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# PICKETING LEGISLATION AND THE COURTS\*

JEROME R. HELLERSTEIN\*\*

In 1806 a group of journeymen cordwainers were tried in Philadelphia for the crime of conspiracy to raise wages.<sup>1</sup> They had formed a trade union and had refused to make boots for wages below the union scale. In addressing the jury which convicted the cordwainers the court declared that the law condemns a combination of workmen whose purpose is to secure an increase in wages: "In every point of view this measure is pregnant with public mischief and private injury . . . tends to demoralize the workmen . . . destroy the trade of the city, and leaves the pockets of the whole community to the discretion of the concerned."<sup>2</sup>

More than eight decades later, during a cabinet makers' strike in the same city, a worker was arrested for picketing at the entrance to a furniture establishment and for denouncing the employees of the store as "scabs." He was brought before the county court on a commitment to keep the peace. Judge Finletter held the striker's conduct an unlawful and a criminal interference with the storekeeper and his employees, and required him to post a bond for good behavior, but not without taking occasion to state judicially: "It seems to me that all unions are governed entirely by foreigners, who bring to this country none of the spirit that should actuate the American citizen."<sup>3</sup>

During the 1927-1928 coal strike in Pennsylvania the miners in the town of Rossiter were prevented from picketing or gathering about the coal company's mine, or from holding meetings in the town because most of the land in the region was owned by the coal operators. The strikers took refuge in a church which was located within shouting distance of the tippie of the mine. There they held religious services, and each day as the non-union workers entered

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<sup>1</sup> Case of the Philadelphia Cordwainer's, Mayor's Court (1806), III COMMONS AND GILMORE, A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY (1926) 59-248; see SAYRE, CASES ON LABOR LAW (1923) 99.

<sup>2</sup> III COMMONS AND GILMORE, *op. cit. supra* note 1, at 230.

<sup>3</sup> Commonwealth v. Silvers, 11 Pa. C. C. 481 (1892).

and left the mine, they heard the strikers militantly singing "Onward Christian Soldiers" and "We're On the Winning Side."<sup>4</sup> A local court of equity, unabashed by the church or the hymns, enjoined the workers from singing their hymns, and forbade them, under the pain of contempt, from congregating in or about the church.<sup>5</sup>

The striking cordwainers of 1806, the picketing cabinet maker of 1892, and the hymn-singing miners of 1928 were all engaged in the struggle of workers to secure a greater share of the fruits of industry. Although separated by many decades, these workers all found their conduct condemned by the law. The cordwainers were living in an era of handicraft industry and the stagecoach; by the time the cabinet maker was arrested, American economic life had been completely transformed by factories and railroads; and while the miners were singing their hymns, the coal fields and the steel mills and industry generally were undergoing technological changes as profound as those wrought by the first industrial revolution.<sup>6</sup> The development of large scale industry with its massing of capital and the consequent increase of the power of employers, and the ever growing number of unskilled workers dependent upon factories for a livelihood, have necessitated a readjustment in the legal relations of employers and workers in order to cope with the new economic order.

Labor has largely won the right to organize and to combine in order to advance and protect its interests through collective action. The contest has shifted from the legality of the labor organization *per se* to the legality of the means, the weapons, the devices which labor may employ to achieve and to make effective group action. The law has not yet entirely sanctioned resort to the strike for every purpose.<sup>7</sup> The use of the boycott has been seriously restricted by the

<sup>4</sup> See Woltman and Nunn, *Cossacks* (1928) 15 AM. MERCURY 399.

<sup>5</sup> *Ibid.*

<sup>6</sup> See CHASE, MEN AND MACHINES (1929).

<sup>7</sup> The battle is still being waged as to the legality of a strike to secure a closed shop. *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011 (1900); *Bausbach v. Reiff*, 244 Pa. 559, 91 Atl. 224 (1914); *Ruddy v. Plumbers*, 79 N. J. L. 467, 75 Atl. 742 (1910) (holding strikes to secure a closed shop illegal). *Contra*: *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389 (1912); see Sayre, *Labor and the Courts* (1930) 39 YALE L. J. 682, 696. A strike to enforce union regulations has been held illegal. *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457 (1908); see Sayre, *Labor and the Courts*, *supra*. Recent years have witnessed the issuance of numerous injunctions by the federal courts, condemning strikes as combinations in restraint of interstate trade. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 Sup. Ct. 172, 65 L. ed. 349 (1921); *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n*, 274 U. S. 37, 47 Sup. Ct. 522, 71 L. ed. 916 (1927); see BERMAN, LABOR AND THE SHERMAN ACT (1930) *passim*.

