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1943

Constitutional Law--Picketing--Freedom of Speech--False Bannering in Connection with Peaceful Picketing

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Recommended Citation

Editorial Board, Minn. L. Rev., "Constitutional Law--Picketing--Freedom of Speech--False Bannering in Connection with Peaceful Picketing" (1943). *Minnesota Law Review*. 2595.
https://scholarship.law.umn.edu/mlr/2595

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Minnesota Law Review

Journal of the State Bar Association

Published monthly, December to June, inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price $3.50 per annum. One dollar per number

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CONSTITUTIONAL LAW—PICKETING—FREEDOM OF SPEECH—FALSE BANNERING IN CONNECTION WITH PEACEFUL PICKETING.—In a recent case an employer was peacefully picketed by a union using banners containing false statements. An injunction was granted against the picketing over two contentions of the union: (1) that the situation fell within the rule that equity will not grant injunctive relief against the publication of libel or slander, and (2) that a policy of a state, characterizing the use of false statements as unlawful, and therefore within the permissible limits which the state might impose upon peaceful picketing, was a violation of the constitutional right of free speech.[1] It is the purpose of this note to analyze these contentions to ascertain whether the rule that equity will not enjoin defamation has been abrogated by this decision, and to explore the more recent identification of peaceful

[1]Magill Bros., Inc. v. Building Service Employees' International Union. (1942) 20 Cal. (2d) 506, 127 P. (2d) 542.

picketing with the right of free speech to determine its proscriptive effect against injunctions in such a case.

1. Equity Will Not Restrain Defamation

The practice of equity to refuse to enjoin a libel was based in part, at least, on the policy of permitting freedom of expression.[2] The rule has been abrogated in England by an accident of statutory development.[3] In America the rule still persists, subject to the modification that if the publication or other expression is a means of committing a tort which may be restrained, the publication itself may be enjoined, regardless of whether it amounts to a libel.[4] In the field of labor law this principle has been applied to statements made in newspapers or by bannering, in aid of an illegal strike or boycott.[5] The injunction is said to be aimed not at the publication, but at the *coercion* rendering the strike or boycott illegal;[6] and in such a situation its issuance by equity has been held not to violate constitutional guarantees of freedom of speech.[7]

Following the principle underlying the decisions in these boy-

[2]McClintock, Equity (1936) sec. 151, p. 272; Pound, Equitable Relief Against Defamation and Injuries to Personality, (1916) 29 Harv. L. Rev. 640; (1925) 11 Va. L. Rev. 225.

[3]McClintock, Equity (1936) sec. 151, p. 272; Walsh, Equity (1930) sec. 51, p. 263; Pound, Equitable Relief Against Defamation and Injuries to Personality, (1916) 29 Harv. L. Rev. 640, 665.

[4]Gompers v. Buck's Stove & Range Co., (1911) 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, rev'd on other grounds, Gompers v. United States, (1914) 233 U. S. 604, 34 Sup. Ct. 693, 58 L. Ed. 1115; Sherry v. Perkins, (1888) 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; Lawrence Trust Co. v. Sun-American Publishing Co., (1923) 245 Mass. 262, 139 N. E. 655.

[5]Gompers v. Buck's Stove & Range Co., (1911) 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, rev'd on other grounds, Gompers v. United States, (1914) 233 U. S. 604, 34 Sup. Ct. 693, 58 L. Ed. 1115; Coeur D'Alene Mining Co. v. Miners' Union, (C.C.D. Idaho 1892) 51 Fed. 260, 19 L. R. A. 382; Jordahl v. Hayda, (1905) 1 Cal. App. 696, 82 Pac. 1079; Webb v. Cooks', Waiters' & Waitresses' Union No. 748, (Tex. Civ. App. 1918) 205 S. W. 465; Thomas v. Cincinnati Railway, (C.C.D. Ohio 1894) 62 Fed. 803. See Pound, Equitable Relief Against Defamation and Injuries to Personality, (1916) 29 Harv. L. Rev. 640, 655.

[6]See Coeur D'Alene Mining Co. v. Miners' Union, (C.C.D. Idaho 1892) 51 Fed. 260, 267, 19 L. R. A. 382; Beck v. Railway Teamsters' Protective Union, (1898) 118 Mich. 497, 527, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

[7]Coeur D'Alene Mining Co. v. Miners' Union (C.C.D. Idaho 1892) 51 Fed. 260, 19 L. R. A. 382; Beck v. Railway Teamsters' Protective Union, (1898) 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Thomas v. Cincinnati Railway, (C.C.D. Mass. 1894) 62 Fed. 803; Jordahl v. Hayda, (1905) 1 Cal. App. 696, 82 Pac. 1079; Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor, (D. Mont. 1907) 156 Fed. 809.

