

## MORE THAN JUST A COOL T-SHIRT: WHAT WE DON'T KNOW ABOUT COLLECTIVE BARGAINING—BUT SHOULD—TO MAKE ORGANIZING EFFECTIVE

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### ABSTRACT

Union organizing is much in the news these days as legislation to facilitate unionization wends its way through Congress.<sup>1</sup> However, it takes more than organizing to organize unions and to maintain organization. Workers do not join unions just to be members or to get cool t-shirts and sing “Solidarity Forever.” Workers join unions because they want what unions can get them—better pay, just cause employment, respect, and a say in workplace conditions.<sup>2</sup> Organizing alone cannot get these things. Organizing is only a vehicle that leads to the collective bargaining power that wins workplace rights.

As Samuel Gompers said in 1925, “[e]conomic betterment—today, tomorrow, in home and shop, was the foundation upon which trade unions have been buil[t].”<sup>3</sup> Through collective bargaining, workers can earn more money, have greater job security, exercise greater control over

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1. See Employee Free Choice Act (EFCA), H.R. 800, 110th Cong. (2007) (as passed by the House in a 241-185 vote, March 1, 2007), available at [www.govtrak.us/congress/bill.xpd?bill=h110-800](http://www.govtrak.us/congress/bill.xpd?bill=h110-800).

2. Sharon Rabin Margalioth, *The Significance of Worker Attitudes: Individualism as a Cause for Labor's Decline*, 16 HOFSTRA LAB. & EMP. L.J. 133, 145-46 (1998).

3. SAMUEL GOMPERS, SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY 94 (Nick Salvatore ed., ILR Press 1984) (1925).

their jobs, and create a community that supports one another.<sup>4</sup> The National Labor Relations Act (NLRA)<sup>5</sup> itself recognizes organizing and joining unions as important because they lead to collective bargaining and create the power necessary to secure improved wages and working conditions and promote economic security.<sup>6</sup> A plummeting union membership rate raises serious concerns as to how well unions can do at bargaining and thus creates weaker incentives to belong to unions.<sup>7</sup>

Unfortunately, in many cases collective bargaining leads nowhere except to impasse, de-unionization, and replacement of unionized workers with unorganized workers.<sup>8</sup> Judicial tinkering is partly responsible for these results, and thus for the decline in union membership.<sup>9</sup> Judges have created doctrines that have made reaching bargaining impasses—rather than reaching negotiated agreements—and provoking strikes—rather than resolving disputes—attractive to employers.<sup>10</sup> Law reform could be used to legislatively repeal these judicial amendments, but, unfortunately, these critical doctrines and their impact have received little attention from the researchers who could engage in the empirical research necessary to law reform. Even worse, some research has been premised on misunderstandings of legal doctrine

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4. Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 253-54 (2005) [hereinafter Dannin, *NLRA Values*].

5. §§ 1-19, 29 U.S.C. §§ 151-169 (2000).

6. *See id.* at § 1. For a discussion of NLRA policies *see generally* ELLEN DANNIN, TAKING BACK THE WORKERS' LAW—HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS 51-79 (2006); Dannin, *NLRA Values*, *supra* note 4.

7. The decline has prompted many to propose reforms. *See* Ellen J. Dannin & Terry H. Wagar, *Lawless Law? The Subversion of the National Labor Relations Act*, 34 LOY. L.A. L. REV. 197, 197-98 (2000) [hereinafter Dannin & Wagar, *Lawless Law*] (discussing the declining numbers in private union membership); PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 106-07, 111 (1990) (discussing further obstacles presented by employers, many of whom are resistant to collective bargaining initiatives).

8. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 202.

9. *Id.* at 198. According to the Bureau of Labor Statistics, private sector union membership has continued to decline:

In 2006, 12.0 percent of employed wage and salary workers were union members, down from 12.5 percent a year earlier, the U.S. Department of Labor's Bureau of Labor Statistics reported today. The number of persons belonging to a union fell by 326,000 in 2006 to 15.4 million. The union membership rate has steadily declined from 20.1 percent in 1983, the first year for which comparable union data are available. . . . The union membership rate for government workers (36.2 percent) was substantially higher than for private industry workers (7.4 percent).

BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR, UNION MEMBERS SUMMARY: UNION MEMBERS IN 2006 (2007), <http://www.bls.gov/news.release/union2.nr0.htm>.

10. *See infra* text accompanying notes 22-46.

and, thus, is of little value.<sup>11</sup>

If union organizing is to be successful, collective bargaining must be a useful tool for empowering workers. This article outlines a menu of research projects that, taken together, lay out a comprehensive social science research agenda for understanding how collective bargaining is faring today. It also advances theories about how these factors may be affecting collective bargaining, and describes methodologies that would be appropriate for research across a wide range of law and social science disciplines.

## I. INTRODUCTION

In 1935, Congress concluded that wage deflation threatened the stability of the country, that the cause of wage deflation was inequality of bargaining power between employers and employees, and that corporation law had caused this inequality.<sup>12</sup> According to Congress, corporation law transformed employers from individuals into amalgamations with collective power, while leaving employees with only the power of individuals.<sup>13</sup> Congress decided that it needed to create an equal and opposing collective entity to rectify the imbalance of bargaining power that the law created<sup>14</sup> and, therefore, enacted the NLRA.<sup>15</sup>

Section 1 of the Act states all this explicitly.<sup>16</sup> It observes that real negotiation is impossible when law gives the employer power so great that the employee, who lacks this legal support and power, cannot bargain as an equal.<sup>17</sup> The result of this inequality, Congress stated, had been, and would continue to be, a ratcheting down of wages and working conditions, devastating competition, and the destruction of commerce.<sup>18</sup> The NLRA's antidote was to protect workers' rights to freedom of association, self-organization, free choice of bargaining representatives, and meaningful collective bargaining, in order to safeguard the economy.<sup>19</sup>

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11. See *infra* text accompanying notes 97, 106-07.

12. National Labor Relations Act § 1, 29 U.S.C. § 151 (2000).

13. *Id.*

14. *Id.*

15. *Id.* §§ 1-19.

16. *Id.* § 1.

17. *Id.*

18. *Id.*

19. *Id.* The NLRA defines the duty to bargain collectively as the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good

The enactment of the NLRA was not the end of the story. Amendments in 1947 and 1959 were condemned by labor.<sup>20</sup> Less noticed, but equally important, have been judicial decisions that have effectively amended the NLRA to take away the rights of employees to engage in self-organization, free choice of bargaining representatives, and meaningful collective bargaining.<sup>21</sup> It is no exaggeration to say that the judiciary's actions have the potential to reset the NLRA's balance power in favor of employers, and to undermine the policies Congress established in the NLRA. The breadth of revision by the least democratic branch of government and the implications of this process have been insufficiently examined. Achieving the balance of power Congress intended to achieve in the NLRA requires a broad research agenda. The goal of that research agenda must be to fully assemble the state of the laws, to track the forces that led to the law as now applied, and to identify methods of bargaining power restraining unions.

This article lays the groundwork for a comprehensive research agenda to be used to understand how collective bargaining under the NLRA is faring today. One use for the research would be as part of a litigation strategy to overturn the judicial amendments that have radically reshaped the NLRA. This article first identifies the key legal doctrines that have undermined collective bargaining by recalibrating the balance of bargaining power set by the NLRA. It then describes issues related to collective bargaining as to which we lack information, research methods that can be used to gather that information, and any special research challenges.

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faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . ." *Id.* § 8(d); see also Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 973-76 (1993) (discussing Congress' objective to curb employer conduct and to promote employee clout in collective bargaining, which, in turn, promotes general economic health).

20. The Labor Management Relations Act, 29 U.S.C. §§ 141-197 (2000), more commonly referred to as the Taft-Hartley Act, was enacted in 1947. The Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (2000), more commonly referred to as the Landrum-Griffin Act, was enacted in 1959. Taft-Hartley's enemies call it the "Slave-Labor" Act. See THE CENTURY FOUND., REPORT OF THE CENTURY FOUNDATION TASK FORCE ON THE FUTURE OF UNIONS: WHAT'S NEXT FOR ORGANIZED LABOR? 75 (1999); see also Shannon Sheppard, *Pamphlets in the Fight Against Taft-Hartley 1947-1948*, HOLT LABOR LIBRARY, Dec. 20, 2002, <http://www.holtlaborlibrary.org/tafthartley.html> (demonstrating organized labor's disdain for the Taft-Hartley Act).

21. Ellen Dannin, *From Dictator Game to Ultimatum Game . . . and Back Again: The Judicial Impasse Amendments*, 6 U. PA. J. LAB. & EMP. L. 241, 243-44 (2004) [hereinafter Dannin, *Dictator Game*].

## II. JUDICIAL DOCTRINES AND COLLECTIVE BARGAINING FAILURE

Two doctrines, developed by judges, have had a powerful impact on collective bargaining.<sup>22</sup> The first doctrine, striker replacement,<sup>23</sup> is dramatic, and its impact is easy to see and understand.<sup>24</sup> In its most basic form, when workers strike, their employer may replace them with other workers, either permanently (that is, during and after the strike) or temporarily (that is, during the strike only), depending on the cause of the strike.<sup>25</sup> If the strike was motivated by economics, for example, to persuade the employer to accept the union's bargaining proposal on wages, the employer may either permanently or temporarily replace the strikers.<sup>26</sup> However, if the strike was caused by the employer's unfair labor practice, the employer may only hire temporary replacements.<sup>27</sup> Permanent replacement seems almost indistinguishable from discharge for striking.<sup>28</sup>

It is obvious that workers will not want to be permanently replaced, and that threat of permanent replacement will make workers hesitant to strike.<sup>29</sup> As a result of this judicial change, employees have less power to persuade their employers to accept their proposals. Furthermore, this doctrine conflicts with the plain language and policies of the NLRA.<sup>30</sup> Among the NLRA policies are creating equality of bargaining power and promoting the practice and procedure of collective bargaining to determine the terms and conditions of employment.<sup>31</sup> In section 13, the NLRA states that the Act is not to "be construed so as either to interfere with or impede or diminish in any way the right to strike."<sup>32</sup> In addition, under the NLRA, an employer violates the law when it discriminates

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22. *Id.* at 267.

23. James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 527 (2004).

24. *See id.* at 527-34.

25. *See* THE DEVELOPING LABOR LAW 356-69 (Higgins et al. eds., 5th ed. 2006); *see also* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) (holding that during an economic strike, employers may permanently replace striking employees).

26. *See Mackay Radio*, 304 U.S. at 345.

27. *See* COMM. ON THE DEV. OF THE LAW UNDER THE NAT'L LABOR RELATIONS ACT, *supra* note 24, at 1472-73.

28. *See* Pope, *supra* note 23, at 527 (citing National Labor Relations Act § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (3) (2000); Eileen Silverstein, *If You Can't Beat 'em, Learn to Lose, but Never Join Them*, 30 CONN. L. REV. 1371, 1373 (1998)).

29. *See id.* at 528-29.

30. National Labor Relations Act § 8(a)(1)(3); Pope, *supra* note 23, at 527.

31. National Labor Relations Act § 1.

32. *Id.* § 13.

against an employee who supports a union, or when it “interferes with, restrains or coerces” an employee who engages in collective bargaining or “other concerted activities for the purpose of collective bargaining” or to support other employees.<sup>33</sup>

From our own experience, it is less obvious that only long after the workers have been replaced is it definitively determined whether a strike was an economic or unfair labor practice strike. If unfair labor practice strikers are permanently replaced, their employers will begin to owe them back pay from the dates of the employees’ unconditional offers to return to work.<sup>34</sup> This can be such a large sum that an employer could risk bankruptcy if it makes the wrong decision. These risks may be so great that employers may exercise restraint when deciding whether to permanently replace strikers.

