of coercion and unfair labor practices.<sup>71</sup>

As far as the speculations of former Chairman Miller and Professor Flanagan are concerned, we have little to say. The firmness with which initial voting intentions are held may well be crucial, and for those voters whose initial intent is not firm, the subtle influence exerted by a respected supervisor or fellow employee may be decisive. But the data were not collected with the intention of determining whether either of these factors explained vote, and they therefore fail to do so (except that they do show that whatever effect trusted supervisors or fellow employees had on vote, it was not to transmit campaign messages).<sup>72</sup> Nor was it relevant, for our purposes, whether these or other campaign tactics did affect vote — except to the extent those tactics are unlawful. Stated in another way, the fact that some campaign tactics have an effect on the voters does not, of itself, support Board regulation of the campaign. One must ask whether the particular effect falls within the Board's area of regulation. If it does not, the fact of its existence does not justify regulation based on the existence of some other assumed effect. Thus, the fact, if such it be, that the views of trusted supervisors or fellow employees affect vote would show that some campaign tactics affect vote, but it would hardly justify Board regulation of those currently unlawful tactics which do not affect vote.

Professor Eames's suggestion that the data show that unfair labor practices and coercion cause some potential union voters to vote against union representation requires a more detailed response. This suggestion is based on the following table:<sup>73</sup>

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69. Miller, *supra* note 17, at 1165-66.

70. Flanagan, *supra* note 19, at 1199-1200. See Ross, *supra* note 22, at 564-65.

71. Eames, *supra* note 18, at 1189.

72. *Law and Reality* at 128 n.28.

73. *Id.* at 115.

PROPORTION OF POTENTIAL UNION VOTERS WHO VOTED AGAINST  
UNION REPRESENTATION IN CLEAN, UNLAWFUL, AND  
BARGAINING ORDER ELECTIONS

Type of Potential Union Voter	Type of Campaign						F	P
	Clean Percent Voting Company	N	Unlawful Percent Voting Company	N	Bargaining Order Percent Voting Company	N		
Intent undecided	.60	15	.65	26	.79	19	.77	NS
Intent union	.07	284	.10	436	.09	224	.66	NS
Attitude predicted union vote	.08	291	.10	451	.09	238	.31	NS
Card-signer	.09	311	.16	487	.11	235	4.45	.01

According to Professor Eames:

Table 5-3 . . . shows that the percent of the “undecided” voters who voted company in the elections with the highest degree of violations was 79; in the elections with the middle degree of violations, the percent of the “undecideds” voting company was 65; in the elections with the fewest violations, the percent of the “undecideds” voting company was 60. I understand the authors to be saying that this variation — 79 percent to 65 percent to 60 percent — is not statistically significant. As a lay reader of statistics, I cannot challenge that observation. But a variation in this direction certainly does not support any conclusion that unfair labor practices/coercion will not have an impact on the crucial — that is, movable — voters, and indeed, suggests the opposite conclusion.<sup>74</sup>

Professor Eames errs to the extent that she suggests that the statistically nonsignificant tendency of the undecided voters to vote against union representation more often in unlawful elections than in clean elections, and more often in bargaining order elections than in unlawful elections, supports the conclusion that unfair labor practices affect vote. The reason that this trend is not significant is not because of some arcane law of statistics, unintelligible to the legal mind, and capable of being dismissed as unimportant. Rather, it is due to the important fact that the number of initially undecided voters was so small (a total of 60 out of a sample in excess of 1000) that the tendency observed by Professor Eames could be due to pure chance. The laws of statistics tell us no more than common sense would tell us — an apparent relationship between two factors that might well be due to chance ought not be relied upon.

Of course, if the trend that Professor Eames points out among

74. Eames, *supra* note 18, at 1188-89.



the initially undecided voters existed equally among other potential union voters, one might regard it as important, albeit not statistically significant. In fact, however, there was no general tendency for more potential union voters to vote company as the amount of unlawful campaigning by the employer increased. To be sure, the proportion of potential union voters voting company increases slightly (but not significantly, except for card-signers) as one moves from clean to unlawful elections, but it then decreases as one moves from unlawful elections to bargaining order elections. In no category of potential union voter was there a statistically significant difference between the proportion voting company in elections with all lawful campaigning and the proportion voting company in elections with unlawful campaigning.

