

December 2019

The Dubious Status of Peaceful Picketing

Howell C. McDaniel, Jr.

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlj>

Recommended Citation

Howell C. McDaniel, Jr., *The Dubious Status of Peaceful Picketing*, 4 Wyo. L.J. 108 (1949)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol4/iss2/7>

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

are making an important contribution in protecting society from the drunken driver, and likewise the sober driver from the indiscriminating police officer or other witness. Certainly they are useful in rebutting the almost inevitable, "I only had a couple of beers," or in sustaining the contention of the suspect who claims that he staggered away from his wrecked automobile not because he was drunk, but because the impact of the collision left him groggy.

RICHARD S. DOWNEY

THE DUBIOUS STATUS OF PEACEFUL PICKETING

The status of peaceful picketing is one of confusion when we consider the shifting views of the courts on the questions of what constitutes peaceful picketing, and who may participate in it. With respect to the former question, the suggestion has been made that picketing is illegal if it is assumed to be the exertion of an economic pressure, but on the other hand if picketing is only the exercise of the right of free speech, it is legal.¹

Distinctions have been made between the terms "picketing,"² which at first was presumed to be illegal, "patrolling,"³ and the use of "missionaries,"⁴ which were held to be within legal bounds.

There are certain important landmarks in the decisions of the United States Supreme Court on picketing. In 1921 the Court decided that strikers and their sympathizers should be limited to one representative at each entrance of an employer's plant, and all others should be enjoined from gathering or loitering at the plant or in the nearby streets. These representatives, or "missionaries," had the right to observe, communicate and persuade, but they could only singly approach persons willing to listen to their grievances. Furthermore, the Court was of the opinion that these "missionaries" could only come from the striking employees or from those hoping for re-employment in the plant.⁵

By 1937 the Supreme Court was beginning to inject the element of freedom of speech into the issue of what constitutes peaceful picketing. A Wisconsin statute⁶ permitted peaceful picketing and patrolling by a single person, or by many persons, as long as it was done without coercion, intimidation, or violence. A labor union, taking advantage of this statute, put an employer out of business because he refused to unionize his employees. In upholding the union's right to picket and publicize its dispute with the employer, Justice Brandeis spoke for

-
1. 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 321 (1940).
 2. *American Steel Foundaries v. Tri City Central Trades Council*, 257 U.S. 184, 205, 42 Sup. Ct. 72, 77, 66 L. Ed. 189, 27 A.L.R. 360 (1921). "The name 'picket' indicated a militant purpose inconsistent with peaceful persuasion."
 3. *Sterling Chain Theatres v. Central Labor Council*, 155 Wash. 217, 283 P. 1081 (1930). Patrolling was held to be legal if the patrol remained more than 100 feet away from the place being patrolled.
 4. *American Steel Foundaries v. Tri City Central Trades Council*, note 1 supra.
 5. *American Steel Foundaries v. Tri City Central Trades Council*, supra.
 6. Wisc. Stat., sec. 103.53 (1935).

the majority of the Court when he said, "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."⁷ Whether this statement should be construed to mean that picketing, or at least peaceful picketing, is freedom of speech protected by the Federal Constitution, or whether Justice Brandeis meant only that a union can make known the facts of a labor dispute, as a matter of free speech—a constitutional right enjoyed by all citizens, without saying how it can be done—is a source of great perplexity.⁸

In April of 1940 the status of peaceful picketing as a form of free speech was thought to be definitely settled when the Court handed down its decision in the often cited cases of *Thornhill v. Alabama*,⁹ and *Carlson v. People of the State of California*.¹⁰ These decisions held that peaceful picketing was a form of speech which was protected by the Constitution of the United States, and that any state law that prohibited peaceful picketing must be struck down because it would deny the right of free speech. These holdings seemed, at the moment, to completely answer the question of the legal status of peaceful picketing. It was speech; nothing more, nor less, than the dissemination of information.

With that question out of the way, the Court found an opportunity, toward the end of the same year (1940) to answer the question as to who may participate in this so-called dissemination of information. In Illinois a man by the name of Swing had been operating his beauty parlor. Neither he nor any of his employees were members of any labor union, nor did they have any desire to become members of a labor organization. A union of those engaged in beauty work tried unsuccessfully to unionize Swing's shop. Picketing followed. The United States Supreme Court reversed the Supreme Court of Illinois, which had held that there could be no peaceful picketing in relation to any dispute between an employer and a union unless the employer's own employees were in controversy with him. Justice Frankfurter expressed the majority opinion of the Court when he wrote that the right of free communication could not be "mutilated" by denying it to workers in a dispute with an employer, even though they were not employed by him.¹¹

