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RATIONAL DECISIONS AND REGULATION OF UNION ENTRY

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I. INTRODUCTION

MORE than a decade after the publication of *Law and Reality*,¹ the debate continues over the proper scope of election campaign regulation under the National Labor Relations Act (the "Act").² The issue has been whether employer efforts to dissuade employees from electing a union to represent them in collective bargaining actually influence the outcomes of elections. Several academic lawyers and social scientists have criticized one aspect or another of the Getman, Goldberg and Herman results³ (hereinafter the "Getman Study"), suggesting that many employer tac-

1. J. GETMAN, S. GOLDBERG & J. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* (1976) [hereinafter J. GETMAN].

2. 29 U.S.C. §§ 151-169 (1982).

3. Flanagan, *The Behavioral Foundations of Union Election Regulation*, 28 STAN. L. REV. 1195 (1976); Kochan, *Legal Nonsense, Empirical Examination and Policy Evaluation*, 29 STAN. L. REV. 1115 (1977); Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163 (1976); Raskin, *Deregulation of Union Campaigns: Restoring the First Amendment Balance*, 28 STAN. L. REV. 1175 (1976); Carnes, Book Review, 31 ARK. L. REV. 165 (1977); Goetz & Wike, Book Review, 25 KAN. L. REV. 375 (1977); Krislov, Book Review, 31 INDUS. & LAB. REL. REV. 111 (1977); Lopatka, Book Review, 72 NW. U.L. REV. 420 (1978); Shapiro, Book Review, 86 YALE L.J. 1532 (1977); Strauss, Book Review, 22 CONTEMP. PSYCHOLOGY 833 (1977).

tics have no effect on election outcomes, and that such tactics should not be regulated by the National Labor Relations Board (the Board).⁴ However, in spite of all of the attention given to election campaign regulation, there is one question that has gone relatively unexamined: what should we expect the results of employer deterrence efforts to be? More specifically, which of the many strategies an employer may adopt in order to dissuade employees from electing a union should concern us most, in the sense that they have a strong chance of actually deterring unionism in areas where it may be socially desirable? This is the question we address in this paper.

In examining this question, this paper draws heavily on analogies with the more theoretically-developed antitrust/industrial organization literature.⁵ One reason for this is that in both labor

4. The Getman Study recommended that "[t]he Board . . . no longer set aside elections or find unfair labor practices based on written or oral campaign communications by employer or unions." J. GETMAN, *supra* note 1, at 150. Specifically, the study found that employees were unaffected by threats, promises or misrepresentations. The study also found that actual grants of benefits during a campaign "had no demonstrable effect on vote." *Id.* at 151.

5. See, e.g., D. EVANS, *BREAKING UP BELL: ESSAYS ON INDUSTRIAL ORGANIZATION AND REGULATION* (1983); F. FISHER, J. MCGOWAN & J. GREENWOOD, *FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND U.S. v. IBM* (1983); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

Generally, the work bringing economic analysis to labor law can be grouped into three sometimes overlapping categories. One category includes essentially economic analysis of unionism. See, e.g., Freeman & Medoff, *The Two Faces of Unionism*, 57 PUB. INTEREST 69 (1974); Lazear, *A Competitive Theory of Monopoly Unionism*, 73 AM. ECON. REV. 631 (1983); Simons, *Some Reflections on Syndicalism*, 52 J. POL. ECON. 1 (1944).

The second category includes work bridging antitrust law with labor law, specifically concerning the question whether certain union-imposed agreements violate the antitrust laws. See Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991 (1986); Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Handler and Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981); Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980); Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

A third category includes rather general economically-oriented critiques of labor law. See Campbell, *supra*, at 991; Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984); Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

The best way to describe the relation this paper has to previous literature in this area is to contrast it with work in each one of these categories. With respect to the first category, this paper explicitly adopts an economic efficiency-based approach toward weighing the costs and benefits of unionism. More specifically the paper identifies monopoly resource misallocation as the key source of social cost and the enhanced provision of workplace public goods (emphasized, perhaps originally, by Freeman and Medoff) as the major source of social benefits.

and antitrust law there is an "entry deterrence" problem. In antitrust, the problem concerns an incumbent firm's actions to prevent the entry of a rival in its market. In the labor setting the problem arises from the employer's attempt to prevent a union from "entering" its worksite as the collective bargaining agent of its employees. There is a target group in both cases: in antitrust, the incumbent firm wishes to hold on to its current, perhaps exclusive, relationship with its customers; in the labor setting, the employer's desire is to protect the status quo in which each worker acts as his own bargaining representative vis-a-vis the employer. In both areas the deterrence tactics are similar: threatening retaliation against the entrant and/or granting benefits to the target group. Moreover, in both areas the predominant policy issue is the same: when should entry be encouraged?⁶

For the most part, this paper attempts to draw on analogies with the antitrust/industrial organization literature to suggest a rational approach to the regulation of efforts to deter union entry. One basic assumption made necessary by this approach is that employers and employees are rational.⁷ This may seem to be a

This paper provides a reasonably rigorous treatment of the welfare economics of unionism.

The major difference between this paper and those in the second category is that this paper applies arguments from the more recent entry deterrence literature of antitrust to labor law. Easterbrook's *Predatory Strategies and Counterstrategies* was the first work to bring modern theoretical antitrust arguments into the antitrust law literature. Easterbrook, *supra*, at 263. We are aware of no previous work in labor law making efforts along these lines.

With respect to the third category, this paper is simply a much narrower, and consequently less abstract, discussion of labor law than most in this category. It is narrower because it deals with a fairly narrow issue: regulation of union entry. We reach rather specific conclusions concerning the direction such regulation should take.

6. For example, in the competitive model of a free-market economy, outside of certain special cases (see D. EVANS, *supra* note 5, at 61-94, for a discussion of cream-skimming entry), entry usually occurs when it is efficient, in the sense that the social benefits from entry exceed the social costs. However, there is little reason to believe that this will always be the case with a union, which functions essentially as a cartel.

7. The reason for this is that most models in the antitrust literature on entry deterrence take it for granted that the firm is maximizing its profits, and in precisely this sense acting rationally. If analogies are to be drawn with this literature it will obviously be necessary to assume that the parties involved in the union organization process are rational.

One may quite reasonably feel that the assumption that firms are acting rationally is not as controversial as the assumption that workers, or groups of workers, are acting rationally. While empirical literature now and then reports instances of consumer (or worker) behavior which appears to be irrational, see, e.g., Gottfries and Hylton, *Are M.I.T. Students Rational?: Report on a Survey*, 8 J. ECON. BEHAV. & ORG. 113 (1987), our view is that such cases can easily be explained as behavior that is rational but naturally restricted or retarded by con-

very minor assumption to some, but it is actually somewhat heretical in this area. The more traditional assumption, judging on the basis of statements by the courts and by commentators, has been that employees and employers act irrationally.⁸ Moreover, this traditional assumption has played an important role in shaping regulations under the Act.

One question naturally begged by the issue of entry deterrence in labor law is what determines or defines socially desirable union entry? In section II of this paper we attempt to answer this question and discuss its implications for union organizing. While the points made in section II are fairly basic, there has not been much previous effort to state them rigorously or to link them to regulation under the Act.

In section III we discuss the legal mechanics of union entry. In section IV our primary focus is not on the standard for socially desirable union entry, but rather on the problems behind any attempt to reorganize unions in a way that brings about self-initi-

straints on capacity to store and use complex information. This view is consistent with bounded rationality theory. See H. SIMON, *MODELS OF MAN* (1957) 196-206; 1 H. SIMON, *MODELS OF BOUNDED RATIONALITY: ECONOMIC ANALYSIS AND PUBLIC POLICY* (1982); 2 H. SIMON, *MODELS OF BOUNDED RATIONALITY: BEHAVIORAL ECONOMICS AND BUSINESS ORGANIZATION* (1982).

We should note that what is perhaps the most important article on the subject of union entry, Professor Bok's *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964), places a great deal of emphasis on the rationality of employee decisions. Specifically, Bok states the issue as being whether a regulation can bring about "more reasoned" decisions by the voters in union representation elections. *Id.* at 52.

We frame the issue differently. As noted above, we take it for granted that employees act "rationally," in the sense they prefer to gain more of the things they desire. The problem, as we see it, is whether regulation can improve the outcome of employee voting by minimizing the risk that employees will be led, even though they are rational, to turn down a union when they would clearly be better off with one, or conversely to vote in a union that will make things worse for them. Clearly, employees, or voters generally, can be rational and yet, because of a lack of information, vote in favor of an undesirable regime.

The outcome, in such a case, would be unfortunate, but not irrational or "less rational" than any alternative. Although only tangentially related to this issue, there is a fairly large body of theoretical literature on majority voting—beginning more or less with Condorcet's paradox—the most basic conclusion of which is that majority voting often leads to irrational (i.e., violating principles of rationality) results. See 1 K. ARROW, *COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE* 125-29 (1983).

8. For a discussion of the assumptions reflected in Board regulation, see J. GETMAN, *supra* note 1, at 7-24. The most troubling of these assumptions, for the authors of the Getman Study, is that workers are easily swayed by campaign rhetoric. This assumption is reflected, to some extent, in more recent work. See, e.g., R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 230-39 (1984); Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1782 (1983) (criticizing Getman Study).

ated entry which satisfies the social desirability criterion. We next examine specific entry deterrence strategies frequently utilized by employers. We ask in this section whether the administrative costs of regulation are likely to be outweighed by the benefits.

In section V we briefly compare the implications of this research with the results of the Getman Study. Finally, section VI discusses the use of the back pay remedy as a means of controlling employer deterrence tactics.

II. COLLECTIVE VERSUS PRIVATE BARGAINING: WHY MIGHT UNION ENTRY BE SOCIALLY DESIRABLE?

A. *Monopoly Unionism and Resource Allocation*

Perhaps the oldest theoretical explanation of the impact of unions falls under the heading "monopoly unionism."⁹ According to this view, a union acts as a monopolist in the labor market, raising the price of its product above the competitive level.¹⁰ Featherbedding, the creation of essentially functionless job categories, is another feature commonly associated with monopoly unionism. From the perspective of the employer there is little difference between paying ten workers \$10 more per day, or creating an additional and functionless job at \$100 per day.¹¹ Thus, featherbedding and across-the-board wage increases are, in at least one sense, the same.

The union's price increase has two immediate effects. First, it transfers wealth from the employer (buyer) to the worker—for each hour of labor, the employer pays a higher price to an organized worker than she paid to the unorganized worker. The second effect is a reduction in the number of workers demanded by the employer.¹² This, in turn, has several implications for the al-

9. See, e.g., R. FREEMAN & J. MEDOFF, *supra* note 8, at 6; Freeman & Medoff, *supra* note 5. For a thorough presentation of the "monopoly unionism" viewpoint, see Simons, *supra* note 5 at 1.

10. Freeman & Medoff, *supra* note 5, at 76.

11. See Campbell, *supra* note 5 at 991. But see Note, *A Critique of Economic Consistency*, 39 STAN. L. REV. 1259 (1987) (arguing in part that featherbedding raises agency and externality problems not presented by across-the-board increases in compensation).

12. Fewer workers are demanded because the price of each worker's time goes up. Another more technical way of saying this is that the employer's demand curve for labor is downward sloping. This is a basic proposition of price theory. See, e.g., J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 322 (3d ed. 1984). Moreover, while there may be empirical disputes over the elasticity of labor demand, we are aware of no empirical literature in economics questioning the proposition that the amount of labor time demanded varies inversely with price.

location of resources. First, the employer will tend, in the long run, to substitute capital (i.e., machinery) for labor, since the presence of a union shifts the relative price of labor in favor of capital. Second, the reduction in demand for labor implies that some employees who would otherwise be employed by the firm will either become unemployed or find work elsewhere. In any event, the employer will employ fewer workers than she did before unionization. These allocational effects are inefficient because the allocation of factors of production in a competitive economy should be determined solely by their opportunity costs, that is, by the value of each factor in its best alternative use.¹³

Why might a union be necessary in order to achieve an increase in a given worker's wage? This question will strike most readers as incredibly naive. The standard answer in the literature points to "inequality of bargaining power."¹⁴ The problem with this as an explanation of the necessity for unions is that it is completely useless as a guide to understanding the ways in which unions may or may not be socially desirable. Instead, our approach attempts to describe in more precise terms the costs and benefits of unionization. Briefly stated, a union is necessary because the employees' threat of unified action raises the cost to the employer of terminating any individual employment relationship, and in doing this, drastically reduces the likelihood that an employer will respond to a given worker's actions through dismissal. In the absence of unionism, the cost to an employee of terminating the employment relationship—for all but the "marginal" workers (those workers whose compensation equals, or is only slightly more than, what they would receive in the next best available alternative occupation)—is very large. Therefore, employees are unlikely to take actions which would increase the probability of termination by the employer. On the other hand, the necessity of a union for the marginal worker is unclear, because the cost of termination to such a worker is small. Of course, where employ-

13. See, e.g., E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 460-64 (5th ed. 1985); G. STIGLER, *THE THEORY OF PRICE* 176-90 (3d ed. 1966). It should be noted that the term competitive is included to rule out the case of monopsony (situation in which there is only one buyer for a particular commodity). In the case where the employer has monopsony power, the union may actually lead to a more efficient outcome by raising the wage toward the opportunity cost of labor that would be realized in a competitive market. See, e.g., J. HIRSHLEIFER, *supra* note 12, at 352 (discussing the impact of minimum wage legislation in the case of monopsony). Monopsony situations are very rare today.

14. See, e.g., National Labor Relations Act § 1, 29 U.S.C. § 151 (1982). See also A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 21 (1986).

ees have accumulated a great deal of firm-specific human capital,¹⁵ the expected cost to the employer of terminating the contract is large. However, we will assume below that because of risk aversion and job search costs, termination costs are "asymmetric" in the sense that the employee's loss from termination is much larger than the employer's.¹⁶ This asymmetry in expected termination costs plays a fundamental role in evaluating the benefits of labor unions.

B. *Termination Costs and the Provision of Workplace Public Goods*

1. *Safety*

As several commentators have recently suggested, unions make a great effort to ensure the provision of certain public goods in the workplace, in particular, safety.¹⁷ Why might a union be necessary to improve worker safety? Alternatively, why might an acceptable level of safety not be provided under private (non-union) employment contracts?

A rather basic proposition from the theoretical literature in tort law is that if employees were perfectly informed as to the risks associated with their worksites, then private employment contracts would provide optimal safety levels.¹⁸ The reason is that if the expected cost of injury to the employees can be reduced by a sufficiently small expenditure on the part of the employer then the employees will be willing to accept a wage cut in exchange for safety improvements.

Consider the following example. Suppose the value of an employee's output to his employer is \$500, the cost of an injury to the employee is \$400, and the probability that the employee will be injured is one-half. Suppose further, however, that if the employer spends \$100, the probability of injury can be reduced to zero. If the employer and employee agree on a contract whereby

15. That is, they know a great deal about the operations of the firm—so much that the employer cannot easily retrain new workers to take their places. See generally G. BECKER, *HUMAN CAPITAL* (2d ed. 1975).

16. This is not a crucial assumption, but it seems to be what everyone believes.

17. See, e.g., W. VISCUSI, *RISK BY CHOICE: REGULATING HEALTH AND SAFETY IN THE WORKPLACE* 53-54 (1983); O'Reilly, *Driving a Soft Bargain: Unions, Toxic Materials, and Right to Know Legislation*, 9 HARV. ENVTL. L. REV. 307, 312-19 (1985).