Professor Eames's suggestion that unfair labor practices affect the crucial group of potential swing voters is further undercut by Table 5-4,<sup>75</sup> which shows that in every category of potential union voter, those who voted *for* union representation were more likely to have perceived unlawful campaigning than were those who voted against union representation. These data are consistent with those for the entire sample, which showed that union voters as a whole were more likely to perceive unlawful campaigning than were company voters, and that they were as likely to perceive it when the Board did not find it had occurred as when the Board did find that it had occurred.

The cumulative effect of these data points strongly to the conclusion that those employees who are contemplating a union vote are sensitive to intimations by the employer that it will use economic power to punish union supporters and reward union opponents. This sensitivity is no greater when the employer conveys this message in unlawful terms than when it does so in lawful terms, and causes no greater loss in union support in the former situation than in the latter. Hence, as we have previously suggested, there is little justification, at least in terms of protecting employee choice, for attempting to distinguish between lawful and unlawful campaigning.

In addition to the criticisms of our methodology and findings, there were criticisms of our recommendations for change in NLRB law and practice. Perhaps the most common of the latter criticisms was directed at the recommendations that campaign speech be freed of all legal regulation, and that election results not be set aside because of either speech or conduct. The critics made two related arguments. First, they observed that the campaigns we studied were

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75. *Law and Reality* at 121.

conducted under the existing regulatory scheme, and that the regulatory scheme may have deterred egregiously unlawful speech and conduct which, if engaged in, would have a substantial effect on employee choice. Second, it was argued that if our recommendations were followed, many employers would engage in precisely that egregiously unlawful conduct that would interfere with employee choice.<sup>76</sup>

Perhaps the central response to this line of argument is that we do not propose legalizing that conduct which uses the employer's economic power to coerce employees into voting against union representation. To be sure, we would deprive the Board of the power to set aside elections on the basis of coercive conduct, but this power is not, of itself, a substantial deterrent to employer coercion. The only penalty imposed on an employer as the result of a set aside order is that the Board conducts a re-run election. Since the union has a statutory opportunity for a second election within twelve months of the first, wholly without regard to a Board set aside order,<sup>77</sup> and since a determined employer can delay an election held pursuant to a set aside order for nearly that long,<sup>78</sup> the employer suffers little, if at all, from such a Board order. Hence, depriving the Board of the power to set aside elections on the basis of coercive employer conduct would not remove a substantial deterrent to employer coercion. Furthermore, we recommend that the Board be provided with additional remedial authority which would deter coercive conduct. If that recommendation is accepted, there is no reason to assume that the removal of authority to set aside elections because of coercive employer conduct would increase the frequency of such conduct.

Grants of benefit designed to encourage employees to vote

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76. Miller, *supra* note 17, at 1170-71; Shapiro, *supra* note 22, at 1540; Kochan, *supra* note 20, at 1121. *But see* Flanagan, *supra* note 19, at 1203-05; Lopatka, *supra* note 22, at 434.

77. National Labor Relations Act § 9(c)(3), 29 U.S.C. § 159(c)(3) (1976).

78. If the Regional Director sustains a union's objection to employer conduct allegedly affecting the outcome of the election, and directs a re-run election, the employer can normally appeal the Regional Director's decision to the Board. *See* Rules and Regulations of the NLRB, series 8, 29 C.F.R. § 102.67(b) (1980). Data are not available on the median or mean time between the original election and the Board's decision in such cases. (Conversation between Stephen B. Goldberg and Joseph Moore, Associate Executive Secretary, NLRB, Dec. 2, 1980). A tabulation of all election cases in the most recent volume of NLRB Reports shows, however, that in a similar type of case — that in which the employer appeals to the Board from a Regional Director's decision denying employer objections — the mean time from the conduct of the original election to the Board's decision was 8 months, 11 days. *See* Jamak, Inc., 239 N.L.R.B. 1274 (1979); Eastern Rock Prod., Inc., 239 N.L.R.B. 892 (1978); Eventide S., 239 N.L.R.B. 894 (1978); General Knit of Cal., Inc., 239 N.L.R.B. 619 (1978); Hickory Springs Mfg. Co., 239 N.L.R.B. 641 (1978); Maremont Corp., 239 N.L.R.B. 240 (1978); Newport News Shipbuilding & Dry Dock Co., 239 N.L.R.B. 82 (1978); The Standard Register Co., 239 N.L.R.B. 1066 (1978).