Even though it was thought that the status of peaceful picketing was settled by the *Thornhill* case,¹² almost before the ink was dry in that opinion, the court found that a state could authorize its courts to enjoin acts of picketing, which were in themselves peaceful, when they were enmeshed with contemporaneously violent conduct.¹³ Members of a milk wagon drivers' union in Chicago wished

-
7. *Senn v. Tile Layers Protective Union, Local No. 5*, 301 U.S. 468, 478, 57 Sup. Ct. 857, 862, 81 L. Ed. 1229 (1937).
 8. GREGORY, LABOR AND THE LAW 340 (Revised and enlarged ed. 1949).
 9. 310 U.S. 88, 60 Sup. Ct. 736, 84 L. Ed. 1093 (1940).
 10. 310 U.S. 106, 60 Sup. Ct. 746, 84 L. Ed. 1104 (1940).
 11. *American Federation of Labor v. Swing*, 312 U.S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855 (1941).
 12. See note 9 supra.
 13. *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies Inc.*, 312 U.S. 287, 61 Sup. Ct. 552, 85 L. Ed. 836, 132 A. L. R. 1200 (1941).

to convince non-union vendor-drivers that they should join their union so as to be able to enjoy all its benefits. When the vendor-drivers expressed themselves as being satisfied as they were, the union drivers smashed windows, burned the stores of the non-union drivers' customers, and threw bombs, as well as wrecking some trucks and shooting at the non-union drivers. The majority held that what would otherwise have been permissible activity was rendered enjoined by the contemporary violence. Justice Black, in the dissenting opinion, protested that the majority of the Court had let the Thornhill Doctrine collapse on its first attack. He thought that the proper way to avoid future objectionable picketing was to maintain order, but not to deny free speech by enjoining all picketing.¹⁴ Thus the Supreme Court began to limit the Thornhill Doctrine almost as soon as it was announced.

In the Spring of 1942 the Court adopted the theory of Justice Black's dissent in the *Meadowmoor Dairies* case,¹⁵ by affirming a holding of the Supreme Court of Wisconsin which had modified an order of the Wisconsin Employment Relations Board to read that only acts of violence were to be forbidden, thus allowing peaceful picketing to continue. The Court was of the opinion that a state could determine its own public policy regarding industrial relations as long as freedom of speech was left unimpaired.¹⁶

A few months later, the Supreme Court again dealt with the subject in two opinions handed down on the same day. The first case¹⁷ involved a union's peaceful and orderly picketing of bakeries and retail stores, which dealt with non-union peddlers. The Court held that although a state is not required to tolerate peaceful picketing in all places and under all circumstances, the picketing could not be enjoined in this case, because of the peddler's mobility and the fact that they were insulated from the public as middlemen, made it impossible for the union to make known its grievance by any other method. This decision seemed to add new vigor to the Thornhill Doctrine.

But the other opinion marked a further departure from the Thornhill Doctrine. A Texas restaurant operator named Ritter contracted with a non-union contractor to have a house built in another section of town than that in which his restaurant was located. A carpenters' union peacefully picketed the restaurant, claiming the owner was unfair to organized labor, and the restaurant employees, being members of a union, refused to work. Union truck drivers refused to deliver supplies to the restaurant, and union patrons stopped eating there. The Texas court enjoined the union from picketing the restaurant, but it did not forbid picketing at the building under construction.¹⁸ Justice Frank-

14. See *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies Inc.*, supra, 61 Sup. Ct. at 558.

15. See note 14 supra.

16. *Hotel and Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U.S. 437, 62 Sup. Ct. 706, 86 L. Ed. 946 (1942).

17. *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 62 Sup. Ct. 816, 86 L. Ed. 1178 (1942).

18. *Carpenters and Joiners Union of America v. Ritter's Cafe*, 149 S.W. (2d) 694 (Tex. 1941).

furter again spoke for the majority of the United States Supreme Court. He said that recognizing peaceful picketing as an exercise of free speech does not imply that a state cannot restrict the sphere of communication to that directly related to the dispute. The injunction was upheld because the picketed business had no connection with the dispute.¹⁹ In the dissenting opinion it was claimed once more that the majority of the Court had abandoned the doctrine of the *Thornhill* case.²⁰ The dissenters questioned why peaceful picketing should be subjected to any regulation at all if it were really speech—the dissemination of information and nothing more.²¹

