Improvising the Future of Worker Mobilization

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Date : November 1, 2016

Michael M. Oswalt, Improvisational Unionism, 104 **Calif. L. Rev.** 597 (2016).

Massive nationwide mobilization of low-wage workers and their advocates (mainly since 2012, though preceded by the nationwide "Day Without an Immigrant" one-day strikes in 2006 and 2007) has spurred recent changes in state and local labor standards: increases in the minimum wage to fifteen dollars an hour, paid sick leave, and measures to address wage theft, abusive scheduling practices, and misclassification of employees as independent contractors. As Michael Oswalt explains in *Improvisational Unionism,* the fast food, Fight for 15, and Walmart strikes did not produce bargaining leverage, but instead something possibly more difficult to conjure: public awareness and a sense among workers that something could be and should be done.

The article explains how these one-day strikes were different from many of the labor strikes since the Depression. Some were initiated by a single employee who was angry at poor working conditions and lack of respect, some were inspired by news and social media coverage of protests elsewhere, and some were the result of organizing by community groups; unions only later began to lend support. Workers acted collectively and with the support of unions, yet the workers and the unions both knew that the unions hadn't a prayer of representing them for purposes of collective bargaining. It is unclear whether this activism – what Oswalt, with his penchant for catchy phrases, calls organizing *by unions,* but not union organizing – will result in any lasting change beyond the state and local minimum wage increases. But what is clear is that labor unrest is once again a part of the contemporary debate even as its form and goals have altered quite significantly since the strikes of the post-WWII period through the death of the strike in the early 1990s.

Improvisational Unionism is, in my judgment, the single best description of and theorization about the nature, goals, and innovative aspects of this aspect of contemporary low-wage worker mobilization. In Oswalt's account, the distinctive feature of the mobilization is its improvisational quality; no one knows what the outcome of a strike or other protest might be, which certainly seems an apt account of the nature of the worker protest and its possible future.

Oswalt's crucial analytic insight is that this "collective action for the sake of collective action" (as he puts it) should be understood and theorized as a form of improvisation. As Oswalt explains, improvisation has been adopted by organizational behavior theorists to promote strategic team-based innovation by training members of a group to say "yes" rather than "no" to another's idea and then to enhance it in some way. (This "yes-anding," Oswalt says, is the distinctive feature of improv.) Improvisation helps people to break free of constraints and to join others in taking control of a situation, and the article describes how activists embraced yes-anding as a way to empower workers to stand up for their rights. His account changed the way I think about worker mobilization now, as well as worker action in the 1930s, when the major sectors of the American workforce unionized.

Turning to the law, Oswalt argues that the fast food and Walmart strikes and picketing are protected by the right to strike guaranteed in sections 7 and 13 of the National Labor Relations Act. The National Labor Relations Board and the courts have imposed many limits on the right to strike, including by declaring slowdowns and intermittent strikes to be unprotected by the NLRA. Oswalt builds on Craig Becker's "Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 **U. Chi. L. Rev.** 351 (1994), to show how these short-term strikes that are so much a part of improvisational unionism are protected notwithstanding the intermittent strike doctrine.

Although the right to strike is a core protection of the NLRA, the courts have held that employers have the right to permanently replace striking workers, and to close or to relocate operations in response to labor unrest. Long strikes are at best highly risky, and sometimes even suicidal. Short strikes reduce the risk to workers by depriving the employer of the time to recruit replacement workers. And for low-wage workers who cannot afford to lose even a week's pay, a one-day strike sends a message and causes the employer hassle without the employee suffering a debilitating financial loss. The problem is that the Supreme Court in UAW v. Wisconsin Employment Relations Board *(Briggs & Stratton)*, 336 U.S. 245 (1949), branded as "indefensible" (and, therefore, unprotected) a union's attempt to exert bargaining leverage by calling twenty-six surprise "special meetings" during working hours in one four-month period.

Oswalt deftly argues alternatively that the contemporary one-day strikes are protected under current law because they lack the coordinated plan in support of a unified goal that the Board and courts found objectionable in *Briggs & Stratton* and later cases, and, moreover, that changes in the nature of work and unions since the 1970s have undermined any plausible defense of the intermittent strike doctrine. The article speaks quite plainly both to lawyers seeking legal strategies and to scholars, and it does a nice job explaining the intricacies of labor law to the non-specialist. In substance and in style, Oswalt speaks to a broad and diverse readership.

Improvisational Unionism is a major contribution to the labor law literature for its rich description of contemporary worker mobilization, its trenchant analysis of what is distinctively new, its melding of organizational theory with legal analysis, and its inspiring vision and passionate legal defense of worker activism and mobilization. Oswalt's zippy and crisp prose is refreshing. He candidly acknowledges the limitations of improvisation as a theory and practice for rebuilding a mass movement of workers, but his fresh voice and new ideas stand as good a chance as any to inspire and energize a new generation of lawyers, activists, and scholars. Because change to labor law will come about only from worker activism that forces the Board and the courts to rethink old rules, this work is important for its reimagining of the nature of collective action and making the case for changing doctrine to reflect the new reality.

Cite as: Catherine Fisk, *Improvising the Future of Worker Mobilization*, JOTWELL (November 1, 2016) (reviewing Michael M. Oswalt, *Improvisational Unionism*, 104 **Calif. L. Rev.** 597 (2016)), http://worklaw.jotwell.com/improvising-the-future-of-worker-mobilization/.