University at Buffalo School of Law
Digital Commons @ University at Buffalo School of Law

Book Reviews | Faculty Scholarship

Summer 2002

# Gary Minda's Boycott in America: How Imagination and Ideology Shape the Legal Mind (book review)

Robert J. Steinfeld
*University at Buffalo School of Law*, steinfel@buffalo.edu

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/book_reviews

 Part of the Law and Economics Commons, and the Legal Theory Commons

## Recommended Citation

Robert J. Steinfeld, *Gary Minda's Boycott in America: How Imagination and Ideology Shape the Legal Mind (book review)*, 20 Law & Hist. Rev. 437 (2002).
Available at: https://digitalcommons.law.buffalo.edu/book_reviews/55

This article has been published in a revised form in Law and History Review http://dx.doi.org/10.2307/744059. This version is free to view and download for private research and study only. Not for re-distribution, re-sale or use in derivative works. © 2002 Board of Trustees of the University of Illinois.


This Book Review is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Book Reviews by an authorized administrator of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

---

Gary Minda, *Boycott in America: How Imagination and Ideology Shape the Legal Mind,* Carbondale: Southern Illinois University Press, 1999. Pp. 271. $39.00 (ISBN 0-8093-2174-2).

In an appendix to his *The Common Law Tradition,* the Legal Realist Karl Llewellyn offered a devastating critique of the idea that judges could decide cases sim-

ply by following precedent. In this appendix Llewellyn presented a comprehensive set of canons of statutory interpretation drawn from case law. His brilliant contribution was to show how these could be arranged in matched contradictory pairs, thrust_parry. For every maxim of statutory interpretation available to judges from somewhere in the prior case law, it turned out that there was another maxim also extracted from some place in the case law that would lead them to exactly the opposite conclusion. One canon of interpretation would say, for example, "a statute cannot go beyond its text." But its matched opposite proclaimed that "to effect its purpose a statute may be implemented beyond its text." Another would say "statutes in derogation of the common law will not be extended by construction," while its matched opposite would say "such acts will be liberally construed if their nature is remedial" (appendix C, 522).

One large problem for the idea of objective, rational judging that Llewellyn helped to lay bare here was that judges often had a choice among the rules of law they could decide to apply in a given case. And it was difficult to see how this initial choice among rules, which in effect dictated the result, could be based upon anything other than the personal or political preferences of judges. This was a terrible problem for the theory of adjudication, given that we live under a system of laws and not men. School after school of legal theorist has struggled since then to show that adjudication can be placed on more solid foundations.

Within Legal Realism itself one group tried to show that this choice among rules could be rationalized and placed on an objective footing through empirical investigations of the social and economic consequences of different legal policies, choosing the one in each situation that best promoted "the public good." Later schools attempted other answers. In recent decades, the law and economics movement has tried to show that choices among rules could be objectively based upon "efficiency" analysis—choose the rule or policy that best promotes "efficiency" in the circumstances, making society as a whole better off.

In the 1970s and 80s the Critical Legal Studies movement picked up the Realist critique and pushed it further. Critics presented compelling arguments that all the extant attempted solutions to the problem of adjudication had fundamental flaws and that, in fact, no solution was possible. There was no way around it. Adjudication inevitably involved the preferences, political and otherwise, of judges.

Gary Minda's new book, *Boycott,* is written as a kind of next generation contribution to this story. It accepts that there is no solution for the problem of adjudication and goes on to ask, in light of that: how does judge-made legal doctrine actually come to be structured in the ways that it does, and how does this structuring come to be made to seem apolitical?

Minda's book looks at boycott and the law's response to it as a way of getting at these questions. It begins by describing the historical origins of the term boycott in the Irish land wars of the late nineteenth century. An entire Irish community sought to pressure a grasping land agent, Captain Boycott, by cutting off all social and economic relations with him. "No one would buy from him: no one would sell to him. . . . He was unable to harvest his own land or transact business of any kind in the community" (25). This type of concerted activity, of course, predated the term boycott itself but henceforth "boycott" would be one of the labels applied to similar conduct in our own country.

For Minda the significance of the Captain Boycott story is that it shows boycott to be a complex social, economic, and political phenomenon. Such concerted activity can be characterized in at least two polar opposite ways. It is possible to focus on the harms the boycottee has inflicted on numerous members of the community and to see the community's response as a peaceful attempt to win justice and vindicate rights. Or it is possible to focus on the harms the boycotters mean to inflict on the boycottee, and the fact that it is many against one, and to see their activity as illegitimate group coercion, even a kind of violence. Both perspectives capture part of the truth about many boycotts and in a great many situations it is possible to adopt either perspective. Why then should one perspective dominate one branch of the law dealing with boycotts and the other another branch?

From late nineteenth-century state common law decisions through twentieth-century judicial interpretations of the secondary boycott provisions of the National Labor Relations Act, Minda shows, judges have fashioned legal doctrines to prohibit a variety of different kinds of boycott activity when they were undertaken by labor organizations. On the other hand, judges have sometimes insulated similar conduct from legal attack when a group other than a labor organization was responsible. In the early 1980s, the United States Supreme Court set aside a state court tort judgment against a Civil Rights group for the economic damage it inflicted on white-owned businesses in Claiborne County, Mississippi, by boycotting the businesses. The high court ruled that the Civil Rights boycott, which protested the racially discriminatory practices of the white businesses, represented a form of political expression protected by the First Amendment. Yet it is clear that one of the goals of the Civil Rights group could be characterized as self-interestedly economic, to win jobs for black people by attacking discriminatory hiring practices. But this boycott was classified and dealt with differently than some similarly motivated boycotts undertaken by organized labor. A short time before, the Supreme Court had held that a boycott of Russian ships mounted by the International Longshoremen's Union to protest the Russian invasion of Afghanistan, a politically motivated boycott, was not insulated by the First Amendment but violated the secondary boycott provisions of the national labor laws.

The main thrust of Minda's book is to show that the very language judges use to describe boycott in these different contexts prejudges the case, as it were, and is responsible for structuring differently the responses of the law to boycott in these different contexts. In the labor context, the dominant metaphors imbedded in the cases have mainly reflected the perspective of boycottees. Civil Rights activity by contrast has, at least in recent years, been described as political protest, in the honored tradition of the Revolutionary era American boycott of British goods, descriptive language from the boycotters' perspective that in effect decides the case.

Minda can perhaps be faulted for presenting the law's response to labor boycotts as more monolithic and unchanging than it was. Between the late nineteenth century and the middle of the twentieth century, the law did begin to give labor somewhat more leeway to engage in certain specific kinds of boycott activity for certain specific purposes, although it continued to condemn many other kinds of labor boycott activity. This is a complicated partial story of which we get little sense here. Perhaps Minda can also be faulted for jumping too quickly from one historical context to another without adequately exploring the changes in basic social

assumptions that took place between periods. But given that he has not really set out to write a history of law, that his project is directed toward examining the conduct of legal reasoning, these are minor objections. A more serious problem, it seems to me, is that while Minda's focus on metaphors may help us to understand the deep images judges relied on to decide cases, it does not really explain why judges were drawn to one image rather than another in the first place. There is not enough here about the way these understandings were contested and struggled over and how judges, in the face of these struggles, embraced the understandings that they did.

This is nevertheless an interesting, provocative book that uses modern language theory to try to delve beneath the surface of legal doctrine to expose some of the underlying processes that are responsible for shaping it.

**Robert J. Steinfeld**
State University of New York at Buffalo