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Fair Notice: Assuring Victims of Unfair Labor Practices That Their Rights Will Be Respected

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FAIR NOTICE: ASSURING VICTIMS OF UNFAIR LABOR PRACTICES THAT THEIR RIGHTS WILL BE RESPECTED

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I. INTRODUCTION

When an employer is found guilty of violating the National Labor Relations Act (the "Act"),[1] the National Labor Relations Board (the "Board") may require it "to take such affirmative action . . . as will effectuate the policies of this Act."[2] This action frequently includes the reinstatement of unlawfully discharged employees and the restitution of lost wages.[3] In addition, the Board routinely requires the employer to post notices at the workplace informing employees that it will not engage in certain unfair labor practices and will take specified remedial actions.[4]

Whether simply posting such a notice will suffice, however, is quite doubtful.[5] Many workers have poor reading skills, others might not happen

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1. Codified as amended at 29 U.S.C. §§ 151-169 (1988). Section 7 of the Act provides, in relevant part, 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 for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1988). Section 8(a) of the Act, in turn, provides that it is an unfair labor practice for an employer:

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
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> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .;
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> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;
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> (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;
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> (5) to refuse to bargain collectively with the representatives of his employees . . . .

29 U.S.C. § 158(a) (1988). For an economist's analysis of § 8(a) violations, see John L. Blackman, Jr., *Relative Severity of Employer Unfair Labor Practices*, 22 LAB. L.J. 67 (1971).

2. 29 U.S.C. § 160(c) (1988).

3. *Id.* For helpful overviews of the Board's remedial powers, see LEE MODJESKA, NLRB PRACTICE 69-78 (1983); CHARLES J. MORRIS, THE DEVELOPING LABOR LAW 1633-94 (2d ed. 1983 & Supp. 1993).

4. *See, e.g.*, MORRIS, *supra* note 3, at 1657. An example of a recent notice may be found in Monongahela Power Co., 314 N.L.R.B. No. 18 (June 24, 1994), a copy of which is located *infra* at Appendix A.

5. For a cogent expression of such skepticism, see Peter B. Hoffman, *Notice Posting: A Pilot*

to see the notice, and the mute posting of a piece of paper might do little to reassure workers that a lawbreaking employer will now respect their rights. Furthermore, numerous studies of the workplace confirm that oral communication to employees is usually far more effective than written notification. Finally, one would hope that if employers actually read the notice aloud that could have more of an impact on their future conduct than if a subordinate merely affixes it to a bulletin board.

For these reasons, in select cases the Board will order an employer to read this notice to an assembly of employees in addition to posting it at the workplace. This remedy, however, has been harshly criticized, especially by various judges on the federal circuit courts of appeals. The most prominent assailant of the remedy is Justice Ruth Bader Ginsburg, who while serving on the District of Columbia Circuit declared: "A forced, public 'confession of sins,' even by an owner-president who has acted outrageously, is a humiliation this court once termed 'incompatible with the democratic principles of the dignity of man.'"[6] On such reasoning, appellate courts frequently have modified this remedy or even refused to enforce it.

"Pygmies do not invite giants to combat,"[7] but in this article I will attempt to show that Justice Ginsburg and other critics of the remedy are badly mistaken. The notice-reading remedy is not humiliating, it does not entail a confession of sins, and it is not offensive to our democratic principles. Furthermore, the remedy can be a small but essential step in redressing the harm inflicted on workers by an employer's unfair labor practices. For these reasons, I will argue that employers should always be required to read notices aloud to their workers as a standard remedy for violations of the Act.

II. THE GENESIS OF NOTICE POSTING AND THE EMERGENCE OF THE READING REQUIREMENT

The Board's authority to require employers to post notices is well-established. Indeed, this power was affirmed in *Pennsylvania Greyhound Lines, Inc.*,[8] the Board's first reported opinion. Having found that the employers violated § 8(2)[now 8(a)(2)] by maintaining a company-dominated

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Study, 18 LAB. L.J. 556 (1967). As Hoffman stated:

> The informative, as well as the remedial aspects of notice posting, have met with a considerable amount of criticism recently. There is more than a modicum of doubt as to whether notices are read, understood, or sufficient to allay the apprehensions and misgivings caused by the employer's unfair labor practices.

Id. at 557 (footnote omitted).

6. Conair Corp. v. NLRB, 721 F.2d 1355, 1401 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1241 (1984) (Ginsburg, J., dissenting in part) (quoting International Union of Elec., Radio & Mach. Workers v. NLRB, 383 F.2d 230, 234 (D.C. Cir. 1967)). *Conair* is discussed *infra* at notes 143-161 and accompanying text.

7. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 525 (3d ed. 1991) (quoting 17 Cong. Rec. app. at 444 (1886) (statement of Rep. Rowell)).

8. 1 N.L.R.B. 1 (1935).

union,[9] the Board ordered them, *inter alia*, to "[p]ost notices in conspicuous places in all of the places of business wherein their employees . . . are engaged, stating that said Association is so disestablished and that respondents will refrain from any such recognition thereof. . . ."[10] That order was later affirmed by the Supreme Court.[11]

The Board's requirement that employers post such notices soon became a common feature of our labor laws. In *NLRB v. Express Publishing Co.*,[12] the Court curtly dismissed an employer's challenge, stating:

> Only a word need be said of that part of the Board's order requiring the posting of notices. We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by § 10(c) of the Act "to take such affirmative action . . . as will effectuate the policies" of the Act.[13]

The Board realized, however, that the simple posting of such notices would not suffice in every case. In isolated instances, the Board began requiring employers to accompany the posting of notices with some verbal assurances that the workers' rights would be respected. An early example of this may be found in *Taylor-Colquitt Co.*,[14] where African-American employees at a Southern lumber concern were assaulted, threatened, and discharged for their interest in unionization. As part of the Board's remedy, the employer was directed to inform the workers "orally and in writing" that management's personnel would not interfere with their rights under the Act.[15] The Board did not explicitly explain the need for such verbalization, but the extreme and vicious nature of the employer's conduct surely may have been a factor. The Fourth Circuit, in turn, enforced the Board's order without any discussion of that remedy.[16]

The Fourth Circuit's affirmance was proper, for § 10(c) invests the Board with significant freedom to fashion remedies appropriate to the facts of specific cases. Indeed, courts should bear in mind that it is the Board, not the judiciary, that has been given that power by Congress. As Justice Frankfurter emphasized:

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9. Section 8(a)(2), codified at 29 U.S.C. § 158(a)(2) (1988), has been criticized for unduly restricting labor-management cooperation and is the subject of much recent scholarly debate. *See, e.g.*, Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994); Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127 (1993); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129 (1993).

10. *Pennsylvania Greyhound*, 1 N.L.R.B. at 52.

11. NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938).

12. 312 U.S. 426, 438 (1941).

13. *Id.*

14. 47 N.L.R.B. 225, *enforced*, 140 F.2d 92 (4th Cir. 1943).

15. *Id.* at 257.

16. NLRB v. Taylor-Colquitt Co., 140 F.2d 92 (4th Cir. 1943).

> A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.[17]

Viewed in this light, there should be no judicial interference with the Board's ordering an employer to read the notice to employees. The Board's power to order notice posting is well-settled, and the further requirement of an oral reading rests soundly within the scope of the Board's discretion. The Board, however, has been cautious in applying this remedy. Employers are not routinely ordered to read notices, but must do so only where a mere posting is obviously inadequate.[18]

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17. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

18. For examples of the Board explicitly withholding this remedy, see Somerset Welding & Steel, Inc., 304 N.L.R.B. 32 (1991); Haddon House Food Prods., Inc., 269 N.L.R.B. 338 (1984); Cyntell Tool Co., 196 N.L.R.B. 1032 (1972).

Cyntell illustrates the paucity of the Board's reasoning when it refuses to issue reading orders. In *Cyntell*, the union requested a public reading where the employer was found to have threatened employees, coercively interrogated them regarding their union sympathies, and engaged in other transgressions against the Act. The Board refused, reasoning that the employer's actions were not "outrageous," it was the employer's first offense, and judicial enforcement and contempt proceedings were available if the employer continued committing violations. 196 N.L.R.B. at 1033.

Such reasoning fails to bear scrutiny. Holding that the employer's actions were not "outrageous" is debatable and is a vague standard that can only breed litigation. Although the employer in *Cyntell* did not unlawfully discharge workers, many might consider threatening and interrogating employees to be quite serious. This uncertainty over what is sufficiently "outrageous" could thus spawn litigation as parties quarrel over the degree of outrage present in their particular circumstances. To preclude that development, it would be more sensible to hold as a matter of law that *any* violation of the Act is sufficiently important to trigger the reading remedy.

The Board's emphasis that this was the employer's first offense also seems misguided. How many free bites at the apple should be allocated to a lawless employer? If we want to prevent second and third violations of the Act -- and reassure workers that even a single violation is cause for concern -- it would be worthwhile to impose the reading requirement on first-time offenders as well as the more contumacious recidivists.

Finally, it is cold comfort that judicial enforcement and perhaps even contempt proceedings are available in a given case. Such matters require the expense, delay, and uncertainty of haling the employer into federal court. Rather than viewing that as a first level of recourse, the Board should routinely impose reading orders in the expectation that this will deter future misconduct, educate both management and workers to the Act's provisions, and reduce the Board's need to seek judicial support

III. THE ILLITERACY JUSTIFICATION FOR READING ORDERS

The Board is particularly likely to issue a reading order when it believes that a large segment of the work force has a low level of literacy. This is especially true when, in addition, the employer has committed serious unfair labor practices. The Board's 1958 opinion in *Jackson Tile Manufacturing Co.*[19] offers a paradigmatic justification for requiring an employer to read the notice to employees. Here, the trial examiner explained that "[t]he theory behind the Board's requirement that a respondent in an unfair labor practice case must post a notice . . . is that such posting will restore the status quo by freeing the employees from the coercive effects of the unfair labor practices."[20] The employer, however, had undermined that purpose by telling employees that such a notice was a "mere formality" and "unimportant" while continuing to violate the law.[21] The trial examiner, therefore, recommended that the plant's manager be required to read the notice "to the assembled employees, supervisory staff, and the plant officials as an expression of company policy."[22]

This recommendation was adopted by the Board, which reasoned:

> [I]n order to dissipate the Respondent's coercive conduct toward its employees, it is necessary to require the Respondent to read and distribute copies of the notice . . . to its employees. We do so not only because of the numerous and serious nature of the unfair labor practices committed by the Respondent but also because . . . the Respondent discouraged employees, if it did not order them, to refrain from reading the notices which it had posted [in an earlier case]. *In addition, the record indicates that some of the Respondent's employees are illiterate.*[23]

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for its rulings.

19. 122 N.L.R.B. 764 (1958), *enforced*, 272 F.2d 181 (5th Cir. 1959) (per curiam).

20. *Id.* at 794.

21. *Id.*

22. *Id.*

23. *Jackson Tile Mfg. Co.*, 122 N.L.R.B. at 767-68 (emphasis added). An employer's belittlement of notice posting also played a role in the Board's issuance of a reading order in Great Atl. & Pac. Tea Co., 134 N.L.R.B. 458, 458 n.2, 467-68. Among other statements, the employer's grocery assistant superintendent told a group of employees that the notice was just a "little old letter" and asserted that the unfair labor practice charges were not serious because even if the employer was convicted "*the only thing we will have to do is post a notice in the store.*" *Id.* at 467 (emphasis supplied by the trial examiner). *See also* Scott's, Inc., 159 N.L.R.B. 1795 (1966), *enforcement denied in relevant part sub nom.* International Union of Elec., Radio & Mach. Workers v. NLRB, 383 F.2d 230 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 904 (1968), discussed *infra* at notes 64-74 and accompanying text. Union leaders have also disparaged the effectiveness of the Board's usual remedy, saying, for example, that "it merely requires the employer to reinstate the worker to his job with back pay and to post a notice saying the company won't be naughty again." SUBCOMMITTEE ON NATIONAL LABOR RELATIONS BOARD OF THE HOUSE COMM. ON EDUCATION AND LABOR 87th Cong., 1st Sess. 21 (1961) REPORT ON ADMINISTRATION OF THE LABOR-MANAGEMENT ACT BY THE NLRB [hereinafter HOUSE SUBCOMM.] (quoting William Pollock, President of the Textile Workers Union of America).

The Fifth Circuit cursorily enforced the Board's order,[24] but relations between the Board and reviewing courts were not to remain so peaceful. The first open conflict concerning the remedy commenced in 1965 with the Board's *Laney & Duke* decision.[25] In *Laney & Duke*, the trial examiner observed that many of the company's workers were "on a low level of literacy and education."[26] For that reason, he concluded that the employers should be required to read the notice to employees upon request.[27]

The trial examiner's recommendation had obvious defects. From the worker's perspective, it could be embarrassing to approach an employer, explain his inability to read, and ask the employer to recite the notice's contents. Moreover, employees understandably might feel some trepidation about individually requesting this service from an employer that has been found guilty of violating their rights. It would be sadly ironic to impose such an onus on people the Act was designed to protect.