The second judicial doctrine, implementation upon impasse, allows an employer to impose terms from its “final offer” when the parties have reached an impasse in bargaining.<sup>35</sup> The impact of this doctrine is not as obviously dramatic as striker replacement, nor is its ramifications as easily grasped. Oddly enough, for a doctrine that has been in existence since the 1940s,<sup>36</sup> it is virtually unknown to the field of industrial relations—now the study of human resources management. In fact, several years ago we conducted an informal survey by questioning industrial relations scholars and found that many of the scholars had not heard of the doctrine, nor did their texts mention it. Most scholars taught that when an impasse was reached in collective bargaining, employers and unions were required to go to mediation to resolve the impasse.<sup>37</sup> One of the prominent scholars we asked during our informal

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33. *Id.* §§ 7, 8(a)(1), (3).

34. *E.g.*, *Chesapeake Plywood, Inc. v. NLRB*, No. 89-2981, 1990 WL 162514, at \*4, \*6 (4th Cir. Oct. 26, 1990); *Trinity Valley Iron & Steel Co. v. NLRB*, 410 F.2d 1161, 1170-71 (5th Cir. 1969).

35. COMM. ON THE DEV. OF THE LAW UNDER THE NAT’L LABOR RELATIONS ACT, *supra* note 24, at 918-19; Ellen J. Dannin, *Collective Bargaining, Impasse and the Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment?*, 19 U. TOL. L. REV. 41, 43-44 (1987) [hereinafter Dannin, *Collective Bargaining*]; *see also* Eric Tucker, “Great Expectations” *Defeated?: the Trajectory of Collective Bargaining Regimes in Canada and the United States Post-NAFTA*, 26 COMP. LAB. L. & POL’Y J. 97, 142 (2004) (discussing various indicators suggesting that unionized employers in the United States are using collective bargaining as a vehicle for extracting employee concessions); Ellen J. Dannin, *Legislative Intent and Impasse Resolution Under the National Labor Relations Act: Does Law Matter?* 15 HOFSTRA LAB. & EMP. L.J. 11, 12-14 (1997) [hereinafter Dannin, *Legislative Intent*] (discussing judicial adoption of the “final offers” doctrine upon reaching of an impasse, and the resulting inequality of bargaining power between employers and employees).

36. Dannin & Wagar, *Collective Bargaining*, *supra* note 37, at 44.

37. Ellen J. Dannin & Clive Gilson, *Getting to Impasse: Negotiations Under the National*

survey said that he was aware of the doctrine, but claimed that it was very rarely used. Ironically, this statement took place at a time when high-profile labor disputes were in the news.<sup>38</sup> Follow-up queries through the years show that little has changed in what is taught in this field.<sup>39</sup> This lack of awareness may explain why there has been little empirical research on implementation upon impasse.<sup>40</sup>

Another reason may be that it is less dramatic, and its impact on collective bargaining and unionization is a bit harder to envision. It appears, though, that the employer's ability to implement the terms it wants creates an incentive for the employer to try to reach an impasse in bargaining, and for the union to try to avoid an impasse.<sup>41</sup> Logically speaking, the easiest way for an employer to get to an impasse is to demand terms it knows will be unacceptable to the union. Just as with striker replacement, implementation upon impasse conflicts with basic NLRA policies that are intended to promote equality of bargaining power.<sup>42</sup>

Third, the striker replacement and implementation upon impasse doctrines interact with one another, and, when applied together, they appear to have a far more powerful impact on collective bargaining than

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*Labor Relations Act and the Employment Contracts Act*, 11 AM. U. J. INT'L L. & POL'Y 917, 925 (1996).

38. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 199-200; *see also* Dannin, *Legislative Intent*, *supra* note 37, at 13-14 (discussing how this oversight is difficult to comprehend considering that the doctrine played an important role in "some of the most protracted and almost irresolvable labor conflicts of recent years . . .").

39. As an example, Richard Block and his co-authors recount an incident in which an employer implemented its final offer and replaced all strikers, but then failed to discuss the role the employer's power to implement played in events which weakened the union. RICHARD N. BLOCK ET AL., *LABOR LAW, INDUSTRIAL RELATIONS AND EMPLOYEE CHOICE: THE STATE OF THE WORKPLACE IN THE 1990S* 88-92 (1996). *But see* MICHAEL D. YATES, *WHY UNIONS MATTER* 69-71 (1998) (discussing implementation of the employer's last offer upon impasse); MICHAEL YATES, *POWER ON THE JOB: THE LEGAL RIGHTS OF WORKING PEOPLE* 121-26 (1994) (discussing collective bargaining and explicitly mentioning the doctrine of implementation upon impasse); Adrienne Eaton & Jill Kriesky, *Collective Bargaining in the Paper Industry: Developments Since 1979*, in *CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR* 25, 44-49 (Paula B. Voos ed. 1994) (discussing the United Paperworkers International Union's efforts with respect to bargaining and specifically mentioning unilateral implementation of a final offer under strong opposition by the union).

40. In fact, research on striker replacement seems to have fallen off as well, perhaps as a result of the current focus on organizing. *See* Gangaram Singh & Ellen Dannin, *Creating a Law Reform Laboratory: Empirical Research and Labor Law Reform*, 51 WAYNE L. REV. 1, 3 (2005).

41. Gangaram Singh & Ellen Dannin, *The Shadow of the Law: Impasse Laws at Odds with the NLRA*, 53 LAB. L.J. 179, 186 (2002).

42. ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW—HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 7-8, 31-32, 86-96, 114-15, 150-52 (2006); Dannin, *Dictator Game*, *supra* note 21, at 267.

either would alone.<sup>43</sup> Both doctrines play a role in connection with impasses. Strikes can occur at any time, except during the term of an agreement not to strike, unless the strike arises in opposition to an unfair labor practice committed by an employer.<sup>44</sup> However, strikes are most likely to occur when there is an impasse in bargaining as a way to persuade the employer to agree to the union's demands.<sup>45</sup> Such a strike is an economic strike, and the employer has the right to permanently replace strikers.<sup>46</sup>

When a bona fide impasse is reached, the employer has the right to implement its final offer.<sup>47</sup> If the employer implements this offer before there is a bona fide impasse, the employer's implementation is an unfair labor practice.<sup>48</sup> The existence of unfair labor practices, including prematurely implementing a final offer, means that a strike may be an unfair labor practice strike to protest the employer's unfair labor practices, rather than an economic strike.<sup>49</sup> If the employer implements its final offer prematurely or illegally, it can be found guilty of an unfair labor practice and will have to remedy the violation.<sup>50</sup> If the employer guesses wrong about replacing strikers, it may have to reinstate the strikers and will owe back pay until it does so.<sup>51</sup>

Whether the employer replaces strikers or implements its final offer will depend, in part, on how confident it is that there is a bona fide impasse and that the strike is not an unfair labor practice.<sup>52</sup> Unions, for their part, also have uncertainty, because they will try to cast a strike as caused by an employer's unfair labor practice so that strikers cannot legally be permanently replaced.<sup>53</sup> In short, the two doctrines are more intimately related to one another than merely taking place at the same stage of bargaining.

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43. Dannin, *Dictator Game*, *supra* note 21, at 267-70.

44. See THE DEVELOPING LABOR LAW, *supra* note 25, at 1597-98.

45. See Dannin & Wagar, *Lawless Law*, *supra* note 7, at 216.

46. THE DEVELOPING LABOR LAW, *supra* note 25, at 1591-92, 1598.

47. *Id.* at 988-89.

48. *Id.* at 996.

49. Dannin, *Collective Bargaining*, *supra* note 37, at 61.

50. See THE DEVELOPING LABOR LAW, *supra* note 25, at 996-97.

51. Craig Becker, "Better Than a Strike": Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act, 61 U. CHI. L. REV. 351, 416 (1994); Michael D. Moberly, *Striking Bargains: the At-Will Employment of Permanent Strike Replacements*, 18 HOFSTRA LAB. & EMP. L.J. 167, 179 (2000).

52. See Peter Guyon Earle, Note, *The Impasse Doctrine*, 64 CHI.-KENT L. REV. 407, 427 (1988); Matthew W. Finkin, *Labor Policy and the Evisceration of the Economic Strike*, 1990 U. ILL. L. REV. 547, 566 (1990).

53. See Moberly, *supra* note 52, at 181-82.



These doctrines—implementation upon impasse and striker replacement—are likely to occur in tandem because both are connected with reaching a bargaining impasse.<sup>54</sup> Not only are they connected in time, but they can also be connected as part of a strategy or series of events that lead to de-unionization and the total defeat of the purposes of the NLRA.<sup>55</sup> Indeed, Human Rights Watch included both striker replacement and unilateral implementation upon impasse as factors that led it to conclude that United States labor law violates international human rights standards.<sup>56</sup>

It is easier to see the connection between implementation upon impasse and striker replacement by considering examples of possible outcomes these two doctrines can produce:

(1) the parties reach an agreement; (2) the parties reach an impasse but eventually resolve their differences; (3) the parties reach an impasse, the employer implements its final offer, and the parties then reach an agreement; (4) the parties reach an impasse, the employer implements its final offer, the parties then fail to reach an agreement, and the union becomes moribund leading to de-unionization—either by its walking away or through decertification; (5) the parties reach an impasse, the workers strike, the employer replaces the strikers (permanently or temporarily), the parties reach an agreement on workplace terms and on striker reinstatement, and many or all strikers are recalled to work; (6) the parties reach an impasse, the workers strike, the employer replaces the strikers (permanently or temporarily), the parties reach an agreement on workplace terms and on striker reinstatement, few or no strikers are recalled to work, and the union eventually becomes moribund and is decertified; (7) the parties reach an impasse, the workers strike, the employer replaces the strikers permanently, and after one year, when they are ineligible to vote, a decertification election is held and the union is decertified; (8) the parties reach an impasse, the employer locks out the workers and then replaces them (permanently or temporarily), the parties reach an agreement on workplace terms and on reinstatement, and many or all the employees are recalled to work; (9) the parties reach an impasse, the employer locks out and replaces the workers (permanently or temporarily), the parties reach an agreement on workplace terms and on reinstatement,

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54. Dannin, *Dictator Game*, *supra* note 21, at 267.

55. *Id.*

56. See HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 59-60 (2000) (citing *NLRB v. Katz*, 369 U.S. 736 (1962)).

few or no employees are recalled to work, and the union eventually becomes moribund and is decertified.<sup>57</sup>

Of the two doctrines, striker replacement and implementation upon impasse, the latter has been far less explored,<sup>58</sup> so that is where we focus the research agenda discussed here. However, it must be borne in mind that striker replacement and implementation upon impasse have long been inextricably intertwined, so research on implementation upon impasse will tend to shed light on strikes and striker replacement.

Each of these doctrines appears to undermine worker bargaining power and, thus, to make unions less effective in protecting workers and

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57. Dannin, *Dictator Game*, *supra* note 21, at 267-68 (citation omitted). In a previous article, I discuss Michael H. LeRoy's analysis of how employers aim to manipulate the amended NLRA § 9(c)(3) to preclude strikers from voting in union decertification elections. *Id.* at 267 n.115. I also note that unions respond to this attempted manipulation by "having strikers file RD petitions to decertify the union so that the election would be held at a time when the strikers would be eligible to vote, thus preserving the union's right to represent the unit for one more year." *Id.* See also Peter Bruce, *On the Status of Workers' Rights to Organize in the United States and Canada*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 273, 274 (Sheldon Friedman et al. eds., 1994) (discussing the Caterpillar strike of 1992 and how it was brought to an abrupt end by the employer's threat to replace striking workers). In recent years, judicial decisions have limited reinstatement rights for strikers, "render[ing] the right to reinstatement virtually meaningless in many cases." Douglas E. Ray, *Some Overlooked Aspects of the Strike Replacement Issue*, 41 KAN. L. REV. 363, 382 (1992).