18. See, e.g., W. VISCUSI, *supra* note 17, at 38-42. For a more general discussion, though largely concerning the liability of sellers for injury to customers caused by their products, see Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

the employer pays the worker \$300, but spends nothing on safety, the *ex ante* value of the contract (that is, the value of the contract considering potential losses and the probability of those losses) for the employer is

$$\$500 - \$300 = \$200.$$

The *ex ante* value of the contract for the employee—assuming, for the moment, risk neutrality—is

$$\$300 - (1/2)(\$400) = \$100.$$

Now suppose the employer and employee agree to lower the wage to \$180, provided that the employer spends \$100 on safety (thereby reducing the risk of injury to zero). Under this agreement the *ex ante* value of the contract for the employer is

$$\$500 - \$180 - \$100 = \$220.$$

The *ex ante* value of the contract for the worker is \$180. Since the *ex ante* value of the contract is greater for both parties after agreeing to make the safety expenditure in exchange for a wage cut, we should expect such a rational bargain to take place.¹⁹

The agreement to improve safety, in this example of perfectly informed rational agents, is one that increases the sum of the *ex ante* valuations of the employment contract. An efficient contract will always have this characteristic.²⁰ In the example above, the sum of the *ex ante* valuations is increased by having the employee “bribe” the employer with \$120 while the employer spends \$100 on safety. The expected benefit of improved safety, \$200, is enjoyed by the employee. Note that the sum of *ex ante* values is increased by \$100, the net benefit from safety.

The numerical calculations in the above example are not themselves important; they should confirm one’s intuitive sense

19. The answer does not depend on the choice of \$300 as the initial wage agreement. This approach, which states results from the economic theory of contracts in a way that avoids mathematical complexity, follows the method used by Professor Shavell. Shavell, *Lecture Notes on Contracts* (Harvard Law School 1987).

20. Generally, agreements which increase the sum of the *ex ante* valuations are Kaldor-Hicks dominating, in the sense that they are clearly preferable under the Kaldor-Hicks efficiency criterion. For the most part, this paper will rely on the Kaldor-Hicks notion of efficiency, which basically holds that regime A is preferable to regime B if the winners gain enough in the move from B to A to fully compensate the losers and still find the switch to regime A desirable. For a non-technical discussion of some of the different notions of efficiency, see R. POSNER, *THE ECONOMICS OF JUSTICE* 48-87 (1981). For criticism of the Kaldor-Hicks efficiency criterion, see Arrow, *Little’s Critique of Welfare Economics*, 41 AM. ECON. REV. 923, 928-32 (1951). While it is true that the Kaldor-Hicks criterion may lead to an indeterminate result when there is a very large income effect, in the vast majority of cases the income effect is likely to be quite small. Willig, *Consumer’s Surplus Without Apology*, 66 AM. ECON. REV. 589 (1976).

for the same result. However, the approach taken—examining the *ex ante* value of the employment contract for each party—is an extremely important feature of this discussion. We approach the question whether unions provide benefits that might not be provided under private employment contracts by thinking about the ways in which the introduction of a union might increase the *ex ante* value of the contract for both the employer and the employee. Resource allocation aside, the entry of a union enhances efficiency if such entry increases the sum of *ex ante* valuations.

There are several well-accepted reasons why private employment contracts may not work as well as the above example suggests and why safety levels may be inadequate in an unregulated labor market. These have been dealt with at length²¹ and are not greatly elaborated upon here. The most commonly-cited problem is imperfect information: workers' perceptions of risk may be incorrect.²² If workers underestimate or completely discount the risks associated with a particular job, they will tend to settle for employment contracts under which an inefficiently low level of safety is provided. This proposition is valid even when workers are fully informed as to the average risk of work within a given industry but are, at the same time, unaware of the specific risk associated with each employer's site.²³

Even if there were no informational imperfections, another reason why safety levels may be inadequate in an unregulated labor market lies in the nature of safety as a public good.²⁴ By definition, if safety is a public good, making the workplace more safe for a single worker makes it safer for all of his or her coworkers. Given this, it is unlikely that any worker, in the absence of a union, would bargain for a reduction in compensation in exchange for a safer work environment. She would, rationally, prefer to wait until some other employee bargained for such an improvement, and then enjoy the benefits. Since this is an important part of the argument, it may help to state it clearly in the form of an example. Consider a worksite with two employees.

21. See, e.g., W. VISCUSI, *supra* note 17, at 4; Shavell, *supra* note 18.

22. See, e.g., W. VISCUSI, *supra* note 17. See generally Note, *Occupational Health Risks and the Worker's Right to Know*, 90 YALE L.J. 1792 (1981). Cf. *New Jersey State Chamber of Commerce v. Hughey*, 600 F. Supp. 606, 609-10 (D.N.J.), *aff'd in part and rev'd in part*, 774 F.2d 587 (3d Cir. 1985).

23. See Shavell, *supra* note 18, at 5.

24. Generally speaking, a public good is a good, like national defense, which, once provided to one person is necessarily available to several others. See generally J. HIRSHLEIFER, *supra* note 12, at 493.

Each employee receives \$500 per year, "safety" costs total \$400 per year and the expected accident cost, if "safety" is not purchased, is \$400 per worker, zero otherwise. The structure of payoffs for the employees in this example is as follows:

TABLE 1

	<i>Amount Received by Employee 1</i>	<i>Amount Received by Employee 2</i>
<i>Both Employees Push for Safety</i>	\$300	\$300
<i>Employee 1 Pushes for Safety; Employee 2 Says Nothing</i>	\$100	\$500
<i>Employee 2 Pushes for Safety; Employee 1 Says Nothing</i>	\$500	\$100
<i>Both Employees Say Nothing</i>	\$100	\$100

The employees are clearly worse off if they both choose "say nothing" as their strategies; yet the structure of payoffs is likely to lead to this result.²⁵

Of course one might argue that the public goods problem is not, by itself, enough. Some employees may suffer a greater risk of harm than others and might therefore be willing to bear the cost of increasing safety even if the benefits are enjoyed by others.²⁶ Or perhaps, these workers might find ways to increase safety without externalizing the benefits. However, it should be pointed out that an additional reason private contracts may not lead to an efficient safety provision is that the bribe the employee must pay in exchange for an improvement in safety may exceed his annual salary, and therefore require a stream of future payments, the receipt of which may seem, to the employer, very un-

25. Note that the second employee can either push for safety or say nothing. If he chooses the former strategy, his payoff is either \$300 or \$100. If he chooses the latter strategy his payoff is either \$500 or \$100. Since he does at least as well by choosing "say nothing" as his strategy, that will most likely be his choice. In the language of game theory, the strategy "say nothing" is dominant. See, e.g., M. INTRILIGATOR, *MATHEMATICAL OPTIMIZATION AND ECONOMIC THEORY* 134 (1971).

26. Where there is a small number of beneficiaries, collective voluntary provision of a public good can sometimes be arranged. See, e.g., J. HIRSCHLEIFER, *supra* note 12, at 514-15 (discussion of NATO expenditures); E. MANSFIELD, *supra* note 13, at 493; see also Olson & Zeckhauser, *An Economic Theory of Alliances*, 48 *REV. ECON. & STATISTICS* 267 (1966).

certain.²⁷ For example, the future payments may be uncertain because the employee may quit or be fired. Of course, the employer could avoid the risk in this case by requiring the employee to remain with the firm for as long as it takes to pay the full bribe or, alternatively, require the employee to pay the bribe up front and borrow money to live on. However, because of uncertainty as to the enforceability of long term employment contracts²⁸ and institutional features which might make borrowing an unappealing strategy for the worker, it is unlikely that either of these solutions would be relied upon.

The conclusion that efficient safety enhancements may not result from private (non-union) contract-making is further reinforced by consideration of termination costs. Besides the likelihood that the workers who make known their preference for safety will be the ones who pay for it, the mere act of stating such

27. Consider the example in the text with the dollar flows changed from every year to every 10 years, and for simplicity assume that the interest rate is zero. Thus, the employee receives \$300 over 10 years or \$30 each year under the inefficient contract. Assume that the probability of injury remains one-half, though now over a 10-year horizon. The employee's *ex ante* valuation remains \$100, equivalent to an annual flow of \$10. Under the efficient "safety-enhanced" contract the employee's *ex ante* valuation is still \$180, equivalent to an annual flow of \$18. In moving from the inefficient to the efficient agreement the employee gives up \$120, or \$12 each year in cash. Obviously nothing has changed from simply altering the periods over which the flows are measured; the employer and employee are still better off under the efficient contract.

Now suppose the employer thinks the employee will leave with one-half probability over the course of 10 years. Then his *ex ante* valuation of the "unsafe" contract is $(\frac{1}{2})(\$500 - \$300) = \$100$. His *ex ante* valuation of the safety-enhanced contract will be $(\frac{1}{2})(\$500 - \$180) - \$100 = \60 . The employee's *ex ante* valuation of the "unsafe" contract is $(\frac{1}{2})(\$100) = \50 , and of the safety-enhanced contract is $(\frac{1}{2})(\$180) = \90 . Clearly, the expenditure in safety will not be worth the employer's effort under the same terms discussed in the earlier example. Moreover, since the employee's lot is improved by only \$40, there is no room for the employee to make a side payment to the employer that would leave them both strictly better off. At best they would be made indifferent if the employee transferred \$40 to the employer. Of course, the reason for this is that the net benefit of safety enhancement, as between the two parties, is $(\frac{1}{4})(\$400) - \$100 = 0$, so it seems that there is nothing to be gained by putting money into safety improvements. The safety expenditure leaves the sum of the *ex ante* valuations unchanged at \$150. But if the employee that leaves is immediately replaced with another identical employee, the expected social cost imposed by inadequate investment in safety remains \$200, and therefore, could efficiently be avoided by an expenditure of \$100. Thus, if the two parties fail to agree on the safety-enhanced contract, the outcome will be inefficient.

28. Generally courts will not enforce contracts for the performance of personal services. RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981). See, e.g., *ABC v. Wolf*, 76 A.D.2d 162, 430 N.Y.S.2d 275 (1980), *appeal dismissed*, 51 N.Y.2d 835, 413, N.E.2d 1173, 433 N.Y.S.2d 759, *order aff'd*, 52 N.Y.2d 394, 420 N.E.2d 363, 438 N.Y.S.2d 482 (1981).

preferences may put the employee at risk.²⁹ The employer may decide that he would prefer not to promote or continue to employ a "complainer." Also, regardless of whether the employer thinks this way, employees may believe that the employer thinks this way and therefore refrain from proposing improvements in safety. This is an obvious point, and yet it is such an important part of the argument that it cannot be overemphasized. Consider again the example discussed above of the worksite with two employees. Suppose now that each employee expects to be fired if he acts alone in pushing for safety, and each considers the expected cost of termination to be \$1000. Taking expected termination costs into account alters the matrix from that shown in Table 1 to the following:

TABLE 2

	<i>Amount Received by Employee 1</i>	<i>Amount Received by Employee 2</i>
<i>Both Employees Push for Safety</i>	\$300	\$300
<i>Employee 1 Pushes for Safety; Employee 2 Says Nothing</i>	-\$1000	\$500
<i>Employee 2 Pushes for Safety; Employee 1 Says Nothing</i>	\$500	-\$1000
<i>Both Employees Say Nothing</i>	\$100	\$100

What was in Table 1 a mild disincentive against bargaining for safety improvements appears in Table 2 as harsh punishment.

These arguments suggest that workers are an unlikely group to bargain, in the course of setting their employment contracts, for safety improvements. Why should the employer not then suggest and implement the improvements? The perfect-information example we first considered suggested that such improvements would be in the employer's interests as well the worker's. Certainly the employer does not fear the cost of termination as does the employee, so fear of termination cannot be an important reason behind the employer's failure to bring about efficient safety provisions. What reasons are left?

There are several reasons. First, the employees may mis-

29. See, e.g., *Meyers Indus., Inc.*, 268 N.L.R.B. 493 (1984).

perceive the risk, and if this is the case the employer may do better for herself by simply satisfying the worker's perceptions of safety improvements, not the reality.³⁰ A second reason is that the employer may misperceive the risk.³¹ A third is suggested by the "agency cost" literature³²—although an efficient safety enhancement can increase the value of the firm, one cannot be sure that the managers will adopt such an improvement.³³ A fourth is that even if workers and employers are fully informed as to risk characteristics, an arrangement whereby all of the employees sacrifice a given sum of money in exchange for safety improvements may not be approved by all, and perhaps not by a majority of employees. Some of the workers may be relatively unconcerned about the risk of injury; they would pay little for an improvement in safety. Unless a scheme could be developed under which each employee would pay no more than what he considered a reasonable price for safety,³⁴ agreement on the terms of such a proposal

30. This point has been demonstrated formally in the products liability context. See Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561 (1977). Professor Viscusi, offers the following:

[I]f turnover costs are small, it will be in the employer's financial interest to attract imperfectly informed workers to the firm. Workers' preference for jobs with less well-known risks enables firms to offer a lower wage than they would otherwise. Since the wage bill increases as workers' probabilistic beliefs become more precise, employers have a financial interest in hiring workers who are not cognizant of the risks they will face.

W. VISCUSI, *supra* note 17, at 70.

31. Though it is usually assumed that employers know more about worksite hazards than workers, exact probabilities of injury are unlikely to be known without considerable efforts by either group. Cf. W. VISCUSI, *supra* note 17, at 59-75. Note that if the employer misperceives the risk of injury at the worksite, while the employees perceive risk correctly, it will then be necessary, if an efficient arrangement is to be reached, for the employees to provide information concerning risk to the employer. This, however, returns us to the collective action problem emphasized in this section.

32. Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

33. Suppose, for example, managers value greater discretion or authority, and certain safety provisions conflict with their freedom to exercise discretion. To the extent that shareholders are unable to monitor their actions, the managers will be able to adopt policies which sacrifice additional safety for greater discretion, authority, or other nonpecuniary rewards.

34. A reasonable price for safety would presumably be any fee less than or equal to the maximum that the employee would be willing to pay for safety. One way of guaranteeing the efficient provision of a public good is to keep providing more of the good until the cost of providing an additional unit of it is equal to the sum of the consumers' valuations. For example, if there are only three consumers and each is willing to pay no more than \$10 per unit, then the optimal quantity is the amount at which the marginal cost of providing an additional unit is \$30. See J. HIRSHLEIFER, *supra* note 12, at 493-96.

In an ideal market, this problem would never arise because workers would

would be hard to reach.³⁵

2. *Rules Versus Discretion*

A second way in which unions are thought to yield social benefits is by the replacement of discretionary dismissal, promotion, and layoff policies with formal procedures.³⁶ Again, we start by asking whether this could be provided by private employment contracts.

Consider the following example. Suppose the value of the employee's output is \$500 with probability one-half and -\$10 with probability one-half.³⁷ Suppose further that the initial agreement is for a wage of \$100. Assume, for simplicity, that the employer pays before observing the worker's productivity.³⁸ Under this agreement the employer's *ex ante* valuation of the employment contract—again assuming risk neutrality—is

$$\frac{1}{2}(500) + \frac{1}{2}(-10) - 100 = 145.$$

The *ex ante* value of the contract to the employee is \$100. Now suppose that the employer and employee made a deal to increase

sort themselves by employer, with those willing to pay more for safety accepting lower wages in exchange for safer worksites. However, because detailed information concerning safety is generally unavailable to job seekers, the full range of worksite safety characteristics will probably never be observed. For example, two firms competing for the same (heterogeneous) pool of potential employees would probably both choose a level of worksite safety that is attractive to the median job seeker, rather than appeal to different ends of the spectrum of worker tastes concerning safety. This problem was originally pointed out, in the more general product-differentiation context by Professor Hotelling. Hotelling, *Stability in Competition*, 39 *ECON. J.* 41 (1929). Freeman and Medoff discuss this problem in slightly different terms (the employer's tendency to cater to the tastes of "marginal" rather than "infra-marginal" workers). Freeman & Medoff, *supra* note 5, at 72.

35. The problem here is with "hold-outs," individuals who try to free ride on the commitments of others. For example, if a group has to be taxed in order to finance the provision of a public good, each member has an incentive to understate his or her willingness to pay if it appears that the shortfall will be taken up by the others. Although beyond the scope of this paper, there are financing schemes which, in some cases, can correct the incentive problem in a way that brings about truthful revelation of preferences. See H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 20 (1982).

36. 1 C. MORRIS, *DEVELOPING LABOR LAW* 27-28 (2d ed. 1983).

37. It might be asked why -\$10 should be considered, instead of a small positive number. The reason for choosing a negative number will be made clear shortly. For now, simply assume that the value of the worker's output is negative for one or more of several possible reasons: the worker gets in the way of other employees, intentionally or unintentionally passes trade secrets on to rival firms, steals or loses expensive tools or some other reason.