against union representation would not be unlawful under the regulatory scheme we propose, and it is likely that grants (and promises) of benefit would increase. As we stated, however,

We do not regard this as a cause for concern. While the Board characterizes a grant or promise of benefits by an employer as a form of "pressure and compulsion," we reject this characterization. An employee is free to choose union representation despite promises or grants of benefit by the employer. He may not lawfully be penalized for doing so. If, under these circumstances, an employee wishes to rely on the employer's promises or grants of benefit as a reason for rejecting union representation, his decision would appear wholly free.<sup>79</sup>

There were, interestingly, no critical comments on this aspect of the book. Either this particular heresy passed unnoticed in the greater heresies, or the labor relations community is intellectually prepared for the overruling of *Exchange Parts*.<sup>80</sup>

Returning to the greater heresy, we do propose the elimination of all legal restrictions on speech. Would that proposal, if adopted, lead to an increase in the frequency of overt threats of reprisal? There are a number of reasons, set out in *Law and Reality*, for thinking this would not occur. First, such statements could be used as evidence if the employer were charged with retaliating against employees for engaging in union activities. Since the penalties for engaging in retaliatory conduct are to be substantially increased under our proposal, most employers should be deterred from making statements that would provide clear evidence of retaliatory intent. Furthermore, some employers might fear the risk of a backlash from overt threats of reprisal. A final deterrent would be provided by the possibility of a union victory, and the harm such threats would do to a future bargaining relationship.

In sum, the reforms that we propose would not lead to an increase in *acts* of reprisal, and we think it unlikely that they would lead to an increase in *threats* of reprisal. They might lead to an increase in promises or grants of benefit, but neither of those are inconsistent with the free choice that the Act seeks to protect.

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79. *Law and Reality* at 160.

80. Former Chairman Miller did, to be sure, refer to the "raw and ugly power of threats and bribes" (Miller, *supra* note 17, at 1174 (emphasis supplied)), the latter being presumably a reference to promises and grants of benefit. Inasmuch, however, as a central purpose of the NLRA is to enable employees to improve their wages and working conditions, it is difficult to understand why an improvement in wages or working conditions constitutes a "bribe," rather than an attainment of the statutory goal. See Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 112-16 (1964); Bailey, *The Rule Against Employer Grants of Benefits During Union Organizing Campaigns: Outdated and Unnecessary* (unpublished third-year paper, Harvard Law School, 1980).

It has also been argued that even if currently unlawful campaigning does not interfere with employee free choice, and the deregulation of speech would not lead to an increased volume of threats or promises, both threats and promises should be unlawful on symbolic grounds. This point was perhaps best made (as so many were) by former Chairman Miller. He wrote:

I cannot recall who said that myths are the only real truths. The democratic mythology includes a belief that voters are rational, that they do concern themselves about issues they believe are important, and that they ought to be able to make their choices free of the raw and ugly power of threats and bribes. That credo may well survive a dozen studies like this one, which tend to show that many voters don't always take seriously all the issues which the campaigners put before them and that many voters have become resistant to unlawful pressures. And maybe — just maybe — a democracy which tolerates an expensive process to implement the mythology and which conscientiously tries to hold industrial elections to “laboratory standards” will be seen by historians as having been, after all, worthwhile.<sup>81</sup>

Apart from the somewhat inflated claim for even the symbolic value of NLRB campaign regulation, there is at least one fundamental problem with Mr. Miller's paean to the glories of that regulation — it doesn't work. The Board has no idea what speech or conduct interferes with free choice, and in setting aside an election because it believes “laboratory conditions” have not been attained, it is as likely to frustrate as to advance free choice. While myths have their value, it is self-defeating to cling to a myth that is not only inconsistent with reality, but also impedes efforts to deal effectively with that reality.