The trial examiner's approach was also unnecessarily burdensome for the employers. One might wonder, for example, whether an employer should be required to abandon other responsibilities and repeatedly recite the notice to separate employees upon request. Perhaps sensing these problems, the Board modified the trial examiner's recommended order so that the employers "whether or not requested to do so," were required to "read the notice to each of their employees, singly *or* collectively."[28]

The Fifth Circuit's refusal to enforce this aspect of the Board's order is a model of judicial fiat. The court simply invalidated the remedy on the grounds that it was "unnecessarily embarrassing and humiliating to management rather than effectuating the policies of the Act."[29]

The court's arrogant resort to that *ipse dixit* is offensive on numerous levels. First, regardless of one's substantive convictions, it is disturbing and unprincipled when judges simply impose their conclusions without any reliance on precedent, principle, or reasoned argument. Such arbitrary behavior is inherently unpersuasive and invites similarly arbitrary responses from other judges. As Justice Scalia once warned, "he who lives by the *ipse dixit* dies by the *ipse dixit*."[30]

Second, the Fifth Circuit's bald reversal ignores the Board's primary responsibility for crafting appropriate remedies for violations of the Act. Judges, therefore, should be cautious about interfering with the Board's remedial scheme. As Justice Douglas realized:

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24. Jackson Tile Mfg. Co. v. NLRB, 272 F.2d 181 (5th Cir. 1959) (per curiam).

25. Laney & Duke Storage Warehouse Co., 151 N.L.R.B. 248 (1965), *enforcement denied in relevant part*, 369 F.2d 859 (5th Cir. 1966).

26. *Id.* at 267.

27. *Id.*

28. *Id.* at 249 n.1 (emphasis added).

29. NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 869 (5th Cir. 1966).

30. Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

> [I]t is important to remind that we do not sit as an administrative agency with discretion to adjust the remedies accorded by the Act to what we think are the needs of particular cases, with power to write or rewrite administrative orders in light of what we think are the exigencies of specific situations, with the duty to pass on the wisdom of administrative policies. Congress has invested the Board, not us, with discretion to choose and select the remedies necessary or appropriate for the evil at hand.[31]

The *Laney & Duke* opinion's third weakness is found in the court's cryptic claim that the Board's remedy would be "unnecessarily embarrassing and humiliating" rather than in fulfillment of the Act's policies.[32] That statement begs numerous questions. Why should an employer be embarrassed about assuring the work force that she will obey the law? How is it humiliating for an employer to state openly that he will respect his employees' statutory rights? How could it be argued that this would *not* effectuate the policies of the Act? The Fifth Circuit's failure to address these questions strips its opinion of any coherence and leaves the court's deliberative process a mystery.

The key to solving this mystery may be provided by Professor Atleson. Atleson asserts that labor law is permeated by moral, political, and economic assumptions and values that judges often do not articulate explicitly in their published opinions.[33] The presence of these values and assumptions "helps explain many decisions which otherwise seem odd, irrational, or at least inconsistent with the received wisdom."[34]

These values and assumptions, Atleson reasons, encompass the belief that employers are the masters of the workplace and have the right to expect the loyalty (or, more accurately, *submission*) of their hired hands.[35] Perhaps rooted in the prevalence of slavery and indentured servitude in America's

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31. NLRB v. Express Publishing Co., 312 U.S. 426, 441 (1941) (Douglas, J., dissenting). The Supreme Court has reiterated this philosophy on numerous occasions. *See, e.g.*, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 216 (1964) ("The Board's [remedial] power is a broad discretionary one, subject to limited judicial review."); Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943) (stating the Board's remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act"); NLRB v. Link-Belt Co., 311 U.S. 584, 600 (1941) ("The Board not the courts determines under this statutory scheme how the effect of unfair labor practices may be expunged.").

32. *Laney & Duke*, 369 F.2d at 869.

33. JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 10 (1983). As Professor Houseman has opined, "labor law is too often (or altogether) a victim of political and value orientations that are particularly objectionable when they result in standing the purpose of the law on its head." Gerald L. Houseman, *American Labor Unions: Dependent Upon but Not Fairly Protected by the Law*, 36 LAB. L.J. 716, 722 (1985).

34. ATLESON, *supra* note 33.

35. *Id.* at 84 (discussing the "key assumption" that "employees owe certain obligations of deference and respect to their employer"). *See also* Karl E. Klare, *Critical Theory and Labor Relations Law, in* THE POLITICS OF LAW 61, 81 (David Kairys rev. ed., 1990) ("Employees are thought to owe a strong 'duty of loyalty' to the employer, although the employer owes no correlative duty to its employees.").

history, a deeply ingrained belief exists that workers owe considerable deference to their "superiors" in the workplace.[36] The passage of the Act and the advent of collective bargaining, moreover, have done little to undermine this conviction.[37] In sum, "[t]he management of the workplace is assumed to be hierarchical and authoritarian."[38]

This assumption may help explain the Fifth Circuit's truculent refusal to enforce the Board's remedy. If one views the relation of employer to employee as that of master and servant, then one might well find it punitive to compel the "master" to voice respect for the servant's legal rights. Such a conceptualization, of course, cannot withstand scrutiny in light of the Act's explicit protection of employee rights or, even more fundamentally, the ideal of equality before the law. This theory, in turn, may explain why the Fifth Circuit failed to support its emotional rhetoric. Although judges may *sense* that an employer should not publicly have to address her employees as legal equals, it could prove painful to acknowledge -- even to themselves -- that such an antidemocratic vestige provided the nucleus for their legal conclusions.[39]

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36. *Id.* at 87-89. As Atleson suggests, "[t]he American view of the employment relationship may intuitively have been affected by the substantial number of bound workers that had previously existed." *Id.* at 88.

37. ATLESON, *supra* note 33, at 180 (concluding that collective bargaining "does not seem to have altered basic legal assumptions about the workers' place in the employment relationship").

38. *Id.* at 45. Atleson's argument is echoed by many other scholars. *See, e.g.*, Barenberg, *supra* note 9, at 959 (discussing "employers' authoritarian control of workplace interaction and communication"); Robert Blauner, Alienation and Freedom: The Factory Worker And His Industry 183 (1964) (asserting that "alienation remains a widespread phenomenon in the factory today"); Charles Conrad & Mary Ryan, *Power, Praxis, and Self in Organizational Communication Theory, in* ORGANIZATIONAL COMMUNICATION 235, 248 (Robert D. McPhee & Phillip K. Tompkins eds., 1985) (discussing theory that "[o]rganizational power is grounded in the employer[s'] ability to threaten the selves of their employees"); ERICH FROMM, ESCAPE FROM FREEDOM 139 (1941) (describing the employer-employee relationship as a coldly instrumental arrangement in which "the owner of capital employs another human being as he 'employs' a machine"); JAMES B. MURPHY, THE MORAL ECONOMY OF LABOR: ARISTOTELIAN THEMES IN ECONOMIC THEORY 163 (1993) (observing that "[h]aving lost control over the productive process, workers are subject to the authority and discipline of the employer"); ROBERTO M. UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 274 (1987) (asserting that "[w]orkers continue to suffer strongly felt experiences of powerlessness and humiliation"). This conviction that the economically dependent are vulnerable to domination and exploitation is by no means limited to current theorists or ideologues of a particular political stripe. It was Alexander Hamilton, for example, who argued that "[i]n the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" THE FEDERALIST NO. 79, at 400 (Alexander Hamilton) (Garry Wills ed., 1982).

39. This belief in the employer's supremacy has permeated the texture of labor doctrine. It is not fortuitous that "America's labor laws provide far fewer protections against exploitation, injury, illness, and unemployment than the laws of the dozen other leading Western industrial nations." WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 1 (1991). Similarly, the Board's current chairman asserts that "employment rights, rights which relate to the ability to provide for oneself and one's family and to the basic human dignity of workers have lagged far behind the evolution of rights afforded individuals in such areas as access to and protection of property." William B. Gould, *The Rights of Individual Workers*, 17 CENTER MAG. 2, 2 (July-Aug. 1984). *See also* Barenberg, *supra* note 9, at 759 (asserting that America has "the most unequal distribution of incomes and job opportunities of any advanced industrial country") (footnote omitted); Houseman, *supra* note

Finally, the *Laney & Duke* court ignored a fact critical to the Board's reasoning: many of the employees were illiterate and could not possibly read the notice. The Fifth Circuit plainly revealed its pro-employer bias by not even addressing this concern. Although the court acknowledged "abundant evidence" that the employer committed "flagrant" violations of the law, it chose to pity the lawbreaking company rather than the illiterate employees.[40]

The Fifth Circuit took a less dogmatic approach in *NLRB v. Texas Electric Cooperatives*.[41] Here, the Board ordered the employer to read the notice because of the low degree of literacy among the work force.[42] The court enforced this remedy on the common sensical grounds that "[o]bviously, if the employees are illiterate and thus not able to read the posted notice it is not unreasonable to require the company to have the notice read."[43] The Fifth Circuit reached a similar result in *NLRB v. Bush Hog, Inc.*[44] Here, too, the Board required notice-reading because numerous employees were illiterate[45] and the Fifth Circuit enforced the Board's order. The court distinguished *Laney & Duke* on the grounds that a far higher percentage of employees were illiterate in *Bush Hog*.[46] The court also observed that an employer "may be required 'to give appropriate notice' to its employees that it will respect their statutory rights" and that "[t]he Board is not restricted to the method of posting customarily used, but may use alternative means of requiring effective notice."[47] The court then concluded:

> Certainly the Board may exercise a broad discretion in fashioning remedies to require an employer to undo the effects of its own unlawful conduct and to effectuate the policies of the Act, though the Board has no power simply to punish the employer.
>
> Where, as in this case, the Board has found numerous infringements of protected rights and a low literacy level among the company employees we cannot hold that the Board abused its discretion in the notice reading requirement of the present order.[48]

33, at 726 ("No labor movement in the world has had to endure more repression, in all probability, than America's has . . . .") (footnote omitted).

40. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 864 (5th Cir. 1966).

41. 398 F.2d 722 (5th Cir. 1968), *enforcing in relevant part*, 160 N.L.R.B. 440 (1966).

42. *Texas Elec. Coop.*, 160 N.L.R.B. 440, 462 (1966).

43. 398 F.2d at 726.

44. 405 F.2d 755 (5th Cir. 1968), *enforcing*, 161 N.L.R.B. 1575 (1966).

45. Bush Hog, Inc., 161 N.L.R.B. 1575, 1597 (1966).

46. *Bush Hog*, 405 F.2d at 758.

47. *Id.*

48. *Id.* at 759. (citing Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940) (additional citation omitted). *See also* Marine Welding & Repair Works, Inc., 174 N.L.R.B. 661, 681 (1969) (issuing notice-reading order based on low literacy skills of some employees and the "atmosphere of fear and futility" created by employer's violations), *enforced in relevant part*, 439 F.2d 395 (8th Cir. 1971) (per curiam).

The weakness in *Bush Hog* is that the Fifth Circuit's approach is vague and could lead to both evidentiary quagmires and individual embarrassment. The court distinguished *Laney & Duke*, where three out of fifty-four employees had little or no reading skills, from *Bush Hog*, where approximately forty-five out of about 190 workers could not read.[49] This distinction invites questions over where to draw the line. If an illiteracy rate of 5.5% is too low to justify a reading order but a rate of approximately twenty-three percent is sufficient, then what about ten, fifteen, or twenty percent? Such vague guidelines can lead only to uncertainty, conflict, and litigation.[50]

The *Bush Hog* distinction is also pernicious for it raises the specter of acute embarrassment for employees with limited reading skills. After having their rights violated by an employer, they might now be questioned on their ability to read. Many of them could feel shamed before their co-workers and fear that public knowledge of their illiteracy could damage their reputations with the company and curtail their hopes for promotion. Rather than subject employees to such distress, it makes more sense simply to have the employer read the notice aloud.

Furthermore, illiteracy is *not* a rare phenomenon in the workplace. To the contrary, the Board could safely assume that virtually all places of employment have workers with low or even nonexistent reading skills. As the Department of Education's National Adult Literacy Survey concludes, an estimated ninety million American adults -- nearly one-half of the adult population -- have difficulty performing at even the lowest literacy levels.[51] Such deficiencies are not limited to menial laborers. As Professors Anderson and Ricks report, "[l]iteracy deficiencies are not confined to the unskilled.

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49. NLRB v. Bush Hog, Inc., 405 F.2d 755, 758 (5th Cir. 1968).

50. Such problems, moreover, are already far too common in this field. As one commentator has complained, "[e]ven experienced labor lawyers are having great difficulty advising clients on how to obey the law." John S. Irving, Jr., *The Crisis at the NLRB: A Call for Reordering Priorities*, 7 EMPLOYEE REL. L.J. 47, 47 (1981).

51. IRWIN S. KIRSCH ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, ADULT LITERACY IN AMERICA 16-19 (1993). This survey's methodology, administration, and terminology have been questioned. *See, e.g.*, John M. Barry, *A Critical Look at Adult Literacy in America*, 5 PUB. PERSP. 15 (1993). It is beyond dispute, however, that reading disabilities affect millions of American workers. According to the Business Council for Effective Literacy, approximately 72 million adults are functionally or completely illiterate. *See* Joanne Draus Klein, *Waking Up to the American Nightmare: One in Five Workers Can't Read or Add Numbers Well Enough to Do the Job*, 16 CORP. CLEVELAND 34 (1992). Similarly, the National Assessment of Education Progress found that 36 million adults could not read at the eighth grade level and that 70 million fell short of the eleventh grade level. *See* Jonathan Kozol, *Illiteracy Statistics: A Numbers Game*, N.Y. TIMES, Oct. 30, 1986, at A31. Kozol's own estimates are equally grim. He asserts:

> Twenty-five million American adults cannot read the poison warnings on a can of pesticide, a letter from their child's teacher, or the front page of a daily paper. An additional 35 million read only at a level which is less than equal to the full survival needs of our society.