38. This assumption is not crucial. We could allow the employer to condition the wage on observed productivity without changing the results of the analysis.

the wage to \$206 provided that the employer would be allowed to dismiss the worker without pay as soon as it became clear that the -\$10 value would be realized. Under this contract the employer's *ex ante* valuation is

$$(\frac{1}{2})(\$500 - \$206) = \$147.$$

The *ex ante* value of the contract to the employee, ignoring the cost of termination for the moment, is

$$(\frac{1}{2})(\$206) = \$103.$$

Note that both *ex ante* valuations are higher under the second contract in which discretionary dismissal is permitted.

To generalize this example slightly, if m_H is the value of the worker's output when he is working diligently and m_L the value when he is passing trade secrets on to rivals, the sum of the *ex ante* values is

$$(\frac{1}{2})m_H + (\frac{1}{2})m_L.$$

Clearly, if m_L is negative, the sum of the *ex ante* values—provided that both parties are risk neutral—is increased by allowing the employer to excuse himself from the contract when the value of the worker's product is negative. On the other hand, if m_L is positive, granting the employer discretion to back out of the contract would not be a mutually beneficial policy.

This example does not “prove” that a discretionary dismissal policy is efficient, but it does demonstrate in a very simple framework that such a policy may have certain efficiency properties, and it highlights some of the considerations that go into determining the social costs and benefits of granting discretion to the employer. The proposition that emerges from the example³⁹ is that, where there is a risk that the employee will actually hurt the enterprise, an efficient contract may be one that grants discretion to the employer to dismiss the employee. The implication is that employees would not benefit, in the special case represented by this example, from a union rule limiting such discretion.

We should expect this proposition to stray far away from predicting what is observed in employment contracts for two reasons: termination costs are great for employees, and employees are risk averse. If termination costs to employees are taken into account, the sum of the *ex ante* values when termination is allowed is⁴⁰

39. Recall that the example assumes that everyone is risk neutral and that the cost of termination is zero to the employee.

40. We have ignored the case where the termination cost is great to the employer. This would happen in the case of an employee who has accumulated

$(1/2)m_H$ — expected termination cost to employee.

When dismissal is not allowed, the sum is

$$(1/2)m_H + (1/2)m_L.$$

Because it is not clear that m_H is greater or smaller in absolute value than twice the expected termination cost, we can no longer say whether both parties can be made better off by granting discretion to the employer. The importance of termination costs increases when we consider that employees are usually risk averse.⁴¹ Even if termination costs were zero, risk aversion would still justify limiting an employer's discretion to terminate without payment.⁴² For these reasons, an efficient contract will, in many cases, deny full discretion to dismiss, or at least require a transfer payment as insurance to the employee in the event that he is dismissed or laid off.

In spite of the important roles played by risk aversion and termination costs in the shaping of employment contracts, there are reasons why we would still expect to see something less than complete denial of discretion to employers. One reason is that there may be cases where an employee's unfitness for an employer's worksite is so great that the employer would refuse to enter into an employment contract without having wide latitude to dismiss. In terms of the contract model presented here, this case is one where the sum of *ex ante* valuations, with dismissal barred, is as follows:

$$(1/2)m_H + (1/2)m_L < 0.$$

Unless the employer has a preference for gambling, it can be

a great deal of firm-specific human capital. Much of the discussion that follows can easily be modified to take this feature into account.

41. Put simply, a risk averse individual would not pay \$50, and more specifically would pay less than \$50, for a lottery ticket which offers \$100 with probability $1/2$ and \$0 with probability $1/2$. One convenient way of expressing a risk averse individual's valuation of such a lottery is to use the square root function, although any other concave function could be used. Thus a risk averse individual might value the lottery just presented as follows: $(1/2)(\sqrt{\$100}) + (1/2)(\sqrt{\$0}) = 5$.

42. Suppose that termination costs are zero and the employee, instead of being risk neutral as assumed in the text, is risk averse (and, for simplicity, assume the employee's valuation of income can be described using a square root function described in note 41). Suppose the employer has power to dismiss and the wage is set at \$225. Then the employer's valuation of the contract is $(1/2)(\$500 - \$225) = \$137.5$. The employee's valuation is $(1/2)(\sqrt{225}) = 7.5$. Now suppose the two agree to lower the wage to \$81 provided that the employer no longer can dismiss the worker. Now the employer's valuation is $(1/2)(\$500) - (1/2)(10) - \$81 = \$164$. The employee's valuation is $(\sqrt{81}) = 9$. Notice that employer and employee are better off under the contract in which dismissal is barred.

shown that he would not enter into such a contract without power to dismiss.⁴³ In this case, discretion would have to be granted in order to induce the employer to enter into the contract.

The second possible explanation of dismissals when parties are not assumed to be risk neutral (as in the original example) is based on informational asymmetry. Suppose that the employment contract were one that required the employer to hold on to the worker but to pay him a lower wage if she observes low productivity.⁴⁴ Once this agreement is adopted, however, the employee may be subject to opportunism on the employer's part. If it is assumed, for example, that only the employer knows the value of the worker's product, then the employer might have an incentive under this contract to underreport that value.⁴⁵ An agreement to dismiss the worker in the poor productivity state could be seen in this case as a constraint adopted to reduce the employer's incentive to take advantage of the worker by underreporting productivity and paying too little. If an employer were required to dismiss in conjunction with a report of low productivity, it would then be impossible for the employer to capture a larger share of the surplus from the contract by issuing such re-

43. If the employer is risk neutral she will clearly not pay for something which has a negative expected value. For example, if in the bad state the employee's work is worth $-\$600$, then the expected value of the worker's output, assuming the employer does not have the right to dismiss, is $(\frac{1}{2})(\$500) - (\frac{1}{2})(\$600) = -\$50$. Clearly, the employer would not offer a positive wage in exchange for an expected loss of $\$50$.

If the employer actually prefers risk, the outcome might be different. As in the discussion in note 41, it will be necessary here to assume that the risk-prefering employer values a lottery differently. Assume for simplicity that this valuation can be done by simply squaring the payoffs. Now suppose that the employer in the example in the preceding paragraph is risk-prefering and, to simplify the arithmetic, has income from another source of $\$1000$. Suppose further that the employee will be paid $\$100$. The employer's valuation of her net income stream, assuming that she cannot dismiss the worker, is therefore $(\frac{1}{2})(\$1400)^2 + (\frac{1}{2})(\$300)^2 = \$1,025,000$. Since this is greater than the employer's valuation of her income stream without the employee's contribution, the employer would be willing to enter into an employment agreement without power to dismiss. Thus, an employer with a preference for gambling might enter into an employment agreement without power to dismiss even when the expected value of the worker's contribution is negative.

44. Why should the employer agree to a contract like this? If employer and employee are risk averse, an efficient contract may involve sharing the risk by paying the employee a lower wage, rather than dismissing him, when the employer observes low productivity. Alternatively, if the employer is essentially insuring the worker by agreeing not to dismiss him when his work is shoddy, the payment of a lower wage may be a way of resolving moral hazard.

45. There are pressures working in the other direction. If the contract lasted for some period of time the worker might catch on. Alternatively, such a policy might hurt the reputation of the employer in the hiring market.

ports falsely.⁴⁶ It should be noted that this rule would require dismissals even when it would be more efficient for the employer not to dismiss workers.

3. *Private Contract Failure*

With the theoretical points behind us, the more important question of this section can now be confronted: why do private employment contracts fail to provide optimal dismissal, promotional and layoff policies? One class of reasons falls under the general label of informational imperfections. If workers misperceive the risk imposed upon them by granting the employer discretion to dismiss—for example, every worker thinks that it is the “other guy” who will be fired—then it follows, from the earlier discussion of safety, that the provision of optimal dismissal policies, through the normal process of contract making, should not be expected. A second subclass of the informational imperfection arguments points to the adoption of dismissal rules as inefficient responses to asymmetrical information.

The public goods explanation pursued in the previous section seems to apply with some force in this case as well. The adoption of formal dismissal procedures, and employer-employee dispute resolution policies generally, seems to require some upfront expenditure in developing an effective administrative process. If an individual employee were required to accept a wage reduction in order to finance formal policies that would then be available to other workers, his incentive would be to wait for some other worker to make the first move. Further, once this is combined with fear of termination, the disincentives working against employees who are prepared to suggest to management that dismissal and promotional policies be changed, seem to be potentially overwhelming.

Another reason that a regime in which rules are followed may be more efficient than one in which action is purely discretionary is that rules prevent employers from quickly acting on irrational decisions, that is, from taking steps which would in the long run make them and their employees worse off.⁴⁷ However, this justification can be easily manipulated and is probably flexible enough

46. This is one of the results of the implicit labor contracts literature in economics. See Hart, *Optimal Labour Contracts Under Asymmetric Information: An Introduction*, 50 REV. ECON. STUD. 3 (1983).

47. The source of the problem would have to be time-inconsistent preferences. See generally J. ELSTER, *ULYSSES & THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 65-77 (1979).

to serve as an explanation for any policy which restricts discretionary action.

C. *Gains from Unionism*

Unions can improve the outcome of private employment contract making in two senses. First, a union may overcome the failure of the contract-making process to provide efficient quantities of workplace public goods such as safety. Second, where misperception of a certain risk is a problem, a union may improve matters by collecting and disseminating more accurate information.⁴⁸

The preceding arguments suggest that a general framework for evaluating unionism would point to three sources of social cost that are affected by the introduction of a union. The first source is allocational efficiency. It is a well-accepted proposition that union-imposed wage differentials create allocational distortions which result in inefficiency. The second source of social cost arises from the provision of certain work-related public goods, like workplace safety and dismissal policy. In this category the union's effect is likely to be positive, insofar as it reduces social cost.⁴⁹ The third source of social cost arises from the admin-

48. See W. VISCUSI, *supra* note 17, at 71-75.

49. Some commentators point to "industrial democracy" as a source of benefits from unionism:

If, as most of us believe, America should continue to have political democracy and a free enterprise economy, it is essential that the great mass of manual workers be committed to the preservation of this system and that they should not, as in many other democracies, constantly be attempting to replace it with something radically different. Yet such a commitment cannot exist if workers feel that their rights are not respected and they do not get their fair share of the rewards of the system.

A. REES, *THE ECONOMICS OF TRADE UNIONS* 186-87 (2d ed. 1977). Unions, according to this view, are good in part because they bring about political stability.

This has intentionally been left out of our analysis. If we were to include it, we would consider this a possible beneficial externality flowing from unionism. However, we doubt that leaving this out seriously impairs our analysis. If there is a benefit flowing from this externality, it must be from the expected loss in aggregate wealth avoided by the union's contribution to political stability. The loss in wealth from "less stability" or "more instability," in the absence of unionism, would presumably result from workdays lost to political agitation, or perhaps violent revolution. We find it hard to believe that these losses (at the margin) multiplied by their respective probabilities of being realized, add up to anything significant. The notion that workers would want to overturn the political system because "their rights are not respected" by employers is speculative, unless it is assumed that workers perceive the political system as another means through which employers refuse to respect their rights. Further, the claims that workers' "rights are not respected" by employers are by no means universally

istrative process called into operation by the entry of a union. The reason for taking such costs into account is that if there are social benefits from labor unions, these benefits still must be weighed against the administrative costs of regulating employment contracts under the NLRA.⁵⁰ In a world of scarce resources, the notion that we should be prepared to devote an unlimited part of the gross national product to enforcing the NLRA is unacceptable. A rational assessment of the impact of unionism should take something of a "systems" approach, inquiring into the effects of unionism and union-related rules on all three sources of social cost.⁵¹

There is a parallel with the antitrust literature that should be noted here. A merger or combination of two or more firms into a monopoly or joint venture often requires the comparison of two types of social cost. One is the deadweight loss that may arise from monopoly pricing. The other is the productive efficiency gain that may result from several firms combining to exploit econ-

valid today. In short, we doubt that unions contribute much now, at least in the way suggested above, to political stability in the U.S.

There may be other benefits flowing from unionism, besides political stability, that might be considered a by-product of industrial democracy. For example, the legislative history of the Wagner Act, 29 U.S.C. §§ 151-169 (1982), indicates some desire on the part of Congress to promote "industrial peace" by reducing the number of strikes having to do with "failure to recognize and utilize the theory and practices of collective bargaining." S. REP. No. 573, 74th Cong., 1st Sess. 1 (1935). Of course, this benefit is more from protecting the legal status of unions and the collective bargaining process than it is from protecting unions themselves. However, to the extent this can be attributed to unions, it may represent another beneficial externality. In *The Two Faces of Unionism*, Freeman and Medoff point to reduction in turnover as a benefit from unionism. Freeman & Medoff, *supra* note 5, at 78. Of course, turnover is also lower in rent-controlled apartments, and yet few point to this as a benefit from rent control. We have focused instead on the insurance benefits of provisions which limit the discretion of the employer. There are probably many other features of unionism which could be cited as benefits, under some theory, which we have not considered. However, such benefits can easily be incorporated into our analysis. We have only restricted our attention to those features which appeared to us to be plausible sources of "net social benefit" (i.e., social benefits exceeding social costs) from unionism.

50. According to the Forty-Eighth Annual Report of the NLRB for fiscal year 1982-83, which contains the most recent figures available, the Board's total obligations and expenditures were \$124,974,486. 48 NLRB ANN. REP. 23 (1986). This includes personnel compensation and benefits, travel and transportation, rent, communications, utilities, printing and reproduction, supplies, materials, equipment and insurance claims and indemnities. *Id.*

51. Readers familiar with the law and economics literature will recall that Calabresi urged a similar "systems" approach toward analyzing tort law. See G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970). Of course, this is really nothing more than cost-benefit analysis, and might just as well be called an "economic" approach.

omies of scale. Thus, antitrust courts are forced in some cases to weigh benefits from productive efficiency against costs from allocational inefficiency.⁵² This is what an "efficiency test" of unionism would require. A union, like a monopoly firm, may engage in monopoly pricing, yet deliver social benefits through exploiting scale economies in the communication and enforcement of employee preferences with respect to workplace safety, procedural safeguards in dismissal and layoff policies and other matters.

The focus on efficiency maintained up to this point may seem to ignore an important distributional effect of unionism.⁵³ Recall that in the discussion of private contract making we noted that in an ideal case (no misperception of risk, low transaction costs), an efficient level of safety would be provided through an exchange in which the employee essentially bribes the employer to increase expenditures on safety by accepting a lower wage. The problem with this arrangement is that it requires the employee to purchase the improvement in safety. If it is accepted that the employee is entitled to a safe work environment, then we should naturally reject any solution to the problem of inadequate safety which requires the employee to pay for safety enhancements. The distributional effect of unionism is obvious here: it provides a solution to the problem of inadequate safety that does not require the employee to purchase the improvements since the employer pays.

Although distributional concerns are unquestionably important, this paper deals almost exclusively with efficiency considerations.⁵⁴ There are two reasons for this approach. First, it is not

52. For example, consider the case where the setting up of a joint venture leads to monopoly, but also lowers the costs of production.

53. Although we distinguish distributional and efficiency concerns in this text, it should be noted that the line between them is not clear. The distributional concerns that are commonly talked about can be seen as reflecting a desire to see certain types of risk allocated efficiently. For example, one could imagine that each of the members of a group that is about to be shipped off to an unexplored planet might be willing to sign an agreement under which whatever income is generated on the new planet by them will be distributed equally. This might be so because each member of the group, knowing nothing about the environment of the planet, has no idea how well she may fare if left to fend for herself. If the members of the group are risk averse, the agreement could be an efficient risk-sharing contract. Yet it is also obviously a distributional rule. Thus, to the extent that distributional concerns can be described as arising from desires to allocate certain kinds of risk efficiently, they can be viewed or treated as efficiency concerns. In light of this, Posner's claim that the core of Rawls' theory of justice had been anticipated in the economics literature by several years is not so surprising. See R. POSNER, *supra* note 20, at 59.

54. The term "socially desirable" will be used, as an alternative to "efficient," and will be taken to have the same meaning. Further, for the most part

altogether clear that distributional concerns cannot be incorporated within efficiency criteria. Thus, explicit consideration of distributional concerns can easily be brought into the analysis, and we will do so at various points in the remaining sections. Second, and perhaps most important, the fairly recent defense of unionism on efficiency grounds offers perhaps the most persuasive case for such an institution. The distributional concerns, important as they are, can be met through many other approaches not requiring the organization of a union (for example, tax and transfer policies). If unions are good because they are in fact efficient, then certainly it is not too much to ask that a program for regulating unionism reflect some concern for the enhancement and preservation of such efficiency.