58. See, e.g., Peter Cramton & Joseph Tracy, *The Use of Replacement Workers in Union Contract Negotiations: The U.S. Experience, 1980-1989*, 16 J. LAB. ECON. 667 (1998) (addressing only the use of replacement workers, and not the implementation upon impasse doctrine); Cynthia L. Gramm & John F. Schnell, *Some Empirical Effects of Using Striker Replacements*, 12 CONTEMP. ECON. POL'Y 122, 122 (1994) (analyzing the effects of using permanent replacement workers on the employer's ability to maintain operations, the effect these replacements have on strikers, and the influence of using such workers on the bargaining process, but failing to mention the doctrine of implementation upon impasse); John F. Schnell & Cynthia Gramm, *The Empirical Relations Between Employers' Striker Replacement Strategies and Strike Duration*, 47 INDUS. & LAB. REL. REV. 189 (1994) (discussing striker replacement, without acknowledging implementation upon impasse); see also LAWRENCE M. AUSUBEL ET AL., *BARGAINING WITH INCOMPLETE INFORMATION* (2000), <http://www.ausubel.com/bargaining-papers/acd-handbook-chapter.pdf> (applying economic theory to the collective bargaining process and mentioning the hiring of replacement workers, but not mentioning implementation upon impasse); *Prohibiting Discrimination Against Economic Strikers: Hearing Before the Subcomm. on Labor of the Comm. on Labor and Human Resources*, 103rd Cong. 6-8 (1993) (statement of Robert B. Reich, Secretary of Labor, on labor-management relations, the importance of the right to strike, and the practice of hiring replacement workers for strikers), available at <http://www.dol.gov/oasam/programs/history/reich/congress/033094rr.htm>. In fact, when implementation upon impasse has been studied by non-lawyers, the doctrine has been badly misunderstood. The result is research that has no bearing on the reality of collective bargaining. A recent example is Jesse A. Schwartz & Quan Wen, *Wage Bargaining Under the National Labor Relations Act*, 15 J. ECON. & MGMT. STRATEGY 1017 (2006). The authors there engage in an elaborate econometric analysis of the impact of an employer's engaging in unilateral implementation of a raise, but do not adequately address the full range of rights judges have given employers once an impasse is reached.

improving their lives. If this intuition is correct, then union efforts to organize workers and retain collective bargaining will be undermined.

Research into the effects of the two doctrines could be used to reform the law, and that reform could take the form of statutory amendment. However, it will take more than merely proposing new legislation to recalibrate bargaining power. We say this because of the history of these two doctrines. Each arose *despite* the clear language of the statute. This suggests that powerful forces are at play here, and they must be addressed in order for law reform to be effective.

As mentioned above, empirical research on these two doctrines could be used as part of a litigation strategy to overturn the judicial amendments that have radically reshaped the NLRA.<sup>59</sup> Before laying out the research agenda we advocate, we first outline how the two doctrines developed. Understanding how they have developed is as important as understanding how they function and affect collective bargaining and the attractiveness of union membership. It is essential to grasp these two doctrines, for they sprung to life even though they permit employers to take actions that violate the express language of the law.

#### A. *The Judicial Impasse Amendments*

When it was enacted in 1935, the NLRA rejected master and servant law.<sup>60</sup> Senator Robert Wagner, the NLRA's drafter, wanted to convert the master-servant relationship into an equal and co-operative partnership that planted a sense of power, individuality, freedom, and security in the hearts of men, and made them the people they were meant to be.<sup>61</sup>

Judges, however, have tended to interpret the NLRA, as a very narrow statute whose purpose is to promote resolving disputes, even when the resolution means trampling on the rights of freedom of association and collective bargaining.<sup>62</sup> However, Robert Wagner saw "the important legislative goals of industrial peace and macro-economic growth and stabilization" as "always secondary to the achievement of social justice through democratic consent in the workplace."<sup>63</sup> It was

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59. For the details of that strategy, see ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW—HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006).

60. See National Labor Relations Act §1, 29 U.S.C. § 151 (2000).

61. 75 CONG. REC. 4918 (1932).

62. See Dannin, *Dictator Game*, *supra* note 21, at 243.

63. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and*

clear to Wagner that tranquil labor relationships were not the sole consideration. He observed that, “[i]t all depends upon the basis of tranquility. The slave system of the old South was as tranquil as a summer’s day, but that is no reason for perpetuating in modern industry any of the aspects of a master-servant relationship.”<sup>64</sup>

Seventy years after its enactment, judicial interpretations of the NLRA increasingly undercut its drafters’ intent.<sup>65</sup> As discussed above, the two judicially-created doctrines of striker replacement and implementation upon impasse are fundamentally at odds with the NLRA’s plain language and express policies.<sup>66</sup>

The right to replace strikers is rooted in dictum from a 1938 Supreme Court decision that was expanded by subsequent decisions.<sup>67</sup> This development occurred despite the fact that the NLRA specifically provided that the right to strike was not to be interfered with, impeded, or diminished in any way.<sup>68</sup> By the 1980s, striking was no longer a practical option.<sup>69</sup>

In the case of implementation upon impasse, the NLRA’s drafters decided not to regulate how impasses would be resolved, but, rather, to leave this to the parties to work out, subject to the pressures of the market.<sup>70</sup> It seems surprising, given the NLRA’s goal of promoting collective bargaining, that its drafters decided to leave bargaining almost unregulated,<sup>71</sup> and decided not to require that the Act’s goals of promoting collective bargaining be met, but this is exactly what they did.<sup>72</sup> Indeed, Congress almost decided not to make bad faith bargaining an unfair labor practice.<sup>73</sup> Rather, Congress hoped that promoting

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*Workplace Cooperation*, 106 HARV. L. REV. 1379, 1423 (1993).

64. *Id.*

65. *See id.* at 1387.

66. *See* James J. Brudney, *Of Labor Law and Dissonance*, 30 CONN. L. REV. 1353, 1354-55 (1998) [hereinafter Brudney, *Of Labor Law*]; Dannin, *Collective Bargaining*, *supra* note 37, at 47; *see also* Julius Getman, *Of Labor Law and Birdsong*, 30 CONN. L. REV. 1345, 1349-50 (1998) (discussing how *Mackay Radio* paved the way for judicial deviation from policies promulgated by the NLRA); James J. Brudney et al., *Judicial Hostility Toward Labor Unions? Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675 (1999) (study discussing which social background factors significantly predict judges’ likelihoods to side with unions’ legal positions in the courts of appeals).

67. *See* Pope, *supra* note 23, at 527-34.

68. National Labor Relations Act § 13 (2000).

69. Pope, *supra* note 23, at 534.

70. Dannin, *Legislative Intent*, *supra* note 37, at 32-33.

71. It was late in the process that bad-faith bargaining was made an unfair labor practice and, even then, the rights and protections were limited. *See* S. REP. No. 573, at 2312 (1935).

72. *See id.*

73. Some today argue that it is not really an unfair labor practice, because the duty to bargain

worker collectivization alone would be sufficient to give workers true freedom of contract and the ability to bargain as equals.<sup>74</sup> The NLRA, thus, has elaborate structures in place to govern the choice of representatives, but none to govern bargaining.<sup>75</sup>

It may be that the NLRA's failure to provide detailed procedures to control bargaining had no effect on the development of the doctrine of implementation upon impasse. After all, the NLRA clearly provides, in section 13, that the right to strike is not to be interfered with, impeded or diminished in any way, but the Supreme Court ignored this and, within three years of the NLRA's enactment, it gave employers the right to permanently replace strikers.<sup>76</sup> Just two years later, in 1940, the groundwork was laid that permitted an employer to unilaterally implement its terms upon an impasse in bargaining, and within one more year the fundamentals of the doctrine were established.<sup>77</sup> Until the mid-1980s, an employer was permitted to implement its final offer (1) if the implemented changes were part of the employer's final offer; (2) if the impasse was bona fide—that is, a real impasse, untainted by any employer unfair labor practices; and (3) if, and only if, the implementation was done in such a way that it did not disparage either the union or the collective bargaining process.<sup>78</sup>

Beginning in the mid-1980s, the National Labor Relations Board began chipping away at these safeguards so that it became easy for employers to reach impasse and, thus, control employment terms unilaterally.<sup>79</sup> The Board required less evidence that bargaining had taken place.<sup>80</sup> It also took a hands-off approach to offers, refusing to

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in good faith has become meaningless. *See, e.g.*, HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 58-59 (2000). In addition to making little effort to encourage the parties to consummate an agreement, judicial decisions have also limited the remedy for bad-faith bargaining to an order to bargain in good faith, rather than imposing monetary sanctions, requiring interest arbitration, imposing terms, or other effective sanctions that might effectuate the policies of the Act. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102.

74. *See* S. REP. No. 573, at 2312.

75. *Cf. id.* (discussing the creation of "refus[ing] to bargain" as an unfair labor practice, the right of employees to have a representative of their choosing, the procedure of holding a governmentally supervised election, but not discussing or laying out structures to govern the actual bargaining).

76. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938); Pope, *supra* note 23, at 527.

77. Dannin, *Collective Bargaining*, *supra* note 37, at 44 n. 7 (citing *Westchester Newspapers, Inc.*, 26 N.L.R.B. 630 (1940); *Sam M. Jackson*, 34 N.L.R.B. 194 (1941)).

78. *Id.* at 45-46.

79. *See* Pope, *supra* note 23, at 534; Dannin, *Collective Bargaining*, *supra* note 37, at 47-64.

80. Dannin, *Collective Bargaining*, *supra* note 37, at 47 & n.20 (citing *E.I. DuPont de*

consider their content as evidence of illegal intent.<sup>81</sup> At this point, any employer who wanted to reach impasse and implement its final offer would find it easy to do so.

In the absence of legislation on resolving impasses, the Board and courts proceeded to fill the statutory gap by developing a complex structure to control bargaining and the use of employer and union weapons.<sup>82</sup> This judicial interpretation made attention to the legal impact of party actions an important part of a successful bargaining strategy.<sup>83</sup> For example, in the Detroit Newspaper strike, one attorney wrote a letter instructing the employer negotiators on how to get to an impasse and create a record that could be used to prove they were at a bona fide impasse.<sup>84</sup> The attorney took the position that implementing the employer's terms was a right that the union was trying to frustrate, and that steps needed to be taken to thwart the union from preventing the exercise of this right:

Because it is unlikely that an acceptable agreement can be reached, we would like to offer some comments and suggestions concerning bargaining to an impasse.

We cannot emphasize strongly enough that reaching a lawful impasse with a union intent upon avoiding that result is difficult, frustrating, and tedious. Unions in general, and the Guild most particularly, understand the significance of a legal impasse and have proven extremely creative in their efforts to deny employers the right

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Nemours & Co., 268 N.L.R.B. 1075, 1076 (1984) ("There need be no undue reluctance to find that an impasse existed.")

81. In *Seattle-First National Bank v. NLRB*, 638 F.2d 1221, 1226 (9th Cir. 1981), the court held that inferences drawn from the content of the parties' proposals could not be the sole grounds for a finding of bad faith. The traditional approach can be seen in cases such as *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139-40 (1st Cir. 1953), *vacated*, 290 N.L.R.B. 571 (1988) and *A-1 King Size Sandwiches, Inc.*, 265 N.L.R.B. 850, 858 (1982). Traditionally, the Board held that an impasse could not be bona fide if caused by an employer's advancing proposals that no self-respecting union could accept. See *Reed*, 205 F.2d at 134-35 ("The Board . . . must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining . . . [I]f the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith, that is, of a desire not to reach an agreement with the union.")

82. See Dannin, *Collective Bargaining*, *supra* note 83, at 64-68; see also *supra* notes 23, 37, and 45 and accompanying text.

83. *Id.* at 58-64.

84. Letter from Michael J. Rybicki, attorney with Seyfarth, Shaw, Fairweather & Geraldson, to Timothy J. Kelleher, Vice President, Labor Relations, The Detroit Free Press (Apr. 22, 1988) (on file with author).

to post conditions. . . .