JONATHAN KOZOL, ILLITERATE AMERICA 4 (1985).

Many skilled, clerical, and technical employees also suffer from deficiencies in language and mathematical skills."[52]

In light of this chronic national problem, the Board should routinely order employers to read the notices to assemblies of their workers. In this manner, the Board could assure that no employee's reading deficiencies prevented her from learning of her rights.[53] Moreover, oral notice would help obviate the problem that even many literate workers might not happen to see the notice posted at the workplace.[54]

IV. BEYOND ILLITERACY: ADDITIONAL JUSTIFICATIONS FOR READING ORDERS

Let us make the fanciful assumption that every employee is highly literate and religiously scours the workplace in search of possible Board notices. Even in such a dream world, employers should still be required to read the notices aloud to their workers. This necessity stems from the heightened psychological impact that can be gained by an oral reading. For an employer to stand before her assembled employees and orally read the notice can convey a sense of sincerity and commitment that no mere posting can achieve. One thinks, for example, of marriage vows. There is no instrumental, legal reason for a couple to vow love and support for each other in any kind of ceremony; simply filling out forms at city hall would achieve the same alteration in the legal status of their relationship. For centuries, however, we have understood that a marriage *ceremony*, complete with verbalized vows of love and fidelity, may bring the couple closer together and enhance the prospects for a successful union. Wedding ceremonies obviously do not guarantee happy marriages, but millions of people annually find them to be a promising beginning. The focus, therefore, should not be

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52. Claire J. Anderson & Betty R. Ricks, *Illiteracy--the Neglected Enemy in Public Service*, 22 PUB. PERSONNEL MGMT. 137, 142 (1993). In fact, their national survey of local governmental employers indicated that 37% "have experienced problems due to [the] inability of illiterate employees to understand organizational rules or policies." *Id.* at 145. Perhaps even more disturbing is the failure of American universities to assure that their graduates possess basic reading skills. *See, e.g.*, William H. Honan, *Report Says Colleges are Failing to Educate*, N.Y. TIMES, Dec. 5, 1993, § 1, at 46.

53. An example of the low literacy skills of many workers can be found in Red Top Cab & Baggage Co., 145 N.L.R.B. 1433 (1964). In *Red Top*, taxi drivers sent a petition to the Governor of Florida and other officials seeking "leagel"[sic] redress and vowing to appoint a "deligation"[sic] of drivers to "disgus"[sic] their problems with the officials. *Id.* at 1457. This example highlights how even workers sophisticated enough to unite for political and socioeconomic action may have difficulty using and comprehending written English. Rather than ignore this problem, the Board and courts should move to assure that it does not jeopardize the workers' ability to apprehend and vindicate their legal rights.

54. Studies of American workplaces have demonstrated that not all employees consult company bulletin boards where such notices are typically placed. *See, e.g.*, HELEN BAKER ET AL., TRANSMITTING INFORMATION THROUGH MANAGEMENT AND UNION CHANNELS 41-43 (1949). As Baker and her co-authors discovered, some employees may never read notices attached to bulletin boards because they do not frequent those areas of the plant or are too busy to read such notices. *Id.* *See also* Hoffman, *supra* note 5, at 557.

on whether employees know the alphabet, but on how we can best assure them that their rights will be respected in practice as well as on paper.[55]

This concept is reinforced by the knowledge that an employer's oral communication to workers is usually far more effective than written notification. This realization is hardly new; for many years it has been common knowledge that "[p]sychological tests indicate that leaflets or other printed propaganda devices cannot match the persuasive power of oral presentations."[56] As numerous workplace-related studies have confirmed, "[f]ace to face communication is most effective."[57]

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55. Employers, of course, may view the notice-reading as being more akin to a shotgun wedding. As Congress realized, however, "[t]here always will be a small minority [of employers] who are amenable only to coercion." 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 26 (reprint ed. 1985) (statement of Sen. Wagner).

56. Note, *Union Right of Reply to Employer On-the-Job Speeches: The NLRB Takes a New Approach*, 61 YALE L.J. 1066, 1074 (1952) (footnote omitted). Classic studies supporting this conclusion include LEONARD W. DOOB, PUBLIC OPINION AND PROPAGANDA 529-32 (1948) (discussing superiority of public meetings over radio broadcasts in influencing people); JOSEPH T. KLAPPER, COLUMBIA UNIV., THE EFFECTS OF MASS MEDIA II-9 to II-10 (1949) ("The lecturer was found to be the most effective in modifying opinions . . . and the printed material least effective."); PAUL F. LAZARSFELD ET AL., THE PEOPLE'S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN 128-29 (2d. ed. 1948) (analyzing radio's superiority over newspaper in political contests); RAYMOND W. PETERS, COMMUNICATION WITHIN INDUSTRY: PRINCIPLES AND METHODS OF MANAGEMENT - EMPLOYEE INTERCHANGE 78 (1950) (discussing advantages of oral communication); WALTER H. WILKE, AN EXPERIMENTAL COMPARISON OF THE SPEECH, THE RADIO, AND THE PRINTED PAGE AS PROPAGANDA DEVICES 27 (1934) ("Several independent indices of the results of the propaganda used showed the speaker technique to have the most striking positive effects . . . and the printed technique to have only a slight effect.").

57. Stuart M. Klein, *Communication Strategies for Successful Organizational Change*, 36 INDUS. MGMT. 26, 27 (Jan.-Feb. 1994). *See also* Richard L. Daft & Robert H. Lengel, *Organizational Information Requirements, Media Richness and Structural Design*, 32 MGMT. SCI. 554, 560 (1986) ("Face-to-face is the richest medium because it provides immediate feedback so that interpretation can be checked."); Fredric M. Jablin, *Superior-Subordinate Communication: The State of the Art*, 86 PSYCHOL. BULL. 1201, 1202 (1979) (noting that "face-to-face discussion is the dominant mode of interaction" in the workplace); Jerry Tarver, *Face-to-Face Communication, in* INSIDE ORGANIZATIONAL COMMUNICATION 205, 220 (Carol Reuss & Donn Silvis eds., 1985) ("Face-to-face communication in all its forms continues to be important."); Cynthia Stohl & W. Charles Redding, *Messages and Message Exchange Processes, in* HANDBOOK OF ORGANIZATIONAL COMMUNICATION 451, 487 (Fredric M. Jablin et al. eds., 1987) ("ambiguous work environments are more effectively clarified (not surprisingly) through face-to-face rather than written communication"). Indeed, as one New Age economist has asserted, "the only really effective communication is from man to man, face to face." ERNST F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED 227-28 (1973). Despite these findings, there is still a profound need for further research. *See, e.g.*, Robert A. Snyder & James H. Morris, *Organizational Communication and Performance*, 69 J. APPLIED PSYCHOL. 461, 461 (1984) (noting that "studies of communication in work organizations are grossly underrepresented in the empirical research literature"); Joanne Yates & Wanda J. Orlikowski, *Genres of Organizational Communication: A Structurational Approach to Studying Communication and Media*, 17 ACAD. MGMT. REV. 299, 320 (1992) ("Empirical research is needed to investigate the various social, economic, and technological factors that occasion the production, reproduction, or modification of different genres in different sociohistorical contexts.").

The Board has recognized the unique power of speech,[58] and, for that matter, so have employers. This is why employers commonly hold "captive audience speeches" to rail against unions[59] and typically prohibit union organizers from campaigning at the workplace.[60] As these employers understand, no substitute for face-to-face communication exists. This, of course, is why reading orders are important regardless of the workers' levels of literacy.

The Fifth Circuit realized this in *J.P. Stevens & Co. v. NLRB*,[61] where it reasoned:

> [I]t misreads the categorical imperative of § 10(c) . . . to think that illiteracy or low intelligence levels are the only justifications for this remedy. After all, the traditional posting of the notice has a therapy beyond mere communication. . . . A part of the medicine is the traditional acknowledgement that the employer has, but will not again, deny employees' rights.[62]

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58. *See, e.g.*, H.W. Elson Bottling Co., 155 N.L.R.B. 714, 716 n.7 (1965) ("The unique effectiveness of speeches addressed to employees assembled during working hours at the locus of their employment has received congressional and judicial recognition and has been substantiated by research studies."), *enforced as amended*, 379 F.2d 223 (6th Cir. 1967).

59. In captive audience speeches, the employer requires workers to assemble during working time and listen to antiunion rhetoric. The Board explicitly affirmed the lawfulness of captive audience speeches in Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948), but they have been widely criticized as being inherently coercive. *See, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 559 (1993) (asserting that "such conduct involves an element of coercion easily distinguishable from expression").

One can disagree with Professor Becker's conclusion but nonetheless be disturbed at particular instances of captive audience speeches. As one witness before a congressional subcommittee testified, in his experience "[e]mployees were marched in large groups into a company dining room to hear top executives viciously attack the unions, extol the company and hand out free ice cream and cigarettes to the captives." HOUSE SUBCOMM., *supra* note 23, at 56. In light of such crude efforts at indoctrination, it is not surprising that union spokesmen have denounced captive audience speeches as "brain washing" sessions. *Id.* at 55.

60. Employers scored a major victory in Lechmere, Inc. v. NLRB, 112 S. Ct. 841 (1992), where the Court ruled that an employer may usually deny nonemployee union organizers access to the workplace unless the union can demonstrate it has no other reasonable means of contacting the workers. Critical reaction to *Lechmere* has been divided. One commentator acknowledges that the decision will make "union organization . . . more costly and more difficult," but praises the Court for taking "a long step forward in reestablishing the sanctity of American property rights." Michael L. Stevens, Comment, *The Conflict Between Union Access and Private Property Rights: Lechmere, Inc. v. NLRB and the Question of Accommodation*, 41 EMORY L.J. 1317, 1369-70 (1992) (footnote omitted). Other scholars have been less sanguine. *See, e.g.*, Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 359 (1994) (asserting that "[c]ontinued recognition of a broad right to exclude in the labor relations arena is founded on an outmoded conception of property rights, one that curiously echoes the refrains of the *Lochner* era"); Robert A. Gorman, *Union Access to Private Property: A Critical Assessment of Lechmere, Inc. v. NLRB*, 9 HOFSTRA LAB. L.J. 1, 20 (1991) (arguing that the decision "grievously trivializes the Section 7 right of employees to learn about the union").

61. 417 F.2d 533 (5th Cir. 1969), *enforcing* 171 N.L.R.B. 1202 (1968), discussed *infra* at notes 109-14 and accompanying text.

62. *Id.* at 539-40.

As the court appreciated, the therapeutic value of reading orders is not limited to the instrumental task of communicating words. It also conveys a sense of assurance that the employer will obey the law. Such assurance is needed by the literate employee just as much as by her illiterate coworker. Employers should therefore be required to read all Board orders to their employees, regardless of the work force's level of literacy.

V. JUDICIAL REJECTION OF READING ORDERS

Although judges have voiced serious misgivings over the Board's reading orders, it has been rare for the courts to reject them in their entirety. There have, however, been important exceptions. *Laney & Duke*[63] was the first of these exceptions; a second prominent example is *International Union.*[64]

Here, the employer engaged in "massive and deliberate violations of the Act" which included numerous threats against employees who supported a union.[65] Moreover, the company's head of labor relations had ridiculed the Board's remedial power, telling workers that in an earlier proceeding the Board had "slapped our hands just like we were naughty little children."[66] Faced with this background, the Board decided that more than a simple posting of the notice was required. "[T]o assure notification to employees of the Respondent's intent to remedy the unfair labor practices committed and to refrain from committing other unfair labor practices in the future," the Board ordered the employer to convene meetings of employees during working time and read them the notice.[67]

In an opinion authored by Judge Tamm, the District of Columbia Circuit refused to enforce this aspect of the Board's order. Judge Tamm argued:

> The public reading by the employer of the order would . . . be humiliating and degrading to the employer and undoubtedly would have a lingering effect on future relations between the company and the Union. It could as well have an

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63. NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966), *denying enforcement in relevant part to* 151 N.L.R.B. 248 (1965), discussed *supra* at notes 25-40 and accompanying text.

64. International Union of Elec., Radio & Mach. Workers v. NLRB, 383 F.2d 230 (D.C. Cir. 1967), *denying enforcement in relevant part to* Scott's, Inc., 159 N.L.R.B. 1795 (1966), *cert. denied*, 390 U.S. 904 (1968).

65. 159 N.L.R.B. at 1796, 1807. For example, the company's president warned employees wearing union insignia that "we are going to get rid of all you badge toters" and that "those boys wearing the badges" would be fired. *Id.* at 1799. Such harassment of employees for wearing union insignia is all too common. For a discussion of this problem, see John W. Teeter, Jr., *Banning the Buttons: Employer Interference with the Right to Wear Union Insignia in the Workplace*, 80 KY. L.J. 377 (1991-92).

66. *Id.* at 1797-98.

67. *Id.* at 1807.