D. *When Should Entry Be Encouraged?*

Taking minimization of the sum of social costs from resource misallocation, failure to provide efficient quantities of public goods, and administrative costs as the goals of a rational system for regulating employment contracts, it is fairly clear that a "second best" condition can be stated under which the entry of a union should be encouraged. That condition is that union entry should be encouraged whenever the reduction in social cost resulting from increased provision of workplace public goods (e.g., safety, procedural safeguards in dismissal policy) exceeds the increases in administrative costs and costs from resource misallocation.⁵⁵ Needless to say, it would be extremely difficult to apply this rule with precision. A somewhat rougher and simpler test, though hard to apply, would be to ask whether unions will enhance the provision of workplace public goods.

the standard for deciding whether something is efficient is the Kaldor-Hicks criterion. For a discussion of this criterion, see *supra* note 20.

55. We describe this as a second best condition for two reasons. The first reason is that it is obviously vulnerable to the criticism that it fails to take into consideration effects the introduction of a union might have in other markets. For the original statement of the second best theorem (which essentially says that curing inefficiency in one of several inefficient markets brings no guarantee that social welfare will be enhanced), see Lipsey & Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

The second sense in which the term second best is used here refers to the nature of the outcome itself. In this description, enhanced safety is achieved through an imperfect institutional mechanism. A "first best" optimum would be one in which such benefits could be realized without incurring the additional costs. However, to the extent that union representation is the only feasible means of realizing certain benefits, there is an institutional restraint (namely, the union) which stands in the way of a first best result.

An immediately obvious implication of just about any "socially desirable entry condition" for unions is that a union may or may not enter when socially desirable. The incentives facing union organizers, or the workers generally, are not by any means likely to guarantee union organizing activity only in circumstances where the social desirability criterion is satisfied. Workers generally will prefer organization when it is sufficiently clear that the expected private benefits from compensation and the provision of workplace public goods are greater with a collective bargaining representative than without one. This does not imply, however, that entry will make the production relationship more efficient. Employees may prefer organization even in the absence of any expected increase in the provision of workplace public goods as long as the expected increase in wages is sufficiently high. However, the increase in wages, by itself, causes a transfer from employers to employees and resource misallocation.

A further reason that a union may not enter when it is socially desirable is the agency problem: the union organizers may have goals which diverge from those of the workers.⁵⁶ For example, the union organizers may have accepted bribes from the employer.

III. REGULATING UNION ENTRY: LEGAL ISSUES

This section considers the legal mechanics of union entry and the legality of several favored employer tactics for combatting an organizing drive. While it would be impossible for us to consider in detail the Board's regulatory procedures for evaluating each prototype violation, we will briefly review the standards employed by the Board to examine these tactics in the hope that this discussion will illuminate the theoretical considerations in the other sections of this paper.

A. *The Legal Mechanics of Union Entry*

Section 9 of the National Labor Relations Act⁵⁷ establishes the procedures through which employees choose a representative for purposes of collective bargaining. Essentially, the statute requires the Board to ensure that elections are conducted under "laboratory conditions,"⁵⁸ that is, in an atmosphere which pro-

56. See, e.g., Note, *supra* note 11 at 1261.

57. 29 U.S.C. §§ 151-169 (1982).

58. General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

motes the uninhibited expression of employee choice. When an employer commits unfair labor practices during an election campaign⁵⁹ the "laboratory conditions" may be destroyed. The Board is entrusted with the dual responsibility of conducting elections and remedying unfair labor practices which occur during and after an election campaign.⁶⁰ Because our focus here is on the propriety of regulating various employer responses to union entry we discuss briefly the mechanics of that entry and the typical employer responses to it.

1. *Organizing*

A union organizing drive most often begins when an organizer or an employee begins soliciting employee signatures for union authorization cards. The authorization cards state that the signing employee wishes to be exclusively represented by a particular union for purposes of collective bargaining with his employer. Normally, a union must obtain signed authorization cards from at least thirty percent of the eligible employees.⁶¹ The union then petitions the Board for an election and submits the cards as proof of at least thirty percent support. The Board subsequently conducts an investigation to determine whether the petition is timely and otherwise meets the requirements of the Act.⁶²

2. *The Election and Bars to Election*

If the union wins a majority of the votes cast and there are no post-election objections,⁶³ the Board will certify the union as the employees' exclusive collective bargaining representative. Before the election both parties will typically engage in campaigning which may take the form of speeches, written solicitations, rallies, meetings and other appeals. It is this campaign activity that,

59. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1982).

60. National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1982).

61. 29 U.S.C. § 159(e)(1) (1982); 29 C.F.R. §§ 101.17-.18(a) (1988).

62. In particular the Board examines the proposed bargaining unit in order to determine whether it is appropriate for the particular workplace in question. If it can, the Board persuades the union and the employer to agree on a date and time for the election. In the event that the parties cannot come to an agreement, a hearing is held and the outstanding pre-election issues are resolved.

63. Following an election, an unsuccessful party may file post-election challenges to either the manner in which the election was conducted or to conduct which allegedly affected the outcome of the election. The moving party has seven days from the day after the ballots are counted to file an objection. If the election is set aside on the basis of post-election objections, another election is normally conducted as soon as possible. See generally NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL (1983).

under certain circumstances, the Board has undertaken to regulate in order to ensure that the "laboratory conditions" necessary to promote employee free choice are not disturbed.

In certain cases, the Board will not allow an election petition on the grounds that it is untimely. A petition is limited both by statute and by decisions of the Board. For example, the Act prohibits an election in a unit if a valid election was held within the preceding year.⁶⁴ The Board will also bar election petitions during the certification year (the twelve month period following the date of certification) in order to give the incumbent union and the employer an opportunity to negotiate their first contract.⁶⁵ Finally, the Board will generally refuse to direct an election where a valid collective bargaining agreement is already in existence. Known as the "contract bar" doctrine, this Board-created prohibition is ostensibly designed to encourage stability in labor relations.⁶⁶ A contract of reasonable duration between an employer and a union will bar a rival election petition except during the "window period" of ninety to sixty days prior to the expiration of the contract.⁶⁷

The campaign tactics of an employer who seeks to resist union entry are often the object of unfair labor charges. In addition to conducting elections in the manner described above,⁶⁸ the Board is charged with evaluating and remedying the unfair labor practices of employers and unions.⁶⁹ We now turn our attention to the favored tactics of employers and the regulatory response to the Board to these tactics.

64. National Labor Relations Act, § 9(c)(3), 29 U.S.C. § 159(c)(3) (1982).

65. *Brooks v. NLRB*, 348 U.S. 96 (1954).

66. B. MELTZER & S. HENDERSON, *LABOR LAW: CASES, MATERIALS AND PROBLEMS* 352 (1985).

67. *Id.* at 352-57.

68. The Board may also dismiss an election petition where it appears that the proposed unit is inappropriate because of a fluctuating workforce. Where the proposed unit is undergoing an expansion or substantial contraction, the Board will generally dismiss the petition without prejudice. When the period of fluctuation is complete, the petition may be refiled. *Bell Aerospace Co.*, 190 N.L.R.B. 509 (1971); *Celotex Corp.*, 180 N.L.R.B. 62 (1969).

69. The Taft-Hartley Act amended §§ 7 and 8 of the Act and thereby established an employee's right to refrain from engaging in concerted activity and made various union activities unfair labor practices. 29 U.S.C. §§ 157, 158 (1982). These activities are not considered in detail here because we do not believe that this kind of illegal activity functions as a *barrier* to union entry. On the contrary, we assume that when a union violates the Act in this manner, it does so solely in order to increase its chances of winning the election.

B. *The Legality of Various Employer Campaign Tactics*

Section 7 of the Act provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities”⁷⁰ In addition to creating the secret ballot election framework just discussed, section 8(a)(1) of the Act makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7].”⁷¹ Employer tactics to resist union entry which have been found to violate the Act (for our purposes here either section 8(a)(1) or section 9) include, but are not limited to, threats of plant closings and job loss; interrogation of small groups of employees; discriminatory discharges based on union sympathy; grants of benefits to employees; inflammatory appeals; false or misleading propaganda; and unlawful employer assistance.

1. *Threats of Plant Closing*

In *NLRB v. Gissel Packing Co.*,⁷² the United States Supreme Court articulated the permissible scope of employer predictions during a campaign: “[T]he prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.”⁷³ The Court further noted that “[i]f there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion”⁷⁴ Following *Gissel* the Board has set aside elections where an employer (or his agent) has predicted that unionization would result in plant closure⁷⁵ and the loss of jobs.⁷⁶ However, the Board will not automatically set aside every election in which an employer has made threats or dismissal predictions about the fu-

70. 29 U.S.C. § 157 (1982).

71. National Labor Relations Act § 8(a)(1), 29 U.S.C. 158(a)(1) (1982).

72. 395 U.S. 575 (1969).

73. *Id.* at 618.

74. *Id.*

75. *Rosewood Mfg. Co.*, 263 N.L.R.B. 420 (1982).

76. *Patsy Bee Inc.*, 266 N.L.R.B. 635 (1983).

ture of her business in the event of union entry. Indeed, it appears that where an employer is accurately describing the bargaining process (as in the statement "can wages or benefits be negotiated downward[?]. You are damn right they can and I have done some"),⁷⁷ the Board will decline to find an actual or implied threat to the employees' right to organize.

2. *Discriminatory Discharge*

The Board will set aside elections⁷⁸ where an employer discharges an employee because he is sympathetic to union entry.⁷⁹ Whether a particular discharge violates the Act depends upon an employer's motivation. In other words, an employer is entitled to terminate an employee who performs badly or whose services he no longer requires even if the employee happens to support union entry.⁸⁰

In *NLRB v. Wright Line*,⁸¹ the United States Court of Appeals for the First Circuit concluded that the Board must demonstrate that an employee's protected activities were a substantial or motivating factor in his discharge. The burden then shifts to the employer to prove a nondiscriminatory rationale for the discharge.

3. *Grant of Benefits*

The Board has persistently applied the *NLRB v. Exchange Parts Co.*⁸² rule, which prohibits any grant of benefits to employees during a campaign.⁸³ According to this rule, the Board as-

77. Caradco Corp., 267 N.L.R.B. 1356 (1983).

78. Another prototype violation is coercive interrogation of an employee. Over the years, the Board has grappled with the issue of whether and when an interrogation interferes with or restrains employees in the exercise of their rights. In general, the Board examines the circumstances surrounding the interrogation in order to determine whether the interrogation tended to restrain, coerce or interfere with rights guaranteed by the Act. *Teamsters Local 633 v. NLRB*, 509 F.2d 490 (D.C. Cir. 1974). An obvious problem with this case-by-case approach is that it assumes it is possible to reconstruct the circumstances of an interrogation and to objectively evaluate the response of the employees to the employer's questions.

79. *Garrison Valley Center*, 246 N.L.R.B. 700 (1979).

80. See, e.g., *Mueller Brass Co. v. NLRB*, 544 F.2d 815, 819 (5th Cir. 1977) ("Absent a showing of antiunion motivation, an employer may discharge an employee without running afoul of the fair labor laws for a good reason, a bad reason or no reason at all."); *Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943).

81. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

82. 375 U.S. 405 (1964).

83. The rule of *Exchange Parts* has come under considerable attack. See, e.g., Hamilton, *NLRB Proscription on Granting Benefits During Election Campaigns—A Det-*

sumes that employees are always coerced in the exercise of their section 7 rights whenever an employer attempts to improve employee benefits or wages during a campaign. At issue here is the extent to which employees will be intimidated by the "fist inside the velvet glove."⁸⁴ In its zeal to avoid the allegedly coercive effect of benefits, the Board has invalidated elections where an employer has reduced vending machine prices,⁸⁵ improved the work rules,⁸⁶ and given free lunches.⁸⁷

4. *Inflammatory Appeals*

In *Sewell Manufacturing Co.*,⁸⁸ the Board announced a set of rules for determining when an election would be set aside because of inflammatory and extraneous appeals to racial prejudice. When a party injects the issue of race into a campaign, the election will be set aside if its comments are untruthful and if they tend to exacerbate and inflame racial feelings.⁸⁹ The party that injects race into a campaign will bear the burden of proving that its statements were both truthful and otherwise related to the election.⁹⁰ As a practical matter, the Board and the federal courts have tended to ignore appeals to black racial pride or to the ethnic pride of other groups.⁹¹

5. *False or Misleading Propaganda*

At some point during almost every union organizing campaign one or more factually inaccurate statements are asserted and disseminated. The Board has in general been reluctant to regulate every falsehood and half-truth that conceivably affected the outcome of an election. With its decision in *Hollywood Ceramics Co.*,⁹² the Board took the position that:

riment to Employees, 1981 ARIZ. ST. L.J. 723; Jackson & Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1 (1982).

84. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964) ("Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.").

85. *Wilker Bros.*, 236 N.L.R.B. 1371 (1978).

86. *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir.), *cert. denied*, 389 U.S. 958 (1967).

87. *Medline Indus. Inc.*, 218 N.L.R.B. 1404 (1975).

88. 138 N.L.R.B. 66 (1962).

89. *Id.* at 71-72.

90. *Id.* at 72.

91. *NLRB v. Sumter Plywood Corp.*, 535 F.2d 917 (5th Cir. 1976); *Bancroft Mfg. Co.*, 210 N.L.R.B. 1007, 1376 (1974).

92. 140 N.L.R.B. 221 (1962).

[A]n election should be set aside only when there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.⁹³

Thus, under *Hollywood Ceramics*, the Board undertook to evaluate the veracity of the statements in question. So long as there was an opportunity for rebuttal, even a false statement would not justify setting aside an otherwise valid election. In 1977, the Board abruptly reversed itself on this issue. In *Shopping Kart Food Market, Inc.*,⁹⁴ the Board decided that it would rely on employees to evaluate campaign statements for themselves, and would no longer set aside an election because of misleading statements. In late 1978, the Board announced that it was returning to the rule of *Hollywood Ceramics*.⁹⁵ This switch proved to be quite temporary. The Board reversed itself yet again in August 1982 and announced an "emphatic belief that on the balance the rule in *Shopping Kart* best accommodates and serves the interests of all."⁹⁶ Thus, at least for the time being, the Board will not set aside an election solely because of misleading or false campaign statements. The Board's regulatory machinery is invoked, however, where forged documents are used or a party has engaged in such deceptive practices that voters are unable to recognize campaign propaganda as such.

6. *Unlawful Employer Assistance*

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it"⁹⁷ This complete prohibition of employer dominated unions is consistent with the Board's essentially adversarial model of labor relations. This model is informed by a long-standing concern that "an organization or a representative or agent paid by the employer for representing employees cannot

93. *Id.* at 224 (citation omitted).

94. 228 N.L.R.B. 1311 (1977).

95. *General Knit of California, Inc.*, 239 N.L.R.B. 619, 620 (1978).

96. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127, 132-33 (1982).

97. 29 U.S.C. § 158(a)(2) (1982). *See also* M. WALSH, COMMITTEE ON EDUC. & LAB., S. REP. NO. 573, 74th Cong., 1st Sess. 10 (1935).

command, even if deserving it, the full confidence of such employees.”

Cases involving unlawful assistance are relatively rare today, but not unknown. In *NLRB v. Streamway Division, Scott & Fetzer Co.*, the United States Court of Appeals for the Sixth Circuit declined to enforce a Board determination that the company violated the Act when it formed an In-Plant Representation Committee.⁹⁸ The Committee was unquestionably dominated by the company, but the court concluded that the Committee was not a “labor organization” within the scope of section 8(a)(2) because “the Committee was a part of a company plan to determine employee attitudes regarding working conditions and other problems in an accurate and effective way, for the Company’s self-enlightenment, rather than a method by which to pursue a course of dealings.”⁹⁹

IV. REGULATING UNION ENTRY: THEORETICAL ISSUES

A. *Why Regulate Entry?*

Why regulate union entry? The preceding arguments demonstrate that there is an ideal entry condition: a union should enter when it can enhance the provision of workplace public goods. Despite this ideal condition, there is nothing to guarantee that the incentives facing union organizers will lead them to push for entry when and only when such entry is socially desirable. The problem is that union organizers may find entry attractive absent any intention to make the production relationship more efficient. Alternatively, the workers may reject the union when entry would be socially desirable. This potential asymmetry provides a justification for regulating entry.