Although employers sometimes get lucky, all too often it is necessary to go through what seems to be ridiculous lengths to establish an impasse. Obviously, the Company needs to proclaim negotiations are at an impasse and present a final offer to the Guild as soon as possible. When you have reviewed this letter, please call so we can discuss this further.<sup>85</sup>

If bargaining power is defined as the “inducement to agree,”<sup>86</sup> then the law has become part of that inducement. But what is the nature of this law today? These judicial interpretations have tended to treat union rights far less favorably than comparable employer rights.<sup>87</sup>

Striker replacement and implementation upon impasse have long played a critical role in how collective bargaining is conducted.<sup>88</sup> While striker replacement has received attention from both legal and non-legal scholars,<sup>89</sup> even today, few studies have been conducted concerning the incidence or impact of implementation upon impasse,<sup>90</sup> and, so far, no empirical ones.

This state of affairs might be somewhat comprehensible were implementation upon impasse is a rare event. However, practitioners in

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85. *Id.*

86. NEIL W. CHAMBERLAIN, *A GENERAL THEORY OF ECONOMIC PROCESS* 81 (1955).

87. *See* Brudney, *Of Labor Law*, *supra* note 73, at 1353.

88. *See* Dannin, *Dictator Game*, *supra* note 21, at 267.

89. *See id.* at 249.

90. Also, few law review articles discuss the incidence or impact of implementation upon impasse. *See* Dannin & Wagar, *Lawless Law*, *supra* note 7, at 198-99. For background information on implementation upon impasse, see generally J. Gilmer Bowman, Jr., *An Employer's Unilateral Action—An Unfair Labor Practice*, 9 VAND. L. REV. 487, 500-03 (1956) (outlining the general purpose and methods of reaching impasse); David G. Esptein, Comment, *Impasse in Collective Bargaining*, 44 TEX. L. REV. 769 (1966) (arguing that general guidelines for determining when parties are at an impasse should be outlined); Joseph E. Kolick, Jr. & Merle M. DeLancey, Jr., *Can One Unilaterally Gain the Right to Make Unilateral Changes in Working Conditions?* 9 LAB. LAW. 137 (1993) (arguing that giving an employer complete discretion to change working conditions upon impasse creates an unfair advantage to the employer in post-impasse negotiations); Terrence H. Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. PITT. L. REV. 1 (1977) (reasoning that, when used in good faith, implementation upon impasse can be a valuable tool in allowing employers to manage their workers); George Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470, 495-501 (1966) (explaining the impasse doctrine); Mark Stolzenburg, Note, *Blind Faith or Efficiency? The Differences Between the Fifth Circuit and All Others on the Topic of Private Sector Impasse Bargaining*, 80 WASH. U. L. Q. 1341 (2002) (arguing that allowing an employer to make unilateral changes to employment terms and conditions after notifying the employee representative and allowing for a counterproposal is a better option than requiring complete impasse).

the area know it is both common and powerful.<sup>91</sup> It has played a part in high-profile labor disputes, including disputes at Caterpillar,<sup>92</sup> the Detroit News,<sup>93</sup> the National Football League,<sup>94</sup> the baseball players' strike,<sup>95</sup> International Paper,<sup>96</sup> and Don Lee Distributor, Inc.<sup>97</sup> All of these collective bargaining disputes also involved the issue or threat of striker replacement.<sup>98</sup>

To the extent there has been research, it generally confirms the theory that implementation upon impasse undermines collective bargaining.<sup>99</sup> However, the results of those studies were tangential to their main focuses.<sup>100</sup> This means that the results must be used with caution. They need to be confirmed, and they need additional research to produce a robust understanding of the judicial impasse doctrines and their impact, if any, on collective bargaining. In short, implementation upon impasse and its connection to striker replacement is every researcher's dream—issues that matters and that are under-researched.

No case studies and no surveys have been done to examine the doctrine of implementation upon impasse and its operation alone and in connection with striker replacement. As a result, we lack basic information of its incidence, operation, and impact. So far our

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91. In fact, "[i]n a study of NLRB cases involving implementation upon impasse, 50% of employers reached impasse on 'control issues,' that is, terms that allow an employer to control the workplace as if its employees were not represented by a union." Dannin, *Dictator Game*, *supra* note 21, at 262 (citing Dannin & Wagar, *Lawless Law*, *supra* note 7).

92. Caterpillar, Inc., 324 N.L.R.B. 201, 204 (1997).

93. Detroit News, Inc., 319 N.L.R.B. 262, 263 (1995).

94. Nat'l Football League Mgmt. Council, 309 N.L.R.B. 78, 79 (1992).

95. Silverman v. Major League Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1056, 1058 (2d Cir. 1995).

96. Int'l Paper Co., 319 N.L.R.B. 1253, 1253 (1995); *see also* JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14 39* (1998).

97. Don Lee Distrib., Inc., 322 N.L.R.B. 470, 481 (1996).

98. *See* Caterpillar, Inc., 324 N.L.R.B. 201, 209 (1997); *Detroit News*, 319 N.L.R.B. at 263; *Don Lee Distrib.*, 322 N.L.R.B. at 486; *Nat'l Football League*, 309 N.L.R.B. at 79; *Int'l Paper Co.*, 319 N.L.R.B. at 1253; *see also* GETMAN, *supra* note 103, at 36.

99. Kate Bronfenbrenner found that employers engaged in hard bargaining on union security clauses in 50% of cases, reducing the likelihood of gaining a contract from 92% to 68%; declared impasse and implemented final offers in 7% of cases, reducing agreement from 82% to 57%; forced a strike through unacceptable demands in 7% of cases, reducing agreement from 85% to 14%; and organized a decertification campaign in 14% of cases, with the agreement rate dropping from 88% to 29%. Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 85 (Sheldon Friedman et al. eds., 1994). Another study found implementation in 23% of negotiations. Joel Cutcher-Gershenfeld et al., *Collective Bargaining in Small Firms: Preliminary Evidence of Fundamental Change*, 49 *INDUS. & LAB. REL. REV.* 195, 204-05 (1996).

100. *See* Bronfenbrenner, *supra* note 99, at 75-76; Cutcher-Gershenfeld, *supra* note 99, at 195.



knowledge of implementation upon impasse and its relationship with striker replacement is unsystematic and based primarily on theory and the anecdotal experiences of practitioners.<sup>101</sup> Without fundamental data such as this, we cannot build an informed bargaining theory and lack a credible basis for rectifying any problems.

### B. An Overview of Existing Empirical Research

There has been little empirical research on the impact of implementation upon impasse alone and as linked with striker replacement. Existing empirical studies have used a variety of methodologies.<sup>102</sup>

First, there have been a few surveys that have found data that shows a statistically significant link between implementation upon impasse and a failure to achieve first contracts after a union has been organized.<sup>103</sup>

A second methodology is content analysis. One study examined all NLRB cases involving the issue of impasse upon implementation in the context of bargaining for a complete collective bargaining agreement and all cases involving permanent replacement of strikers for the fifteen year period from 1980-1994.<sup>104</sup> This period extended from a few years

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101. See Ellen Dannin & Gangaram Singh, *The Force of Law on Collective Bargaining: Empirical Research and Labor Law Reform* 4-5 (2002) (unpublished article, on file with author), available at <http://ssrn.com/abstract=433480>.

102. See, e.g., Bronfenbrenner, *supra* note 99, at 76-77; Dannin & Wagar, *Lawless Law*, *supra* note 7, at 205-07.

103. Bronfenbrenner, *supra* note 99, at 84-86; see also Kate Bronfenbrenner & Tom Juravich, *It Takes More than House Calls: Organizing to Win with a Comprehensive Union-Building Strategy*, in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* 19, 20 (Kate Bronfenbrenner, et al. eds., 1998) (discussing how Kate Bronfenbrenner's study of certification elections and first-contract campaigns that occurred in 1986 and 1987 "confirmed the prevalence of egregious employer behavior in the private sector and the effectiveness of that opposition in thwarting union efforts to win elections and bargain first contracts"); Joel Cutcher-Gershenfeld et al., *How Do Labor and Management View Collective Bargaining?*, 121 *MONTHLY LAB. REV.* 23, 23, 28, 30 (Oct. 1998) (concluding, based on data derived from a national random-sample survey of union and management negotiators, employer pressure tactics in first contract situations, such as the use of strike replacement workers, increases the likelihood that no agreement will be reached); Aided by Consultants, Employers are Blatantly Violating Law, 36 *Daily Lab. Rep. (BNA)*, at A-3 (Feb. 22, 1985).

104. A full description of the methodology and findings are included in several articles. The most comprehensive of the articles is *Lawless Law*. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 205-10; see also Ellen J. Dannin & Terry H. Wagar, *How True is What Everyone Knows? Board Avoidance, First Contract and the Organizing Versus Servicing Model*, 51 *LAB L.J.* 3, 5 (2000) [hereinafter Dannin & Wagar, *How True*]; Ellen J. Dannin & Terry H. Wagar, *Impasse and Implementation—How to Subvert the National Labor Relations Act*, 4 *WORKING USA* 73 (Fall 2000) [hereinafter Dannin & Wagar, *Impasse and Implementation*].

before the first Reagan appointees through the appointment of some Clinton Board members, thus representing a wide range of Board member ideologies.<sup>105</sup> Among its findings were that data showed many employers wished to de-unionize and that many employers had made proposals they knew were likely to lead to an impasse.<sup>106</sup> This data thus suggested that impasse was being used as a tool to de-unionize.<sup>107</sup> While interesting, the data set is based on a skewed sample—only cases in which the Board issued a decision.<sup>108</sup> As a result, it is impossible to know how applicable the results are to negotiations and employers as a whole.

Third, the authors have used a series of simulations to explore how different methods for resolving bargaining impasses operate.<sup>109</sup> The first simulations examined three legal regimes for impasse resolution:

(A) At impasse the employer may implement its final offer; it may permanently replace strikers; and it must bargain in good faith;

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(B) At impasse the parties go to final offer binding arbitration (the law in some states for the public sector); strikes and lockouts are illegal; and

....

(C) To get beyond the impasse, the parties must reach agreement;

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105. See Dannin & Wagar, *Lawless Law*, *supra* note 7, at 207-10.

106. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 223-24, 226, 230.

107. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 229-30; Dannin & Wagar, *Impasse and Implementation*, *supra* note 104

108. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 205-07; Dannin & Wagar, *How True*, *supra* note 104, at 5.

109. Gangaram Singh & Ellen Dannin, *Law and Collective Bargaining Power: An Experiment to Test Labor Law Reform Proposals*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES 191, 193 (Richard N. Block ed., 2006) [hereinafter Singh & Dannin, *Collective Bargaining Power*]; Ellen Dannin & Gangaram Singh, *Creating a Law Reform Laboratory: Empirical Research and Labor Law Reform*, 51 WAYNE L. REV. 1, 13 (2005) [hereinafter Dannin & Singh, *Empirical Research*]; Gangaram Singh & Ellen Dannin, *The Shadow of the Law: Impasse Laws at Odds with the NLRA*, 53 LAB L.J. 179, 181 (2002) [hereinafter Singh & Dannin, *Shadow of the Law*].

lockouts and strikes are legal; and no replacements are permitted.<sup>110</sup>

These simulations have provided a productive way to test theories about how specific laws work.<sup>111</sup> The simulations so far have uncovered clear differences on many dimensions among the three systems, including the balance of bargaining power.<sup>112</sup>

The authors are currently analyzing data from a second set of simulations that examine six legal regimes in which one, two, or none of the following methods for resolving impasse exist: implementation upon impasse, permanent replacement of strikers, and temporary replacement of strikers.<sup>113</sup> A preliminary analysis of the data supports the conclusion that existence or nonexistence of each of these impasse methods affects perceptions of the parties' relative bargaining power and likelihood of reaching agreement in unique ways.<sup>114</sup> The regime which offers both permanent replacement of strikers and implementation upon impasse was perceived as giving employers far more power than employees and of being the least likely to result in an agreement.<sup>115</sup>

Taken together these simulation studies suggest that the law used to resolve bargaining impasses has the power to cast a long shadow over negotiations, negotiator strategy, and perceptions of power. More specifically, employers were perceived as having the greatest bargaining power in a regime in which both permanent striker replacement and implementation upon impasse existed, while unions were perceived as having the most power where neither existed. In addition, the first regime was seen as one in which the parties were least likely to consider the other side's proposal and the least likely to reach a negotiated agreement. The second regime was seen as most likely for negotiators to consider the other side's proposals and most likely to reach a negotiated agreement. In other words, these findings suggest that the existence of implementation upon impasse and striker replacement

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110. Singh & Dannin, *Shadow of the Law*, *supra* note 109, at 180-81; Dannin & Singh, *Empirical Research*, *supra* note 109, at 13-14; Singh & Dannin, *Collective Bargaining Power*, *supra* note 109, at 193-96.