> impact on the atmosphere, not only at the time of the reading, but in the future, for peaceful, fruitful, and effective labor bargaining. It is conceivable that some conduct on the part of an employer or a union might reach such extreme dimensions as to justify the novel and drastic step of requiring the offending party to stand up before the employees and read the Board's notice publicly, but we cannot close our eyes to the reality that such a course would inevitably poison the future relations between company and union and be a source of continuing resentment. The ignominy of a forced public reading and a "confession of sins" by any employer, any employee, or any union representative makes such a remedy incompatible with the democratic principles of the dignity of man.[68]

Judge Tamm's declaration represents the triumph of rhetoric over reasoning. An employer that would feel degraded and resentful over having to make a public acknowledgement of the workers' statutory rights should not be the subject of judicial empathy. To the contrary, such an employer would be the type of reprobate most in need of the Board's remedy. Furthermore, Tamm's fear that the reading could "have an impact on the atmosphere" is precisely the point -- we *want* to transform the environment into one where employees feel confident that their rights will be respected. Tamm gave no reason to support his claim that the reading would lead to continued strife and bitterness in the workplace, and it is far more rational to expect that the remedy would allow both management and labor to make a fresh start under the aegis of the Act.

Tamm's depiction of the reading order as a "novel and drastic" requirement is equally disingenuous. The Board had required oral assurances since at least 1943,[69] and during that quarter of a century there had been no reports of the remedy leading to untoward results. Finally, Tamm deliberately mischaracterized the reading as a "confession of sins" when, in truth, it entails a simple affirmation that the employer will take remedial action and comply with the law.[70]

Tamm also rejected the idea that the remedy would be acceptable if the employer were given the choice of either reading the notice himself or permitting an agent of the Board to do so. For Tamm, this would put the Board "in the position of not being completely neutral, although that is the

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68. 383 F.2d at 233-34 (footnotes omitted).

69. *See* Taylor-Colquitt Co., 47 N.L.R.B. 225, *enforced*, 140 F.2d 92 (4th Cir. 1943), discussed *supra* at notes 14-16 and accompanying text.

70. As one of the Board's former chairmen has explained:

> The highly publicized charge that the Board require[s] a "public confession" . . . is of course without foundation in fact. Since Volume 1 of our reports, the posting of a notice stating that the respondent will not do certain things forbidden by law has been commonplace. For many years the Board and the courts have agreed that this notice cannot be phrased in terms that require an employer or a union to admit violations of the Act.

Frank W. McCulloch, *New Remedies Under the National Labor Relations Act, in* NEW YORK UNIVERSITY INSTITUTE OF LABOR RELATIONS, TWENTY-FIRST ANNUAL CONFERENCE ON LABOR 223, 236 (Thomas G.S. Christensen ed., 1969) (footnote omitted) [hereinafter ANNUAL CONFERENCE].

position which the Board is legally duty bound to take."[71] Here again, Tamm is guilty of either woeful ignorance or deliberate deception. The mandate of neutrality is plainly inapplicable when the Board is called upon to redress unfair labor practices. At that point, the Board is under orders from Congress "*to take such affirmative action . . . as will effectuate the policies of this Act.*"[72] As the Second Circuit has explained:

> Of course the Board must be neutral in its approach to any proceedings before it, but once it has been found that an employer has acted unlawfully, the question is not how the situation can be neutrally remedied; it cannot, for a remedy is by definition not neutral. . . . The reading of a Board order by a Board official surely does nothing more to destroy the Board's neutrality than does the customary heading on notices posted by employers pursuant to Board orders stating that the employees are being notified "pursuant to a decision and order of the National Labor Relations Board."[73]

There is, thus, no principled justification for Judge Tamm's refusal to enforce the Board's reading order. It would not have degraded the employer, poisoned the atmosphere, or entailed self-incrimination. Furthermore, as Judge J. Skelly Wright reasoned in his partial dissent, "[t]he fact is that this employer has acted unlawfully and adequate remedies are needed to restore the balance."[74]

VI. WEAKENING THE REMEDY: PERMITTING EMPLOYERS TO HAVE BOARD REPRESENTATIVES READ THE NOTICES

Few courts have been as regressive as the *Laney & Duke* or *International Union* tribunals. In more modest ways, however, judges have

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71. International Union of Elec., Radio & Mach. Workers v. NLRB, 383 F.2d 230, 233 n.5 (D.C. Cir. 1967).

72. 29 U.S.C. § 160(c) (1988) (emphasis added). As Professor Lesnick explains, "were the legislature to have embraced a concept of 'neutrality' so coldly indifferent to self-organizational rights, the Wagner Act would never have been enacted in 1935 or would have been repealed outright in 1947." Howard Lesnick, *The Labor Board and the Courts of Appeals: A Crisis of Confidence, in* ANNUAL CONFERENCE, *supra* note 70, at 35, 46.

73. Textile Workers of America v. NLRB, 388 F.2d 896, 904-05 (2d Cir. 1967), *enforcing as modified*, J.P. Stevens & Co., 163 N.L.R.B. 217, *cert. denied*, 393 U.S. 836 (1968), discussed *infra* at notes 95-102 and accompanying text. As I will explain in part VI, *infra*, the problem with having a Board agent read the notice is not that it imperils the Board's neutrality, but rather that it carries less symbolic weight than a reading by the employer.

74. 383 F.2d at 234 (Wright, J., dissenting in part) (footnote omitted). For contemporary commentary on the majority's decision, see David H. Huggler, *Labor Law Remedies National Labor Relations Board Order Requiring Employer to Read Unfair Labor Practices Notice to Employees Rejected as Inappropriate to Accomplish Dissemination of Information Concerning Employees' Rights*, 13 VILL. L. REV. 422, 429 (1968) (concluding that "it is difficult to foresee any situation where the forced reading would be appropriate"); *Labor Law: Reading Provision in NLRB Order is Inappropriate Except in Extreme Cases*, 1968 Duke L.J. 173, 175 (finding "sound reasons for enforcement of the Board's reading order").

continued to dilute the potency of the Board's reading orders. This has been accomplished by enforcing the Board's orders, but only with the condition that employers would have the option of permitting a Board agent to read the notices instead of doing so themselves. This modification strips the remedy of much of its symbolic value, and it is regrettable that the Board frequently has acquiesced in this matter.

This "compromise" approach was forged in a series of cases involving the Stevens textile concern, a notorious repeat offender of the Act.[75] In the first case, *J.P. Stevens & Co. (Stevens I)*,[76] the employer committed "massive and deliberate" unfair labor practices to crush its workers' organizational efforts. These unlawful practices included discharging seventy-one employees, making at least twenty-three illicit threats of reprisal and promises of benefit, engaging in surveillance of union activities, and posting threats on bulletin boards.[77] For these reasons, the Board concluded that the conventional posting of the notice could not negate the effect of the employer's unfair labor practices. It therefore required the employer "to convene during working time meetings of employees . . . and read to them a copy of the . . . notice."[78]

Upon review, the Second Circuit was ambivalent in its response to the Board's order.[79] The court acknowledged that "remedial orders should not be disapproved merely because they are imaginative" and recognized that the Board was trying to "cope . . . with a major campaign of illegal anti-union activity, spearheaded by retaliatory discharges."[80] The court was also firm in rejecting the employer's hyperbolic assertions that the Board was a vindictive tyrant trampling upon the Fifth Amendment.[81] With shameless

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75. Indeed, the textile industry as a whole has hardly been known for its hospitality to unions. As the president of the Textile Workers Union of America once explained:

> Pro-union workers find themselves denied such basic rights as freedom of speech and assembly.
>
> They are browbeaten, brainwashed and terrorized by their employers.
>
> Some are discharged in open violation of the law. And since there are few other job opportunities in the small mill towns where most textile plants are located, a discharge amounts almost to banishment from the community.
>
> The employer, who dominates the mill town, mobilizes all of its forces against prounion workers, including the press, the radio, the clergy, and even the police . . . .

HOUSE SUBCOMM., *supra* note 23, at 7 (opening statement of William Pollock).

76. 157 N.L.R.B. 869 (1966), *enforced as modified*, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

77. *Id.* at 878.

78. *Id.* at 878-79 (footnote omitted).

79. J.P. Stevens & Co. v. NLRB, 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

80. *Id.* at 303-04 (footnote omitted).

81. The Fifth Amendment provides in relevant part that no person "shall be compelled in any *criminal* case to be a witness against himself." U.S. CONST. amend. V (emphasis added.) Obviously a prospective statement to comply with the law in a civil case does not transgress this constitutional protection. Furthermore, even in criminal cases the government can compel testimony from an unwilling witness by conferring immunity from use of the testimony in subsequent criminal proceedings. Kastigar v. United States, 406 U.S. 441 (1972). This holds true even if the witness fears his testimony may subject him to civil liability, physical harm, or economic retaliation. *See, e.g.*,

disregard for law and logic, the employer attempted to rely on both the Constitution and William Shakespeare to attack the Board. Citing *Miranda v. Arizona*[82] and *Escobedo v. Illinois*,[83] the employer claimed that the reading would be akin to a coerced confession.[84] "Upon what meat doth this our Caesar feed?" the employer cried.[85]

The court swiftly disposed of the employer's constitutional gambit, simply noting that "the notice to be read does not in terms admit past offenses."[86] The court then reasoned:

> We have no desire to engage in humiliation of the Company; nor do we believe the reading provision was put in the order for that purpose. It was designed rather, as the Board said, "to undo the effect" of numerous and egregious unfair labor practices by insuring that the full counteracting force of the remedial order would be felt by the employees. Moreover, even posting a notice may be of some embarrassment to the Company.[87]

To this extent, the Second Circuit's reasoning is meritorious. The employer's constitutional argument was worthless, for the Board had *not* required it to "confess" anything, far less the commission of a crime. Instead, the notice was prospective -- stating that the employer "*WILL NOT*" violate the Act and "*WILL*" take affirmative steps mandated by the Board.[88] To misconstrue this as an interference with the Fifth Amendment makes a mockery of a cherished constitutional right.

The court was also cognizant of the reading order's sound remedial purpose -- to "undo" the atmosphere of fear and coercion created by the employer's disregard for the Act.[89] Moreover, the court recognized that the employer's claim of "embarrassment" is without limits[90] -- the thin-skinned employer could always claim that he was "shamed" by even having to post a notice (or, for that matter, being named as a respondent in Board proceedings).

The Second Circuit did, however, undermine the potency of the Board's remedy in two important ways. First, it held that the readings would be ordered only at the twenty plants where unfair labor practices occurred rather than at all of the employer's facilities throughout North and South Carolina.[91] Second, the court required the Board "to afford the Company the alternative,

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WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 426 (2d ed. 1992).

82. 384 U.S. 436 (1966).

83. 378 U.S. 478 (1964).

84. J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

85. *Id.* (quoting Cassius in WILLIAM SHAKESPEARE, JULIUS CAESAR, act 1, sc.2).

86. *Id.*

87. *Id.* at 305.

88. *J.P. Stevens & Co.*, 157 N.L.R.B. 869, 882-84 (1966) (emphasis added).

89. J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 304-05 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

90. *Id.*

91. *Id.* at 305.

at its option, of having the notice read by Board representatives, rather than by its own officials."[92]

Neither of these limitations is prudent. The first modification seems counterproductive in light of the employer's widespread illicit assault on the workers' rights. Given that the employer had already committed unfair labor practices at twenty of its facilities, requiring it to read the notice at all plants within the two-state region seems a sensible prophylactic step rather than an abuse of discretion.

It is the court's second level of interference, however, that is particularly regrettable. The court claimed that its choice "eliminates the necessity of participation by the Company, if it so desires, and still guarantees effective communication of the Board's order to the Company's employees."[93] This focus is seriously myopic.

It is true that the notice would be technically "communicated" to the workers regardless of whether it was read by the employer or a Board representative. The psychological and symbolic value of the communication, however, would be jeopardized if the employer did not read it. For a Board agent to read the notice would permit the employer to distance himself from the violations instead of delivering a personal pledge to take corrective action. Furthermore, the employer's silence could trigger anxiety in the hearts of the workers. Employees would naturally wonder, "If the boss will really respect our rights, than why won't he say so himself?" Rather than engender such concerns, the employer should have been required personally to read the notice.[94]

In *Stevens II*,[95] the Board's reading order was again limited by the Second Circuit. Here the Board found that the employer had refused to desist from its massive, unlawful campaign to destroy the union movement.[96] The Board attempted to treat this growing cancer with a second regimen of oral readings. The Board explained:

> This individual, face-to-face approach by the Respondent's supervisors towards its employees we find to have a greater psychological impact upon the

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92. *Id.* (footnote omitted).

93. *Stevens I*, 380 F,.2d at 305.

94. The court dropped the caveat that "[w]e do not hold that a reading provision without this alternative would never be appropriate." *Stevens I*, 380 F.2d at 305 n.21. This naturally raises the question of when such a scenario could arise. If unlawfully terminating 71 employees, threatening the work force, and engaging in other unfair labor practices at 20 different locations would not justify the Board's remedy, then one wonders what could ever satisfy the Second Circuit.

95. J.P. Stevens & Co., 163 N.L.R.B. 217, *enforced as modified sub nom.* Textile Workers of America v. NLRB, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

96. *Id.* at 226. The Board also found that the employer's "long campaign of illegal intimidation and unlawful discharge" was "largely successful." *Id.* at 227. As the Board explained, "[f]ew, if any, union supporters are left, and those who might espouse the union cause, such as reinstated employees who previously had been discharged for their union activity, would probably be afraid to promote the Union for fear they would be discharged again." *Id.* For these reasons, the Board decided that "[r]emedies other than the conventional ones are clearly called for here." *Id.* at 226.