In April, 1949, the Supreme Court again considered the scope of the Thornhill Doctrine. A truck drivers' union picketed a plant in Missouri which manufactured ice and rented frozen food lockers. The plant was completely unionized by the CIO and the AF of L. There was no dispute between the plant and its employees. The plant sold ice to non-union peddlers, none of whom it employed. After the plant refused to comply with a demand by the union that it stop selling to these peddlers, a picket line was placed around the plant in an effort to force plaintiff to agree to stop selling ice to the non-union peddlers. The result was that all deliveries to and from the plant by union drivers were halted, and tenants of the storage house could not obtain their food stuffs. The Supreme Court of Missouri found that the union was engaged in activities which constituted a violation of a state anti-trust statute,²² and enjoined the union from picketing the plaintiff's plant.²³ Speaking through Justice Black, an unanimous Supreme Court affirmed the judgment,²⁴ holding that peaceful picketing could be enjoined without violating the union's constitutional guarantees of freedom of speech and press where such picketing was a part of an integrated course of conduct, which was in violation of the state law. The picketing and placards were to effectuate the purposes of an unlawful combination and their sole, unlawful immediate objective was to induce plaintiff to violate the Missouri law by entering a conspiracy in restraint of trade. The court said that the general statement of the limitation of a state's power to impair free speech in the *Thornhill* case²⁵ was not intended to apply to a fact situation like that in the instant case.

While the United States Supreme Court decisions just summarized are not exhaustive, they fairly present the views of the Court as to the nature and allowable participants in peaceful picketing. But the picture is not a clear one. As Professor Gregory has said,²⁶ "It is hard to understand the Court's present

19. *Carpenters and Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722, 62 Sup. Ct. 807, 86 L. Ed. 1143 (1942).

20. See note 9 *supra*.

21. See *Carpenters and Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722, 729, 62 Sup. Ct. 807, 810, 86 L. Ed. 1142 (1942).

22. Mo. Rev. Stat. sec. 8301 (1939).

23. *Empire Storage and Ice Co. v. Giboney*, 357 Mo. 671, 210 S.W. (2d) 55 (1947).

24. *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 69 Sup. Ct. 684, 93 L. Ed. 649 (1949).

25. See note 9 *supra*.

26. GREGORY, *op. cit. supra* note 8, at 361.

position as being anything but a retreat from the Thornhill case, and this can mean only that the majority no longer believe peaceful picketing to be speech—the dissemination or information—and nothing more. For if they do still believe that peaceful picketing is free speech, then they have entered on the monstrous undertaking of denying this liberty constitutional protection whenever they see fit to do so. As the minority (of the Court) complains, the majority can't have it both ways. Peaceful picketing either *is* or it is *not* an instance of free speech under the constitution."

It is necessary to examine more particularly the power of the state to determine its policy concerning peaceful picketing. A state has the right to impose reasonable regulations for the protection of its citizens, their lives, and their property.²⁷ To protect the community as a whole, a state may determine whether the common interest will best be served by imposing some restriction upon the weapons used to inflict economic injury in the struggle of conflicting industrial forces.²⁸ Many of the state decisions emphasize that the constitutional right of free speech is not unlimited. This is not a recent innovation of our courts. For example, in 1917 Justice Pitney, speaking for the majority of the United States Supreme Court, said, "The right of free speech is not so absolute that it may be exercised under any circumstances without any qualification. Like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others."²⁹

The following discussion of the state court decisions is not intended to be exhaustive of the cases; the intention is rather to point up significant decisions in a representative cross section of states.

The Supreme Court of California has said picketing is neither unlawful *per se*, nor unlawful because there is no labor dispute between an employer and his employees, but violent picketing and untruthful picketing are unlawful.³⁰ So where a union, in an effort to unionize employees of two bowling alleys carried banners and signs which conveyed false and untrue information con-

-
27. *Near v. Minnesota*, 283 U.S. 697, 708, 51 Sup. Ct. 625, 628, 75 L. Ed. 1357 (1931); *Carlson v. People of the State of California*, 310 U.S. 106, 113, 60 Sup. Ct. 746, 749, 84 L. Ed. 1104 (1940).
 28. *Aikens v. Wisconsin*, 195 U.S. 194, 25 Sup. Ct. 3, 49 L. Ed. 154 (1904); *Truax v. Corrigan*, 257 U.S. 312, 372, 42 Sup. Ct. 124, 144, 66 L. Ed. 254, 27 A.L.R. 375 (1921); *Dorchy v. Kansas*, 272 U.S. 306, 47 Sup. Ct. 86, 87, 71 L. Ed. 248 (1926); *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 481, 57 Sup. Ct. 857, 863, 81 L. Ed. 1229 (1937); *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies Inc.*, 312 U.S. 287, 295, 61 Sup. Ct. 552, 556, 85 L. Ed. 836, 132 A.L.R. 1200 (1940); *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 775, 62 Sup. Ct. 816, 819, 86 L. Ed. 1178 (1942).
 29. *Hitchman Coal and Coke Co. v. Mitchell*, 245 U.S. 229, 254, 38 Sup. Ct. 65, 73, 62 L. Ed. 260, L.R.A. 1918 C, 497, Ann Cas. 1918 B, 467 (1917).
 30. *Magill Bros. Inc. v. Building Service Employees' International Union*, 20 Cal. (2d) 506, 127 P. (2d) 542 (1942).