Note that this is unlike entry by firms in a competitive economy, where it is expected that firms will enter when anticipated economic profit is positive.¹⁰⁰ Thus, whenever price exceeds average cost within a given industry, firms will enter.¹⁰¹ This continual entry of new firms drives prices down toward average cost. As more efficient, lower cost firms enter, prices are driven down further. The process continues until prices are driven to the minimum unit cost of producing. Thus, if the market is competitive, the profit signal is sufficient as a regulatory mechanism because

98. 691 F.2d 288 (6th Cir. 1982).

99. *Id.* at 294.

100. See, e.g., R. LIPSEY, P. STEINER & D. PURVIS, *ECONOMICS* 221 (1987).

101. *Id.* at 220-23.

firms will enter under such conditions only when entry is socially desirable. The profit signal generally will encourage entry by more efficient firms.¹⁰²

The question then arises whether it is possible to bring about socially desirable union entry through regulation. We suggest three approaches. First is a case-by-case determination of whether the introduction of a union will enhance the provision of workplace public goods. This would obviously be a very costly way of regulating union entry. At a minimum, it probably would require the Board to examine the conditions of the employer's worksite and determine whether improving safety conditions would be desirable. Given the kind of costly inquiries that would have to be made under this approach, we readily exclude it as infeasible.

The second approach would be to change the internal structure of a union in a way that would make it respond to signals in the same way as the firm in a competitive market. The structure of the union would have to be such that it pressed for organization only when the entry of a union would enhance the provision of workplace public goods. An organization that enforced the claims of workers to certain workplace public goods would best meet this incentive structure. By way of illustration, suppose unions were essentially private enforcement agencies that had the power to bring a negligence suit, *ex ante*, for the expected loss to workers from, for example, inadequate safety.¹⁰³ A court could employ the Hand test¹⁰⁴ to determine an employer's negligence: whether the employer's costs of improving safety exceeded the additional expected loss imposed upon workers by not improving safety. The union would enter when the expected loss to workers (its recovery) exceeded its entry costs and the employer was negli-

102. An exception should be made for the special case of the "cream-skimming" entry discussed earlier. See D. EVANS, *supra* note 5, at 61-94. Also, if a monopolist exploits its market power, less efficient firms may enter to compete. However, this is clearly not the competitive model described in the text. Besides, the entry of another firm will force the monopolist to compete, and, given that the monopolist is more efficient, drive out the entrant.

103. For a general discussion of *ex ante* negligence suits, see Rose-Ackerman, Entitlement and Efficiency in Tort Law (Paper presented in the Law and Economics seminar at Harvard Law School (1987)).

104. We refer to Judge Learned Hand's formula for negligence, which states that negligence is a failure to take care where the cost of care is less than the probability of the accident multiplied by the loss if the accident occurs. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). Here it should probably be referred to as an *ex ante* Hand test since the court would be required to estimate the probable loss and the likelihood of its occurrence.

gent in providing safety. The employer would then face a choice: pay the costs of improving safety now, thereby avoiding a negligence verdict, or pay the workers' expected losses. Clearly, the employer would pay the costs of improving safety precisely when such improvements would be socially desirable.¹⁰⁵

Although this scheme appears to have the desirable result of encouraging union entry only when socially desirable, its practical shortcomings are numerous. First, the union's entry would be conditioned in part on the costs of organizing. If such costs were small, then costs of organizing would not be a consideration. But if the costs were large, then obviously there would be situations where a union should enter but would not because of high organizing costs. Second, high administration costs of bringing a negligence suit might discourage such attempts.¹⁰⁶ Third, this scheme would require the courts to develop notions of "due care" in the dismissal context and many other areas. While courts have already developed some helpful doctrines in this area,¹⁰⁷ it may well be administratively infeasible (and very expensive) for courts to review all of the aspects of the employment relationship that enter into the collective bargaining process. In light of these considerations, it is not clear that "private enforcement unionism" would solve the incentive problems associated with union entry.

The third approach to union entry regulation would require the levying of an entry tax. By requiring each union, upon entry, to pay a tax equal to the increase in total employee compensation achieved through unionization, presumably entry would occur

105. Why not strict liability? As the type of suit we have in mind is an *ex ante* suit, that is, brought before the accident occurs, strict liability would obviously be meaningless.

106. Moreover, suits may be brought when litigation is inefficient, in the sense that the costs of litigation far exceed the social benefits from enforcing the underlying claims. See Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982).

107. The tort of wrongful discharge has been held by courts to create a cause of action for an employee whose discharge is contrary to an established public policy. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980). For a good discussion of the expanding law of wrongful discharge, see Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1413-14 (1967); Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457, 473-74 (1979); Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1097-109 (1984); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1840 (1980); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 368 (1974).

only when safety enhancements and other "efficiency gains" could be realized through organization. Entry motivated solely by the prospect of higher wages would be deterred through the imposition of such a tax. However, as a means of deterring inefficient union entry, the union should also be required to pay, as part of an entry tax, the loss from the resource misallocation attributable to the union-induced wage increase. With an entry tax equal to the sum of the increase in the wage bill and the misallocation loss, only where the efficiency gains exceed this sum does the incentive to enter remain. Thus, union entry would occur only in circumstances where such entry is efficient.

There are problems raised by this approach. How to estimate an efficient entry tax is a serious issue in itself. The administrative costs of tailoring such a tax to each instance of union entry would make this solution impractical. Indeed, estimation of a tax which would be correct only in the average case would be extremely difficult. However, even if the practical difficulties were not so impressive, a more troubling aspect of an entry tax is its obvious conflict with the entitlement preserving function of unions. We noted earlier that unions are entitlement preserving because unionized employees are not required, as would be the case in a regime of private contract making, to accept lower compensation in exchange for such public goods as enhanced workplace safety. If unionized employees are required to pay a tax which is greater than the union-induced increase in compensation, then they are giving up something in exchange for the benefits of union representation. Such an outcome would be inconsistent with the belief that employees are entitled to such benefits as safety enhancements achieved through unionization. If we believe that employees are entitled to safer work environments and procedural safeguards in dismissal policy, then we cannot also require that employees pay for such enhancements.

In the end, the search for an optimal system for regulating union entry leads to an unclear and dissatisfying answer. Neither a case-by-case examination of the potential costs and benefits of union entry, nor changing the organizational structure, nor levying an entry tax offer practical solutions. The present system, which attempts to prevent employers from discouraging union entry when a majority of the workers prefer union representation, may be the most workable compromise.

Still, even if the goal is to permit the preferences of workers to govern workplace arrangements, this does not imply that labor

organizing should be supported or encouraged at all costs. There are administrative costs associated with any regulatory scheme. Thus, one must ask: even if the goal is to support workers in their efforts to unionize, what kinds of deterrence efforts on the part of the employer should concern us most? If some employer actions are completely or very likely to be ineffective in either encouraging or discouraging union organization, then resources should not be devoted to regulating such actions.¹⁰⁸ This is a proposition which appears somewhere in the first few pages of almost every critical discussion of the regulation of union election campaigns.¹⁰⁹ However, we restate it here as a prologue to what we consider a novel examination of this issue. While previous work in this area has analyzed statistical evidence,¹¹⁰ our approach is to draw some conclusions about what we should expect the result of various employer actions to be, given rational strategic behavior on the part of employers and employees. We consider below several deterrence tactics and their likely outcomes in light of the counterstrategies available to organizers.

B. *Speech: Threats, Predictions, Inflammatory Appeals*

"I *am* a businessman and I have to make business decisions."¹¹¹ These words, coupled with predictions of a plant closing, are typical of the responses of employers to union organization campaigns.¹¹² The usual goal of the employer in the course of a campaign is to deter union entry by persuading employees that everyone will be worse off if a union is elected to represent the workers in collective bargaining. As noted in section III, a rather complex set of rules has been developed by the Board and the federal courts to regulate the process and outcome of union election campaigns. Using these rules in *Thomas Indus-*

108. In 1987 the NLRB's total expenditures and obligations were \$130,831,000, of which 8% (or about \$10,466,480) was spent regulating union elections. Telephone interview with Daniel Hartline, Budget Analyst, Budget Section, Financial Management Branch, Division of Administration, National Labor Relations Board (June 17, 1988).

109. See, e.g., J. GETMAN, *supra* note 1, at 3-6; Bok, *supra* note 7, at 43-44, 62-64, 66; see also Jackson & Heller, *supra* note 83, at 21 (referring to "incentive to litigate" under current doctrine governing promises and grants of benefits by employers).

110. See J. GETMAN, *supra* note 1; Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision*, 79 NW. U.L. REV. 87 (1984).

111. Thomas Prods. Co., 167 N.L.R.B. 732, 733 (1976).

112. NLRB v. Village IX, Inc., 723 F.2d 1360 (7th Cir. 1983); International Paper Co., 273 N.L.R.B. 615 (1984).

tries, *Thomas Products Co. Division*, for example, the Board set aside the results of the election on the ground that the employer's comments were likely to coerce employees into voting against the union.¹¹³

This section examines two questions: what are the theoretical grounds for regulating speech in union election campaigns?; and why should we expect efforts to threaten employees to influence the outcome of the elections?

1. *Regulating Campaign Speech and the Economics of Information*

If a candidate for President of the United States promised to eliminate the budget deficit within the first month of his or her tenure, few would be overly concerned about the effects of such a statement on the outcome of the election. Most would consider such a promise pure nonsense, and we would anticipate the absurdity of this hypothetical candidate's strategy to be pointed out by many others. Why should the election of a collective bargaining representative be treated differently?

One reason to distinguish the union election campaign is that employees probably think there is more at stake in the typical union election. There certainly is more at stake in the sense that each vote will have a greater influence on the outcome. In addition, it might be argued that more is at stake because the outcome may be more important for the worker than the outcome of a Presidential election. However, it is not clear where these observations lead us. They do not clearly provide support for heavy-handed regulation of campaign speech in union elections.¹¹⁴

Another reason for treating union elections differently might be found in aspects of the relevant market for information. The union election campaign is unlike the typical political election in which many individuals and groups participate in the process and offer views on the issues. Unlike a political election, where any competitor or commentator seeks to capitalize on the verifiably false statements of a given candidate, the union election normally pits two competitors against each other, and leaves it, to some

113. *Thomas*, 167 N.L.R.B. at 733.

114. That voters take union representation election campaigns more seriously than presidential elections might suggest that they are much less likely to be duped by outrageous claims. Indeed, the notion that union election campaigns should be regulated more heavily simply because they may be more important to voters in an economic sense, should also lead us to think that product advertising should be regulated more heavily as the products involved make up a larger share of the consumer's budget.

extent, to the employees to choose one over the other. The closer analogy is to that of a consumer who must choose on the basis of advertising whether to buy a product from one firm or a close substitute from another. No doubt the consumer would considerably discount the promises and predictions of both producers, and one would expect the same of the employee in a union election campaign. Further, one should expect each competitor in this kind of campaign to disclose information favorable to itself, for otherwise the voter rationally would assume the worst.¹¹⁵ However, in addition to disclosing favorable private information, each side will attempt to smear the other.¹¹⁶ To the extent that some of this information cannot be shown to be false, a fair amount of unreliable information is transmitted which may not be totally ignored by the voters or disproven by the candidates.¹¹⁷

The question, then, is who will provide information to the employees that is not tainted by self-interest? The employees themselves are unlikely to do so because access to such information is perceived as a public good.¹¹⁸ Moreover, even for the em-

115. In a market where there is quality variation and only sellers possess information concerning the quality of their goods, we should expect sellers whose goods are above the minimum quality to disclose this (and thereby fetch a higher price for their goods), for otherwise a rational consumer would assume the worst. For a discussion of this argument, see Grossman & Hart, *Disclosure Laws and Takeover Bids*, 35 J. FIN. 323, 323-25 (1980).

116. See, e.g., Bok, *supra* note 7, at 49-50. Professor Bok observes: In some cases, to be sure, [the employee] will be informed of better wages and generous contract terms that the union has secured in other plants where it has bargaining rights. But this information will usually be rebutted in various ways by the employer: there may be additional plants in which the union has failed to obtain the same conditions, or the contracts may be less favorable in other respects than the terms under which the voter is already working, or it may be argued that the other plants are simply better situated financially to provide the benefits in question.

Id.

117. We should expect voters to rationally accept the statements of employers and union organizers concerning easily verifiable or disprovable statements, since there would be little reason for either party to make statements which can easily be shown to be false. With respect to information that is not easily verifiable, the outcome is harder to predict. Some of this information would be ignored, and some of it discounted only partially. Reputation for truth telling would serve as an additional constraint on the actions of the participants, but this would probably not be enough to eliminate incentives to provide false information. Although this analysis is inconclusive, it suggests limits on the social benefits that might be provided by the regulation of campaign speech.

118. The results of the Getman Study verify this. See Goldberg, Getman & Brett, *Union Representation Elections: Law and Reality: The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981). The authors note:

Employee choice . . . is made early in the campaign, is firmly rooted in

ployee who would not prefer to wait for some other source to provide the information, it may seem that the marginal impact of his vote could not justify a great investment into gathering and assessing the kind of information that is needed to make an informed decision whether to vote for a union.¹¹⁹ This is the familiar problem of voter apathy, observed, for example, in political elections and shareholder voting. Further, while independent sources of information exist in consumer markets, for example *Consumer Reports*¹²⁰ and Underwriters Laboratory,¹²¹ we are unaware of any analogous sources available to employees.

In light of these considerations, there may be stronger arguments for regulating speech in the union election campaign than in the political campaign or in product advertising.¹²² However, this is not an argument that has been explicitly relied upon by the

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.

... [T]here 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

... [W]e concluded that the likelihood that the content of campaign propaganda substantially affects vote is so slim that its regulation cannot be justified

Id. at 571.

119. On the complexity of such a decision, consider the following description of the problem offered by Professor Bok:

Assuming that the employee can make a sound appraisal of the conditions in the plant, he may be hard pressed to decide to what extent a union can improve upon the situation. He will seldom possess much direct knowledge concerning the union and its activities

The voter may be particularly handicapped in gauging the disadvantages of having a union in the plant. Will collective bargaining cause the plant to move or lose business? Will there be dictatorial union leaders or favoritism toward particular groups of workers? Will strikes occur and will replacements take his job?

Bok, *supra* note 7, at 49-50.

120. Consumers Union of U.S., Inc., which publishes *Consumer Reports*, regularly tests various consumer products and reports the results to its readership.

121. Underwriters Laboratories Inc. is a nonprofit organization dedicated to improving consumer safety by working with government and manufacturers. By selectively putting the UL Mark on various consumer products, Underwriters Laboratory Inc. enables consumers to purchase products that meet its standards for safety and quality.

122. For example, the union election campaign may deserve stricter regulation than the typical political campaign because there are fewer candidates "poling" the statements of other candidates in the union election campaign. In addition, unlike many markets for consumer goods, there are generally no independent sources of information in union election campaigns.

Board.¹²³ More important, the arguments considered here do suggest that regulation of the statements made by union organizers as well as employers should be based on a truth-in-advertising concept (if this is feasible) rather than on the current rationale.

Even if one believes that the case for regulating speech in the union election campaign is stronger than that for regulating speech in the political campaign, the question remains how restrictive such regulation should be. As a general matter, the law is reluctant to constrain and fix liability for speech.¹²⁴ This can best be explained by the nature of speech as a consumption good. Speech is an important mechanism for conveying information. Information, as a public good,¹²⁵ often has beneficial "spill-

123. As Professor King observes: "In the early Wagner Act years (1935-1941), the Board usually held that any anti-union statement of an employer made during an organizational campaign was coercive *per se* . . . [since] any anti-union statements by the employer preyed upon an employee's fear of the loss of his job and thus were impermissible." King, *Pre-Election Conduct—Expanding Employer Rights and Some New and Renewed Perspectives*, 2 INDUS. REL. L.J. 185, 187-88 (1977) (citations omitted). Today the general standard remains the "laboratory conditions" test of *General Shoe*, which essentially requires that campaigns be conducted under conditions which "as nearly as possible" reveal the "uninhibited desires" of the employees. *General Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948). When such conditions are not present—which might occur because of campaign speech by the employer—the Board may require that the election be conducted over again. See *id.*; see also B. MELTZER & S. HENDERSON, *supra* note 66, at 94; King, *supra*, at 190.