cott and strike cases, the court in the instant case took the position that since the utterance of falsehood was unlawful, the otherwise lawful picketing, when accompanied by false statements, became illegal and hence open to restraint on the ground that the utterance of the falsehood was not being inhibited, but rather the unlawful picketing. It is questionable whether, in light of the recognized right of labor to be heard concerning its dissatisfaction with industrial conditions, the rationale of the principle that equity will enjoin a publication that is part of a wrong which would be enjoined itself, is justifiably applied to the false bannering situation.[8] In the illegal boycott and strike cases, such as *Beck v. Railway Teamsters' Protective Union*[9] and *Coeur D'Alene Mining Co. v. Miners' Union*,[10] it was not the publications as such which rendered the labor disputes illegal, but rather the *coercion* thereby engendered. At the time of those cases, publications in the course of a labor dispute were considered a disguise for inarticulated threats; the courts were really laying down the principle that force could not be used to win victories on economic fronts. On the other hand, where the "evidentiary conclusion" of coercion is not accepted, it is clear that equity will not grant an injunction against false statements uttered in the course of an industrial dispute,[11] since the constitutional guarantee of free speech, which

[8] "At the time of the Beck Case, it was the view of many courts that picketing could not be carried on peacefully—the display of banners was regarded as a subterfuge for unspoken threats. . . . The court was not laying down an ultimate principle of law but was expressing an evidentiary conclusion of the time to illustrate the principle that you must not demonstrate or intimate that force will be used to achieve victory in the economic dispute. Such a conclusion of another year should not necessarily control the experience of today . . . the dissemination of information about a labor dispute near the premises of the employer no longer has inherent in its nature the 'covert and unspoken threats' which promoted the decision in the Beck Case." Book Tower Garage, Inc. v. Local No. 415, (1940) 295 Mich. 580, 584, 295 N. W. 320.

[9] (1898) 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

[10] (C.C.D. Idaho 1892) 51 Fed. 260, 19 L. R. A. 382.

[11] In Coeur D'Alene Mining Co. v. Miners' Union, (C.C.D. Idaho 1892) 51 Fed. 260, 267, 19 L. R. A. 382, the distinction is clearly made: ". . . when the acts complained of consist of such material misrepresentation of a business that they tend to its injury . . . the offense is simply a libel; and in this country the courts have with great unanimity held that they will not interfere by injunction. . . . On the contrary, when the attempt to injure consists of acts or words which will operate to intimidate . . . the courts have with nearly equal unanimity interposed by injunction." For statements to the same effect see Richter Bros. v. Journeymen Tailors' Union, (1890) 24 Weekly L. Bull. 189, 192, 11 Ohio Dec. Rep. 45; Beck v. Railway Teamsters' Protective Union, (1898) 118 Mich. 497, 527, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Marx & Jeans Clothing Co. v. Watson, (1902) 168 Mo. 133, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440; Lietzman v. Radio Broadcasting Station, (1935) 282 Ill. App. 203, 213; see discussion in (1932) 2 Brooklyn L. Rev. 61, 62.

divests it of jurisdiction to restrain libel in other situations, applies equally in industrial disputes.[12] Therefore, in light of the fact that injunctions are not issued in boycott and strike cases where the "unlawfulness" consists merely of false statements, it would seem that an injunction should not have been issued in the instant case.

Moreover, in another case, *Near v. State of Minnesota,*[13] where there was an attempt under a state statute to restrain a defamatory newspaper, reasoning almost identical to that in the instant case was denied validity. The justification of the statute was based on the fact that it dealt not with publication per se, but with the "business" of publishing, and since the latter constituted a nuisance, it could be enjoined. Nevertheless, the Supreme Court pointed out that the subterfuge of characterizing a thing that can not be restrained as one which can, would not be countenanced.[14]

2. The Identification of Peaceful Picketing with Free Speech

Climaxing the protracted struggle of labor against "government by injunction,"[15] the recent Supreme Court decisions basing the right to peacefully picket on constitutional guarantees of free speech[16] have clearly established that in balancing social interests, the preservation of free speech is of more precious metal than the emancipation of enterprise from the burdens of the picket line.[17]

[12]Richter v. Journeymen Tailors' Union, (1890) 24 Weekly L. Bull. 189, 11 Ohio Dec. Rep. 45; Truax v. Bisbee Local No. 380, (1918) 19 Ariz. 379, 171 Pac. 121; Ex parte Tucker, (1920) 110 Tex. 335, 220 S. W. 75; Lietzman v. Radio Broadcasting Station, (1935) 282 Ill. App. 203.

[13](1931) 283 U. S. 697, 51 Sup. Ct. 625, 75 L. Ed. 1357, discussed in (1931) 16 Minnesota Law Review 97.

[14]Cf. Lovell v. Griffin, (1938) 303 U. S. 444, 452, 58 Sup. Ct. 666, 82 L. Ed. 949, discussed in (1939) 23 Minnesota Law Review 375.

[15]Frankfurter and Green, The Labor Injunction (1930) p. 88.