111. Singh & Dannin, *Collective Bargaining Power*, *supra* note 109, at 209; Dannin & Singh, *Empirical Research*, *supra* note 109, at 47.

112. Singh & Dannin, *Collective Bargaining Power*, *supra* note 109, at 208-09; Dannin & Singh, *Empirical Research*, *supra* note 109, at 29; Singh & Dannin, *Shadow of the Law*, *supra* note 109, at 187.

113. See Ellen Dannin, Michelle Dean & Gangaram Singh, *Law Reform, Collective Bargaining, and the Balance of Power*, 11 WORKING USA (forthcoming 2008) [hereinafter Dannin, Dean & Singh, *Balance of Power*].

114. *Id.*

115. *Id.*

undermine the NLRA's policies and their absence promotes the policies.

In short, existing empirical research on implementation upon impasse and its relationship with striker replacement is sparse and unsystematic. But there is no reason for this state of affairs to continue. Certainly, in this case, the unfortunate lack of research is potentially some researcher's fortune. To promote that process, we set out a systematic research agenda.

### III. CRAFTING A RESEARCH AGENDA

It is rare for a scholarly article to be written about what is not known about a subject, as opposed to what is known. That, however, is the focus of this section. So far, what is known about the intersection of implementation upon impasse and striker replacement suggests four immediate areas for basic research: (1) documenting its incidence, context, and frequency; (2) rigorously analyzing its characteristics, including the impact of geography, industry, union, negotiator preparation, labor-management cooperation programs,<sup>116</sup> the identity of employer and union representatives, and the role of the NLRB in resolving or promoting impasses and the use of the impasse weapons; (3) ascertaining whether employers reach impasse as a strategy, and, if so, what drives this strategy; (4) assessing its impact on the economy, union density, and achieving the NLRA goals of improving employee terms of employment and promoting co-determination of workplace conditions.<sup>117</sup>

The choice of an appropriate methodology is as important as determining what questions are to be answered. The method of study may not be a matter of choice. Researchers usually come out of school with training in one research method, and that is the one they will use. However, the menu of choices can be expanded by working with a research partner from another discipline. In the best cases, this can lead to growth and greater understanding in addition to the ability to do important research neither can do alone. In the worst cases, a research partner may be unreliable or the researchers will be unable to bridge disciplinary differences.

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116. In a small preliminary survey of union bargainers conducted by Dannin, Wagar, and Gilson, one surprising result was that the existence of labor management cooperation programs was positively related to reaching impasse. This test run had too small a sample to be meaningful, but it does suggest that any survey should include questions about the role labor-management cooperation plays in resolving bargaining issues.

117. See Dannin & Singh, *Empirical Research*, *supra* note 109, at 11-12.

If choice of research methods is possible, it is important not to plunge ahead, but, rather, spend time thinking about the purpose of the study. Is it to test or refine theories? Is it to investigate problems in theories or in the fit of facts to theories? Is it to increase knowledge of facts in order to make change in policies? Considering who the audience is—theorists, other researchers, or policymakers—may assist in deciding what the research goal is.

For legal academics that have never done empirical work, empirical studies are both exciting and daunting. Trying to tease meaning out of a table of statistics can feel like looking at a wall, but given time and patience, it is possible to see the story told by the numbers. This job cannot be left up to research partners, for while they may be good at analyzing statistics, they will need to rely on the lawyer to explain the nuances of the law, facts, and legal issues. The partner, in turn, can help explain issues such as statistical significance and the distinction between correlation versus causation. For lawyers, proof means something different from scientific proof. It is important to bear in mind that experiments can neither conclusively prove nor disprove theories. In other words, results consistent with a theory's predictions do not necessarily mean the theory is true. The results only mean that so far the theory has not been falsified. In addition, data can seem so compelling that it is tempting to give it more credence than is appropriate. This means the investigator must question the validity and meaning of all results, especially those that support one's thesis.

Studies tend to fall in one of two categories: (1) inductive, that is, observations based on the examination of data in order to develop or test a theory or proposition or (2) deductive, that is, reasoning from axioms to develop theories and make predictions. No single method is best, and the use of many methods has the benefit of providing a more robust understanding of the object of study. Indeed, the discussion above on impasse research to date showed that study of the issue of impasse has already used many methodologies, and each has a contribution to make.<sup>118</sup>

Here, then, is a quick overview of issues involved with choosing a research methodology.

#### A. Methodological Challenges

Considering the advantages of various methodologies is as

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118. See *supra* text accompanying notes 102-15.

important as identifying issues to be explored.

**1. Comparisons of Bargaining Contracts:** It might seem that the best way to gauge the impact of the impasse doctrines would be to compare outcomes using collective bargaining agreements from negotiations where an impasse was declared versus those where there was no impasse. However, this is not a useful route for a number of reasons.

Any impact of implementation upon impasse will not show up in consummated agreements or, at best, could be discerned only weakly and with enormous effort. First, one would have to compare the terms of each agreement with a control group to determine the outcome that would have been achieved under another bargaining regime. Unfortunately, there is no systematic or comprehensive collection of collective bargaining agreements. “The Bureau of Labor Statistics collects only agreements covering more than 1000 workers, but most negotiations take place in far smaller units,” and these may be the contexts in which the impasse weapons are used.<sup>119</sup>

Second, and even worse, any study based on collective bargaining agreements would not capture situations in which no agreement was reached, in which the union was decertified, or in which the strikers were replaced, the very situations in which the impact of the doctrine is of most importance.

Third, even in negotiations where impasse is not declared, it is always a concern at some level. Both employer and union negotiators will be aware of the roles that the impasse doctrines can play.<sup>120</sup> As a result, vigilance for signs that impasse may be a tactic will affect even negotiations where it is not even mentioned.

**2. Case Studies:** A more useful methodology “to gather basic data on the incidence, characteristics, determinants, and impact of impasse” would be case studies in which the investigator attended the negotiations and observed the process.<sup>121</sup> In our opinion, case studies have many positive qualities. We have found that they are a well-accepted method of research and one in which many social scientists are trained. They provide a window into real events as they unfold. They capture complex actions and interactions and cast light on natural behavior.

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119. Dannin & Singh, *Empirical Research*, *supra* note 109, at 9.

120. *See id.* at 12.

121. *Id.* at 7.

However, case studies of collective bargaining, especially ones involving implementation upon impasse and striker replacement, may require the commitment of years to just one negotiation.<sup>122</sup> For example, a study of NLRB cases involving implementation upon impasse and striker replacement found negotiations that lasted many years.<sup>123</sup>

**3. Surveys:** We have long wanted to conduct a local or national survey of employer and union negotiations. Surveys of real negotiations could provide a window into how collective bargaining takes place under the impasse doctrines. Depending on the design, it could pick up data on a number of factors that theoretically affect bargaining processes and outcomes. For example, in the mid-1990s, we observed that there seemed to be a number of bad faith bargaining cases in the newspaper industry.<sup>124</sup> This observation suggested to us that a survey should include questions about the role of industry associations in formulating bargaining proposals.

We have so far been unsuccessful in our plan for a survey because we were unsuccessful in securing the grant money necessary to support the undertaking. A survey of the scope needed would be very expensive.<sup>125</sup> We were told that the main reasons we were unsuccessful in securing the grants were: 1) no one was doing research in this area so it must not be important; and 2) examining collective bargaining agreements for the impact of implementation upon impasse or striker replacement was a better methodology. These responses are a warning to others as to the difficulty of research that requires grants.

As for the second reason we were given for denial, the referee was unaware of the problems with using collective bargaining agreements—in other words, a referee can have an impact on research that is not warranted by their knowledge. We decided to do the basic research that would demonstrate that this is an important and interesting area, which led us to use bargaining simulations.<sup>126</sup> We found that they, too, require grant money, mainly to pay the participants, but the cost was much less than that of national surveys.

Surveys in an area as contested as collective bargaining will require care in their construction. Certainly surveys can be constructed that

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122. *Id.*

123. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 216 fig. 2.

124. *See, e.g.*, Detroit News, Inc., 319 N.L.R.B. 262 (1995); McClatchy Newspapers, 299 N.L.R.B. 1045 (1990), *rev'd*, 131 F.3d 1026 (D.C. Cir. 1997).

125. Dannin & Singh, *Empirical Research*, *supra* note 109, at 8.

126. *See* Dannin, Dean & Singh, *Balance of Power*, *supra* note 113 and accompanying text.

require asking questions about emotional or even embarrassing issues. In the case of impasse doctrine, it may mean asking whether the parties have engaged in bad faith bargaining; in other words, whether they have violated the law.

This means that any researcher must consider whether the time invested in order to capture details of one negotiation is the best use of the time and money required versus another methodology. One alternative would be to use records kept by negotiators themselves. However, records may suffer from a real or perceived bias. Another option would be to use NLRB case files. They will include affidavits, notes proposals, and other documents that can be analyzed. However, these will all be negotiations in which bad faith bargaining was alleged, so they will suffer from selection bias.

At some point, this technique or some variant of it should be tried, but it should not be the only method. Both case studies and surveys are likely to be very expensive and thus may require grant-writing skills to fund them.

**4. Simulations and Other Psychological Experiments:** The simulations research discussed above has the advantage of creating what is essentially a law reform laboratory. That is, simulations make it possible to test actual reactions to different methods for resolving impasses and to do so in a way that is akin to that used to study the physical sciences; simulations make it possible to decide upon a theory or policy to test or an anomaly to explore. The impasse simulations coupled with a survey instrument have made it possible to get detailed information on conduct under different regimes as well as reactions by the participants as to their views on their “laws.” Even though these are not the real world, they have enough points in common with it that they provide rich feedback that researchers can build on in follow-up simulations or through other methodologies.

Ideally a simulation should be as simple as possible. Simulations used in game theory or experimental economics are often kept free of context in order to test very simple theories. However, in some cases a theory cannot be tested free from context. A simulation to test the impasse doctrines is needed to provide context in order to educate naive participants. As little context as possible should be used, for participants may vary in how they interpret or understand context. This means that context creates a possibility of bias.

Simulations make it possible to test policies in a way that can illuminate weaknesses in theory and shed light on the possibility of



outcomes or problems not considered by theory. They may suggest issues that should be taken into consideration in drafting legislation or implementing the law. Although there are drawbacks, realistic context provides the opportunity for powerful insights to emerge during simulations.

Another issue to consider is who is an appropriate simulation participant. In some cases, professionals or people who know the field can be ideal because they do not need to be trained in the nuances of law and practical application. However, professionals may have biases that they will apply to the issues being tested. Naïve participants are more likely to lack the strong biases of employer and union negotiators, but they need to be trained about issues that matter if their responses are to be realistic and therefore meaningful. Given the brief time available for a simulation, care must be taken to ensure that training is complete and accurate while being as succinct as possible. In our study, we chose to use naïve participants and to use them in two sets of simulations.<sup>127</sup> There was some overlap among issues, and outcomes as to the issues were quite consistent. This consistency supports the validity of our results.