Whatever the stated case, as the Getman Study makes clear, the NLRB relies on the following three assumptions in support of its current regulation:

(1) "employees are unsophisticated about unionization, so their sentiments are tenuous and easily changed by the campaign";

(2) "employees are attentive to the campaign and base their decisions on the parties' arguments"; and

(3) "reprisals and benefits will coerce union supporters into voting against union representation."

J. GETMAN, *supra* note 1, at 140-41.

124. This is evidenced by relevant first amendment doctrine and also by tort doctrine governing liability for intentional infliction of emotional distress. For the connection between first amendment doctrine and liability, see *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *New York Times v. Sullivan*, 376 U.S. 254 (1964) (concerning libel of a public official; plaintiff bears burden of proving actual malice with convincing clarity). On liability for intentional infliction of emotional distress, see *Eckenrode v. Life of America Ins. Co.*, 470 F.2d 1 (7th Cir. 1972) (setting out elements of a *prima facie* case for tort of intentional infliction of severe emotional distress: "(1) Outrageous conduct by the defendant; (2) The defendant's intention of causing, or reckless disregard of the probability of causing emotional distress; (3) The plaintiff's suffering severe or extreme emotional distress; and (4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct").

125. Speech, or more precisely the information conveyed by it, is a public consumption good in the sense that it is "nonrivalrous" in consumption since one individual's consumption of information conveyed by speech does not re-

overs." When information is costly to produce, market participants, in the absence of efforts to subsidize the provision of information, will tend to produce too little of it.¹²⁶ Exempting the means of providing information from liability is easily justifiable as an indirect means of subsidizing the provision of information.¹²⁷

Thus, even if union election campaigns are distinguishable from political campaigns in respects that justify more comprehensive regulation of union election speech, one should still be reluctant to regulate speech that arguably provides beneficial information. With respect to speech that does not provide any beneficial information, the administrative costs of regulation can only be justified in cases where it is clear that such speech is likely to influence workers' votes because it cannot be disproven or because the workers are likely to treat it as true rather than discount it. While the Board has not adopted this policy, one might argue that it has come close in its decisions governing inflammatory appeals (*Sewell*¹²⁸) and false or misleading propaganda (most recently, *Midland National Life Insurance Co.*¹²⁹). Appeals to racial prejudice, one might argue, never provide beneficial information and a rule restricting such speech cannot be described as burdening or taxing the provision of beneficial information. It is easy to accept this and yet not be satisfied that this justifies the administrative costs of regulation. Appeals to racial prejudice, if based on false information, can be disproven by the other side and are likely to be discounted as false propaganda by rational voters. On the other hand, if such appeals are based on valid information, the speaker, whether the union or the employer, can provide the information and avoid "liability" by dispassionately stating it as fact.¹³⁰ In either case the administrative cost of regulation—if the goal of such regulation is to prevent the transmission of informa-

duce the amount available for others to consume at the same time. The other feature commonly associated with public goods is "nonexclusivity," that is, the provider of the good cannot deliver it exclusively to just one consumer. Clearly information conveyed by speech can be delivered exclusively to one recipient. For an introductory discussion of public goods which addresses the difficulty in distinguishing the elements of exclusivity and rivalry, see NICHOLSON, *MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS* 707-08 (3d ed. 1985).

126. See, e.g., J. HIRSHLEIFER, *supra* note 12, at 493-94.

127. For a development of this argument, see R. POSNER, *supra* note 20, at 262.

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

129. 263 N.L.R.B. 127 (1982).

130. See Bok, *supra* note 7, at 71.

tion which appeals to racial prejudice—is unlikely to be justified as a general matter.

2. *Coercive Speech: How Easy is it to Deter a Union?*

An employer may be able to deter a union from entering by sending signals which persuade the employees that they will be worse off with a union. Consider the most threatening signal, the plant closing. Suggestions that the plant will close if a union is elected clearly are designed to lead employees to think that the expected costs of union representation exceed the expected gains—were the threat carried out this would certainly be true. However, there is a very simple and important reason that a threatened plant closing may not have its intended effect: in the vast majority of cases, it would be an irrational response, and the employees are probably aware of this. This problem, which we refer to as “endgame irrationality,” is fairly obvious but has received little attention in this context.¹³¹ The basic point is that if the threatened retaliation makes sense during the election campaign, it must also make sense after the union has been voted in, for otherwise why should anyone pay any attention to it? If the participants are rational, a threat which is based on an irrational act is one that should have little effect when announced.

This argument can be made clearer with a simple hypothetical. Suppose workers receive a total of \$500 from an employer and the firm's profit is \$1000. Assume that the plant's total output is not affected by the introduction of a union, and the amount which the workers can transfer from the employer is bounded below by \$0 and above by \$1000. The employer's choice after the union is elected is to accept a lower level of profit, say \$800 per year, or to shut the plant down, forgoing the lower stream of future profits with an organized plant. If the employer can earn a higher return by shifting his capital into some other activity, then shutting down and selling the plant will be an attractive option. However, if the employer and the union can come to an agreement in which the employer still makes an economic profit (i.e., more than in any other available alternative) after paying the union wage, it would be an irrational act to close the plant. That such an agreement exists may be the case because the union can always ask for nothing, leaving the employer in the same position

131. But these arguments have received a great deal of attention in the theoretical antitrust literature. See, e.g., P. MILGROM & J. ROBERTS, *PREDATION, REPUTATION AND ENTRY DETERRENCE* 1 (1981).

he was in before the election. Given that there is room for an agreement to be reached after the union is elected, we do not expect the employer to act as if no agreement could be reached.

Note that nothing in this argument suggests that the employer will find it within his interest to bargain in good faith with the union after it has been elected to represent the workers in collective bargaining.¹³² The point is only this: if an agreement can be reached under which the employer still finds it profitable to run his plant, shutting down the plant after the union is elected would be irrational, and it is highly probable that employees, or at least union organizers, are aware of this.

It may be that, in multiplant settings, an employer will consider closing one plant in order to gain the reputation of a harsh retaliator and thereby deter unions from entering in the remaining plants. Closing a plant would simply be an investment in reputation, with the payoff being the union wage differential multiplied by the number of employees at remaining plants.¹³³ One can imagine situations in which the cost of closing a profitable plant is less than the gain from avoiding union wages to a large number of employees at other plants. Further, once one plant is closed, the investment in reputation is a sunk cost, so the employer should be willing to close another plant if the expected gains exceed the costs. For these reasons it may not seem irrational for the employer who owns many plants to carry out a threat to close a plant.

132. Indeed, as Professor Weiler has noted, even an employer whose campaign conduct has been sufficiently egregious so as to warrant a *Gissel* bargaining order cannot be forced by the Board to make "a reasonable contract offer." Weiler, *supra* note 8, at 1794. Professor Weiler also observes:

The vigorous debate about matters of high principle that still rages over the legitimacy of using bargaining orders in place of secret ballot elections is really beside the point. A bargaining order is an effort by an outside agency to construct a lasting collective bargaining relationship between a trade union and an employer whose antiunion behavior has been so egregious that the Board is prepared to bypass the normal secret ballot election. What can the union do with the bargaining order? Although the order requires the employer to sit down at the negotiating table and go through the motions of trying to reach an agreement, the governing principle of freedom of contract under the NLRA means that the employer is not required to consent to any significant changes in working conditions.

Id. (citations omitted). For an earlier discussion of these issues, see Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

133. For example, if the employer has two plants and the union is expected to increase wages by 15%, then the value of deterring entry into both plants would be the present value of the stream of future wage bills (i.e., aggregate labor costs) from both plants, multiplied by 15%.

However, there are several problems with the argument that a plant closing may be an investment in reputation. First, it requires us to believe something which is not so readily believed: that the employer, facing uncertain union entry at any one of a number of plants, will find it within her interest to invest a very large sum in deterring future union organizing. It is unclear whether the expense incurred in closing a plant in order to send signals to future union organizers will be justified by the savings from deterring union entry. Second, the influence of any such signal will eventually dissipate with labor force turnover. Finally, union organizers have available counterstrategies. For example, for an employer with several plants, a union can try to organize all or many of them at the same time.

The value to the employer of a threat is the reduction in the expected present value of the stream of production costs that is earned by deterring union entry. Thus, in the multiplant employer case, under conditions of uncertain union entry into any one of several plants, the value of such a threat is unlikely to be great enough to justify a response as drastic as a plant closing. For example, suppose the employer has two plants and faces the decision to close down one plant, after a union has been elected to represent the workers, in order to deter the entry of a union into the second plant. Assume that if the employer closes the first plant, he merely reduces the probability of a union entering the second, in the following year, from one to, say, one-half. Further, if the union does not enter the second plant in the following year, then it may enter in the year after that, again with probability one-half. The same will continue to be true for the remaining years, far into the future. Although the probability of union entry is assumed to be fairly high in this example, it is also assumed that the employer's signal does not dissipate, that is, the probability of union entry does not increase over the years following the closing of the first plant. Assume further that the stream of future cash flows can be discounted as if the appropriate interest rate were 10%, that the first and second plants are of equal size, that the union will include all of the workers in the plant, and that the union will increase wages by 15%. The last assumption, which reflects the generally accepted estimate of a 15% union wage differential,¹³⁴ is extreme in the sense that it assumes the union will

134. See, e.g., R. FREEMAN & J. MEDOFF, *supra* note 8, at 44-46 (citing work of H.G. Lewis). Professor Lewis found the union wage effect to be roughly 10-15%. See H. LEWIS, *UNIONISM AND RELATIVE WAGES IN THE UNITED STATES*

impose this cost on the employer rather than compromise at any time for less. Given these assumptions, the value to the employer of a closing threat is equal to 12.5% of the current (i.e., the current year's) wage bill.¹³⁵ Thus the employer, in this example, rationally would close the first plant if the cost of closing it were less than 12.5% of the current wage cost. However, the cost of closing a plant is the capitalized value of the stream of profits flowing from the plant. Although there may be cases where this is less than 12.5% of the wage cost, one should be reluctant to think that this will occur with any sort of regularity.

The numerical example just considered is somewhat extreme in its assumption that the union would never consider anything less than its 15% wage increase. A far more reasonable assumption is that the union will settle for less in order to reach an agreement. But this assumption resurrects the endgame irrationality problem, though now in the multiplant setting. Consider the case where the union has already entered nine of the employer's ten plants. If the employer would not shut his plant down in the single plant case, then it follows that the employer will not shut down the last plant after the union has entered. However, it is hard to see why the employer would shut down the ninth plant in order to prevent entry into the tenth; the argument extends forward in the chain, forcing the conclusion that the employer would not close any of the plants in order to signal hostility to union entry. To anyone familiar with the theoretical literature in anti-trust, this argument will have a familiar ring.¹³⁶ It is vulnerable in its implicit assumption that employers and union organizers are

(1960). Freeman and Medoff report that the union wage differential was 20-30% during the 1970's.

135. Consider the following formula. The term "signal" refers to the employer's attempt to dissuade the union's entry by threatening the organizers. Thus, the choice to "signal" means to threaten the organizers.

Let:

r = interest rate (assumed to be 10%)

D = annual union wage bill differential (how much the employer's annual labor costs rise if the union enters, assumed to equal 15% of the annual wage bill)

P = probability that union will enter the plant, given that the employer signals (assumed to be $1/2$)

V_s = the expected present value of the increase in the employer's labor costs, given that the employer signals

V_{ns} = the expected present value of the increase in the employer's labor costs, given that the employer does not signal

Given this information, the value of an entry deterring signal is equal to $V_{ns} - V_s$, $= D(1-P)/(r+P)$, which calculated under the given assumptions is 12.5% of the current wage bill.

136. See, e.g., Easterbrook, *supra* note 5, at 282-88.

confident of each other's rationality.¹³⁷ This may not be the case. However, the argument demonstrates some of the weaknesses inherent in a presumption that certain employer threats, like predictions of plant closings, necessarily deter unions and are, in fact, likely to be carried out.

These arguments point to the key issue raised by employer threats and predictions: credibility. In the vast majority of cases, incredible statements have little impact, if any, on the rate of union entry.

The issue then becomes what set of generally credible employer strategies might, with some regularity, deter union entry in situations where such entry would be socially desirable. "Precommitment" strategies may be in this category. The classic precommitment strategy is that of the motorist who holds his steering wheel out of the window as he approaches another motorist head-on.¹³⁸ Strategies like this one, which signal to the other party that one has forsaken discretion over a certain future action, easily satisfy the credibility requirement. But what employer strategies might be cited as precommitment strategies? The employment of a gang of thugs to intimidate pro-union employees would pass the test, since one of the more important reasons for choosing this as a strategy is to signal to the employees that "things are out of control." Although this was not an unusual approach to deterring union organizers in the not too distant past,¹³⁹ it is clearly illegal today. It would be stretching things to suggest that the recent use of professional consultants might fall within this category of employer strategies.¹⁴⁰ The decision to

137. *Id.*

138. For a more general discussion, with several interesting examples, see T. SCHELLING, *THE STRATEGY OF CONFLICT* chs. 5, 8 (1960).

139. See, e.g., S. BIRD, D. GEORGAKAS & D. SHAFFER, *SOLIDARITY FOREVER: AN ORAL HISTORY OF THE IWW* (1985). The authors describe a 1927 machine gun attack by Colorado state police on IWW picketers which left six dead and 23 wounded. *Id.* at 192; see also G. ADAMS, *AGE OF INDUSTRIAL VIOLENCE* 104-05 (1966) ("In the summer of 1909, two large manufacturers, Triangle Waist Company and Leiserson's, fired some employees whom they suspected of union agitation. . . . Leiserson then hired professional thugs as 'special police' to guard the factory. A list of these men and their criminal records appeared in the *Jewish Daily Forward*. Next to it the *Forward* printed dramatic photographs of some battered and bloody girl strikers whom these toughs had assaulted. Five ruffians beat one striker, Clara Lemlich, so badly that she was hospitalized for several days."); E. DELANEY & M. RICE, *THE BLOODSTAINED TRAIL* (1927). We have no doubt but that these kinds of precommitment strategies were very credible.

140. Note however, that Professor Laura Cooper has found that the "use of [professional labor] consultants [by employers] had no demonstrable impact in improving the employer's likelihood of success in the election or eroding employee support for the union." Cooper, *supra* note 110, at 126.

sell the enterprise to a known union buster might be considered a precommitment strategy. However, the Board does not have the authority to control such decisions.¹⁴¹ It is, in fact, hard to identify employer strategies subject to regulation under the Act which might be classified as precommitment strategies. In spite of this there are measures which bear some resemblance to the precommitment variety. For example, the decision to fire a productive worker on the basis of union sympathies might be considered a signal to employees that the employer will not exercise rational discretion. Since the firing of an employee is an act which wastes some of the employer's resources up front, it should have more persuasive force as a signal than a threat, which can easily be taken as bluff.

If the administration of the Act were completely costless, we might conclude that threats and predictions, or for that matter any action which might deter union entry in situations where such entry would be socially desirable, should be subject to regulation. However, in the face of significant administrative costs, a more conservative decision rule is required.

C. Conduct: Granting Benefits, Firing Sympathizers, Bribing or Setting Up a Company Union

1. Granting Benefits to All Employees

Consider the case of two firms competing in the same market. Firm 1 produces with unit cost \$1, firm 2 with unit cost \$2. What would be the result of competition? If the firms are competing with respect to price, the competitive equilibrium would be one in which firm 1 charges slightly less than \$2 for its product, and firm 2 does not produce, since at any price less than \$2 it could not recover its costs. This is thought to be a desirable result because consumers are able to enjoy more of the product, at a lower price, in this outcome than in the case where the two firms agree to share the market at some price higher than \$2. By selling the product at a price less than \$2, the incumbent firm is granting benefits to consumers that would not be realized if its competitor were allowed to remain with a positive profit in the market.