[16]Thornhill v. Alabama, (1940) 310 U. S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093, discussed in (1941) 25 Minnesota Law Review 238; Carlson v. California, (1940) 310 U. S. 106, 60 Sup. Ct. 746, 84 L. Ed. 1104; American Federation of Labor v. Swing, (1941) 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855, rehearing denied (1941) 312 U. S. 715, 61 Sup. Ct. 735, 85 L. Ed. 1145, discussed in (1941) 25 Minnesota Law Review 640; Bakery & Pastry Drivers v. Wohl, (1942) 315 U. S. 759, 62 Sup. Ct. 816, 86 L. Ed. 740; see Senn v. Tile Layers' Union, (1937) 301 U. S. 468, 478, 57 Sup. Ct. 857, 81 L. Ed. 1229; Milk Wagon Drivers' Union v. Meadowmoor Co., (1941) 312 U. S. 287, 297, 61 Sup. Ct. 552, 85 L. Ed. 836, rehearing denied (1941) 312 U. S. 715, 61 Sup. Ct. 803, 85 L. Ed. 1145, discussed in (1941) 25 Minnesota Law Review 640; cf. Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board, (1942) 315 U. S. 437, 62 Sup. Ct. 706, 86 L. Ed. 567.

[17]See American Federation of Labor v. Swing, (1941) 312 U. S. 321, 326, 61 Sup. Ct. 568, 85 L. Ed. 855, rehearing denied (1941) 312 U. S. 715, 61

Obviously, therefore, where a state interferes with peaceful picketing, its restraint must be defensible on some principle outweighing the value to the public of unhindered communication of ideas and information concerning labor's grievances.[18] The scope of constitutional immunity from restrictions by the states that is to be accorded to peaceful picketing is still in initial stages of formation.[19] The question arises as to whether its limits are to be determined by the same considerations applied to other types of free speech, such as those dealing with religious,[20] political,[21] and judicial matters,[22] or whether the industrial context of picketing is to place it in a category of its own.[23]

In ordinary free speech cases it is well recognized that freedom

Sup. Ct. 735, 85 L. Ed. 1145, discussed in (1941) 25 MINNESOTA LAW REVIEW 640; Thornhill v. Alabama, (1940) 310 U. S. 88, 105, 60 Sup. Ct. 736, 84 L. Ed. 1093, discussed in (1941) 25 MINNESOTA LAW REVIEW 238.

[18]See Note, (1941) 29 Calif. L. Rev. 366, 375.

[19]For discussion of this problem see Teller, Picketing and Free Speech, (1942) 56 Harv. L. Rev. 180; Note, (1942) 40 Mich. L. Rev. 1200; Note, (1941) 29 Calif. L. Rev. 366; Note, (1941) 90 U. Pa. L. Rev. 201; Note, (1941) 41 Col. L. Rev. 89.

[20]Pierce v. Society of Sisters, (1925) 268 U. S. 510, 45 Sup. Ct. 571, 69 L. Ed. 1070; Cantwell v. Connecticut, (1940) 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352 and note; Minersville School District v. Gobitis, (1940) 310 U. S. 586, 60 Sup. Ct. 1010, 84 L. Ed. 1375, 127 A. L. R. 1493 and note.

[21]De Jonge v. Oregon, (1937) 299 U. S. 353, 57 Sup. Ct. 255, 81 L. Ed. 278, discussed in (1937) 21 MINNESOTA LAW REVIEW 744; Herndon v. Lowry, (1937) 301 U. S. 242, 57 Sup. Ct. 732, 81 L. Ed. 1066.

[22]Bridges v. California, (1941) 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 149, discussed in (1942) 26 MINNESOTA LAW REVIEW 552.

[23]In Bakery & Pastry Drivers v. Wohl, (1942) 315 U. S. 769, 62 Sup. Ct. 816, 819, 86 L. Ed. 781, the Court hinted at such a possible course, stating: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." This statement has been termed "the first clear-cut declaration by the Supreme Court that picketing may create difficulties warranting special regulatory measures, which probably are not justified when freedom of speech is exercised in other ways." See Note, (1942) 40 Mich. L. Rev. 1200, 1206. In Teller, Picketing and Free Speech, (1942) 56 Harv. L. Rev. 180, 198, the author asserts that the Supreme Court's opinion in Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, (1942) 315 U. S. 740, 62 Sup. Ct. 820, 86 L. Ed. 802 "cannot be reconciled with the identification of picketing with free speech." He points out that although the Court failed to mention that the injunction of the Wisconsin court restrained picketing of employees' homes, the order of the Wisconsin court was set out in the body of the Supreme Court's decision and that its effect must have been brought to the Court's attention. A much more decisive indication of the view of the Supreme Court that the industrial nature of picketing induces its differentiation from other kinds of free speech is found in Carpenters and Joiners Union v. Ritter's Cafe, (1942) 315 U. S. 722, 62 Sup. Ct. 807, 86 L. Ed. 725. For a discussion of its implications see infra.

of speech is not absolute. Utterances hampering war effort,[24] interfering with the freedom of judicial decisions,[25] urging violence,[26] or affronting the public decency,[27] may be prohibited. The public interest in permitting free speech under such circumstances is outweighed by the public interest in maintaining peace, safety, and moral standards. Since the preservation of free speech is considered essential to the perpetuation of American democratic institutions,[28] the justification for any restrictive action is based on a finding of a clear and present danger of serious substantial evil.[29]

The Supreme Court has recognized the importance of the right of free speech in labor dispute cases. It has conceded that the clash of the conflicting interests of employer and employee "inevitably implicates the well-being of the community,"[30] and Mr. Justice Frankfurter has pointed out that "the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing."[31] From the political viewpoint, labor speech appeared to him "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[32] The

[24]Schenk v. United States, (1919) 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Abrams v. United States, (1919) 250 U. S. 616, 40 Sup. Ct. 17, 63 L. Ed. 1173; Gilbert v. Minnesota, (1920) 254 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. 287.

