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Summer 2002

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

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## 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).

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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-distribu

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after 1962) the Court's most influential and creative Justice, but Horwitz's treatment of him sometimes borders on hero worship.

His explanation for the Warren Court's liberalism, although provocative, is not entirely persuasive. Horwitz attributes it to the fact that the members of the liberal majority were "outsiders" who shared "socially marginal origins" (11). Most of them did come from humble and sometimes difficult backgrounds. Thurgood Marshall was black and others were, by virtue of their ethnicity, religion, and/or the fact that they were from immigrant families "cultural outsiders." The problem with this explanation for the Warren Court's liberalism is that the same things could be said of Felix Frankfurter and Tom Clark, two of its leading conservatives.

Specialists will find other points with which to quibble. For example, *Dennis v. United States* (1951) did not raise "the question of whether individuals could be convicted for mere speech" (57); it was a prosecution for *conspiracy* to teach and advocate the violent overthrow of the government, a distinction that mattered a great deal, at least to Justice Robert Jackson. Only a few Pollyannas will agree with Horwitz that "it would be mistaken to dismiss the [Warren] Court's efforts to deal with the constitutionality of obscenity as a failure" (104).

The merits of his book far outnumber such minor flaws. It is, for example, excellent at explicating the interaction between the Warren Court and the civil rights movement. Horwitz illuminates most effectively the philosophical issues underlying the Court's internal debates over the sit-in cases. He also makes the controversy over the "countermajoritarian difficulty" comprehensible to readers without a background in constitutional law and explains in a way they can understand why the conception of democracy relied on by proponents of judicial self-restraint, such as Frankfurter, is simplistic. Horwitz is particularly good at elucidating the relationship between democracy and the protection of minority rights.

He sought, he says, to write a book for those who wish "to acquire some introductory knowledge of the historical significance of the Supreme Court without being distracted or intimidated by legal technicalities" and to "show the general reader how interesting and exciting the intense study of a particular, focused historical era of the Supreme Court can be" (xi). Horwitz has achieved his objectives. He has written a book about the Warren Court that would make a valuable addition to the reading list of any constitutional history course or any class on the post-World War II period.

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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 prejudices 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.

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Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor*, New York: New Press, 1997. Pp. 273 + xii. \$24.00 cloth (ISBN 1-56584-355-X), \$14.95 paper (ISBN 1-56584-517-X).

Despite a century of legal and social gains for American workers, today "modern-day coolies" still toil under almost incomprehensible hardship within the United States. Hunter College historian Peter Kwong unveils this dark side of the thriving American economy in *Forbidden Workers: Illegal Chinese Immigrants and American Labor*, a work that examines the plight of Chinese labor and prescribes legal reforms and labor organizing to treat the growing problem. Among the figures Kwong profiles is Zhen, a former schoolteacher from outside the seacoast city of Fuzhou, in southeast China. Smugglers, appropriately known as "snakeheads," brought Zhen to New York City at a cost to him of roughly \$30,000—which he and illegal immigrants in similar predicaments are required to pay back in three years time. In Chinatown, Zhen works any jobs he can find, depending upon a corrupt employment agency where he competes with hundreds of other undocumented immigrants. Fourteen-hour days at Chinese restaurants or sweatshops barely provide Zhen with the money both to live and pay back the snakeheads. The threat of retribution against either him or his family constantly hangs over Zhen should he fail to meet his payments. He shares an apartment with over a dozen illegals and subsists on a diet of fermented bean curd and cheap steamed buns. While Zhen regrets his decision to come to the United States, his alternatives seem limited. China today, thanks to the state-directed capitalism of Deng Xiaoping, is undergoing an economic upheaval that has left nearly one million unemployed.

Kwong is particularly effective in depicting the complicated journey of the Chinese migrants, the overwhelming number of whom hail from Fujian Province. The journey—vividly described as a sort of baseball game, where one moves from base to base—carries migrants first to Southeast Asia, onto Central America or Mexico, then finally to the United States, and ultimately to the outskirts of New