

April 1999

A Labor Lawyer's View of Legal Argument

Julius Getman

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>

 Part of the [Law Commons](#)

Recommended Citation

Julius Getman, *A Labor Lawyer's View of Legal Argument*, 74 Chi.-Kent L. Rev. 409 (1999).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol74/iss2/5>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

A LABOR LAWYER'S VIEW OF LEGAL ARGUMENT

JULIUS GETMAN*

Legal argument is serious business. Important issues of national policy are regularly determined and large sums of money are allocated by the acceptance or rejection of legal argument—this is why people hire lawyers, why so many young people want to become lawyers, and why hidden behind lawyer jokes is a combination of awe, envy, and anger. Explaining the significance of legal argument to the public is a major industry. One has but to turn on the television set to find prominent lawyers, law professors, prosecutors, and former judges discussing the intricacies of the legal process. Thus, one would be well advised to take legal argument seriously. It is not as clear that legal argument is worthy of its importance. Do the best legal arguments lead to just results?

Law professors generally assume that a strong correlation exists between sound legal argument and sound policy. My own view is increasingly skeptical. How can legal argument lead to justice when it is so rarely informed about, and is increasingly removed from, the lives of people affected by it? My skepticism is reinforced by years of scholarship in and practice of labor relations law. The more I have learned, the less satisfied I have become with the legal rules and the way they are formulated.

The system of regulation created since the passage of the National Labor Relations Act (“NLRA”),¹ the focus of my teaching and scholarship, evidences class bias, confusion, contradiction, and ignorance. Decisions by the Labor Board and the courts reflect a profound lack of understanding of the industries and practices they regulate and of the legitimate interests of the parties affected by their decisions. As a result, a statute aimed at promoting the interests of workers by securing their rights to unionize, strike, and bargain collectively has been transformed into a complex system of rules that ignores, misinterprets, and undervalues these rights.

* Professor, University of Texas Law School.

1. 29 U.S.C. §§ 151-169 (1994). The NLRA, enacted in 1935, is also known as the “Wagner Act.”

The pattern of undervaluing worker interests is longstanding. Shortly after passage of the Wagner Act,² which both announced the legality and stressed the importance of the right to strike, the Supreme Court in *NLRB v. Mackay Radio & Telegraph Co.*³ announced in dicta, with no serious discussion about the need for such a rule or of its costs, that employees who exercised the right to strike may be permanently replaced.⁴ Because the Court has reaffirmed the *Mackay* doctrine on several occasions without really justifying it, subsequent legal decisions have used the rule as a starting point for decisions limiting the rights of strikers, presumably pursuant to the assumption that employer interests are thereby protected. In fact, empirical evidence suggests that the interests of employers can be adequately protected by giving them the right to hire temporary replacements,⁵ something the Court has never even considered. Neither has the Court addressed the impact of the *Mackay* doctrine on strikers.

The harm caused by the *Mackay* doctrine over the years has been immense. Permanent replacement of striking workers has wrecked lives and lifelong friendships, destroyed families and entire communities, and even resulted in death.⁶ Yet its consequences rarely, if ever, come to the attention of lawyers, judges, or legal academics. Permanently replaced strikers are largely invisible—separated by class, location, experience, and occupation from those who frame and respond to legal argument. No mention of the doctrine's consequences on the lives of those it directly affects has appeared in legal argument and none, or almost none,⁷ in judicial opinions. Additionally, academics who are ignorant of *Mackay's* practical workings and who are deluded by myths of interest balancing and the beneficent market continue to defend it.⁸ Every right granted to employees by the NLRA, including the right to organize, strike, bargain collectively, and make common cause, has

2. *See id.*

3. 304 U.S. 333 (1938).

4. *See id.* at 344.

5. I have discussed this issue with executives, managers, and officers of many paper companies in writing a book on the strike against International Paper Company (*see infra* note 6) and in subsequent meetings.

6. The impact of the *Mackay* doctrine on striking workers and their families, supervisors, community, and line crossers over the course of ten years is described in JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14* (1998).