Some reviewers also criticized our recommendation that an employer who holds campaign meetings on working time and premises should be required to allow the union to hold such meetings on working time and premises.<sup>82</sup> This recommendation was based, in part, on the findings that far more employees attend company meetings than union meetings, and that attendance at campaign meetings is powerfully correlated with campaign familiarity. Several reviewers made the point, in response, that there was no evidence that campaign familiarity affected vote. Hence, they suggested, whatever advantage the employer may have in familiarizing voters with its campaign is irrelevant, and does not justify a recommendation aimed at increasing union campaign familiarity.<sup>83</sup>

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81. Miller, *supra* note 17, at 1174. See Shapiro, *supra* note 22, at 1541-42.

82. See text at notes 26-33 *supra*.

83. Goetz & Wike, *supra* note 16, at 384-85; Miller, *supra* note 17, at 1171-72.

One rejoinder, which was made in the book, is that this criticism overstates the data on lack of campaign impact. While there was no evidence that attending company meetings or familiarity with the content of the company campaign was associated with switching to the company, there was evidence that attending union meetings and familiarity with the union campaign were associated with switching to the union. There was also evidence that those employees who attended union meetings were usually already committed to the union. Hence, the data do justify recommending union access to employees on working time and premises — without such access the union is at a disadvantage in communicating with those employees who might vote either company or union, and for whom increased knowledge of the union might be crucial.<sup>84</sup>

There is yet another aspect in which the union may be at a substantial disadvantage when the employer conducts campaign meetings on working time and premises, and denies the union an opportunity to do likewise. As we suggested, the fact of the employer's campaign, wholly apart from its content, may be effective in persuading employees to vote against union representation. The employer who conducts a meeting during working hours graphically demonstrates that it is aware of the dissatisfaction that led to the union organizing drive, and is sufficiently concerned about that dissatisfaction to suspend production in order to deal with it. Furthermore, whatever the employer has to say about unionization is communicated in an orderly fashion in the very place where it is relevant — the workplace. In contrast, the union that is denied an opportunity to meet with employees on company premises and can attract only a small fraction of those employees to a union meeting off company premises is forced to communicate in a wholly catch-as-catch can fashion. Employee supporters of the union must attempt to catch other employees in the brief time they have for lunch, on break, or in other nonworking moments on company property. Nonemployee organizers, barred from the premises, have the still more difficult task of attempting to communicate with employees as they enter the employer's premises anxious to start work on time or leave the premises to return home. The union organizer can, to be sure, pursue the employee to that home, but his or her visit there is

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84. Indeed, union access to employees may be considerably more important than employer access. All employees know something about their wages, benefits, and working conditions, but some will have had no experience at all with unions, and even more will have had no experience with the particular union seeking to represent them.

apt to be regarded as an intrusion — particularly by the very employees who are not already union supporters.

The contrast between the image of the employer — in control in the workplace, stating its position in an orderly fashion — and the union organizer — scurrying about on the outside, attempting to say a few hurried words — is striking. To the extent that the fact of the campaign, apart from its content, has an effect on vote, the union's exclusion from company premises also places it at a substantial disadvantage in communicating to employees one of its central messages — that it, just as much as the company, is a responsible organization, that it is capable of dealing with the company on equal terms, and that it is as worthy a candidate for the employees' trust as is the employer. We think that equal access can be justified because it can redress that campaign disadvantage.

Finally, increased union access to employees must be seen as one element in our total package of recommendations. Our proposal that government regulation of speech be terminated rests, in part, on the expectation that each party will be able to point out to the voters those aspects of the other party's campaign it believes to be untruthful or unfair. Unions will have that ability only if they have the opportunity to communicate on equal terms with the employer.

## V. CONCLUSION

In the final analysis, the fate of the substantive recommendations contained in *Law and Reality* may be less important than how the Board treats that study. As Professor Shapiro recognized, the study "took about a decade from conception to publication and . . . cost a small fortune."<sup>85</sup> If other researchers and funding agencies are to commit the time, energy, and funds necessary to carry out additional empirical research on those aspects of the labor-management relationship that the Board regulates, they must have some assurance that the results of their research will be taken seriously. It is not too late for the Board to provide that type of response to this research. We hope that it will do so.

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85. Shapiro, *supra* note 22, at 1532.