> employees than similar remarks made by an employer in a letter to all employees or in a speech to a large assembly of workers. We find, therefore, that the posting of a notice, which is our usual remedy, is insufficient to dissipate the effects of the Respondent's unfair labor practices. In this case it is essential that each employee be made individually aware of his statutory rights. Accordingly, we have ordered Respondent's supervisors, many of whom were directly implicated in the unfair labor practices . . . to read the attached "Notice to All Employees" to the employees in their departments, thereby directly placing the imprimatur of recognizable supervisory authority on the notice.[97]

The Second Circuit's response echoed its decision in *Stevens I*.[98] The court again rebuffed the employer's histrionic rhetoric[99] but softened the Board's order. The court explained:

> [I]n view of a number of considerations, including the element of humiliation in having Company officials personally and publicly participate in reading the notice, the order should be enforced only at those plants where the Board found unfair labor practices, and should be modified to afford the Company the alternative of having the notice read by Board representatives, rather than by its own officials.[100]

As in *Stevens I*, the Second Circuit failed to realize the need for a prophylactic region-wide remedy and the psychological importance of having the notice read by company officials as opposed to government outsiders. The Second Circuit's modification may be partially excused, however, because it occurred with the Board's acquiescence. Instead of standing firm, the Board conceded that "a reading by Board representatives will effectuate the policies of the Act."[101] The Board's yielding on this point is unfortunate, for a reading by a Board agent cannot logically carry the same impact as a reading by management. Only the latter has the authority to hire, fire, supervise, discipline, and take a host of other actions to affect the workers' lives. It is the employer, not the Board agent, to whom the worker must look for her daily bread, and any remedy that permits the employer to remain silent loses much of its rehabilitative power.[102]

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97. *Id.* at 227 (footnotes omitted). The Board again extended this requirement to all of the employer's plants in North and South Carolina. *Id.* at 228.

98. J.P. Stevens & Co. v. NLRB, 388 F.2d 896 (2d Cir. 1967), *cert. denied*, 393 U.S. 836 (1968).

99. The employer repeated its allegation that the Board's remedy amounted to compelled self-incrimination. "During centuries past," the employer argued, "countless thousands suffered oppression and tortures and death rather than confess they had committed wrong when they deeply and devoutly believed that they had not." *Id.* at 904 n.8. The court coolly responded that "we regard the requirement somewhat less emotionally than does the Company." *Id.*

100. *Id.* at 903-04 (footnote omitted).

101. *Id.* at 905.

102. It bears emphasis that the Board is not obligated to bow to the judgments of appellate courts. Even if a circuit court refuses to enforce the Board's order in a given case, the Board can continue to apply its original approach in subsequent cases. As the Board has stated:

As *Stevens III*[103] reveals, however, the Board chose to continue along the path of acquiescence. Confronted with the Stevens company's continued defiance of the law, the Board ordered the "reading of the notice by either a Board agent or company official."[104]

The Fourth Circuit enforced this remedy,[105] but its opinion was not unanimous. Judge Boreman angrily declared:

> The forcing of such declarations, in the nature of confessions or recantations, is not a matter to be lightly regarded. The feeling and the resolution of free men against forced utterances can become extremely intense. Over many centuries they have suffered oppressions rather than admit wrongdoing which they deeply and devoutly believed they had not committed. In these newly devised directives of the Labor Board there appears to be an ominous trend, whether so intended or not, toward old oppressions, the eroding of fundamental rights and freedoms.[106]

Once one dispels Judge Boreman's haughty rhetoric, it is apparent that there is no substance to his claims. First, his insinuation that the employer is being coerced into confession is simply wrong. The employer is not required to admit any wrongdoing; she must simply enunciate a willingness to comply with the Board's order. Indeed, the employer is little different from a witness swearing to tell the truth or a government official taking her vows of office. Furthermore, Judge Boreman's emphasis on freedom rings rather hollow, as any concern for the *workers'* statutory freedoms is conspicuously absent from his diatribe.[107]

> It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.

Insurance Agents' Int'l Union, 119 N.L.R.B. 768, 773 (1957), *enforcement denied*, 260 F.2d 736 (D.C. Cir. 1958), *aff'd*, 361 U.S. 477 (1960).

There was thus no reason for the Board to acquiesce in the Second Circuit's *Stevens I* opinion, and one wishes the Board had possessed the courage of its convictions in *Stevens II*. *See, e.g.*, Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 707 (1989) (acknowledging "the legitimacy of an agency's desire to maintain a uniform administration of its governing statute while it reasonably seeks the national validation of its preferred position").

103. J.P. Stevens & Co., 167 N.L.R.B. 266 (1967), *enforced in relevant part*, 406 F.2d 1017 (4th Cir. 1968).

104. *Id.* at 269 n.10.

105. *Stevens III*, 406 F.2d at 1022. On the same day that the Board decided *Stevens III*, it also issued its decision in *Stevens IV*, J.P. Stevens & Co., 167 N.L.R.B. 258 (1967). Here too the employer was given the option of having a Board official read the notice to employees. *Id.* at 258 n.2, 264. *Stevens IV* was also enforced in relevant part by the court in J.P. Stevens & Co. v. NLRB, 406 F.2d 1017 (4th Cir. 1968).

106. 406 F.2d at 1025 (Boreman, J., dissenting in part).

107. Judge Boreman and other critics appear to hint that the Board's reading orders could somehow transgress the First Amendment's protection of "freedom of speech." That suggestion is never explicit, however, for the good reason that it is utterly without merit. Cases such as Wooley v. Maynard, 430 U.S. 705, 715 (1977) (holding that "[t]he First Amendment protects the right of individuals . . . to

Finally, it bears emphasis that defendants adjudged to have engaged in discriminatory behavior have frequently been required to voice their intention to obey the law. In *United States v. City of Parma*,[108] for example, a municipality found in violation of the Fair Housing Act[109] was ordered to implement an advertising campaign promoting the city as an equal housing opportunity community and to adopt a resolution welcoming all persons of good will. In upholding these remedies, the Sixth Circuit explained:

> It is common in [discriminatory] pattern or practice suits against private defendants to require educational programs for employees and advertising programs to advise the public of the nondiscriminatory policies which will be followed. . . . The requirement that Parma adopt a welcoming resolution is

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refuse to foster . . . *an idea* they find morally objectionable") (emphasis added) or West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (stating that "no official . . . can prescribe what shall be orthodox in politics, nationalism, religion *or other matters of opinion* or force citizens to confess by word or act *their faith therein*") (emphasis added) are clearly inapposite to the Board's remedy. In a Board-mandated reading, the employer is not required to espouse an "idea," embrace an "opinion," or express "faith" in any creed. Instead, the employer must simply state a willingness to obey the law regardless of how he or she may feel about that law. As Professor Tribe has explained, opinions such as *Barnette* are premised on the belief that the government may not force someone to voice "an *ideological view* the individual finds unacceptable." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 804 (2d ed. 1988) (footnote omitted) (emphasis added). That is a far cry from requiring an employer found guilty of unfair labor practices to state a prospective willingness to comply with the Board's order.

Furthermore, courts repeatedly have ruled that it does not violate the First Amendment to require a convicted lawbreaker to publicize the fact of his conviction. *See, e.g.*, Lindsay v. State, 606 So. 2d 652 (Fla. Dist. Ct. App. 1992) (upholding requirement that probationer place advertisement in newspaper containing his mug shot, name, and the words, "DUI-convicted"); Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) (per curiam) (upholding requirement that convicted drunk driver place bumper sticker on car reading "CONVICTED D.U.I.-RESTRICTED LICENSE"); People v. Letterlough, No. 92-03212, 1994 WL 284804 (N.Y. App. Div. June 27, 1994) (requiring convicted drunk driver to affix sign on license plates stating: "CONVICTED DWI"). As the court explained in *Goldschmitt*, such compelled messages are "no more ideological than a permit to park in a handicapped parking space." 490 So. 2d at 125. In a related vein, the *Lindsay* court explained that "[e]ven the first amendment right of free speech may be limited by an otherwise valid condition of probation." 606 So. 2d 657.

Such cases uphold requirements far more onerous than the Board's reading orders. In contrast to the convicted drunk driver, who must advertise his conviction of a criminal offense to the public at large, the employer need not don a scarlet letter. To the contrary, she must simply read the Board's notice to her workers in relative privacy. Any supposedly compelled self-stigmatization is therefore minuscule in comparison with what courts repeatedly have condoned in criminal cases. For a critique of cases requiring those convicted of criminal offenses to display signs or issue public apologies, see Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991). The cases Professor Massaro discusses, however, bear no resemblance to the Board's rather innocuous remedy. *See, e.g.*, Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (compelling offender to perform community service while wearing clothing identifying her as someone convicted of driving while intoxicated); State v. Bateman, 771 P.2d 314 (Or. Ct. App.) (en banc), *cert. denied*, 777 P.2d 410 (Or. 1989) (requiring child molester to post signs on home and car doors stating "DANGEROUS SEX OFFENDER--NO CHILDREN ALLOWED").

108. 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

109. 42 U.S.C. §§ 3601-3631 (1988).

> relatively innocuous and fits in with the advertising campaign which we have approved.[110]

In light of this standard practice in cases involving housing discrimination, there is no reason why a similar remedy should not be accepted in cases where workers are discriminated against because of their lawful union activities. In fact, the Board's notice-reading remedy is far less expensive and burdensome than the remedies approved in *Parma* as it does not necessitate the expenditure of money or the passage of a resolution. Judge Boreman's wrath to the contrary, the remedy is a fair and efficient means of attempting to redress the harm done to the workers' statutory rights.

The Board issued yet another reading order in *Stevens V*.[111] The Board continued its acquiescence, however, by permitting the employer to have a Board representative perform the reading.[112] This "softened" reading requirement was enforced by the Fifth Circuit.[113] The court's opinion was insightful, particularly in its evaluation of the competing interests between employer and employees. With regard to the employer's supposed humiliation, the Fifth Circuit reasoned that "embarrassment takes on a minor value when outweighed by the necessity of effectuating the policies of the National Labor Relations Act."[114] The court also understood the need to remove the employees' fear of coercion.[115] The court reasoned:

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110. *Parma*, 661 F.2d at 577. United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973), *aff'd in relevant part*, 509 F.2d 623 (9th Cir. 1975) (per curiam) is to similar effect. There the defendants were ordered to conduct an educational program to inform their employees of the court's decision and of their duties under the Fair Housing Act, as well as "inform[ing] the public generally and their customers and clients specifically" of their nondiscriminatory policy. *Youritan*, 370 F. Supp. at 652.

111. J.P. Stevens & Co., 171 N.L.R.B. 1202 (1968), *enforced*, 417 F.2d 533 (5th Cir. 1969).

112. *Id.* at 1202.

113. J.P. Stevens & Co. v. NLRB, 417 F.2d 533 (5th Cir. 1969).

114. *Id.* at 539.

115. *Id.* Supporting its premise that employees may fear retaliation from employers, the court relied on the classic article, Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964) (*cited* in *Stevens V*, 417 F.2d at 540 n.16). As Bok concluded:

> In regulating organizational activity, a realistic sense of priorities should lead us to recognize that an elemental fear of reprisal still poses the major threat to the free and fair elections contemplated by the act. Under these circumstances, lesser problems should not be allowed to obscure the pressing need for more effective restraints against the clear threats and discriminatory discharges that do so much to awaken the fears of many employees.

Bok, *supra*, at 140-41. This problem, moreover, has worsened rather than diminished over the past several decades. As Professor Weiler warns, there has been a "skyrocketing use of coercive and illegal tactics" by employers, and "[t]he current system of unfair labor practice remedies has proved powerless to contain such intimidation or to undo its effects." Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 HARV. L. REV. 1769, 1769-70 (1983) [hereinafter Weiler, *Promises to Keep*]. *See also* Barenberg, *supra* note 9, at 932 (discussing "the legal regime's woeful failure to protect workers' freedom of association"); Charles B. Craver, *The National Labor Relations Act Must be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 436 (asserting that the inability of current remedies to protect workers and unions "encourages

> For repeated violations persisted in despite intervening declarations of illegality, the Board is warranted in impliedly concluding that such conduct has created a chill atmosphere of fear and, further, in recognizing that the reading requirement is an effective but moderate way to let in a warming wind of information and, more important, reassurance.[116]

It is difficult to find fault in the Fifth Circuit's opinion -- it showed proper respect for the Board's remedial discretion, recognized the rather picayune nature of an employer's "embarrassment," and appreciated the therapeutic value of reading notices for the workers. It is unfortunate, however, that the Board had not ordered the employer itself to deliver the recitation.[117]

Following the *Stevens* cases, the Board has usually accompanied its reading orders with the proviso that the employer could opt to have a Board agent read the notice.[118] The Board's recent decision in *Three Sisters Sportswear Co.*,[119] for example, demonstrates the Board's continued hesitancy to require a personal reading by employers. In *Three Sisters*, the administrative law judge believed that the company's chief executive officer should personally read the notice because he "was responsible for and directly implicated in most of the violations found."[120] The Board, however,

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unscrupulous companies to ignore their legal obligations"); Howard J. Parker & Harold L. Gilmore, *The Unfair Labor Practice Caseload: An Analysis of Selected Remedies*, 34 LAB. L.J. 172, 174 (1983) (explaining how the weakness of the Board's remedial powers "creates a situation in which violation becomes a very attractive alternative to an employer").