Note the analogy between this scenario, often referred to as

141. An employer is free to cease doing business altogether, even if motivated by anti-union animus. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268 (1965) ("[a]n employer has the absolute right to terminate his entire business for any reason he pleases . . .").

the "limit pricing" model in the antitrust literature,¹⁴² and that of the employer granting benefits to employees in order to prevent the entry of a union. The employer is forced through competition with an incipient union to grant benefits to the employees, in the hope that the granting of such benefits will lead the employees to "prefer" their present relationship with the employer to one of representation by a union in collective bargaining. What is bad about this?

The most widely-circulated theory is that set out in *Exchange Parts*: employees will interpret the granting of benefits during an election campaign as a demonstration of employer economic power held in reserve for reprisals.¹⁴³ This is a dubious theory which would require us to condemn the "limit pricer" as well. Indeed, pressed to its logical extreme it would force the conclusion that the granting of any benefits to consumers should be condemned as a demonstration of corporate economic power.

An alternative, though closely related theory is that an employer will change his course after the union has lost the representation election, and the benefits will disappear.¹⁴⁴ This is an argument familiar in the limit pricing literature. Under this theory, a firm limits prices, or engages in predation, until the competition is forced out of business. After this, the price limiting firm behaves as a monopolist.¹⁴⁵ Assuming that competitors eventually do go out of business, this theory provides at least a starting point for an argument in favor of regulation.

However, there are some important reasons to think that this provides nothing more than a starting point. First, if the members of the target group thought seriously about the future, they would see through the employer's plan and realize that they will be better off in the long run by accepting union representation.

142. See, e.g., F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 233, 243 (1980).

143. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

144. That is, at the rate at which these forms of compensation are growing, the employer will get back more than she lost in benefits by reducing wages and benefits.

145. This argument generally falls under the heading "predation." For a discussion of predation, see F. SCHERER, *supra* note 142, at 335-40. This is also an important part of the "destructive competition" argument traditionally raised by firms as a defense for engaging in collusive pricing practices. The argument was that unless the firms engaged in price-fixing, competition would lead to the ruin of all but one firm, and that one surviving firm would act as a monopolist. For one of the earliest unsuccessful attempts to use this argument as a defense for horizontal price restraints, see *United States v. Joint-Traffic Ass'n.*, 171 U.S. 505 (1898).

Moreover, if, for some reason, the employees failed to see this themselves, the union would certainly help by revealing and explaining the employer's strategy.

A second and perhaps more important problem with the predation theory is its assumption that rival entrants will "go away." In the limit pricing case, the assumption that higher-cost competitors will die out is a rather bold one. Indeed, to some extent it stands the theory of competition on its head by suggesting that firms are not attracted to enter into certain industries by the potential for earning profits. The predation theory postulates that firms enter into certain industries not as profit-seeking entrepreneurs, but through the sheer luck of being in the right place. Accordingly, once competitors see that there is no potential to take the market away from the limit pricer, they leave, failing to return for the hour when the limit pricer decides to behave as a monopolist.

It is hard to accept this theory in the limit pricing context, and for similar reasons it is difficult to accept it as a basis for Board regulation. The most obvious problem is that it requires the excluded competitor—the higher-cost rival firm in the limit pricing story, the union in the present story—to behave irrationally by exiting the game and not returning for the period when the incumbent begins to exploit its freedom to act without the restraint of potential competition. A rational rival either would not exit, or would exit with an unannounced intention to return. Also, the incumbent's actions should be expected to attract other potential rivals. Thus, if the excluded rival were foolish enough to leave without returning, at least there might be others not so foolish. Admittedly, in the union setting, there is no well-established theory of competition which suggests that unions will enter where there is room for improvement in employee benefits. However, the absence of such a theory need not prevent us from inferring that unions are more likely to enter in precisely this situation. There is, in fact, evidence of entrepreneurial activity in the organization process.¹⁴⁶

146. See, e.g., Bok, *supra* note 7, at 114. Professor Bok, referring to the union's actions after losing a representation election, observes that "it is standard practice for unions to maintain contact with the employees and to make another attempt to organize at the first favorable opportunity." *Id.* More up-to-date evidence can be found in reports of the recent drive to organize the Nissan manufacturing plant of Smyrna, Tennessee. See N.Y. Times, Jan. 26, 1988, at A23, col. 4 (reporting that United Automobile Workers organizers had been meeting with Nissan employees for 18 months before opening of organization drive).

One might argue that entry costs play an important role here. For example, in the limit pricing story, if the sunk costs or preparation time required to enter an industry were sufficiently high, the incumbent may enjoy substantial, though less than full, freedom to act as a monopolist. Similarly, if the cost of organizing a given worksite is sufficiently high, the employer may find it possible to revoke all of the benefits offered for the purpose of fighting off the union without fearing the immediate return of an organization drive. The arguments point to the issue of contestability. If rivals can enter and exit at low cost, the presence of a lone incumbent should not be a source of misery since the incumbent will be forced by the constraint of potential competition to act as a competitor.¹⁴⁷ However, if entry costs are for some reason very high, then there is much less reason to believe that the incumbent will be compelled to behave competitively.

The entry cost point is a fair one. However, it seems to have much more force in the antitrust setting than in the labor law setting. While it is fairly easy to believe that there are industries in which the costs of entering are prohibitive—for example, high fixed-cost industries like local telephone service—it is hard to see how this applies in the union setting. Because there seems to be no obvious analogy to the high fixed-cost industry, a contestability-based theory of regulation presumably would lead to the conclusion that the granting of benefits by the employer should not be subject to regulation under the election campaign provisions of the Act.

One exception to this rule might arise where there is an incumbent union, whose tenure may be protected by the contract-bar doctrine.¹⁴⁸ If the organizers of the incumbent union had accepted bribes from the management, then management could avoid competing with an incipient union over the period in which the incumbent union's tenure is protected by the contract-bar doctrine. However, such protection can last no longer than three years.¹⁴⁹ The question, then, is whether a three-year wait would

147. Generally, contestability theory places emphasis on the entry and exit conditions within a market rather than its competitive structure. However, the theory is rather complex, and involves much more than simply studying entry and exit conditions. See W. BAUMOL, J. PANZAR & R. WILLIG, *CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE* (1982).

148. See generally A. COX, D. BOK & R. GORMAN, *supra* note 14, at 273.

149. See generally R. GORMAN, *BASIC TEXT ON LABOR LAW* 57-58 (1976). Of course, the union's tenure is only protected by the contract-bar rules if the collective agreement has been reduced to writing and meets other Board-mandated requirements. See *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160 (1958).

constitute the kind of prohibitive entry cost that would justify an *Exchange Parts*—like prohibition on the granting of benefits.¹⁵⁰ Arguments can be made on either side of this question.¹⁵¹ However, if we assume that entry costs are prohibitive in these circumstances, we are left with only the conclusion that the *Exchange Parts*¹⁵² prohibition on the granting of benefits is justifiable where there is an incumbent union whose tenure will be protected by the contract-bar doctrine.

The contestability argument pursued here carries over to the problem of employer-dominated unions.¹⁵³ Unless the tenure of the employer-dominated union is protected, or the costs of organization are unusually high, there is little reason to spend resources litigating claims that an employer's sponsorship of a union is an unfair labor practice. As long as such an organization can be replaced by a non-employer-dominated union through the election device, there seems to be no strong case for regulation.¹⁵⁴

2. *Conditioning Benefits on the Vote of an Employee*

The provision of discriminatory benefits—those conditioned upon the actual vote of an employee in an election campaign—presents some interesting and very different reasons for regulating the granting of benefits. In *NLRB v. Savair Manufacturing Co.*,¹⁵⁵ the Supreme Court held that a union's waiver of initiation fees conditioned on joining immediately rather than after the election presented grounds for setting aside the results of an elec-

150. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

151. On the side of waiting, the union has to wait one year before a new election can be held, under § 9(c)(3) of the Act. 29 U.S.C. § 159(c)(3) (1982). See R. GORMAN, *supra* note 149, at 52. Further, many organizational drives begin years before an election is held. See *supra* note 137 and accompanying text.

152. 375 U.S. 405.

153. On the subject of employer-dominated unions, see National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982).

154. The contract-bar rules will not bar an election petition filed by a rival union where the "incumbent" union is unlawfully employer dominated or assisted. See *Paragon Prods. Corp.*, 134 N.L.R.B. 662, 663 (1961) ("Thus, the Board has excepted from the contract-bar rule certain types of contracts which in its considered judgment did not foster industrial stability such as contracts where the identity or existence of the representative was in doubt or contracts which themselves were in conflict with the policies of the Act . . ."). Section 8(a)(2) of the Act forbids employers to dominate, assist or interfere with the formation or administration of a labor organization. 29 U.S.C. § 158(a)(2) (1982).

155. 414 U.S. 270 (1973).

tion.¹⁵⁶ This result can be taken to stand more generally for the proposition that benefits conditioned on the vote of an employee in an election campaign, even if offered by the union organizers, may justify the setting aside of an election.

This rule seems defensible in light of our earlier discussion. By conditioning benefits on the vote of an employee, the union or the employer can put the voting employee in the classic "prisoner's dilemma."¹⁵⁷ For example, consider the following facts, roughly similar to those of *Savair*.¹⁵⁸ Suppose the union offers a \$100 prize to each worker who promises to vote for the union, the money to be paid only if the union wins. Assume for simplicity that there are only three employees and that one has already promised to vote for the union. Obviously, only one more vote is needed to make a majority. Whether or not the union says so, the remaining two employees who have not committed themselves to vote for the union will notice that the union has no incentive to seek extra promises after receiving one more. This provides a strong incentive for the remaining employees to promise immediately in order to be eligible to receive the prize if the union wins.

To see how this incentive structure can distort voting preferences, let us make a few additional assumptions. Let \$100 be the value each of the uncommitted employees assigns to the non-union status quo. Let \$10 be the value assigned to union representation. Obviously, the employees prefer the non-union option. However, if the conditional reward of \$100 is offered, one of the remaining employees can make himself better off by promising early and voting for the union, thereby ending up in a position that is worth \$110 to him. The other remaining employee would then be worse off, by \$90. Since the gain to the winning

156. The court noted:

Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the union. His outward manifestation of support must often serve as a useful campaign tool in the union's hands to convince other employees to vote for the union, if only because many employees respect their co-workers' views on the unionization issue. By permitting the union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the union to buy endorsements and paint a false portrait of employee support during its election campaign.

Id. at 277.

157. For discussion of the prisoner's dilemma problem, see J. HIRSHLEIFER, *supra* note 12, at 294-95.

158. 414 U.S. 270 (1973).

employee, \$10, is less than the loss to the losing employee, \$90, the employees are unambiguously worse off as a group.

The "prisoner's dilemma" flavor of this example is illustrated in Table 3 below. The top block shows the average gain to both employees on the assumption that the union will not end up giving the \$100 prize to both employees. Thus, if any one of the employees promises to vote union, the union will not seek an additional promise and the average realized by the employees will be \$60.

TABLE 3

	<i>Amount Received by Employee 1</i>	<i>Amount Received by Employee 2</i>
<i>Both Employees Promise and Vote For</i>	\$60	\$60
<i>Employee 1 Promises and Votes For; Employee 2 Does Not Promise and Votes Against</i>	\$110	\$10
<i>Employee 2 Promises and Votes For; Employee 1 Does Not Promise and Votes Against</i>	\$10	\$110
<i>Both Employees Do Not Promise and Vote Against</i>	\$100	\$100

The preceding example shows that a union may be voted in with the help of a conditional reward scheme even though the employees are better off without one. Another more obvious problem with the conditional reward scheme is that it presents to the employees a certain benefit, the reward, to be contrasted against the very uncertain benefit (or loss) from voting against the union.¹⁵⁹ Given that the incentives for employees, indeed voters generally, to engage in research before voting in an election are weak, permitting employers or union organizers to offer conditional rewards would only further dilute such incentives, and most likely lead to significant distortions in voting preferences.¹⁶⁰

159. For a discussion of uncertainty and complexity, see *supra* note 119 and accompanying text.

160. An analogous problem is presented by the two-tiered tender offer. See

For this reason, we distinguish this from the typical "granting of benefits" case. Conditional reward schemes, outside of de minimis cases, tend to skew the incentives of voters in ways that might easily determine the results of elections, and should therefore be prohibited, as they now are under *Savair*.

3. *Firing Sympathizers*

The discharge of an employee because of membership in or support of a union is an unfair labor practice,¹⁶¹ and few would argue that the result should be otherwise. Still, the question remains whether and on what grounds such action might deter union entry.

An important concern alluded to earlier is that a discriminatory discharge may be most effective in chilling organization efforts through signalling precommitment. The employer who has discharged a productive employee no doubt suffers a cost. Of course, after the discharge the termination cost to the employer is sunk. This might suggest that the organizers should not be deterred since the employer's future actions, if rational, will not be influenced by sunk costs.¹⁶² But the argument here is not that discriminatory discharges can deter entry by rational organizers because they believe the employer will be "backward-looking," that is, the employer will decide to keep wasting more resources by discharging employees simply because she has already wasted a great deal. Rather, since the discharge may credibly signal that the employer has forsaken the exercise of rational discretion,¹⁶³ it may be more worrisome than other deterrence tactics.

Alternatively, a strategy of discharging union sympathizers might deter union entry by increasing the cost of organizing to the employees. Of course, this is also true of any policy of harassing union sympathizers (for example, through interrogation).

Macey & McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13 (1985).

161. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982); cf. *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009 (3d Cir. 1980).

162. See, e.g., R. LIPSEY, P. STEINER & D. PURVIS, *supra* note 100, at 167 ("Because they involve neither current nor future costs, sunk costs should have no influence on deciding what is currently the most profitable thing to do.").

163. The discriminatory discharge has been distinguished from other deterrence tactics by other commentators. Professor Bok observed: "With all the debate over misleading statements, last-minute benefits, and no-solicitation rules, there is little doubt that in many plants an elemental fear of reprisal plays the major role in discouraging organizational activities among the employees." Bok, *supra* note 7, at 124-25.

Since the preceding argument concerning the granting of benefits rests on notions of contestability, consistency requires that we suggest the employer be prevented from effectively setting up barriers to prevent union entry.

4. *Bribery*

At this stage sufficient groundwork has been laid to deal quickly with the problem of bribery. Offering bribes to all employees is indistinguishable from the granting of benefits unconditioned upon the employee's vote. It follows that these two strategies should give rise to the same treatment under the Act. However, no rational employer would offer bribes to all employees when by offering bribes to a subset of union organizers and sympathizers she can achieve the same result at lower cost. But if the union can begin organizing fairly easily, why should this concern us? Further, this strategy may backfire if the employees are aware that by claiming support for a union they can become eligible for a windfall in the form of a bribe. In short, it is unclear that bribery will deter union entry. Almost certainly bribery is not equivalent to discriminatory termination in its ability to chill employee organization efforts.

It may appear to be inconsistent, on the one hand, to prohibit the offering of benefits conditioned upon an employee's vote and the election outcome while, on the other hand, to suggest the plain bribery should not be prohibited. However, the case of an employer offering a bribe to a group of union sympathizers is distinguishable from that of an offer conditioned upon voting decisions in an election campaign. It is most obviously distinguishable in that the bribe is paid up front, whereas the conditional reward is paid out only after some desired election outcome is realized.¹⁶⁴ The recipient of the bribe, therefore, is free to accept it and then renege on the promise. For the same reason, the employee's incentive to weigh the prospective costs and benefits of union representation is not diluted by the bribe. Another sense in which the bribe is distinguishable from the conditional reward has to do with the conditions under which voting takes place. Since the employees are often uncertain of the benefits of voting one way or the other, while the conditional reward is

164. The distinction between a conditional and an unconditional benefit, and its implication for the "coerciveness" of a benefit grant, was central to the Fifth Circuit's decision that the benefit grant at issue in the *Exchange Parts* litigation did not violate § 8(a)(1) of the Act. See *Jackson & Heller, supra* note 83, at 7-8 (referring to *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964)).

certain, it is very likely that *Savair*-type benefit schemes will distort voter preferences even if the conditional reward is fairly small relative to the gains or losses from union representation.¹⁶⁵ On the other hand, union organizers are likely to have some notion of the gains from organization, and should therefore be unwilling to sell out for less than a compensating bribe. If this policy were extended to all disgruntled employees, an employer would have to provide the monetary benefits of unionism in the form of up front bribes.