[25]Patterson v. State of Colorado, (1917) 205 U. S. 454, 27 Sup. Ct. 556, 51 L. Ed. 879; Toledo Newspaper Co. v. United States, (1918) 247 U. S. 402, 38 Sup. Ct. 560, 62 L. Ed. 1186.

[26]State v. Van Wye, (1896) 136 Mo. 227, 37 S. W. 938; State v. Mockus, (1921) 120 Me. 84, 113 Atl. 39; Williams v. State, (1922) 130 Miss. 827, 94 So. 882.

[27]Gitlow v. New York, (1925) 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138.

[28]See Thornhill v. Alabama, (1940) 310 U. S. 88, 103, 60 Sup. Ct. 736, 84 L. Ed. 1093, discussed in (1941) 25 MINNESOTA LAW REVIEW 238.

[29]". . . to justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent . . . that the evil to be prevented is a serious one. . . . Only an emergency can justify repression." See the concurring opinion in Whitney v. California, (1926) 274 U. S. 357, 376, 47 Sup. Ct. 641, 71 L. Ed. 1095. For other leading cases expounding this principle see Schenk v. United States, (1918) 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Gitlow v. New York, (1925) 268 U. S. 652, 45 Sup. Ct. 625, 69 L. Ed. 1138; Cantwell v. Connecticut, (1939) 310 U. S. 296, 60 Sup. Ct. 900, 84 L. Ed. 1213, 128 A. L. R. 1352 and note. For a discussion of the meaning of the term see Note, (1941) 27 Iowa L. Rev. 105; Note, (1940) 29 Calif. L. Rev. 366.

[30]See Carpenters and Joiners Union v. Ritter's Cafe, (1942) 315 U. S. 722, 62 Sup. Ct. 807, 808, 86 L. Ed. 785.

[31]See Thornhill v. Alabama, (1940) 310 U. S. 88, 103, 60 Sup. Ct. 736, 84 L. Ed. 1093, discussed in (1941) 25 MINNESOTA LAW REVIEW 238.

[32]See Thornhill v. Alabama, (1940) 310 U. S. 88, 103, 60 Sup. Ct. 736, 84 L. Ed. 1093, discussed in (1941) 25 MINNESOTA LAW REVIEW 238.

mere fact that the economic interests against which labor verbally warred might suffer, was deemed subordinate to the interests of the public in receiving such information.[33]

Since the *clear and present danger* principle is the constitutional test of permissible restraints on free speech by a state, the question arises as to whether that is the yardstick which the Supreme Court has chosen to determine the permissible scope of peaceful picketing. If it is the measure, then the mere fact that speech activity is contrary to a state's policy would not, in the absence of a clear and present danger to the state, justify the courts in issuing an injunction against peaceful picketing.

The Supreme Court made it clear in the *Carlson and Thornhill Cases* that state legislation forbidding peaceful picketing was invalid as an unconstitutional prohibition of labor's right to publicize its views. The Court indicated, however, that the states were still left with ample power to regulate certain social evils emanating from picketing activity so long as these were of the kind which warranted interference with free speech in the form of peaceful picketing. In the *Meadowmoor Case* the Court upheld an Illinois ruling that where "acts of picketing in themselves peaceful" were enmeshed in violence, future peaceful picketing might be enjoined; and in *Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*[34] the Court approved a decree permitting peaceful picketing and forbidding only violence.

However, the Court has indicated that the ideas of a particular state concerning the wise limits of an injunction in an industrial dispute are not conclusive.[35] Injunctions based on violations of state common law or statutory standards have been held to be a deprivation of due process when the right to free discussion has been impaired. Thus in *American Federation of Labor v. Swing*[36]

[33]See Thornhill v. Alabama, (1940) 310 U. S. 88, 105, 60 Sup. Ct. 732, 84 L. Ed. 1093, discussed in (1941) 25 MINNESOTA LAW REVIEW 238; American Federation of Labor v. Swing, (1941) 312 U. S. 321, 326, 61 Sup. Ct. 568, 85 L. Ed. 855, rehearing denied (1941) 312 U. S. 715, 61 Sup. Ct. 735, 85 L. Ed. 1145, discussed in (1941) 25 MINNESOTA LAW REVIEW 640.