This rising tide of unfair labor practices has taken its toll on American workers' sense of security. According to Professor Weiler, a Lou Harris poll demonstrates that "fully 43% [of nonunionized workers] believe that *their* employer would fire, demote, or otherwise make life miserable for union supporters in a representation campaign." Paul C. Weiler, *Milestone or Tombstone: The Wagner Act at Fifty*, 23 HARV. J. ON LEGIS. 1, 11 n.18 (1986). Furthermore, Professor Barenberg reports that "about eighty percent of the public believes employers are likely to fire workers for engaging in union activit[ies]." Barenberg, *supra* note 9, at 931-32 (citing Fingerhut/Powers, National Labor Poll (1991)).

116. *Stevens V*, 417 F.2d at 539-40 (footnote omitted).

117. The Board continued to grant the employer this option in J.P. Stevens & Co., 179 N.L.R.B. 254, 285 (1969), *enforced*, 441 F.2d 514, 527 (5th Cir.), *cert. denied*, 404 U.S. 830 (1971). The Fifth Circuit's opinion in *Stevens VI* is noteworthy due to Judge Goldberg's pessimism regarding the efficacy of Board remedies. Judge Goldberg opined that "to the Company, the words of judicial and administrative admonition are as but 'sounding brass or a tinkling cymbal'" and concluded his opinion by "praying that there will be no *Stevens VII*." J.P. Stevens & Co. v. NLRB, 441 F.2d 514, 528. That prayer, unfortunately, went unanswered and the Stevens company continued to be a litigant before the Board and courts. *See, e.g.*, NLRB v. J.P. Stevens & Co., 464 F.2d 1326 (2d Cir. 1972) (per curiam) (finding the employer in civil contempt for violating the court's orders in *Stevens I* and *II*), *cert. denied*, 410 U.S. 926 (1973).

118. The appellate courts, in turn, have shown a general willingness to enforce this modified version of the reading order. *See, e.g.*, Monfort of Colo., Inc., 298 N.L.R.B. 73 (1990), *enforced in relevant part*, 965 F.2d 1538 (10th Cir. 1992); Marine Welding & Repair Works, Inc., 174 N.L.R.B. 661 (1969), *enforced in relevant part*, 439 F.2d 395 (8th Cir. 1971) (per curiam).

119. 312 N.L.R.B. 853 (1993).

120. *Id.* at 880. In addition to being unlawful, some of the behavior was bizarre and carried strong overtones of violence. In one instance, the company's chief executive officer pushed a female

provided that the official "may elect to have the notice read by a Board agent rather than to read it himself."[121]

It appears, therefore, that the Board will usually give employers the option of having a Board representative read the notice. This is misguided, for it is the employer who committed the violations, is a daily presence at the company, and can prove a continuing threat to the workers. For these reasons, the Board should not succumb to appellate pressures to modify its reading orders.[122]

VII. REQUIRING INDIVIDUAL EMPLOYERS TO READ THE NOTICE

In rare cases, the Board has insisted that the notice-reading be performed by a particular official in the employer's hierarchy. The Board typically reserves this remedy for cases where the named official's involvement in the unfair labor practices has been both personal and extensive. Even under such limited circumstances, however, personalized reading orders have led to significant conflict between the Board and circuit courts.

Loray Corp.[123] exemplifies when the Board will require a named official to read the order. As the Board explained, this order was necessary due to the egregious nature of the violations and the official's extensive personal involvement.[124] The Board stated:

> We find that our usual remedies, the posting of a notice and the order for reinstatement and backpay for the discriminatees, are insufficient to dissipate the effects of the Respondent's extensive and flagrant unfair labor practices. In this case it is essential in view of the flagrancy of the Respondent's opposition to unionization that each employee be made individually aware of his statutory rights and that his exercise of rights will be respected by his Employer. In our

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Hispanic employee and in a separate incident physically blocked another female Hispanic employee from leaving the office after his brother had screamed obscenities at her. *Id.* at 868, 870.

A disturbing similarity between *Three Sisters* and Domsey Trading Corp., 310 N.L.R.B. 777 (1993), *enforced*, 16 F.3d 517 (2d Cir. 1994), discussed *infra* at notes 175-77 and accompanying text, is that both cases involve obscene and violent actions by employers against women of color. This tragic phenomenon, which traditionally has received far too little attention, is finally being discussed in a serious and insightful manner. *See, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY (Toni Morrison ed., 1992).

121. 312 N.L.R.B. at 853.

122. For a contrary perspective, see Hoffman, *supra* note 5, at 559. Hoffman merits praise for being an early advocate of issuing reading orders, but he erred in believing that it would suffice to have a Board agent perform the recitation. *Id. See also* Philip Ross, *Analysis of Administrative Process Under Taft-Hartley*, 63 Lab. Rel. Rep. (BNA) 132, 153 (Oct. 17, 1966) (calling for Board representatives to read notices).

123. 184 N.L.R.B. 557 (1970).

124. *Id.* at 558.

> view the mere posting of notices would not serve this purpose and we find additional measures are necessary. Accordingly, in addition to posting copies thereof at appropriate places, we have ordered Respondent's owner, president, and chief administrator [Schwartz] who was directly implicated and the major mover in the numerous unfair labor practices to personally sign the notices. We have also ordered Schwartz to personally read the attached "Notice to All Employees" at assembled meetings at which all employees will be reached, thereby directly placing on the notice the imprimatur of the person most responsible for the illegal acts in question. We order this not out of any desire to punish or embarrass Schwartz. However, in the light of the repeated adamant proclamations by Schwartz that it was futile for his employees to organize, we are of the opinion that unless the employees hear from Schwartz himself that he will conform his conduct to the requirements of the Act the coercive and restraining effect of Schwartz' conduct and utterances will not be dissipated.[125]

Loray is an excellent opinion, for it recognizes that the best way to remove the cloud of fear created by the employer's misconduct is for the employer personally to announce that he will respect the workers' rights. The argument should be extended, however, so that a company official would *always* be required to perform the reading. The choice of *which* official to name should be entrusted to the Board's discretion, as it will have more familiarity with the facts at hand than a reviewing court could hope to possess. In some instances, symbolic resonance could be maximized by having the company's chief executive officer perform the reading.[126] This would convey to the workers that the company took their rights seriously and that even top management would safeguard them from retaliation. In other instances, the remedy could have greater meaning if the speaker was a lower-level supervisor with whom the workers had a more familiar daily relationship.[127] Again, however, the Board would be in the best position to

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125. *Id.* (footnotes omitted).

126. As Professor Klein argues, "the credibility of a message is directly related to the status of the source of that message." Klein, *supra* note 57, at 27. For that reason, the Board could decide that requiring a company's chief executive officer to read the notice would maximize its credibility.

127. As Klein explains:

> The supervisor is a key communicator — The hierarchy of authority is linked through supervision at each level. People expect to hear important officially sanctioned information from their immediate supervisor or boss. Supervisors are expected to be well-informed and to be accurate transmitters of information. Moving down through the ranks to the non-management level, supervision takes on an even more important characteristic. The most important actor and the primary company representative is their immediate supervisor. Consequently, the role of supervision as the last of the hierarchical communications link to the nonsupervisory employees is an essential one.

Klein, *supra* note 57, at 28. The workers' perceptions of their supervisors can, of course, depend upon a wide range of factors. *See, e.g.*, Ronald J. Burke & Douglas S. Wilcox, *Effects of Different Patterns and Degrees of Openness in Superior-Subordinate Communication on Subordinate Job Satisfaction*, 12 ACAD. MGMT. J. 319, 326 (1969) ("In general, the greater the openness of either superior or subordinate (or both), the greater the degree of subordinate satisfaction . . . ."); Paul M. Muchinsky, *Organizational Communication: Relationships to Organizational Climate and Job Satisfaction*, 20

assess this on a case-by-case basis. *Loray* represents an important step in the right direction by compelling a corporate wrongdoer to take individual responsibility for his violations of the Act.

The Board also issued an individualized reading order in *United Dairy Farmers Cooperative Ass'n.*[128] Here the Board found that the employer's unfair labor practices were so "outrageous" and "pervasive" that "conventional remedies will not suffice to dissipate them and are inadequate to give Respondent's employees sufficiently explicit reassurances and understanding of their rights under the Act."[129] The Board therefore ordered the company's president to read the notice to employees and to give the Board a reasonable opportunity to attend and witness that recitation.[130]

The Board's approach was well taken, for the president had personally threatened and interrogated employees. The Board reasoned, "[a]s it is clear that Respondent's unlawful campaign emanated from the top; so too must reassurances that this company campaign will end come from the top."[131] The Board realized that having one of its agents read the notice could not have the same impact upon employees as hearing the words from the actual instigator of the violations. The Board was also prudent in stipulating that an agent of the Board must be given a reasonable opportunity to attend the reading. This provision imposes only minimal expense on the Board and helps assure that the employer actually convenes the workers and reads the notice in a meaningful manner.[132]

The Board also issued an individualized reading order in *Sambo's Restaurant, Inc.*[133] Here the Board ordered the company's district manager to read the notice as part of an effort "to dissipate as much as possible the lingering atmosphere of fear created by Respondent's unlawful conduct and to insure that if the question of union representation is placed before employees in the future they will be able to voice a free choice."[134] This order was enforced by the Ninth Circuit, which held that the company was

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ACAD. MGMT. J. 592, 600 (1977) ("[I]t seems highly plausible that the [employee's] perceived trust in the supervisor and perceived influence of the supervisor would be highly related to the way [employees] perceive[] management . . . ."); PAMELA SHOCKLEY-ZALABAK, FUNDAMENTALS OF ORGANIZATIONAL COMMUNICATION 148 (2d ed. 1991) ("[T]he credibility of the supervisor is more important than organizational status in determining who is approached for task, political, and social information.").

128. 242 N.L.R.B. 1026 (1979), *enforced in relevant part*, 633 F.2d 1054 (3d Cir. 1980).

129. *Id.* at 1029. The employer's actions included wrongfully discharging union supporters and threatening employees. United Dairy Farmers Coop. Ass'n v. NLRB, 633 F.2d 1054, 1056 (3d Cir. 1980).

130. 242 N.L.R.B. at 1029.

131. *Id.* at 1029 n.14.

132. Upon judicial review, the Third Circuit enforced the reading requirement but remanded the case for the Board to consider whether it should also issue a bargaining order. *United Dairy Farmers Coop*, 633 F.2d at 1070.

133. 247 N.L.R.B. 777 (1980), *enforced*, 641 F.2d 794 (9th Cir. 1981).

134. *Id.* at 777-78.

barred from contesting the remedy on appeal because it had failed to file a motion for reconsideration before the Board.[135]

In *Teamsters*,[136] however, the District of Columbia Circuit nullified the Board's individualized reading order. Here the Board concluded that the employer's unlawful discharges and other violations had created a "lingering atmosphere of fear" and were "likely to have a continuing coercive effect" on the work force.[137] The Board therefore ordered the company's owner and manager to read the notice aloud to assure "that each employee will be made individually aware of his statutory rights and will personally be assured by Respondent's highest ranking representative that those rights will be respected."[138]

The D.C. Circuit refused to enforce this order in its original form. Writing for the court, Judge Mikva emphasized that the owner personally committed only one of the company's numerous unfair labor practices, and there was thus no "unusual need" for the owner to read the order himself.[139] Judge Mikva then concluded:

> It is quite likely that a personal assurance from the chief executive officer of a company will have a marginally greater impact than one coming from some other official of lesser rank. But the negative aspects of the order overwhelm the marginal benefit. Such specificity is uniquely oppressive on the individual singled out, and the lack of particularized need may create the misimpression that the Board is seeking to punish an uncooperative respondent. When the remedial value is as slight as it is in this case, we think that the hardship outweighs the benefit. . . . Giving due regard to personal dignity and the limitations on the Board's discretion, we think such a specific reading order is unjustified. We will enforce this provision of the Board order only if it is modified to require the Employer to "have a responsible officer of Respondent" read the Board notice.[140]

Judge Mikva's analysis is long on sophistry, short on substance, creates needless ambiguities, and unjustly shifts the burden from the company's head officer to some innocent underling. First, he never explains why it is oppressive for a company's chief executive officer to read the notice. That officer is, after all, the proverbial captain of the ship and should be expected to take responsibility for the company's unfair labor practices. It is therefore irrelevant whether the company's owner personally committed "only" one unfair labor practice or many. Moreover, Judge Mikva's emphasis on the number of unfair labor practices leads to uncertainty: what number or

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135. 641 F.2d at 796. *See also* United Supermarkets, Inc., 261 N.L.R.B. 1291 (1982) (ordering owner of company to read notice to assembled employees).

136. Teamsters Local 115 v. NLRB, 640 F.2d 392 (D.C. Cir. 1981), *enforcing as modified* Haddon House Food Prods., Inc., 242 N.L.R.B. 1057 (1979).

137. 242 N.L.R.B. at 1058.

138. *Id.* at 1058-59.

139. 640 F.2d at 403.

140. *Id.* at 403-04 (footnote omitted).

percentage of violations committed *would* justify an individualized reading order?