One of the most useful things we did in constructing the study was inadvertent. In the second study, we took notes during the debriefing at the end of each session as we engaged in an open discussion of the participants' reactions. We also invited the participants to add comments, based on that discussion, to a separate survey instrument. These comments illuminated and helped explain the statistical results.

One caution about the use of simulations is that they are so much fun and seem to reveal so much about real world operations that it is important to do constant reality checks and to be cautious in the interpretation of the data. Not every key issue can be tested directly.

For example, in the simulations, we wanted to test whether the various iterations of implementation upon impasse and striker replacement affected bargaining power.<sup>128</sup> However, the nature of the simulation made it impossible to test this issue, because we only allowed our participants to create their negotiation strategies. We did not allow them to then bargain and measure outcomes, because naïve negotiators were unlikely to mirror those of experienced negotiators and thus the results of their negotiations would tell us nothing useful about bargaining power in real negotiations. We did, however, feel confident

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127. See *supra* notes 113-15 and accompanying text.

128. *Id.*

that the structure of the simulation would tell us something about their perceptions of their own and their opponent's bargaining power and that the participants' perceptions of bargaining power were likely to reveal something of actual bargaining power. This was especially likely to be the case since we had a large number of participants for each regime; thus trends in the data were likely to be reliable.

In short, although the structure of this simulation did not allow us to measure bargaining power related to each regime, it did allow us to test whether an impasse method affected perceptions of relative party bargaining power and that we could draw some useful conclusions that these perceptions told us about real world bargaining power which would affect actual bargaining outcomes.<sup>129</sup> The result is that we are using simulations to illuminate forces and help fill in our knowledge about processes.

If care is taken about the limitations of simulations, they are a useful tool that gives a researcher a high degree of control over factors to be studied. They make it possible to replicate and verify findings. They can be used to falsify theories; that is, if predicted results do not appear in the experiment, they probably will not appear in the real world. They can help to answer research and policy questions. But, again, they only suggest what might happen in the real world and cannot predict what will happen.

Simulations and other research that involves the use of human beings requires compliance with regulations on the use of human subjects in research, just as it does for survey research and psychological experiments.

Simulations also entail detailed experimental logistics, beyond just running the simulation. They require being able to recruit an appropriate and adequate pool of participants, possibly providing compensation for participation, and potentially debriefing about the purpose and design of the experiment. Simulations must also be carefully designed, so some test runs are important, as are test data analyses to ensure that the model is appropriate and that survey instrument questions are unambiguous and appropriate for eliciting the information desired.

##### **5. Doctrinal / Historical:** The forms of study that will be most

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129. *See id.* at 208-09. *See generally* Ellen Dannin & Gangaram Singh, *The Force of Law on Collective Bargaining: Empirical Research and Labor Law Reform* 1, 32-33 (2002) (unpublished article, on file with author), *available at* <http://ssrn.com/abstract=433480> (describing the methodology of simulations performed by the author, analysis of data gathered therein, and proposals for change that resulted).

comfortable to legal researchers are doctrinal and historical. They can provide an understanding of how the law evolved that reveals the existence of underlying policies. In the case of the impasse doctrines, the history of striker replacement is relatively well known, while the history of implementation upon impasse was less so until recently. More can certainly be learned by examining the forces that led to the evolution of legal doctrines that undermine the statutes they are grafted onto. In some cases, historical studies can be a form of comparative law.

**6. Comparative Law:** Comparative law can be an attractive vehicle to provide insight into domestic law. Researchers in the United States have found Canadian law to be a source of law reform proposals, as well as a source of evidence of how different iterations of law have functioned in a similar country.<sup>130</sup> In the case of the impasse doctrines, New Zealand has also been used as a law reform laboratory in order to examine how proposed reforms have operated or how social context affects laws that appear similar.<sup>131</sup> When using legal developments in another country as a source of information, data can be gathered from observation, interviews, or records of events, such as news stories or legal cases.

There are important caveats in the case of comparative work. First, as in almost no other area of research, it is easy to do mediocre, non-rigorous work. This is most likely to be done if research has no more depth than comparing statutes or case outcomes. In order to do meaningful comparative work, a researcher must be fully immersed in the foreign society. This takes time and work to see the other country as its natives do.

Second, it is lucky when natural experiments occur, but this sort of luck is rare. To find useful natural experiments, a researcher needs both luck and curiosity. A researcher also needs caution and circumspection in order not to read too much into seemingly similar or dissimilar developments.

**7. Content Analyses:** Content analyses of documents such as laws or cases can provide useful information akin to that of a survey. An analysis of cases can provide a wealth of data including basic

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130. See Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKELEY J. EMP & LAB. L. 30, 43-50 (1997).

131. See Ellen Dannin & Clive Gilson, *Getting to Impasse: Negotiations Under the National Labor Relations Act and the Employment Contracts Act*, 11 AM. U. J. INT'L L. & POL'Y 917, 918 (1996).

demographics concerning parties, dates, violations charged, industries, geographic areas, decision-makers, and attorneys. Depending on the object of study, it may be possible to focus on language used in order to discern motives. Content analysis can feel a bit like an archeological excavation, peeling back what lies beneath the surface.

While a legal researcher should have no trouble reading the cases and identifying the facts that are the focus of study, it may be necessary to work with and learn from partners in other disciplines. If there is a large data set, statistical analysis will be required in order to make useful sense of the information.

Gathering data through content analysis is time consuming and tedious. Student assistants can be used, but not many will find this to be exciting work. Care must be taken to check their results, and cases may need to be analyzed by more than one person to ensure that issues which require judgment calls are coded consistently. Furthermore, information that finds its way into published cases is not a fair representation of reality or of all legal disputes in an area. This creates problems of selection bias and skewed data.

In sum, there are many methodologies available to study legal doctrines. In the next sections, we discuss the substance of research to which these methodologies can be applied.

### *B. Impasse—Incidence*

We know that not all employers use impasse strategically and that, of those who do, not all use it to undermine collective bargaining, for, if they did, no one would ever agree to a new contract and collective bargaining would be a long dead institution. However, we do know that at least some employers do pursue strategic impasses.<sup>132</sup> In a collective bargaining regime that resolves impasses by allowing an employer to unilaterally implement its terms and that offers an employer the opportunity to rid itself of a unionized workforce should they strike, we would expect to see it used strategically in at least some cases. The data and anecdotal evidence support these two conclusions so far. Unfortunately, to date no study has addressed the specific question of incidence, so we cannot answer the most fundamental question: How common is it? We also do not know whether the incidence of implementation upon impasse and striker replacement vary based on

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132. See generally Peter G. Earle, Note, *The Impasse Doctrine*, 64 CHI. KENT L. REV. 407 *passim* (1988) (tracing the history, definition, and application of the impasse doctrine).

industry, union, negotiator, job classification, and geography.

General experience gives some reason to suspect that its use may be increasing, but there has been no good quantitative study. A rough study based on the Lexis BNA Daily Labor Reporter file and the NLRB case file found that implementation upon impasse cases roughly doubled, while striker replacement cases remained flat during the period 1981-1995.<sup>133</sup> Among the questions to be answered are: Do these figures and trends in the database reflect the reality of negotiations? What is causing these results?

While gathering this basic descriptive data is essential, much more is needed in order to grasp whether these doctrines play a significant role in collective bargaining. To answer that question, we need more qualitative data to shed light on the quantitative data.

### C. Characteristics

In order to assess the significance of the impasse doctrines, we need information on the characteristics of bargaining in which it occurs versus those in which it does not. If some impasses are strategic, what is unique about the behavior of an employer who wishes to reach impasse? The most direct way to answer this question might be to survey employers, but since this could mean admitting to a violation of the law, would they be candid?<sup>134</sup> If they are not candid, is it possible they might, nonetheless, provide useful information or even inadvertently reveal their purpose?

If direct evidence is not available or reliable, circumstantial evidence might be useful in answering the question. Evidence of a desire or attempts to reach impasse might be found in statements about bargaining, impasse, or unions.<sup>135</sup> Intent to reach an impasse might also be evident in length of bargaining and number of bargaining sessions before an employer declares an impasse.<sup>136</sup> However, strategic impasse cases might involve few or many sessions and shorter or longer periods as a result of a number of factors.<sup>137</sup> These might include whether

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133. Dannin, *Legislative Intent*, *supra* note 35, at 29-30.

134. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 220.

135. *See id.* at 224.

136. *See id.* at 213-15.

137. *See* Dannin, *Collective Bargaining*, *supra* note 35, at 55-56. These factors are the same as those that the NLRB developed in order to determine whether a bargaining impasse was genuine. *See id.* at 44. In the 1980s the Board began to loosen the requirements and thus make it possible to achieve an impasse and implement more easily. *See id.* at 42. If a bona fide impasse is not

surface bargaining is involved or whether a union was pursuing a strategy of making small concessions or using information requests to delay impasse.<sup>138</sup> Thus, although length of bargaining and number of meetings are important factors, it seems likely that no one pattern is tied to strategic impasses.<sup>139</sup>

Concessions should tell us something about the negotiations. It may be that unions would make different sorts of concessions if they are trying to stave off what is or appears to be an impasse strategy versus the normal course of bargaining. Normal concessions ought to demonstrate a desire to promote the friendly adjustment of industrial disputes or remove industrial strife and unrest. Concessions involving minor issues might be more common when the goal is to delay impasse. Union negotiators could be asked why concessions were made. Any survey or case study must examine the depth, nature and purpose of concessions—not just whether they were made. If there is a difference in types of concessions, are those used to prevent impasse or implementation successful in that role, do they achieve any other union goal, and what is the impact on the employer-union relationship and the relationship of the union with its members?

Unions may make information requests in order to delay or prevent impasse and even permanent replacement of strikers.<sup>140</sup> If an employer fails to provide information or to provide it in a timely manner, an impasse might not be a bona fide impasse.<sup>141</sup> In addition, if the failure to provide information is an unfair labor practice, and the union strikes in response to it, the strikers may not be replaced permanently.<sup>142</sup> More

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achieved and the employer implements its offer, any strike may be an unfair labor practice strike, preventing an employer from permanently replacing the strikers. *See id.* at 61. This means that employers may be reacting to the needs of bargaining or they may be engaging in strategies to persuade the NLRB that an impasse is bona fide. *See id.* at 63-64.

138. *See* Dannin & Wagar, *Lawless Law*, *supra* note 7, at 204.

139. *See id.* at 214, 216. It might seem likely that an employer that is seeking to achieve a strategic impasse might declare an impasse as quickly as possible. *Id.* at 214. However, one study found a mixed pattern. *Id.* Impasse was declared in 25% of cases with five or fewer meetings and in 5% of cases with no meetings. *Id.* Thirty-six percent of cases involved bargaining of under three months, and 14% involved bargaining of less than one month. *Id.* at 216. Without more, however, these figures are opaque. *Id.* For example, an employer seeking to de-unionize might decide to engage in extended bargaining to wear the union down. *See id.* On the other hand, few sessions or an impasse achieved quickly might mean there was a deep and genuine divide coupled with the need for swift action to save a company. *See id.* Obviously, time alone reveals little about the employer's intent. *See id.* at 214, 216.

140. *See* Clifford R. Oviatt, Jr., *The Bush NLRB in Perspective: Does the Playing Field Need Leveling?*, 11 HOFSTRA LAB. L.J. 47, 60 (1993).

141. Dannin, *Collective Bargaining*, *supra* note 35, at 54.

142. *Id.* at 61.

research is needed to know whether and how unions are using information requests, what role this strategy plays in whether impasse is reached, whether it prevents implementation or permanent replacement, and whether these effects occur with or without filing Board charges.