[34](1942) 315 U. S. 437, 62 Sup. Ct. 706, 86 L. Ed. 567. It would seem that in contrast to the considerable amount of violence necessary, as in the Meadowmoor Case, to justify a blanket injunction, "considerably less violence is sufficient to justify an injunction which merely restrains the violent acts, but permits peaceful picketing." See Note, (1942) 40 Mich. L. Rev. 1200, 1203.

[35]American Federation of Labor v. Swing, (1941) 312 U. S. 321, 326, 61 Sup. Ct. 568, 85 L. Ed. 855, rehearing denied (1941) 312 U. S. 715, 61 Sup. Ct. 735, 85 L. Ed. 1145, discussed in (1941) 25 MINNESOTA LAW REVIEW 640.

[36](1941) 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855, rehearing denied (1941) 312 U. S. 715, 61 Sup. Ct. 735, 85 L. Ed. 1145, discussed in (1941) 25 MINNESOTA LAW REVIEW 640.

the constitutional guarantee of freedom of discussion was infringed by the common law policy of a state which forbade peaceful picketing where there was no immediate employer-employee dispute. In *Bakery & Pastry Drivers v. Wohl*[37] it was held that a state cannot, by statute, define "labor disputes" so narrowly as to substantially confer immunity from all picketing on particular enterprises. Similarly, in *Journeymen Tailors v. Miller*[38] where the New Jersey court held that peaceful picketing in the absence of a labor dispute rendered the picketing unlawful and therefore not entitled to constitutional protection, an order granting an injunction was reversed by the Supreme Court. In none of these peaceful picketing cases did the Supreme Court evidence an intention of departing from the "clear and present danger" test. Moreover, in *Bridges v. California,*[39] a case dealing with the power of a court to curtail criticism of the judiciary, the Supreme Court incidentally noted that the "clear and present danger" limitation laid down in the *Thornhill Case* was the same as that applied in cases dealing with the constitutionality of convictions under the criminal syndicalism act, the anti-insurrection act, and the espionage acts. Even though the Court approved a blanket injunction in the *Meadowmoor Case,* it pointedly limited the restraint to the time necessary to neutralize the intimidation caused by the violence, and the enjoined union was given the right to petition for a modification of the decree after a suitable period had elapsed. Thus the Court has strongly indicated that in a normal situation peaceful picketing, in the absence of violence, may not be proscribed and that, therefore, the mere fact that peaceful picketing is illegal in manner or purpose under state law will not be a justification for its restraint if the element of violence is lacking.

In dealing with the problem of injunctions against peaceful picketing, state courts have refused to adopt this view. Although it has been asserted that peaceful picketing in the absence of violence may not be restricted,[40] the courts which have refused to grant injunctions have done so by declaring that the particular fact situations before them constituted lawful picketing by reference to holdings of the Supreme Court in passing on similar fact

[37] (1942) 315 U. S. 769, 62 Sup. Ct. 816, 86 L. Ed. 781.

[38] (1941) 312 U. S. 658, 61 Sup. Ct. 732, 85 L. Ed. 1106.

[39] (1941) 314 U. S. 252, 62 Sup. Ct. 190, 86 L. Ed. 149, discussed in (1942) 26 MINNESOTA LAW REVIEW 552.

[40] Blanford v. Press Publishing Co., (1941) 286 Ky. 657, 664, 151 S. W. (2d) 440; Heine's, Inc. v. Truck Drivers' Local No. 676, (1941) 129 N. J. Eq. 308, 312, 19 A. (2d) 204; S & W Fine Foods v. Retail Delivery Union, (1941) 11 Wash. (2d) 262, 274, 118 P. (2d) 962; Culinary Union No. 631 v. Busy Bee Cafe, (1941) 57 Ariz. 514, 519, 115 P. (2d) 246.

situations;[41] while the courts which have issued injunctions against peaceful picketing have placed their decisions squarely on the principle that peaceful picketing to be entitled to constitutional immunity must be carried on for a purpose and in a manner recognized as lawful by the state. Thus peaceful picketing is unlawful and, therefore, not entitled to constitutional protection when carried on to compel the employer to maintain a closed shop,[42] to compel him to enter into a union contract which would not have been valid under a state statute,[43] or to force him to discharge employees in violation of a state labor relations act.[44] The same is true where the picketing violates state anti-trust laws,[45] involves the use of false statements,[46] is carried on where there is