Judge Mikva's opinion adds further ambiguity by requiring that "a responsible officer" of the company perform the reading. Who might that description encompass? One can envision future conflicts over whether a treasurer, personnel director, or foreman would satisfy the court. More importantly, it is the Board that has the best opportunity to appraise the company's hierarchy and select the most appropriate official to reassure employees of their statutory protection. Judge Mikva effectively strips the Board of that ability and vests the discretion in the hands of the employer, who has been found guilty of violating the Act and could deliberately select a less than credible official.[141]

Finally, Judge Mikva's opinion is meritless insofar as it purports to be based on "personal dignity." If the court really believed that the reading is so humiliating, then it could not justify permitting the owner to delegate it to a subordinate who played no role in the violations. There is nothing degrading about a president affirming that her company will obey the law, but there would be a degree of oppression if she could compel an innocent subordinate to deliver the recitation.

In sum, *Teamsters* represents the pitfalls of judicial interference. The opinion ignores the Board's remedial discretion, undermines the psychological impact of the remedy, and insulates a company's top management at the expense of those lower in the corporate hierarchy.[142]

The District of Columbia Circuit took a slightly more reasonable approach in *Conair Corp.*[143] Based on the company's "massive and unrelenting coercive conduct," the Board ordered the company's owner and president to read the notice to assembled employees.[144] This remedy was

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141. Perhaps what Judge Mikva meant by "a responsible officer" was an individual responsible for the occurrence of the unfair labor practices. That definition, however, was not suggested by the court, and there still would be no justification for having the employer rather than the Board select the reader.

142. Notwithstanding this interference, Judge Mikva supported the legitimacy of reading orders in general. As he realized:

> This is not a mere "additional" promulgation of the notice's contents, but rather a deliberate attempt to alleviate the workers' fears about the Employer's intentions. The reading can do little to disrupt the already strained relationship between the Employer and the Union, and it may be of substantial benefit to the employees. Whether or not this hope is realized, we cannot say that the Board was wrong to make an effort in that direction.

640 F.2d at 402-03.

143. Conair Corp. v. NLRB, 721 F.2d 1355 (D.C. Cir. 1983), *enforcing in relevant part,* 261 N.L.R.B. 1189 (1982), *cert. denied,* 467 U.S. 1241 (1984).

144. 261 N.L.R.B. at 1193-95, 1285. As the Board explained:

> There can be no doubt of the extreme gravity of Respondent's violations of the Act. In particular, the numerous discriminatory discharges are serious unfair labor practices which go "to the very heart of the Act" and have a lasting coercive impact on employees. . . . This mass discharge imparted in dramatic fashion the unmistakable message that loss of employment was the price to be exacted for the exercise of Section 7 rights. In subsequent months, Respondent reinforced and embellished this coercive message by repeatedly threatening discharge, by discriminatorily refusing reinstatement to some discharged strikers, by discriminatorily delaying reinstatement of other strikers, by

enforced by a divided panel of the District of Columbia Circuit.[145] In a portion of the opinion joined by then-Judge Scalia, Judge Wald held that the extensive personal involvement of the company's president justified the Board's order. Judge Wald reasoned:

> The president of a company may indeed ordinarily be entitled to protest as oppressive a requirement that he read to the employees, even on a single occasion, a statement of their rights and his company's obligations under the Act. The dignity interests implicated by such a requirement must always be carefully weighed and may be decisive when unfair labor practices, however egregious, are carried out entirely or primarily by subordinate management personnel. But it is the pervasive personal involvement of President Rizzuto in the unfair labor practices in this case that creates the need and justification for his personal involvement in their remedy. In order to dispel the atmosphere of intimidation created in large part by the president's own statements and actions, it is justifiable to require at least one formal declaration by him personally that the employees' statutory rights will be respected in the future. The Board's order can thus reasonably be said to effectuate the purposes of the Act, and is not punitive, as argued by the Employer. While we emphasize that a remedy such as that ordered here should be reserved for extraordinary circumstances giving rise to a particular remedial need, it is important to recall that the notice to be read by the president is nothing more nor less than an official statement of the statutory rights and obligations found to have been violated by the Employer. Under the special circumstances of this case, we will enforce this aspect of the Board's order.[146]

Judge Wald's enforcement of the Board's reading order was far too grudging, for it failed to recognize the value of having a specific company official read the notice in every case. Nonetheless, her opinion was met with a stinging partial dissent by then-Judge Ruth Bader Ginsburg, who argued that "it is foreign to our system to force named individuals to speak

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discriminatorily discharging reinstated strikers, and by repeatedly threatening plant closure in retaliation against the Union's campaign. Moreover, these unfair labor practices were only the most serious among the many committed by Respondent.

Id. at 1192-93 (footnotes omitted).

145. The court refused, however, to enforce the Board's order that the employer bargain with the union, reasoning that bargaining orders are improper when the union has never demonstrated that it is supported by a majority of the workers in the proposed bargaining unit. 721 F.2d at 1384. This issue in the case has fueled considerable debate, particularly among law review editors. *See, e.g.*, Diana Dietrich, Note, *Labor Law—Remedial Non-Majority Bargaining Orders*—Conair Corp. v. NLRB, 33 KAN. L. REV. 345 (1985); Maureen N. Egan, Recent Cases, *Conair Corp. v. NLRB: Limits on the Power of the NLRB to Remedy Employer Unfair Labor Practices*, 33 DEPAUL L. REV. 813 (1984); Richard B. Lapp, Note, *Remedial Gap at the NLRB Following the Demise of the Nonmajority Bargaining Order: Gourmet Foods, Inc. and Warehouse Employees, Local 503*, 1985 WIS. L. REV. 1193; David S. Shillman, Note, *Nonmajority Bargaining Orders: The Only Effective Remedy for Pervasive Employer Unfair Labor Practices During Union Organizing Campaigns*, 20 U. MICH. J.L. REF. 617 (1987). For the perspective of a Board member who dissented on this issue, see Robert P. Hunter, Conair*: Minority Bargaining Orders Usher in 1984 at NLRB*, 33 LAB. L.J. 571 (1982).

146. 721 F.2d at 1386-87 (footnotes omitted).

prescribed words to attain rehabilitation or to enlighten an assembled audience."[147] Instead, Judge Ginsburg believed that the company's president should be allowed "to choose between reading the notice himself or designating a responsible officer to read it on his behalf."[148] She then concluded:

> A forced, public "confession of sins," even by an owner-president who has acted outrageously, is a humiliation this court once termed "incompatible with the democratic principles of the dignity of man." It has a punitive, vindictive quality and is the kind of personal performance command equity decrees have avoided. Moreover, as Board Chairman Van de Water noted , a reading of the notice by the president may be less effective than a reading by another responsible officer. The former, humiliated and degraded by the personal specific performance order, may demonstrate "by inflections and facial expressions, his disagreement with the terms of the notice." The latter, assigned the task but lacking the same personal involvement, may perform it with less distaste, more detachment, and thus with greater credibility. I would not single out the president here, or any other named individual, hand him lines, and make him sing.[149]

It is disappointing that a judge of Justice Ginsburg's unquestionable intellect and integrity could falter so repeatedly in her analysis.[150] First, her argument that the reading order is "foreign" to our system of government is simply false. As *City of Parma*[151] demonstrates, courts have required defendants to go to considerable lengths to "enlighten" their employees concerning the law and to publicize policies of nondiscrimination.[152] There

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147. *Id.* at 1401 (Ginsburg, J., dissenting in part).

148. *Id.*

149. *Id.* at 1401-02 (citations omitted).

150. Indeed, it was opinions such as *Conair* that prompted Senator Metzenbaum's complaint to Ginsburg that "in reading your opinions, I can't discern whether you can identify with the harsh practical realities of the workplace when antiunion employers intimidate their employees to prevent them from organizing." *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary*, 103d Cong., 1st Sess. 152 (1993). It should be noted, however, that on the Supreme Court Justice Ginsburg has indicated some understanding of the needs of American workers. *See, e.g.*, NLRB v. Health Care & Retirement Corp. of Am., 114 S. Ct. 1778, 1785 (1994) (Ginsburg, J., dissenting) (challenging the majority's conclusion that nurses were "supervisors" unprotected by the Act).

151. United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982), discussed *supra* at notes 108-110 and accompanying text.

152. Ginsburg also neglected the fact that employers are legally obligated to "enlighten" their employees in a host of other circumstances. The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988), for example, places considerable burdens on employers to educate their workers concerning health and safety dangers in the workplace. As Professor Rothstein remarks, "[m]any OSHA standards require employers to provide specific safety training for employees." MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 128 (3d ed. 1990). *See, e.g.*, Ames Crane & Rental Serv. v. Dunlop, 532 F.2d 123, 125 (8th Cir. 1976) (holding that "the duty of an employer to take adequate precautionary steps to instruct and train employees against reasonably foreseeable dangers" was not fulfilled by making available written safety materials); Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975) (explaining that employer's steps to protect workers

is no principled reason why such a remedy should be commonly accepted in cases of housing discrimination, but shunned in cases involving discrimination based on union sympathies.

Furthermore, there is nothing "humiliating," "vindictive," or "punitive" about a reading order. The employer is merely required to inform employees of the Board's decision and to assure them that their rights will be respected. Such a remedy can be characterized as degrading only if one believes that employers are above the law.

Ginsburg's reliance on the traditional equitable reluctance to order specific performance of personal service contracts is also misplaced. As Judge Wald reasoned, "[t]hat principle operates in a factual and legal context too remote to serve as the basis for overturning the Board in an exercise of remedial discretion."[153] Indeed, it has been understood for decades that the Board is empowered to order actions beyond those typically compelled by courts of equity. As Justice Frankfurter reasoned, "[a]ttainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies."[154] Given that the Board has unquestioned authority to order a recalcitrant employer to hire or reinstate a worker she despises,[155] surely the Board has

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must include "an adequate safety and training program"); Bechtel Power Co., 7 O.S.H. Cas. (BNA) 1361, 1365 (1979) (holding that employer's providing employees with safety booklet was insufficient to comply with law); A.J. McNulty & Co., 4 O.S.H. Cas. (BNA) 1097, 1100 (1976) ("The Commission has consistently held that the mere issuance of safety instructions does not satisfy the employer's duty . . . ."). As two scholars have explained, "the employer occupies a position of authority in the workplace. The employee relies on the employer for training, direction and supervision in the workplace. Thus, the employer is the most credible source of workplace safety information." Victor E. Schwartz & Russell W. Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38, 81 (1983).

In light of the extensive steps employers must take to educate and protect workers against physical hazards, there is no reason to question the Board's power to order employers to assure workers that their statutory rights will be respected.

153. Conair Corp. v. NLRB, 721 F.2d 1355, 1387 n.101 (D.C. Cir. 1983).

154. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1944) (upholding Board's power to order hiring of workers denied employment due to union affiliation). Furthermore, as one thoughtful observer has explained:

> Whereas equity developed with knowledge that denial of equity jurisdiction would not preclude legal relief, in unfair labor practice cases the NLRB is the final source of relief. Moreover, equity courts prefer to order the cessation of unlawful conduct rather than affirmative performance, especially when compliance must be measured against a subjective standard. Yet, the NLRB constantly orders parties to undertake extensive activity and requires both subjective and objective compliance with its orders. The application of equitable standards to NLRB orders ignores Congress' decision to place the administration of the NLRA in this agency in order to avoid the traditional restrictions on equity courts.

Dennis M. Flannery, Note, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69, 92-93 (1963) (footnotes omitted).

155. *Phelps Dodge*, 313 U.S. at 187-89; *see also* 29 U.S.C. § 160(c) (1988) (authorizing Board to order the "reinstatement of employees with or without back pay").

the lesser power of simply ordering that employer to address her employees for several minutes.

Ginsburg's final argument—that an emotionally detached subordinate may read the notice more effectively than the company's chief executive officer— is misguided for several reasons. First, the Board's order in *Conair* included the condition that "[t]he Board shall be afforded a reasonable opportunity to provide for the attendance of a Board agent at any assembly of employees called for the purpose of reading such notices."[156] With a Board representative present, it seems quite unlikely that an employer would try to make the reading a farce.

Second, by definition, a subordinate cannot speak with the same authority as a chief executive officer. Whereas a company's president seems certain to capture her employees' attention, a subordinate may be received as a poor flunky pressured into reading a notice the president refused to recite.[157]

Third, Ginsburg's insistence that the company's president be allowed to delegate the reading to a subordinate also contradicts her proclaimed concern for individual dignity. As Ginsburg (similarly to Mikva) failed to consider, if the reading were humiliating, then "an owner-president who has acted outrageously" should not be allowed to force an innocent subordinate to perform the task. Unfortunately, Ginsburg seems to have internalized the idea that top management is entitled to an aura of supremacy in the workplace that the Board must respect even when the law has been broken.

Fourth, even if a subordinate might read the notice more effectively than the company's president, that decision is best left in the hands of the Board. It is the Board -- not a federal judge -- that is familiar with the relevant parties and is in the best position to decide who should read the notice. For an appellate judge to override the Board's judgment in this matter borders upon judicial arrogance.

In sum, one can sympathize with Wald and Scalia when they state: "We confess to being rather mystified as to the legal basis for the position taken by Judge Ginsburg in her dissent."[158] As they observed, "[w]hile the elevated language of the dissent has a vaguely constitutional ring, it identifies no constitutional provision or principle offended by the Board's action."[159]

The reason for this lack of constitutional analysis is that no such argument could possibly prevail. The First Amendment is not violated because the employer is not required to espouse allegiance to any ideology or creed. The Fifth Amendment is not implicated because no self-incrimination occurs. Finally, the Eighth Amendment is inapposite because "it was designed to protect those *convicted of crimes*,"[160] rather than those

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156. 261 N.L.R.B. 1189, 1289 (1982).