#### *D. Determinants of Impasse*

The NLRA promotes the co-determination of working conditions in order to defuse labor unrest and improve working conditions.<sup>143</sup> But if co-determination is reduced to nothing more than a compelled signature on an agreement, then it is more akin to a coerced confession in criminal law than the NLRA's goals of the "friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and . . . [the restoration of] equality of bargaining power between employers and employees."<sup>144</sup>

A key inquiry must be: what role, if any, does the employer's ability to implement or hire permanent striker replacements play in shaping bargaining and driving its outcomes? The mere fact that a collective bargaining agreement was consummated does not mean implementation upon impasse played no role.<sup>145</sup> A union (that fears an employer may implement) facing an employer (that knows it can implement) should be more likely to accede to an employer's bargaining demands. The question, then, is: what would have happened under a bargaining regime in which the union could have struck without fear of replacement, the employer could not have implemented its final offer, and "impasse" was a mere description rather than a goal that triggered a reward? If the doctrine has a negative effect on union bargaining power, it might help explain why, as many have noted, wage pressure was so low through years of high productivity and low unemployment.<sup>146</sup>

Teasing out the causes of impasse is not easy. Some impasses may have been manufactured by an employer solely in order to implement, in order to de-unionize, or for some other strategic purpose.<sup>147</sup> However, some—and likely most—impasses will occur because the parties simply disagree and have not yet found a way past that disagreement. How then

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143. 29 U.S.C. § 151 (2000).

144. *Id.*

145. See Dannin, *Collective Bargaining*, *supra* note 37, at 66.

146. See, e.g., CENTURY FOUNDATION TASK FORCE ON THE FUTURE OF UNIONS, WHAT'S NEXT FOR ORGANIZED LABOR? 3-23 (1999).

147. DAVID A. DILTS & WILLIAM J. WALSH, COLLECTIVE BARGAINING AND IMPASSE RESOLUTION IN THE PUBLIC SECTOR 47-48 (1988).

should a strategic impasse be distinguished from a normal impasse?<sup>148</sup>

One way to distinguish between the two types of impasse would be to examine the issue or issues which led to impasse. Most real disagreements will arise because of economic reasons. If impasse is reached on issues of less importance to an employer's bottom line, but which an employer knows a union is unlikely to agree to, it seems reasonable to suspect that the impasse was reached as part of the employer's strategy.<sup>149</sup> Such an investigation should focus on impasses that involve union security, dues checkoff, seniority, merit pay, certain subcontracting issues, changing the scope of the bargaining unit, changing job classifications, and other issues that take away the union's ability to affect terms and conditions of employment. While these are life or death issues to unions and workers, we would expect employers to be more concerned with running the business—that is, with economics—than dues checkoff. We would expect that even an employer who was concerned with these issues would be unlikely to reach impasse on them and endure the resulting disruption, unless reaching impasse was the goal.

The problem is more complex, however, than economic versus noneconomic issues. An impasse can still be strategic in nature, even though it occurs as a result of economic issues.<sup>150</sup> In addition, impasses

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148. *Id.* at 48. "When such an impasse is observed, it should be recognized for what it is: an element of a bargaining strategy designed to accomplish some goal." *Id.*

149. In one study economic issues were the cause of impasse in only 37% of cases, while 50% of impasses were caused by "control issues," issues that essentially allow an employer to control a workplace or otherwise act as if no union were there. Dannin & Wagar, *Lawless Law*, *supra* note 7, at 223 tbl.5. Most likely no union will agree to control issues, thus ensuring an impasse. *Cf.* NLRB v. A-1 King Size Sandwiches, Inc., 732 F.2d 872, 874-78 (11th Cir. 1984) (holding surface bargaining where employer refused to relinquish any control whatsoever). Finding so many impasses reached on control issues rather than economic issues in this study suggests that reaching impasse was the goal. While it is not illegal to insist to impasse on control issues that are defined as mandatory subjects of bargaining, some are permissive subjects upon which no legal impasse can be reached. In addition, it is worth considering whether these are the sorts of issues that an employer who abides by the law and recognizes a union as the legitimate representative of its workers should be willing to compromise or at least take a hands-off attitude to. A traditional factor for determining whether an impasse has been reached is the importance of the issue or issues upon which impasse was reached. Peter Guyon Earle, Note, *The Impasse Doctrine*, 64 CHI. KENT L. REV. 407, 421 (1988) (citing Taft Broad. Co., 163 N.L.R.B. 475, 478 (1967)). While it is not illegal to take a strong stand on most of these issues, arguably reaching an impasse on control issues would be evidence that no real impasse had been reached. In addition, taking a stand might be evidence of an intent to reach impasse.

150. Employers can also advance economic offers they know will be unacceptable to a union and which are likely to cause an impasse, for example, demands for deep concessions by a profitable employer. *See* Dannin & Wagar, *Lawless Law*, *supra* note 7, at 202. In fact, this is an employer's best strategy, because if the union strikes over economic issues, the employer may



based on certain economic issues in specific contexts, specifically, demands for deep wage and benefit concessions unjustified by financial circumstances,<sup>151</sup> seem likely to be strategic rather than real.<sup>152</sup>

Another factor that should be explored is what motivated an employer to pursue an impasse strategy. Even an employer who had a long term amicable collective bargaining relationship might choose strategic impasse as a result of financial exigency, while others will choose to enlist the union's help in working out financial problems. The employer in financial trouble might be more willing to see the union as an impediment to quick changes, many of which it knows will be unpalatable to the employees.

Change of ownership or management might also motivate a change in strategy.<sup>153</sup> Thus, the outer form of the employer might remain the

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permanently replace the strikers. *See id.* Beginning in the 1980s, the Board forbade examining a party's proposals for evidence of illegal intent. As a result, employers have had wide ambit to make economic proposals likely to lead to impasse but yet not violate the law. *See Okla. Fixture Co.*, 331 N.L.R.B. 1116, 1117 (2000). In *Okla. Fixture Co.*, Member Hurtgen cautioned against evaluating the reasonableness of a proposal but was willing to consider whether a proposal was designed to frustrate bargaining and agreement. *Id.* at 1117 n.10. *See also* *Liquor Indus. Bargaining Group*, 333 N.L.R.B. 1219, 1220 (2001); *Reichhold Chems., Inc.*, 288 N.L.R.B. 69, 69 (1988), *aff'd in relevant part sub nom.* *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 726 (D.C. Cir. 1990) (Board examines proposals only to evaluate whether they are clearly to frustrate agreement). More recently, the Board has retreated from this position. In *Pub. Serv. Co.*, 334 N.L.R.B. 487 (2001), the Board said it does not evaluate whether particular proposals are acceptable or unacceptable but will infer bad-faith bargaining "when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract" and where "the union is excluded from the participation in the collective-bargaining process to which it is statutorily entitled, effectively stripping it of any meaningful method of representing its members in decisions affecting important conditions of employment . . ." *Id.* at 487-88.

151. For example, in *Unbelievable, Inc. v. N.L.R.B.*, the employer proposed cutting some wages 50%, essentially eliminating holiday and vacation pay, and eliminating the pension plan. 118 F.3d 795, 797 (D.C. Cir. 1997). When the Operating Engineers union responded that the proposals were so outlandish no union could agree to them, the employer responded that it would not mind if the union struck. *Id.* By the third bargaining session, the employer declared impasse and said it would implement its final offer. *Id.* In negotiations with the Teamsters, the employer proposed discharge language which, according to the employer, meant it could fire "anybody for anything." *Id.* The employer said it wanted a strike so it could replace the employees and get rid of the unions. *Id.*; *see also* Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in *RESTORING THE PROMISE OF AMERICAN LABOR LAW* 75, 86 (Sheldon Friedman et al. eds, 1994).

152. *See, e.g.*, PETER RACHLEFF, *HARD-PRESSED IN THE HEARTLAND: THE HORMEL STRIKE AND THE FUTURE OF THE LABOR MOVEMENT* 115 (1993). In 1985, Hormel made its first and only contract offer, one month before expiration. *Id.* The offer included a 150 page rewrite of the entire agreement with no commitment to existing "safety problems" and a variety of other unrealistic conditions. *Id.*

153. *Cf.* Adrienne Eaton & Jill Kriesky, *Collective Bargaining in the Paper Industry:*

same, but not its ethos.<sup>154</sup> Gathering the data about changes in ownership or management and whether this entails a change in philosophy may be difficult. Union informants might be able to provide some of this information, but may also be unaware of changes or might not know a new owner's philosophy. Alternate sources of information might be surveying management respondents or examining a new owner's record elsewhere. The behavior of new foreign owners, particularly ones from countries with laws that promote collective bargaining or where unions and employers have more amicable relations, bears special attention.<sup>155</sup> How do these owners adapt to US labor laws and mores?

A third factor that can motivate an employer to engage in a strategic impasse is advice from a consultant or attorney.<sup>156</sup> Some studies have suggested that management consultants counsel the use of strategies, including illegal strategies, designed to undermine employees' choice of collective bargaining.<sup>157</sup> Consultants can also play a role during negotiations. Anecdotal evidence supports the contention that employer consultants advise strategic implementation even though this would violate the law. Penalties for NLRA violations are small, and the benefits can be great.<sup>158</sup> Unions may be unaware that a consultant is involved, because they often try to operate behind the scenes.<sup>159</sup> Where the identity of a consultant is known, it may be possible to discover its

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*Developments Since 1979*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 25, 54 (Paula B. Voos ed., 1994); see also Charles Craypo, *Meatpacking: Industry Restructuring and Union Decline*, in CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 63, 88-89 (Paula B. Voos ed., 1994).

154. See Michelle Amber, *NLRB Approves Settlement Agreement Ending Litigation Between Avondale, Unions*, available at LEXIS 244 DLR A-12, Dec. 21, 2001 (case demonstrating that new ownership can also convert an embattled relationship into an amicable one).

155. See Gregory M. Saltzman, *Job Applicant Screening by a Japanese Transplant: A Union-Avoidance Tactic*, 49 INDUS. & LAB. REL. REV. 88, 90 (1995-1996).

156. See Jules Bernstein, *The Evolution of the Use of Management Consultants in Labor Relations: A Labor Perspective*, 36 LAB. L.J. 292, 296 (1985); Terry A. Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U. L. REV. 506, 507 (1984); Michael H. LeRoy, *Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA*, 29 U.C. DAVIS L. REV. 1019, 1052, 1073, 1075-76 (1996).

157. See Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 83-84 (Sheldon Friedman et al. eds., 1994); MARTIN J. LEVITT WITH TERRY CONROW, CONFESSIONS OF A UNION BUSTER 151 (1993).

158. PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 234-35 (1990).

159. See MARTIN J. LEVITT WITH TERRY CONROW, CONFESSIONS OF A UNION BUSTER 42 (1993).

record using resources unions have constructed to share information about them.<sup>160</sup> Employers would then have information as to how consultants are used.

An investigation could determine whether certain industries experience greater levels of impasse and implementation. Any that do could then be the subject of follow-up investigations to determine what factors might have caused this result. One factor could be changing technology. Financial exigency could exist within a specific industry even though the larger economy is healthy, and if so, it might drive all members of that industry to pursue independent impasse strategies, or it might drive express industry policy. While in some cases documents might provide this information, much of this may be considered confidential or be difficult to find. If the same terms are sought within individual negotiations this might be some evidence for the existence of such a strategy.

The use of labor-management cooperation should also be investigated as a factor that might affect impasse and particularly the use of an impasse strategy. If labor-management cooperation is used to improve problem solving, then the existence of such a program would make implementation upon impasse less likely. However, the reality may be more complex and more interesting. At a minimum, an impasse—particularly if it is accompanied by implementation—reached by an employer engaged in labor-management cooperation will call into question its effectiveness in defusing workplace tensions. This would be even more the case if the union is decertified. Given the repeated attempts to amend the NLRA to permit forms of labor-management cooperation which are currently illegal as assisted or dominated labor organizations,<sup>161</sup> a finding that it does not defuse workplace problems, and thus, may not improve productivity, would be important for national policy.