[41]Thus it has been held that the right to peacefully picket is not lost by the absence of a labor dispute between the employer and his employees, Culinary Union No. 631 v. Busy Bee Cafe, (1941) 57 Ariz. 514, 115 P. (2d) 246; Denver Local Union No. 13 v. Buckingham Transportation Co., (1941) 108 Colo. 419, 118 P. (2d) 1088; Heine's, Inc. v. Truck Drivers' Local 676, (1941) 129 N. J. Eq. 308, 19 A. (2d) 204; S & W Fine Foods v. Retail Delivery Union, (1941) 11 Wash. (2d) 262, 118 P. (2d) 962; Davis v. Yates, (1941) 218 Ind. 364, 32 N. E. (2d) 86, although a breach of contract is thereby induced. Los Angeles County Fair Association v. Pomona Valley Central Labor Council No. C-412, (Cal. Super. Ct. 1941) 8 Lab. Rel. Ref. Man. 1108; see McReynolds v. Machinists Union, No. 11522, (Cal. Super. Ct. 1941) 8 Lab. Rel. Ref. Man. 1104. A labor union may picket peacefully the place of business of a person who has no employees. O'Neil v. Building Service Union, (1941) 9 Wash. (2d) 507, 115 P. (2d) 662; Naprawa v. Chicago Flat Janitors' Union, Local No. 1, (1942) 315 Ill. App. 328, 43 N. E. (2d) 198. Some states have also held peaceful secondary picketing unenjoinable. Alliance Auto Service, Inc. v. Cohen, (1941) 341 Pa. 382, 19 A. (2d) 152; Mason & Dixon Lines, Inc. v. Odom, (1942) 193 Ga. 471, 18 S. E. (2d) 841; Blanford v. Press Publishing Co., 286 Ky. 657, 151 S. W. (2d) 440; People v. Muller, (1941) 286 N. Y. 281, 36 N. E. (2d) 206.

[42]Schwab v. Moving Picture Operators, (1941) 165 Ore. 602, 109 P. (2d) 600; contra, McKay v. Retail Automobile Salesmen's Local Union, (1940) 16 Cal. (2d) 311, 106 P. (2d) 373, cert. denied (1941) 313 U. S. 566, 61 Sup. Ct. 939, 85 L. Ed. 1525. It has also been held that picketing for unionization where none of the employees is a member of the union may be enjoined. Roth v. Local Union, (1939) 216 Ind. 363, 24 N. E. (2d) 280; Crosby v. Rath, (1940) 136 Ohio St. 352, 25 N. E. (2d) 934, cert. denied (1941) 312 U. S. 690, 61 Sup. Ct. 618; Shively v. Garage Employees' Local Union No. 44, (1940) 6 Wash. (2d) 560, 108 P. (2d) 354.

[43]Wisconsin E. R. Board v. Milk & Ice Cream Drivers' & Dairy Employees' Union, Local No. 225, (1941) 238 Wis. 379, 299 N. W. 31.

[44]R. H. White v. Murphy, (1942) 310 Mass. 510, 38 N. E. (2d) 685, discussed in (1942) 26 MINNESOTA LAW REVIEW 895, 896.

[45]Borden Co. v. Local No. 133, (Tex. Civ. App. 1941) 152 S. W. (2d) 828.

[46]Nash v. Retail Clerks' Association, (Cal. Super. Ct. 1942) 11 L. R. R. 47; Coward Shoe, Inc. v. Retail Shoe Salesmen's Union, (1941) 177 Misc. 70, 31 N. Y. S. (2d) 781; see Alliance Auto Service v. Cohen, (1941) 341 Pa. 283, 19 A. (2d) 152; but cf. Lyons v. United Hotel Employees' C. I. O. Local No. 440, (Cal. Super. Ct. 1941) 8 Lab. Rel. Ref. Man. 1108, where the court distinguished between the situation in which information was disseminated to those who were in a position to discern its falsity and the situation in which it was disseminated to those who were not, and refused to enjoin false statements in the former situation.

no "trade dispute,"[47] or is maintained in furtherance of an unlawful labor objective.[48]

The validity of the state decisions limiting the permissible area of peaceful picketing to a category of lawfulness would be open to doubt,[49] but for a recent case, *Carpenters & Joiners Union v. Ritter's Cafe*,[50] in which the Supreme Court placed a new limitation on peaceful picketing. In the *Ritter Case* the plaintiff had hired a contractor to construct a building under an agreement that the latter was to choose his own labor. Non-union labor being employed, a union peacefully picketed the plaintiff's restaurant, a business which had no connection with the building under construction. As a result, the waiters refused to cross the picket line to go to work. The Texas court declared this a violation of state anti-trust laws and, therefore, enjoinable. This was upheld by the Supreme Court on the ground that a state may restrain the peaceful picketing of industry by strangers to that industry.

This case raises the question of whether the Court intended to sanction the notion that labor speech must conform to a standard of "lawfulness" as defined by the states. This seems unlikely in view of its recent prior decisions. It would seem more probable that the court meant to postulate the principle that the sphere of free labor speech must be confined to the "area of the industry within which a labor dispute arises."[51] If this second interpretation

[47]Crosby v. Rath, (1940) 136 Ohio St. 352, 25 N. E. (2d) 934, cert. denied (1941) 312 U. S. 690, 61 Sup. Ct. 618.