The key problem with bribery is observed where the bought-off employees are elected to represent their co-workers. Again, as long as the employees can vote them out easily, the election of corrupt representatives would not permanently bar the entry of an incorrupt union. However, since the tenure of a validly elected incumbent union is protected under the contract-bar doctrine,¹⁶⁶ replacement costs in the short run may be very high.

These considerations point once again to the issue of contestability. If organizational efforts are easily initiated, then the arguments for devoting resources to regulating bribery under the Act appear to be weak. However, because the tenure of elected unions is protected to some extent through such rules as the contract-bar doctrine, organization efforts are not in all cases easily initiated; thus, entry barriers raised by provisions like the contract-bar doctrine may justify prohibition of bribery.

D. *Summary and Implications*

The preceding discussion has raised several concerns in the regulation of speech and conduct in union election campaigns. With respect to speech regulation, we have argued that while the economic aspects of the relevant information market suggest that campaign speech in union election campaigns might deserve more comprehensive regulation than speech in political campaigns, such regulation is an unattractive option. Because of its public good characteristics, speech which contains arguably beneficial information should, in general, not be restricted. Even where speech contains no beneficial information at all, the administrative costs generated through litigation are in most cases difficult to justify. There is nothing "new" about these conclusions; however, these conclusions, unlike those in previous work, are based on the underlying economics.

165. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

166. A. Cox, D. Bok & R. GORMAN, *supra* note 14, at 273.

With respect to conduct, we have pointed to two key theoretical concerns that should influence the regulation of union entry: credibility and contestability. Credibility is a key issue because employers attempt to dissuade employees from voting for union representation by signalling to the employees that life under union representation will not improve, and may become worse. The signals come in a variety of forms, such as predictions of lay-offs,¹⁶⁷ or threats of plant closings.¹⁶⁸ But if employees are rational, only credible signals will have a chance of influencing employees. Threats to do something irrational or impossible should have no effect on the behavior of employees. Thus, any effort to regulate the deterrence activities of employers should be restricted to credible signals.

Although no attempt has been made here, and it would be beyond the scope of this paper to provide a general description of credible signalling, it is clear that signals generated by "precommitment" acts satisfy the credibility requirement. This is a reason to distinguish the discriminatory discharge, for example, from the threat of a future plant closing. The discriminatory discharge is an up-front expenditure and in this sense has at least some of the characteristics of precommitment. The typical plant closing threat, however, is indistinguishable from a bluff.

Contestability refers here to the ease with which a union can enter and exit. If a union can enter relatively easily, then there seems to be little need for concern over the employer's granting of benefits to fight off union organization. The converse is also true: if union entry is difficult, then the granting of benefits is appropriately an object of concern in the regulation of employer deterrence efforts. In the case where there is no incumbent union, however, entry is usually easy. It follows that in such cases there should be little need, absent extremely unusual circumstances, to devote resources to regulating the effects of benefits granted before or in the course of an election campaign. In the case of an incumbent union, the approach is necessarily more complicated. In particular, in light of provisions that protect the tenure of an incumbent union, it is probably desirable to prohibit

167. *Peabody Coal Co. v. NLRB*, 725 F.2d 357 (6th Cir. 1984); *Multi-Medical Convalescent & Nursing Center v. NLRB*, 550 F.2d 974 (4th Cir.), *cert. denied*, 434 U.S. 835 (1977).

168. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *NLRB v. Baja's Place*, 733 F.2d 416 (6th Cir. 1984); *Ahrens Aircraft Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983).

distribution of benefits. These arguments apply as well to bribery.

Further, granting of benefits conditioned upon an employee's vote should be held "unlawful," as a per se violation of section 8(a)(1) of the Act. The reason for this is that the vast majority of employees have little incentive to collect information to enable them to estimate with precision the expected costs or benefits of union representation. This is the problem of "rational apathy." The offer of a bribe conditioned upon the employee's vote puts the employee in the position of comparing an uncertain payoff from voting with the certain gain from accepting the bribe, and this, we have demonstrated, may distort incentives in a way that would influence the outcome of an election.

Some specific recommendations surface from these considerations. First, the administrative costs of regulation and economic aspects of the relevant information market counsel against heavy-handed regulation of noncoercive speech. Thus, we strongly support the Board's more recent approach to this issue as outlined in its *Midland*¹⁶⁹ decision. Second, since rational voters tend to discount incredible employer threats, resources should be devoted to regulating this behavior only to the extent that it generally satisfies the requirement of credibility.¹⁷⁰ Third, the *Exchange Parts*¹⁷¹ prohibition against granting benefits during election campaigns should apply, if at all, only to cases in which there is an incumbent union, or for some other obvious reason, where union entry is very difficult. Fourth, the granting of benefits conditioned upon an employee's vote should remain, as suggested in *Savair*,¹⁷² sufficient grounds for setting aside the results of an election. Fifth, since discriminatory discharges and other attempts to harass union sympathizers are likely to deter rational organizers through raising the costs of entry and, perhaps, credibly signalling future irrational conduct, such tactics should continue to be treated as violations of the Act.

V. COMPARISON WITH EMPIRICAL STUDIES

The most important empirical study in this area remains the

169. *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982).

170. Obviously, implementing such a rule may be costly. It follows that if relatively few threats satisfy the credibility requirement, then resources should not be devoted to regulating this behavior.

171. *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

172. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

Getman Study.¹⁷³ Among the study's many findings, the following three are particularly relevant: (1) employer speech has no impact on election outcomes; (2) the granting of benefits has no impact on election outcomes; and (3) employees tend to make up their minds fairly early in the typical election campaign and do not invest a great deal of effort in studying the statements of the employer or the union. These results have been disputed by some economists,¹⁷⁴ but they are entirely consistent with the economic analysis presented here, which takes as its basic assumption that employees, employers and union organizers are rational.¹⁷⁵

However, the conclusions of this paper diverge in some important respects from those of the Getman Study. For example, while the Getman Study recommends that the Board allow the granting of benefits during an election campaign, we suggest that such a decision be made by considering the ease with which a union can enter or exit a given workplace. If a union can enter relatively easily then the granting of benefits during an election campaign should be allowed. However, in cases where union entry is barred by the existence of an incumbent union or some other constraint, then it may be appropriate to take into account the granting of benefits in reviewing elections. Of course, we do

173. J. GETMAN, *supra* note 1. There have been other studies in this area. See, e.g., Cooper, *supra* note 110; see also R. FREEMAN & J. MEDOFF, *supra* note 8, at 234-35 (studies cited). Perhaps the most important empirical critique of the Getman Study is Dickens, *The Effects of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983). The Dickens study is criticized in Goldberg, Getman & Brett, *The Relationship Between Free Choice and Labor Board Doctrine: Differing Empirical Approaches*, 79 NW. U.L. REV. 721 (1984).

174. See, e.g., R. FREEMAN & J. MEDOFF, *supra* note 8, at 236-39.

175. We have offered several reasons, in the preceding pages of the text, for thinking that the results of the Getman Study are quite reasonable, and indeed consistent with a theory of rational union entry. With respect to employer speech and the granting of benefits, the crux of our argument is that rational employees or union organizers very often "see through" false promises and irrational threats.

We have noted that if employees are rational, they generally will not put a great deal of effort into gathering and examining the information needed to make an informed decision as to the desirability of union representation. The simple reason is that each would see the marginal impact of his or her vote as too small to justify the cost and, all other things equal, would rather "ride free" on someone else's information gathering. This exhibition of rational apathy is also observed in shareholder voting.

The finding that employees tend to make up their minds quickly is quite consistent with the evidence that outcomes of political elections seem to be explained by voters' feelings of prosperity rather than by the campaign promises of candidates. See, e.g., *Voting With Your Wallet*, THE ECONOMIST, Apr. 16, 1988, at 30.

not suggest that the Board simply pursue its present course, as set forth in *Exchange Parts*, by simply incorporating "ease of entry" as another factor to be considered. Rather, bright line rules should be adopted which distinguish cases in which union entry is unusually difficult from those in which it is not.¹⁷⁶

Our position also differs from the Getman Study with respect to the *Savair*¹⁷⁷ decision. Since the Getman Study recommends that the Board no longer hold that the granting of benefits violates section 8(a)(1) of the Act, presumably its authors would extend the same recommendation to *Savair*-type schemes. We argue that the holding of *Savair* should stand insofar as it applies to conditional reward schemes.

VI. DETERRING EFFORTS TO DETER UNION ENTRY: REMEDIES

Sanctions against employers who engage in discriminatory discharge are sufficiently weak that a profit-motivated employer almost always finds it within his interest to fire a union sympathizer rather than risk the threat of union entry. This is a point which has been repeatedly stated in the literature. We make no attempt to support or refute this point here, though the arguments supporting it appear to us to be overwhelming. Rather, our goal in this section is to examine, in light of our efficiency-based justification of unionism, what "optimal" or "efficient" damage measures would provide. Since our interest is largely with deterring inefficient behavior, we will have relatively little to say about compensation as a goal of damages under the Act.

A. *Optimal Damages Generally*

Activities which yield more in social benefit than in social cost should not be deterred. It follows from this that "infinite" damage measures—for example, charging an offender a fine which is equal to his or her lifetime wealth—will generally not be advisable in all fields of activity in which actors assume liability. Such a

176. For example, the rule might simply say that the granting of benefits by an employer cannot serve as grounds for challenging the results of a representation election unless the election involves an incumbent union.

Professors Jackson and Heller propose an alternative rule: promises and grants should be considered lawful unless the Board proves they in effect force employees to choose between statutory rights and existing conditions of employment. Jackson & Heller, *supra* note 83, at 21, 58-59. Jackson and Heller claim that their proposed rule, if adopted, would reduce incentives to litigate under the *Exchange Parts* rule. *Id.* However, since they urge that a presumption be replaced with a more flexible rule of decision, this conclusion is questionable.

177. *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973).

damage rule would, obviously, deter some socially beneficial activity.

If the goal is to deter only those activities which generate more in social cost than in social benefit, an optimal damage rule is one that, in general, internalizes the social cost to the actor. This rule has been further refined to require in certain circumstances a fine which internalizes the sum of the "transfer cost" and the deadweight loss resulting from the activity which gives rise to damages, less the cost for the defendant to defend himself against a claim.¹⁷⁸ In the antitrust setting, this rule would require a monopolist to pay a fine equal to the sum of the deadweight loss and the amount by which the monopolist's revenue exceeds that of a similarly situated firm which charged a competitive price, less the cost of defending against the government's charge of anticompetitive pricing.

We focus on the application of an optimal fine in the antitrust setting because of its similarities to the union setting. The interesting feature of the fine described here is that it does not deter efficient monopolization. To see why, consider the case where several firms enter into a joint venture which has the effect of drastically lowering production costs. If such benefits in productive efficiency exceed the costs from allocative inefficiency, the firms will still find it profitable to proceed with the venture and pay the fine.¹⁷⁹

It should be noted that the damage rule considered here is an ideal one, but not one that we expect courts would be able to implement. The administrative costs of determining on a case-by-case basis the proper measure of deadweight loss associated with any venture which had the effect of monopolizing a market would simply be too high. However, the reason for studying the optimal penalty question is not to recommend that courts attempt to rigidly apply such a penalty, but to use the optimal measure as a benchmark against which the more traditional and administratively feasible damage measures recognized by courts may be compared.

178. For a statement of this optimal damage rule, see Easterbrook, *supra* note 5, at 318-25. See also Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983). The more general treatment of this is in Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

179. See *supra* note 52 and accompanying text; see also Easterbrook, *supra* note 5, at 318-25.

B. *Optimal Damages for Discriminatory Discharge*

What is an optimal fine for employers who discharge union sympathizers? The implications of the preceding discussion are rather counterintuitive because the union is the analogue of our joint venture. Thus, it appears at first glance that the union should be required to pay a fine equal to the transfer cost plus the deadweight loss (reduced by the cost of defending itself, but we can assume for simplicity that this is zero). If improvements in safety and other areas raise the union's effective compensation beyond the amounts represented by these social costs, then the union will still find it profitable to organize.

This would no doubt strike everyone as a strange result. The union may not be able to pay such a fine, even if its entry could be justified on efficiency grounds, simply because it is difficult to obtain funds. Further, the sense of entitlement preservation associated with unionism is lost when we require that union members pay for their benefits.

If, in light of these considerations, we restrict ourselves to fines assessed against the employer for trying to deter entry through discriminatory discharges, at what level would an "optimally deterring" fine for such activity be set? The optimal fine, or damage measure, would require the employer to pay the "transfer cost"—the foreseeable loss in wage income imposed on the discharged employee—plus the social cost resulting from inefficient provision of safety, less the social benefit from avoiding union-induced resource misallocation. There are two obvious implications of such a damage rule. The first is that it simply is not clear whether the fine would in all cases exceed the loss in the worker's income—better known as the backpay remedy.¹⁸⁰ Thus, an efficient fine for deterring union entry through discriminatory discharge might require the employer to pay more or less to the discharged employee than a backpay remedy. The second implication is that whether or not the fine would exceed the backpay remedy would depend on the efficiency consequences of union entry. If the union's entry could be justified on efficiency grounds, then the fine should exceed the backpay remedy. If, on

180. It has long been Board policy that an employee's backpay award must be limited to actual lost wages minus any interim earnings, that is his *net* lost wages. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940); *Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1*, 51 (1935), *enforced in part*, 91 F.2d 178 (3d Cir. 1937), *rev'd*, 303 U.S. 261 (1938).

the other hand, the union's entry would be inefficient, the fine should be less than a full backpay award.

Needless to say, as in the antitrust setting, it would be administratively infeasible to determine, on a case-by-case basis, whether a given union's entry would be efficient or inefficient. A slightly more feasible alternative would be to determine an appropriate average fine. If it is determined that union entry is, on average, efficient, then the fine assessed in each case should be one that exceeds the foreseeable loss imposed on the worker by discriminatory discharge, by an amount which represents the net social benefit, on average, from union entry. However, in requiring some estimate of the average net social gain from union entry, even this approach is too demanding, for such an estimate would be difficult to obtain and would be a never-ending subject of debate and litigation. But it is not necessary that courts actually attempt to levy optimal fines. Indeed, this would be an unwise policy if, as suggested here, the administrative costs of doing so are extremely high. If union entry is, more often than not, efficient, then the practical implications of this discussion, for the deterrence of discriminatory discharge, are clear: (1) the penalty for discriminatory discharge should be at least as great as a backpay remedy; and (2) an optimal penalty might be approximated by a multiple damages award, like a double or treble backpay penalty.

C. *Efficiency Versus Distributional Concerns*

We are under no illusion that this treatment of damage remedies will meet with general approval, since many of the concerns people generally express with respect to union entry are distributional. There are many people who think that unions are good because they transfer wealth to low-income members¹⁸¹ of society, and this thinking no doubt influences attitudes toward proper remedies under the Act. Of course, sympathy and reality appear to be widely divergent in this case because the damage provisions for discriminatory discharge seem to have a regressive impact.

It should be clear that an attempt to factor in distributional concerns would suggest that the fine or damage measure assessed against the employer should be at least as great as the reasonably foreseeable loss in the employee's income. However, it is not clear that a goal of compensating employees could justify a multiple damages award.

181. Nevertheless, this is not clear in the long run. See G. STIGLER, *supra* note 13, at 256-58.

VII. CONCLUDING REMARKS

This paper is an attempt to fill what seems to us to be a gap in the literature. The empirical validity of the assumptions which are reflected in the law regulating union entry have been tested, several times over, but surprisingly little attention has been given to the theoretical arguments that might support these assumptions. We examine these arguments here, drawing heavily on concepts developed in the antitrust and industrial organization literature.

Since the conclusions are stated succinctly in the text, we do not repeat them here. Instead we simply note that labor law is a system of market intervention which calls into consideration many, if not all, of the complicated and interesting economic problems already confronted in the antitrust literature. More needs to be done in evaluating the economic foundations of labor law and in assessing the theoretical connections between labor and other similarly regulated fields.