It is worth noting that some have theorized that labor-management cooperation can be used to de-unionize by offering cooperation as a substitute for unionization.<sup>162</sup> If true, then an employer might pair it

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160. For example, unions have created websites to track consultants. *See, e.g.*, Spotlight on Union Busters, <http://www.corporatecampaign.org/lally.htm> (last visited Dec. 3 2007); Welcome to the Bust the Union Buster Website, <http://www.aflcio.org/unionbuster/> (last visited Dec. 3 2007).

161. *See, e.g.*, Teamwork for Employees and Managers Act of 1997, H.R. 634, 105th Cong. (1997).

162. TERRY L. BESSER, TEAM TOYOTA: TRANSPLANTING THE TOYOTA CULTURE TO THE CAMRY PLANT IN KENTUCKY 16-17 (1996); GUILLERMO J. GRENIER, INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY 177 (1988); James Rundle,

with a de-unionizing strategy, including using the impasse doctrines. In order to determine this, it would be important to know not only if labor-management cooperation exists in a workplace but also details of its operation. For example, excluding the union from its institution and operation would suggest that the employer is pursuing a union substitution strategy,<sup>163</sup> and that an impasse was reached because of a desire to de-unionize.<sup>164</sup>

It seems likely that employer anti-union sentiment would play a role in de-unionization. However, many employers probably consummate collective bargaining agreements each year and do not use their power to implement strategically, despite not liking unions. Given that many employers harbor some degree of anti-union attitudes or at least would like to gain unilateral control of the employment relationship,<sup>165</sup> it seems likely that most employers would be tempted to at least consider a strategy of intended or calculated impasse.<sup>166</sup> It also appears that, whatever an employer's sentiments, the doctrine of implementation on impasse ought to help shape employer attitudes in favor of an impasse strategy. When the option to implement on impasse is available what, then, makes an employer decide an impasse strategy is not to its advantage?

A good labor climate should make an employer less likely to try to pursue an impasse strategy, but such a climate may be the result of other factors as much as it might drive them. Assessing their interaction would entail a two-step process: first, examining the incidence of impasse associated with each of these factors; and second, further exploration to understand the dynamics, particularly where there are unexpected correlations. Thus, factors such as job classifications,

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*Winning Hearts and Minds in the Era of Employee-Involvement Programs*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 213, 215 (Kate Bronfenbrenner et. al. eds., 1998); James R. Rundle, *The Debate over the Ban on Employer-Dominated Labor Organizations: What is the Evidence?*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW (Sheldon Friedman et al. eds., 1994).

163. See Bruce Nissen, *Unions and Workplace Reorganization*, in UNIONS AND WORKPLACE REORGANIZATION 9, 12 (Bruce Nissen ed., 1997).

164. See Dannin & Wagar, *Lawless Law*, *supra* note 7, at 226. One study found that approximately 39% of employers in the study demonstrated a strong desire to de-unionize. *Id.* at 226 tbl.6.

165. See Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519, 522 (2001); Cynthia L. Estlund, *Economic Rationality and Union Avoidance: Misunderstanding the National Labor Relations Act*, 71 TEX. L. REV. 921, 948-52 (1993).

166. DAVID A. DILTS & WILLIAM J. WALSH, COLLECTIVE BARGAINING AND IMPASSE RESOLUTION IN THE PUBLIC SECTOR 48 (1988).

industry, geography, industry association policy and recommendations, or the union involved may have an impact on an employer's decision to use or not use impasse strategically. For example, certain job classifications may have sufficiently great bargaining power to force the employer to bargain, while others would not. Conditions in some industries may make an employer fear losing productive time to a workplace dispute, while a declining industry may push employers to cut costs ruthlessly.

The length of the relationship between the employer and the union may be a key issue to determine whether impasse is being used strategically. Although many have been concerned about the problem of achieving first contracts after winning an NLRB election, implementation upon impasse has occurred in very long term relationships, some as many as seventy-five years.<sup>167</sup> Because older relationships exist only where there are companies of long standing, many of these relationships could be in industries suffering from the restructuring and global competition of recent years.<sup>168</sup> This would make it more likely that these older companies would have strong incentives to seek economic relief.<sup>169</sup> On the other hand, just because these motives could exist, does not mean they do. Just as plausible is that a change in management has occurred or that existing management has decided to pursue a change in strategy.<sup>170</sup>

Geography may also play a complex role. Employers in a specific region are more likely to share information or to be aware of local bargaining disputes and their details. They may also use the same attorneys or other representatives and receive similar advice regarding bargaining. In addition, employers in a specific region, regardless of industry, may be affected by similar economic conditions. Furthermore, different areas of the country may have different mores and find different bargaining behavior acceptable. The dividing line between

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167. See Dannin & Wagar, *Lawless Law*, *supra* note 7, at 210. It was also unexpected that implementation in the cases involving older relationships were particularly devastating. See *id.* at 211. The Board has been far less likely to find an impasse to be illegal the longer the relationship exists. *Id.* A track record of prior agreements is a valid reason to interpret ambiguous evidence in favor of a real impasse. *Id.* at 211-12. Thus, where there has been long term collective bargaining, the Board may resolve doubtful evidence more favorably to the employer because the Board presumes those employers are not anti-union. See *id.* However, if there has been a change in management or ownership the new management may have decided to take a different approach to labor-management relations, including seeking a strategic impasse. See *id.* at 213.

168. *Id.* at 210-11.

169. *Id.* at 212-13.

170. *Id.* at 213.

right-to-work states versus non-right-to-work states is an obvious one, but there may also be relevant differences within each of these large groups. One such difference might be comparative state levels of unionization or, within a state, the interplay between rural and urban views.

Finally, the impact of specific unions needs to be considered. For example, Justice for Janitors has pursued coordinated tactics throughout the country that have enhanced their bargaining success and achieved far better results than would have been predicted based on their members' skills, citizenship status, and job mobility.<sup>171</sup> Teamster strategies during the UPS strike involved carefully executed plans which began a year before the contract was to expire and which made it impossible for the employer to pursue an aggressive strategy.<sup>172</sup> However, while Justice for Janitors has replicated its strategy nationwide, the Teamsters do not appear to have done so with the UPS strategy.<sup>173</sup>

Some unions have been proactive in creating strategies and promoting negotiator training to resist impasse.<sup>174</sup> Some have been more involved in researching the employer prior to bargaining, and developing a strike-avoidance strategy<sup>175</sup> before negotiations begin.<sup>176</sup> If unions have developed ways to respond to the possibility of impasse, how effective are these?

### *E. Impact of Reaching Impasse*

Many factors used to assess whether an impasse was strategic may also reveal and predict the impacts of impasse. A union's filing a charge concerning an employer's declaration of impasse and implementation—and, particularly, the NLRB's finding that an impasse was not bona fide

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171. Roger Waldinger, et al., *Helots No More: A Case Study of the Justice for Janitors Campaign in Los Angeles*, in ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES 102 (Kate Bronfenbrenner, et al., eds. 1998); Ruben J. Garcia, *Across the Borders: Immigrant Status and Identity in Law and LatCrit Theory*, 55 FLA. L. REV. 511, 528-29 (2003).

172. See Stephen B. Moldof, *Union Responses to the Challenges of an Increasingly Globalized Economy*, 5 RICH. J. GLOBAL L. & BUS. 119, 133 (2005).

173. Compare Brian Petruska, *Choosing Competition: A Proposal to Modify Article XX of the AFL-CIO Constitution*, 21 HOFSTRA LAB. & EMP. L.J. 1, 12-13 (2003), and Herbert R. Northrup, *The Teamsters' Union Attempt To Organize Overnite Transportation Company: A Study of a Major Union Failure*, 30 TRANSP. L.J. 127 (2003) (discussing the Teamsters' organizing and union strategies), with Moldof, *supra* note 172, at 133 (discussing UPS's 1997 strategy).

174. See Dannin, *Lawless Law*, *supra* note 7, at 216-17.

175. See James J. Brudney, *To Strike or Not to Strike*, 1999 WIS L. REV. 65, 82-83.

176. For example, some unions have used information requests as a tactic to stave off a finding of a bona fide impasse. See Dannin, *Legislative Intent*, *supra* note 35, at 29.

and that an implementation was illegal may suggest that impasse was pursued as a strategy, but would certainly not be determinative. Board trial and investigatory files contain useful information. A union may file a charge for many reasons: because it believes there is an unfair labor practice, to achieve some strategic goal such as ensuring that a strike will be found to be an unfair labor practice strike as opposed to an economic strike,<sup>177</sup> to rally the troops, or to pressure an employer to settle a contract.<sup>178</sup> In addition to knowing the outcome of a charge (whether it was dismissed, a complaint was issued, or it settled) the Board's assessment of evidence would be useful. Filing the charge might ameliorate the bargaining situation. This would provide insights into the Board's performance in both its formal processes and in its wider role in promoting collective bargaining.

We do not know the incidence of de-unionization after an impasse and whether it only occurs where an impasse was strategic.

Finally, the employer's ability to replace strikers is seen by many as weakening union bargaining power.<sup>179</sup> Strikes naturally tend to occur when there is an impasse in bargaining. As a consequence, striker replacement and implementation upon impasse have both a temporal connection and, theoretically, a tendency to operate in the same direction—to weaken union bargaining power. Unions fear strikes as a risky strategy that could lead to de-unionization. They also fear reaching an impasse—both because it might lead to a strike and de-unionization and also because it would allow an employer to implement terms of employment. In either case, the unions know that they may become powerless to affect employees' terms and conditions of employment, and thus moribund, as a result of impasse. This complex interplay leads to the question of how to assess an employer's motives from the fact that a

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177. An employer is not permitted to hire permanent replacements if a strike was caused by the employer's unfair labor practices and this fact, along with the reality that the determination of whether a strike is an economic or an unfair labor practice strike does not come until relatively late; therefore, a mistaken prediction can be costly and may push the parties toward a settlement. Michael D. Moberly, *Striking a Happy Medium: The Conversion of Unfair Labor Practice Strikes to Economic Strikes*, 22 BERKELEY J. EMP. & LAB. L. 131, 139-43 (2001); Douglas E. Ray, *Some Overlooked Aspects of the Strike Replacement Issue*, 41 U. KAN. L. REV. 363, 368, 373 (1992).

178. See Ray, *supra* note 177, at 370-71, 399-400.

179. As discussed above, implementation upon impasse is likely to be accompanied by striker replacement. See Dannin & Wagar, *Lawless Law*, *supra* note 7, at 202-03. Unions have been advised to avoid strikes for fear of permanent replacement, so it seemed likely there would be relatively few strikes; however, strikes occurred in 144 of 228 cases, or in 63.6% of cases. *Id.* at 217. Permanent replacements were hired in 67 cases or in 46.5% of the strikes. *Id.* If impasse is being used with permanent replacement of strikers to de-unionize, this level of strikes and replacements suggests that an environment to accomplish that end did exist. See *id.* at 202.

strike has occurred.

#### IV. CONCLUSION

If it is correct that the doctrines of implementation upon impasse and striker replacement operate in tandem to strengthen employer bargaining power and to weaken unions and if, in addition, they offer employers a method of de-unionizing, essentially giving them veto power over a choice the law says belongs to employees, then we need to ask whether these doctrines should continue to exist. Moreover, if these doctrines determine whether or not employees can use bargaining to co-determine their work lives, then studying them has the potential to add to our understanding of the economy and the ways in which law shapes behavior. A research agenda targeted toward finding answers to the sorts of questions sketched above would begin the process of understanding to what extent implementation upon impasse is used, how it is used, and what impact it has. The responses should also amplify existing bargaining theory and help explain otherwise anomalous phenomena, including wage stagnation despite low unemployment and the continued drop in union membership despite heroic efforts by unions to increase their numbers.

If, in addition, empirical research shows that implementation on impasse favors the employer to such an extent that it undercuts collective bargaining, weakens unions, and leads to de-unionization then it tells us we need legal reform to enable the NLRA to achieve its purpose. These are issues of critical importance to the survival of unions. The research required to answer these questions is enormous. We invite our colleagues in all disciplines to join us in this scholarly enterprise.