7. I know of no such decision, but perhaps one exists.

8. *See generally* Douglas L. Leslie, *Retelling the International Paper Story*, 102 *YALE L.J.* 1897 (1993).

been cut down, subjected to technical complication, and made dangerous to exercise. Nowhere is this more evident than in the law that supposedly gives to employees the right to freely choose union organization without fear of economic consequences. But the law gives employers a marked advantage in being able to make captive audience speeches to its employees without giving the union a right to respond.⁹ Experienced union organizers know that employees who are identified early as union supporters run a major risk of being fired and that the remedies intended to protect this right are woefully inadequate.¹⁰

In a recent article, I compared labor law decisions to the battle strategy of British army officers in World War I who, "like most of the country's elite, believed that class, rank, and education gave certain people the ability and the right to make rules to control the conduct of people whose situation they did not understand and whose experiences they did not share."¹¹ I am far from alone in my pessimistic view of the labor laws. One of the deans of U.S. labor law, Professor Summers, recently stated, "The Wagner Act has failed in its purposes."¹² He concludes that the courts have resisted and distorted the basic purposes of the NLRA.¹³ A distinguished senior labor

9. See *NLRB v. United Steelworkers*, 357 U.S. 357 (1958).

10. See generally PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* (1990). The empirical study of union representation elections that I conducted together with Professors Goldberg and Brett convinced me that the elaborate system of regulation established by the NLRB and the courts to govern union organizing is based on assumptions that, when tested, turned out to be misleading, mistaken, and inconsistent with the behavior of employees and the policies of the Wagner Act. Under this system, in order to promote free choice by employees, employer speech is carefully controlled and union access to employees severely limited. Our data and interviews with union organizers made clear that a system of greater employer speech and greater union access would make far more sense. Our conclusion that access to employees is more valuable than limiting employer speech has been agreed to by every union organizer with whom I have spoken. Yet such a change in the law is now inconceivable.

11. Julius G. Getman, *Of Labor Law and Birdsong*, 30 CONN. L. REV. 1345, 1348-49 (1998).

12. Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 794 (1998).

13. See *id.* at 813-16. Enacted in 1935, the Wagner Act declared the public policy of the United States to be one of "encouraging the practice and procedure of collective bargaining." 29 U.S.C. § 151 (1935). The premises and purposes of collective bargaining were threefold.

First, in section 1 of the statute, the drafters recognized the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of [collective] ownership." *Id.* Second, free collective bargaining was viewed as a market alternative to legislative control. Third, collective bargaining would serve the social purpose of enriching democracy by giving workers a voice in decisions of industry affecting their working lives.

Unfortunately, the last two purposes, relying on collective bargaining to reduce government intervention and providing workers a measure of industrial democracy, have been

scholar, Professor Schatzki, believes that my view is, if anything, unduly optimistic because he finds implied in my criticism the hope that regulation could be made fairer if scholars provided the courts with greater information about the reality of labor relations. He concludes that:

While the judges' ignorance may make it easier for them to do what they do, it is not ignorance, I believe, that accounts primarily for their consistently unfriendly-to-the-labor-movement holdings. While appreciating that causation for judges' actions is multiple and complicated, I believe there is a heavy thumb on the scales. It's simple: judges don't like labor unions.¹⁴

In a recent book, Professor Gross describes the transformation of the NLRA from a law "intended to democratize vast numbers of American workplaces so that workers could participate in the employment decisions that most directly affected their lives [by] . . . encourag[ing] . . . the practice and procedure of collective bargaining"¹⁵ to one that "legitimizes employer opposition to the organization of employees, collective bargaining, and industrial democracy."¹⁶

The failures of labor law inevitably point to the failures of legal argument more generally. Labor law is a field in which specialists and experts abound. Interpretation of the NLRA has involved a continual effort by expert lawyers representing labor, management, and the public to explicate the law; decisions by carefully selected administrative law judges, overseen by the National Labor Relations Board, supported by a large, expert legal staff; a great deal of careful scholarly analysis by professors of law and industrial relations; and final interpretation by the courts of appeals, in whose ranks are to be found a considerable number of distinguished former academics, and the Supreme Court. But legal expertise and skilled arguments are inadequate. Both those who make legal arguments and those who

largely lost from view, not only by courts and commentators, but also by unions.

Courts have taken an additional step in clouding the first purpose by declaring that the purpose of the statute is "industrial peace." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954); *see also* *NLRB v. Beverly Enters.-Mass., Inc.*, 174 F.3d 13, 25 (1st Cir. 1999); *NLRB v. Quinn Restaurant Corp.*, 14 F.3d 811, 815 (2d Cir. 1994); *Martinsville Nylon Employees Council Corp. v. NLRB*, 969 F.2d 1263, 1268 (D.C. Cir. 1992); *Mack Trucks, Inc. v. UAW*, 856 F.2d 579, 587 (3d Cir. 1988).