[48]Schwab v. Moving Picture Operators, (1941) 165 Ore. 602, 109 P. (2d) 600 (picketing for closed shop); Petrucci v. Hogan, (1941) 27 N. Y. S. (2d) 718 (picketing city for closed shop unlawful purpose since city must follow statutory rules in hiring); Coward Shoe, Inc. v. Retail Shoe Salesmen's Union, (1941) 177 Misc. 70, 31 N. Y. S. (2d) 781 (picketing to retaliate against rival union held unlawful purpose); Shively v. Garage Employees' Local Union No. 44, (1940) 6 Wash. (2d) 560, 108 P. (2d) 354 (picketing employer to compel non-union employees to join union held unlawful purpose); Olson v. Bakery Drivers' Union, (1940) 6 Lab. Rel. Ref. Man. 1100 (picketing for closed shop contract an unlawful objective); Hotel & Restaurant Employees' International Alliance v. Longley, (Tex. Civ. App. 1942) 160 S. W. (2d) 124 (picketing to compel signing of a particular contract with union).

[49]To argue that the Constitution protects only lawful speech would be to impart to freedom of expression only an illusory liberty, for if lawfulness were the requisite for constitutional protection, a state could defeat freedom of speech by segregating what it considers undesirable into a category of unlawfulness. See Chafee, Free Speech in the United States (1941) p. 14. "If picketing is a form of free speech, it may not be enjoined although carried on for an improper objective." Teller, Picketing and Free Speech, (1942) 56 Harv. L. Rev. 180, 196.

[50](1942) 315 U. S. 722, 62 Sup. Ct. 807, 86 L. Ed. 785.

[51]In the *Swing Case*, Illinois was not allowed to limit peaceful picketing to places where there is a labor dispute between employer and employee. Here Texas might constitutionally limit labor speech to the situation in

is correct, it would seem that peaceful picketing with false banners, if within that area, is entitled to constitutional protection. For, although there is little doubt that the use of false banners or statements in connection with picketing is unlawful,[52] none of the courts which have refused to allow a prior restraint on free speech has distinguished between truth or falsity. To the contrary, there is ample authority for the proposition that freedom from prior restraint extends to the false as well as to the true.[53] However, an indication that the Supreme Court may deviate from this rule in the case of peaceful picketing is demonstrated by its dictum in the *Thornhill Case* to the effect that a state may have power to regulate the accuracy of statements made during the picketing.[54]

In view of the fact that the Court in the *Ritter Case* enjoined a particular mode of labor speech which was antagonistic to the state's policy, namely, picketing of strangers to the industry, the states which have in the past restricted the content of labor speech,

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which the disputants were part of the same industry. Apparently then, picketing is only free speech when it is restricted "to the area of the industry within which a labor dispute arises." Further strength is given this interpretation by the fact that the Court expressly left open to the disputants "other traditional modes of communication." If a union may constitutionally inform the public by radio that an employer in one industry is unfair to labor in another, but cannot do so by picketing, it is obvious that the Court recognizes as inherent in the nature of the latter an element not present in the former. The Ritter decision would seem to be an acceptance of the fact that it "is not what the picket says, but his *locus in quo* which proximately causes the desired result." See the concurring opinion of Robinson, C. J. in S & W Fine Foods v. Retail Delivery Union, (1941) 11 Wash. (2d) 262, 118 P. (2d) 962.

Theoretically, the test employed by the Court in circumscribing the area of permissible peaceful picketing—that of "economic interdependence" between the industry and the picketing union—may be beyond reproach, but hard practicality deserves some consideration. As Mr. Justice Reed points out, by whom is the test of "eligibility" to picket to be determined—by labor or by enterprise? Moreover, it is permissible to picket retailers of a product distributed by the employer with whom the union quarrels on the ground that he receives the benefit of lower prices as a result of the lower wages paid by the employer. Cf. Alliance Auto Service, Inc. v. Cohen, (1941) 341 Pa. St. 283, 19 A. (2d) 152; Goldfinger v. Feintuch, (1937) 276 N. Y. 281, 11 N. E. (2d) 910. Is there ground for a distinction which permits restraining picketing of a person who, by contracting with an employer of non-union labor, enjoys a lower cost? See Note, (1942) 40 Mich. L. Rev. 1200, 1211.

[52]People v. Jenkins, (1930) 138 Misc. 498, 246 N. Y. S. 444, aff'd (1931) 255 N. Y. 637, 175 N. E. 348; People v. Kaye, (1937) 165 Misc. 663, 1 N. Y. S. (2d) 354.

[53]See the cases cited in footnote 15. See Patterson v. Colorado, (1907) 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879; cf. Marx & Jeans Clothing Co. v. Watson, (1902) 168 Mo. 133, 149, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440.

[54]See Thornhill v. Alabama, (1940) 310 U. S. 88, 99; 60 Sup. Ct. 736, 84 L. Ed. 1093, discussed in (1941) 25 MINNESOTA LAW REVIEW 238.

when antagonistic to the state's policy, may possibly feel themselves vindicated in taking such a step.

It is submitted that while under the *Ritter Case* the complete identification of peaceful picketing with free speech has been in part obliterated, injunctions against peaceful picketing with false banners are open to the same objections to prior restraint present in the "pure" type of free speech case.