cerning the employees and their employer, it was held that such picketing must cease.³¹

In New Jersey, 12,000 union employees of the Western Electric Company went on strike and picketed the plant. 4,000 other employees, not union members, desired to remain on their jobs. Pickets congregated and marched in close formation, "belly to back," at the entrance to the plant, thus obstructing free passage to the non-strikers. The pickets jostled, pushed and knocked down a few of these employees. In enjoining the picketing as unlawful, the court said that the employees' right to strike includes the right of picket as a means of publicity, but picketing is unlawful when large numbers of pickets congregate or march in close formation obstructing the free passage of those who desire to enter, or when the picketing has an immediate tendency to intimidate, and keep non-striking employees from having free passage into the plant.³²

A barber in Massachusetts, who employed no one, was picketed by a barbers' union because he would not join the union, and because he refused to raise his price of haircuts from \$.50 to \$1.00, the union price. The court found that there was no labor dispute between the barber and the union, and held that the picketing was an unlawful violation of an individual's right to conduct his business free from illegal interference.³³

The courts of Washington and Colorado have also held that peaceful picketing of an employer's place of business is unlawful where the purpose of the picketing is to force the employees to join, or to compel the employer to enter into a contract, which would in effect compel his employees to become union members.³⁴ The United States Supreme Court dismissed the union's appeal of

-
31. *Supra* note 30. *Contra: Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 64 Sup. Ct. 126, L. Ed. 58 ((1943). (Picketing was peaceful, but pickets gave impression that they had been employed in the cafe, when in fact it was operated by the owner. Pickets told prospective customers that the food was bad, and to patronize would aid the cause of Fascism. Held, loose language is part of give and take in economic and political controversies, and "unfair" and "fascist" do not falsify the facts).
 32. *Western Electric Co. v. Western Electric Employees Ass'n.*, 137 N.J. Eq. 489, 45 A. (2d) 695 (1946).
 33. *Saveall v. Demers*, 322 Mass. 70, 76 N.E. (2d) 12, 14, 2 A.L.R. (2d) 1190 (1947). (After stating that Massachusetts decisions would not sanction, as lawful, a combination to picket a competitor for the purpose of attempting to regulate the details of business, Justice Qua said, "If picketing is speech it is certainly also much more. However peacefully it may be carried on, it possesses elements of compulsion upon the person picketed which bear little relation to the communication to any one of information or ideas. And resort is commonly had to it precisely because of these elements which, much more than any force of argument contained in it, give it the power it possesses. To fail to recognize these facts is to put reality aside. It would seem, therefore, that even if picketing is constitutionally protected in its aspect as speech, it must, because of its other aspects, be subject to some degree of regulation as to circumstances, manners, and even objects, lest orderly existence be submerged in a flood of picketing by groups of people, having no peculiar right of their own, to make other people do what they do not wish to do and as free men are under no obligation to do.")
 34. *Swenson v. Seattle Central Labor Council*, 27 Wash. (2d) 193, 177 P. (2d) 873, 170 A.L.R. 1082 (1947); *Gazzam v. Building Service Employees International Union*, 29 Wash. (2d) 488, 188 P. (2d) 97 (1948); *Denver Milk Producers Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers' Union*, 116 Colo. 389, 183 P. (2d) 529 (1947).

the Colorado case, refusing to decide the constitutional issues involved because the record was inadequate.³⁵

In New York an unlawful purpose test was applied to enjoin the picketing of New York City retail stores which were supplied by a New Jersey slaughterer and packer of kosher poultry. The purpose of the picketing was to persuade the New York City stores not to handle the New Jersey poultry, in order to insure that members of the defendant union would be employed to slaughter all kosher poultry consumed in the city of New York. The court held that if the union's objective is not permitted by the common law and the statutes of the state, the picketing is unlawful and may be enjoined. The unlawful purpose was the attempt to erect an embargo against the importation of food into a large city.³⁶