157. *But see* Klein, *supra* note 57, at 28.

158. Conair Corp. v. NLRB, 721 F.2d 1355, 1387 n.101 (D.C. Cir. 1983).

159. *Id.*

160. Ingraham v. Wright, 430 U.S. 651, 664 (1977) (emphasis added) (holding that "the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public

subjected to civil remedies. All that remains, therefore, is rhetorical thunder without doctrinal substance. That, of course, cannot legitimate judicial interference with the Board's remedial scheme. As Wald and Scalia reasoned, "[w]e believe that more than an affront to the sensibilities of individual judges is required to justify wholly eliminating this remedy from the Board's arsenal."[161]

The District of Columbia Circuit addressed this issue again in *United Food*.[162] Here, the Board ordered a company's president to read the notice and the Board's opinion was fully enforced by the District of Columbia Circuit. Writing for the court, Judge Mikva distinguished his opinion in *Teamsters*[163] on the grounds that in the earlier case "the record did not indicate that substantial links existed between the particular employer ordered to read the notice and the labor law violations committed."[164] Instead, the present case was more analogous to *Conair*, for in each instance the company's president had "pervasive personal involvement" in the unfair labor practices.[165] Judge Mikva therefore decided that "the Board could well have concluded that only a personal reading by him would 'dispel the atmosphere of intimidation created in large part by [his] own statements and actions.'"[166]

Judge Mikva concluded in a philosophical vein, stating:

> National labor law has undergone many changes from the early days of the Wagner Act. Throughout this period, courts have acknowledged the broad remedial discretion that the Board must have to effectuate the policies of the statute. Such discretion makes it difficult to provide bright-line limits on the remedies that the Board can utilize. As the decisions of this court in *Teamsters* and *Conair* demonstrate, unique and specific facts of a case will more often than not provide the measure that allows a remedy in one case and precludes it in another. Such are the vagaries of judicial review of the delicate fabric of our national labor law.[167]

Judge Mikva's conclusion is artful verse but poor law. Drawing distinctions between *Teamsters* and *Conair* will lead to uncertainty as parties squabble over the precise extent of an executive's participation in the violations. Rather than impose such "vagaries" on the system, the courts should respect the Board's discretion in deciding who should read the notices.

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schools"). Furthermore, the Board's reading orders cannot reasonably be considered "cruel and unusual punishments."

161. 721 F.2d at 1387 n.101.

162. United Food & Commercial Workers Int'l Union v. NLRB, 852 F.2d 1344 (D.C. Cir. 1988), *enforcing* Monfort of Colo., Inc., 284 N.L.R.B. 1429 (1987).

163. Teamsters Local 115 v. NLRB, 640 F.2d 392 (D.C. Cir. 1981), *enforcing as modified* Haddon House Food Prods., Inc., 242 N.L.R.B. 1057 (1979), *cert. denied*, 454 U.S. 827 (1981), discussed *supra* at notes 136-42 and accompanying text.

164. *United Food*, 852 F.2d at 1348.

165. *Id.* at 1348-49.

166. *Id.* at 1349 (quoting *Conair Corp.*, 721 F.2d 1355, 1387 (D.C. Cir. 1983)).

167. *Id.*

The Board, in turn, should not hesitate to require that top executives help redress the harms caused by their companies' unfair labor practices regardless of whether they "personally" committed the violations.

The Board also issued an individualized reading order in *S.E. Nichols, Inc.*[168] In this case, administrative law judge Josephine Kline carefully explained why the company's president would be personally ordered to read the notice. She reasoned:

> Brecker [the company president] was a stellar performer in the [antiunion] campaign. Despite that fact, he failed to testify, thus apparently attempting to disassociate himself from the Company's conduct. It is essential that unequivocal assurance be given the employees that Brecker, the director and perpetrator of the wrongs, assumes responsibility for remedial action and it will not be left to lower echelon management. In furtherance of this consideration, I shall also recommend that all supervisors be required to attend any meetings in their stores when the notice is read to employees. As Brecker's comrade in arms, [the company's district supervisor] will also be required to attend the meetings.[169]

Judge Klein's decision is powerful, for she recognized the need to assure employees that the company's president—as well as supervisory personnel—would respect their rights. By requiring all supervisors to attend the notice-readings and for the president himself to perform the recitations, Judge Klein did her best to assure that the workers could recover from the employer's extensive unfair labor practices.[170]

Judge Klein's recommended remedy was adopted by the Board[171] but was modified by the Second Circuit.[172] The Second Circuit expressed ambivalence over the reading order, acknowledging that it "insures that the full counteracting force of the remedial order will be felt by the employees," but finding "an element of some humiliation in the requirement that a company official personally and publicly read the notice."[173] The court therefore required the Board "to afford the company the alternative, at its option, of having the notice read by a Board representative, rather than by

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168. 284 N.L.R.B. 556 (1987), *enforced as modified*, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989).

169. *Id.* at 596.

170. Among other actions, the employer discharged employees because of their union sympathies, threatened workers, and discriminated against employees who testified in Board proceedings. *Id.* at 556-62, 593. Moreover, the employer also violated the Act by suggesting to workers that they might need the employer's "protection" if they were interviewed by the Board's agents. *Id.* at 580-82. For a discussion of this aspect of the case, see John W. Teeter, Jr., *Inadvisable Advice: Limits on Employers' Counseling of Employees with Regard to Unfair Labor Practice Proceedings*, 12 INDUS. REL. L.J. 292, 302-04 (1990).

171. The Board did, however, limit the remedy's scope to the corporate division where the unfair labor practices transpired. 284 N.L.R.B. at 560.

172. NLRB v. S.E. Nichols, Inc., 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989).

173. *Id.* at 962.

president Brecker."[174] Once more, a tribunal chose to limit the potential effectiveness of the remedy rather than subject a company official to some conjectural embarrassment.

Notwithstanding this mixed reception by the appellate courts, the Board recently has evinced its continued willingness to issue individualized reading orders in particular cases. In *Domsey Trading Corp.*,[175] the Board ordered the company's manager (who was also one of the owner's sons) to read the notice. The Board explained:

> Based on the violence that Peter Salm [the manager] has perpetrated, directed, and condoned here, his racial and sexual degradation of unfair labor practice strikers and union representatives, and the other unfair labor practice violations he *personally* committed . . . we believe that it would effectuate the policies of the Act by requiring that Peter Salm read the notice in order to assuage the fears of the unit employees that their future involvement in union and other protected concerted activities will not result in similar misconduct on his part. This case is clearly distinguishable from *Monfort of Colorado*, 298 NLRB 73 (1990), where the Board did not require the employer's president to read the notice because he was personally responsible for only two of the unfair labor practices found. We do not impose this remedy for punitive reasons. It is designed, rather, specifically to address Peter Salm's demonstrated willingness and proclivity to resort to unlawful means, including violence, to thwart the union's organizing campaign and otherwise to run roughshod over the fundamental statutory rights of employees. Thus, because it will best effectuate the policies of the Act, we adopt the judge's recommendation directing that Peter Salm read the notice in English to the unit employees.[176]

Domsey is commendable in that the Board ordered the manager personally to read the notice without the option of delegating the task to a subordinate or Board agent. Moreover, the Board was sensitive to the fact that not all employees spoke English and arranged for the notice to be read in other languages as well.[177]

Unfortunately, however, the Board is still too timid in its approach and too reluctant to make corporate officials take personal responsibility for

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174. *Id.* The court also limited the remedy to the specific store where the violations occurred. *Id.*

175. 310 N.L.R.B. 777, 779-80 (1993), *enforced*, 16 F.3d 517 (2d Cir. 1994).

176. *Id.* at 780 (footnote omitted). The Board found that the manager had personally engaged in a series of vicious acts that included unlawful discharges, threats, offers of bribes, and hitting a female union representative with a rock. *Id.* at 779. According to testimony at the hearing, the manager also subjected striking employees (most of whom were from Haiti and many of whom were women) to sickening racial and sexual insults. *Id.* For provocative discussions of the harmful effects of such verbal attacks, see MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993). The special problems confronted by foreign-born workers are discussed in Lora Jo Foo, *The Vulnerable and Exploitable Immigrant Workforce and the Need for Strengthening Worker Protective Legislation*, 103 YALE L.J. 2179 (1994).

177. 310 N.L.R.B. at 780 n.13.

reading notices. It is instructive that the *Domsey* Board chose to distinguish *Monfort* rather than abandon its case-by-case approach of deciding whether a specified official must read the notice. We are thus left with uncertainty as to when the Board will issue individualized reading orders and, for that matter, when the courts will enforce them.

VIII. CONCLUSION

The Board should issue a reading order in every case where the employer is found to have violated the Act.[178] This reading should be performed by a specific company official the Board has selected to maximize the order's credibility and the employees' sense of assurance. Such orders are necessary for a series of reasons. First, millions of Americans suffer from reading deficiencies and cannot comprehend a printed notice. Second, even literate employees may not happen to observe the printed notice at the workplace. Third, a mere piece of paper is unlikely to reassure victims of unfair labor practices that the employer will take rehabilitative action and respect their rights. Fourth, it has been demonstrated repeatedly that an employer's oral statements to her employees are usually more effective than written communications. Fifth, for the employer to stand before her workers and actually read the notice carries more symbolic weight than any posted notice could possess.

Furthermore, it might not be too wishful to hope that employers required to read notices might internalize some portion of what they speak. Instead of simply having the notice posted, employers would have to assure their employees, in a face-to-face setting, that they would comply with the Board's order and respect their rights. Even employers who performed the reading solely as a legal requirement might come to appreciate the intrinsic value of practicing what they preached. As Professor Murphy reasons, "[t]he habitual use of certain means to attain an end often induces us to treat those means as an end."[179] One would hope that reading orders would induce at least a few employers to view compliance with the Act as a worthy end in itself.

Employers might also find themselves the beneficiaries of unexpected rewards. Workers might well appreciate the employer's openness, grow confident of their rights, and become more committed to their jobs.[180] As industrial psychologists have discovered, there is a causal connection between "worker morale" and "productive efficiency."[181]

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178. I also would approve of ordering union officials to read the Board's notices when they have violated the Act, but that justification would require a separate article to explain.

179. MURPHY, *supra* note 38, at 38.

180. *See, e.g.*, Burke & Wilcox, *supra* note 127 (analyzing relationship between employer openness and employee job satisfaction); Barenberg, *supra* note 9, at 893 (warning that "United States workers of the 1990s are much more likely to resent authoritarian or overtly inegalitarian management styles than their forerunners of the interwar years").

181. MURPHY, *supra* note 38, at 29.

For these benefits to unfold, the Board must show determination, and the courts must show restraint. The Board should resolutely issue reading orders and refuse to acquiesce in the interference of judges. The Board should also make each reading order an individualized one instead of reserving this remedy for rare cases.

The courts, in turn, must exercise self-discipline and cooperate with the Board's remedial efforts.[182] The Board's reading orders are fair, necessary, and squarely within the administrative discretion conferred by § 10(c). There is, thus, no principled basis for judicial interference.

By itself, my proposal cannot transform American workplaces into temples of harmony and production.[183] Far more must be done to free workers from the coercion of lawless employers. At a minimum, however, we should begin our endeavor by giving workers fair and meaningful notice that their rights under the Act will be vindicated.

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182. *See, e.g.*, Flannery, *supra* note 154 at 90 (explaining that "[u]nless the NLRB secures the cooperation of the reviewing courts, its efforts to adapt orders to varying factual situations will fail") (footnotes omitted); Michael H. Stephens, Comment, *Recent Developments in the Creation of Effective Remedies Under the National Labor Relations Act*, 17 BUFF. L. REV. 830, 831 (1968) (asserting that "[t]he Board's efforts to create orders which effectively remedy particular situations will necessarily be in vain without the cooperation of the reviewing courts") (footnote omitted). As Professor Lesnick relates, however, "[f]ar from receiving encouragement (much less a prod) in coping with the serious inadequacies of the remedial scheme routinely employed, the courts have in effect told the Board that they must face a vigilant and skeptical, even hostile, reception when they attempt to take some minimal steps towards achieving a better climate of compliance." Lesnick, *supra* note 72, at 49.

183. The admittedly incremental nature of my proposal at least renders it more feasible than reforms dependent upon legislative action. *See, e.g.*, Houseman, *supra* note 33, at 724 (concluding that "labor law reform in general appears to be a distant hope at the moment"); Weiler, *Promises to Keep*, *supra* note 115, at 1770 & n.1 (describing the failure of the Labor Reform Act to win Senate approval during the Carter presidency). The prospect for legislative reform under the Clinton administration seems equally bleak. A bill that would forbid employers from permanently replacing economic strikers, for example, is "headed for almost certain defeat in the Senate." 146 Lab. Rel. Rep. (BNA) 273 (June 27, 1994).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, coerce, or otherwise discriminate against you by discharging you for engaging in union activities or other protected concerted activity.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act by removing union newsletters from union bulletin boards at the facilities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer Jay L. Boyland immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he previously enjoyed, and WE WILL make him whole for the losses he incurred as a result of the discrimination against him and expunge from our files any reference to his discharge and notify him the unlawful discharge will not be used as a basis for future personnel actions against him.

WE WILL, if requested by the Union, allow the reposting of the union newsletters previously removed.

MONONGAHELA POWER COMPANY