3. THE OBJECTION OF JUDICIAL CENSORSHIP

If judges were models of judicial objectivity, capable of infallibly branding utterances either true or false without the discoloration of human prejudice based on personal, economic and social views, the decision in the instant case would not be open to the objection that it seriously endangers the right of labor to publish its side of a dispute by peaceful picketing. But in false bannering cases it is likely that, in passing on the truth of such statements as "unfair,"[55] "traitor,"[56] "scab,"[57] "strike,"[58] or "strike-breaker,"[59] a judge's decisions will often be swayed by his own personal conception of desirable social ends.[60] Moreover, the fact that as a rule the judiciary is far more sensitive to the damage resulting from picketing than to the harm done by its restraint has always been a disturbing problem.[61] In the instant case the

[55]Denver Local Union v. Perry Truck Lines, (1940) 106 Colo. 25, 101 P. (2d) 436; Alliance Auto Service v. Cohen, (1941) 341 Pa. 283, 19 A. (2d) 152.

[56]Vulcan Detinning Co. v. St. Clair, (1925) 315 Ill. 140, 145 N. E. 657.

[57]Nann v. Raimquist, (1931) 255 N. Y. 307, 174 N. E. 690, discussed in (1931) 16 MINNESOTA LAW REVIEW 118; Wood Mowing & Reaping Machine Co. v. Toohey, (1921) 114 Misc. 185, 186 N. Y. S. 95.

[58]People v. Tepel, (1938) 3 N. Y. S. (2d) 779; Philip-Henrici Co. v. Alexander, (1916) 198 Ill. App. 568; Harvey v. Chapman, (1917) 226 Mass. 191, 115 N. E. 304.

[59]State v. Zanker, (1930) 179 Minn. 355, 229 N. W. 311.

[60]"There is something fantastic about a process of dealing with strikes and boycotts that entrusts arbitrament to the possible error of an individual judge. . . . One who reads the fervid opinions of not a few of the trial judges must wonder whether the writer was in any mood to hear evidence objectively and to decide dispassionately." Powell, The Supreme Court's Control Over the Issuance of Injunctions in Labor Disputes, (1928) 2 Selected Essays on Constitutional Law 733, 764. In Nann v. Raimquist, (1931) 255 N. Y. 307, 174 N. E. 690, discussed in (1931) 16 MINNESOTA LAW REVIEW 118, Mr. Justice Cardozo, taking the position that such statements merely represent a point of view, stated, "Courts have enough to do in restricting physical disorder without busying themselves with logomachies in which the embattled words are the expression of the writer or the speaker."

[61]The familiar statement in Atchison, T. & S. F. Ry. Co. v. Gee, (C.C. S.D. Iowa 1905) 139 Fed. 582, 584, 140 Fed. 153 (proceedings for contempt) —"There is, and can be, no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or unlawful lynching."— finds itself almost equalled by the statement in a California case where the court said: "Truth is that the term 'peaceful picketing' is a self contradiction and aptly describes nothing known to man. To use the term is as inept as

court stressed the fact that no exception was taken to the trial court's finding that the statement on the banner, that there was a strike in progress, was false. In these cases the protection by appellate review of the finding of falsity is of little value, since by the time an order for an injunction is reversed a strike may have been broken and its purpose defeated. Though erroneous, an injunction issued by a court which has jurisdiction of the subject matter and persons must be obeyed until it is modified or set aside by the court entering the order or until it is reversed by an appellate court on penalty of the invocation of contempt proceedings.[62] This is an additional hardship since the judge who may have issued the injunction, sitting alone, determines whether a violation has occurred and may mete out criminal punishment without giving the victim the jury safeguard privileged to him in a criminal trial.

Conclusion

Even though peaceful picketing is regarded as protected to the same extent as other forms of expression by the guarantee of freedom of speech, it may be enjoined when it is used as the means of committing some other unlawful act, such as threat of violence as in the *Meadowmoor Case* or violation of an anti-trust act as in the *Ritter Case*. To hold further that the falsity of the statement made under circumstances which would preclude an injunction against a true statement makes the picketing wrongful so as to permit it to be restrained, applies to expression by picketing a limitation not recognized as authorizing restraint of other forms of publication.

Decisions such as those in the instant case substitute state control by injunction for competitive discussion of matters of particular interest to both labor and the consumer public. In a greater share of situations the employer is amply protected by a civil action for compensation or by criminal prosecution. He has at his elbow, moreover, the means of neutralizing by counter-publicity any misrepresentations that may occur during the labor controversy. Such decisions imply a lack of confidence in the ability of the American public to segregate falsehood from truth—an implication unjustified in an industrial era in which the consumer public is alive to the technique and dialectics of industrial struggle.

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would be to speak of a peaceful holdup or a peaceful war. It is an alliterative euphemism, coined possibly through carelessness, but seized upon avidly by legislators and judges, thus to make it easy to give blanket approval to practices, many of which are plainly immoral. . . ." Ted R. Cooper Co., Inc. v. Los Angeles Bldg. Trades Council, (1941) 7 Lab. Rel. Ref. Man. 706, 707.

[62]Vulcan Detinning Co. v. St. Clair, (1925) 315 Ill. 40, 145 N. E. 657.