Three of the most recent cases affecting the status of peaceful picketing were decided by the Supreme Court of Washington in June of 1949.³⁷ These cases hold that when there is no labor dispute,³⁸ that is, a controversy between an employer and his employees, a union's picketing is unlawful and may be enjoined. And further, when the purpose of the picketing is that of coercion rather than persuasion, it is enjoined.³⁹ Justice Steinert of the Washington Supreme Court has indicated that the use of any set formula used to decide the issues of peaceful picketing will confuse the issues. He contends that it is a fallacy to say, "The right of free speech is protected by the constitution; the supreme court of the United States has held that peaceful picketing is an exercise of the right of free speech; the picketing here involved was peaceful; therefore, it follows that the picketing in this instance is protected by the constitutional provisions."⁴⁰

In resolving the question of what constitutes peaceful picketing, and who may participate in it, in the light of recent state decisions, it appears that peaceful picketing may be enjoined when it is untruthful,⁴¹ when there is intimidation (as in mass picketing),⁴² when there is no labor dispute,⁴³ when it is used to foster an unlawful objective of a union,⁴⁴ and when its purpose is that of coercion rather than persuasion.⁴⁵ All of the above, however, is without any force if

35. 334 U.S. 809, 68 Sup. Ct. 1015, 92 L. Ed. 1741 (1948).

36. *Mayer Bros. Poultry Farms v. Meltzer*, 80 N.Y.S. (2d) 874, 274 N.Y. App. Div. Rep. 169 (1948).

37. *Hanke v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers' Union*, 207 P. (2d) 206 (Wash. 1949); *Cline v. Automobile Drivers and Demonstrators Local Union No. 882*, 207 P. (2d) 216 (Wash. 1949); *Pacific Navigation and Trading, Inc. v. National Organization of Masters, Mates and Pilots of America, West Coast Local 90*, 207 P. (2d) 221 (Wash. 1949).

38. 1 *TELLER*, op. cit. supra note 1 at 419. Labor dispute, "a quarrel between employer and employee as to the terms and conditions of employment." Non-labor dispute, "any dispute between two people or groups of people whose relationship to each other are not those of employer and employee."

39. See note 37 supra.

40. *Hanke v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers' Union*, 207 P. (2d) 206, 212 (Wash. 1949).

41. See note 30 supra.

42. See note 32 supra.

43. See notes 33, 34, 35, and 37 supra.

44. See note 36 supra.

45. See note 37 supra.

peaceful picketing is considered merely free speech. As Justice Schwollenbach of the Supreme Court of Washington has said, "The United States Supreme Court has established this rule: Peaceful picketing is an exercise of the right of free speech. Organized labor has the right to communicate its views either by word of mouth or by the use of placards. This is nothing more nor less than a method of persuasion. But when picketing ceases to be used for the purpose of persuasion—just the minute it steps over the line from persuasion to coercion—it loses the protection of the constitutional guaranty of free speech, and a person or persons injured by its acts may apply to a court of equity for relief."⁴⁶ On the question of regulating peaceful picketing, Justice Douglas in a concurring opinion in the *Wohl* case⁴⁷ said, "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."

The realm of uncertainty surrounding the status of picketing may grow and recede as the views of our courts shift to adhere to the social and economic conditions prevailing at the particular time they are called upon to settle conflicts between management and labor. The words of Professor Teller seem to be as true today as they were in 1940, when he wrote, "The story which comprehends the nature and consequently the extent of legal protection afforded picketing is one which, like a serial, will be told in future installments. It cannot be stated with certainty today that picketing is an instrument primarily in the nature of economic warfare nor can it be said that it is equivalent to the exercise of free speech."⁴⁸

HOWELL C. McDANIEL, JR.

TERMINATION OF A WAR

Statements that "courts judicially know . . . the date of the termination of the war"¹ are correct but the actual date of which the courts take judicial cognizance is subject to considerable variance. Selection of the actual date follows a definite pattern for actions which might be classified as public;² and a different pattern for those actions between private individuals and corporations. One exception to the rule for private actions³ will be discussed later.

One might think that the segregation of actions into "public" and "private" would cause some trouble; but no case has been found where the court was in

46. *Swenson v. Seattle Central Labor Council*, 27 Wash. (2d) 193, 177 P. (2d) 873, 880, 170 A.L.R. 1082 (1947).

47. *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 776, 62 Sup. Ct. 816, 819, 86 L. Ed. 1178 (1942).

48. 1 TELLER, *op. cit. supra* note 1, at 442.

1. 31 C.J.S. Sec. 62, p. 640; 20 Am. Juris, Evidence Sec. 62, p. 83.

2. *i.e.* involving a subdivision of government, or an activity entrusted during a war to a government department.

3. *Malbone Garage, Inc., v. Minkin*, 272 App. Div. 109, 72 N.Y.S. (2d) 327 (1947).