14. George Schatzki, *It's Simple: Judges Don't Like Labor Unions*, 30 CONN. L. REV. 1365, 1365 (1998).

15. Julius Getman, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1974-1994*, 50 INDUS. & LAB. REL. REV. 515 (1997) (reviewing JAMES A. GROSS, *BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1974-1994* (1995)).

16. GROSS, *supra* note 15, at ix.

accept or reject them have developed what expertise they possess largely by reading cases, treatises, and law review articles—none of which are likely to reflect a basic understanding of reality.

Professor Markovits, in responding to an earlier draft of this article, took the position that legal argument based on incorrect factual conclusions is not good legal argument. His justification for good legal argument is hardly reassuring. Given that no actor in the process—whether lawyer, Labor Board member, judge, or academic—is likely to be adequately informed, how are we to distinguish between good and incorrect legal argument? We can't be surprised that the system developed through partisan argument—responded to by judges likely to be both partisan and ignorant—is beset by contradiction and injustice.

The difficulties with labor law cannot be solved by traditional non-fact-based techniques of legal decision-making. The NLRA itself, even as bolstered by its legislative history, provides few answers to the many questions raised by its vague general language. It tells us that an employer may not “interfere” with the rights of employees to form, join, and support unions,¹⁷ but it does not spell out or even indicate what conduct or speech runs afoul of this broad prohibition. Similar vague language, often suggesting contradictory policies, is found throughout the NLRA.¹⁸ Nor would it be possible to resolve issues by resorting to precedent as harmonized by legal scholarship. In the sixty years of the NLRA's existence, the Board and the courts have developed a body of precedent noteworthy for being inconsistent, highly technical, and unpredictable. Professorial contributions are similarly inconsistent.

At one time I thought that labor law could be significantly improved by empirical scholarship; my first major effort in that area convinced me otherwise.¹⁹ Obtaining relevant and reliable data is

17. See 29 U.S.C. § 158(a)(1) (1994).

18. See generally JULIUS GETMAN & BETRAND B. POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 4-5 (1998).

19. Professors Goldberg, Brett, and I labored for six years to develop a body of data that would shed light on the law governing the representation process. Our methodology was praised by reviewers and courts, but inevitably the data were subject to differing interpretations. We saw in the data a strong argument for deregulating much of the process. Professor Dickens reanalyzed our data and came to slightly different conclusions. See William Dickens, *Union Representation Elections: Campaign and Vote* (1979) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with author). Professor Weiler, based on his reading of Dickens, argued that our conclusions and our data pointed in different directions. See Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). The Board at one time referred to our data in changing a small aspect of its doctrine. See *Shopping Kart Food Market, Inc.*, 228 N.L.R.B. 1311 (1977).

difficult and the data are likely to be ignored or distorted by the process of legal argument. Decision-makers distrust counterintuitive data, expert witnesses can obscure and confuse their meaning, and the legislature can easily override their implications based on partisan agendas.

I once thought that labor law was unique: different from other areas of law in which legal argument is based on a better understanding of underlying reality and in which other techniques of decision-making are more likely to lead to just results. Conversations with colleagues and occasional forays into different areas convince me that, in fact, labor law is typical of our legal system with all its contradictions and injustices.

Our system is almost certain to continue promulgating court-made rules based on erroneous assumptions. We cannot fall back on a more modest version of justice in which rules are understood, predictable, and routinely applied. We have too many rules, too many jurisdictions, too many judges, and too many decision makers.²⁰ That our system works as well as it does is less a tribute to the nature of legal argument than to the remarkable diversity of the American political system.

This singular bow to empirical research was greeted with suspicion and criticism by Board members and commentators. See ARCHIBALD COX ET AL., *LABOR LAW CASES AND MATERIALS* 183-85 (12th ed. 1996). The Board quickly abandoned the effort. In the twenty years since our study, very little careful work has been done and decisions by the Board and the courts in this critical area continue to be based on conjecture and surmise.

20. I have finally concluded that the only way in which justice can be achieved in labor is for working people to organize and become politically powerful.