courts.<sup>8</sup> It is our purpose here to examine the course which statutes and decisions have taken in this country with respect to picketing by workers, and to consider the efficacy of the adjustment to the changes in our economic life which our law-making bodies have made of the employment by workers of this weapon.<sup>9</sup> The importance of picketing in industrial struggles is reflected by the statement of a labor leader in a study of the recent strikes in the southern textile industry that the "real contest of the strike takes place on the picket line."<sup>10</sup>

Where a strike or a combination of workers is itself unlawful, picketing in furtherance of the strike is illegal. The problem with which we shall concern ourselves is: where a combination of workers is legal, how far may the instrument of picketing be used by the workers to advance their interests?<sup>11</sup>

<sup>8</sup> See LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE* (1914); WOLMAN, *THE BOYCOTT IN AMERICAN TRADE UNIONS* (1916); Sayre, *loc. cit. supra* note 7.

<sup>9</sup> A number of important problems relating to picketing have not been considered in this study. The extent to which a blanket injunction will be issued forbidding all picketing by a trade union when some acts of misconduct have occurred is treated in Note (1931) 44 HARV. L. REV. 971. For a discussion of the right to picket when there is no strike in progress, see Note (1927) 40 HARV. L. REV. 896. An interesting question is whether the right to picket which exists when there is a dispute between employer and employees is limited or modified where the controversy is between two rival unions. Cf. *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931); *Goyette v. Watson Co.*, 245 Mass. 577, 140 N. E. 285 (1923). No attempt is here made to consider the law of boycott in its relation to picketing. For a general discussion of picketing see Note (1902) 15 HARV. L. REV. 482; Note (1924) 10 IOWA L. BULL. 79; Note (1927) 12 CORN. L. Q. 226; Note (1927) 4 WIS. L. REV. 309.

<sup>10</sup> TIPPETT, *WHEN SOUTHERN LABOR STIRS* (1931) 233; *cf. id.* 255.

<sup>11</sup> Modern English picketing legislation may be traced from the Combination Act of 1825 which forbade groups of workers from using "violence to person or property," "threats or intimidation," from "molesting," or "in any way obstructing" any person, for purposes which include efforts to secure higher wages, shorter hours, to affect working conditions, or to organize a union. 6 Geo. IV, c. 129 (1825). This act was sweepingly interpreted by the courts to forbid even the mildest type of picketing activity. *Regina v. Dykerdike*, 1 Mood & R. 179 (1832) (telling employers whom to employ held molestation); *Regina v. Rowlands*, 5 H. & N. 20 (1859) (expressing intention to strike held threat); see SLESSER AND BAKER, *TRADE UNION LAW* (3d ed. 1927) 187. In 1859 an amendment was passed providing that no workman merely by reason of "endeavoring peacefully and in a reasonable manner to persuade others from working" should be guilty under the 1825 act. 22 VICT., c. 34 (1859). Eight years after this amendment, Baron Bramwell declared in a charge to a jury that the amendment had not legalized coercion of "liberty of mind and thought," and that if a picket did nothing more than watch the motions of the workers and subject them to "black looks," he would be guilty under the law of England. *Regina v. Druiitt*, 10 Cox C. C. 592 (1867). In 1871 seven women were imprisoned merely for saying "bah" to a blackleg; innumerable convictions took place for the use of abusive language. See WEBB, *HISTORY OF TRADE UNIONISM* (1911) 268.

The Criminal Law Amendment Act of 1871 repealed the acts of 1825 and 1859, and forbade the use of "violence" to person or property, the use of

## I. CONSPIRACY LEGISLATION IN THE UNITED STATES

The chief legal instrument which was employed against labor until the last decade of the nineteenth century was the criminal prosecution.<sup>12</sup> The common law doctrine of conspiracy was the foundation upon which the criminal law was developed in dealing with collective action by labor. While the drastic doctrine of the *Philadelphia Cordwainers*<sup>13</sup> case that a combination of workers to secure higher wages is illegal is said never to have been generally accepted

"threats" or "intimidation," or "molestation and obstruction." 34 & 35 VICT., c. 32 (1871). Under the act a person was deemed to "molest or obstruct" if (1) he persistently followed a person; (2) if he hid any tools, clothes or property, or deprived any person thereof, or hindered him in its use; (3) if he watched or beset the house of any person, or his place of business or any place where he happened to be; (4) or if with two other persons, he followed any person through the street, in a disorderly manner. In 1875, as a result of the agitation by labor leaders and sympathizers, the term "molest or obstruct," which had been the basis for some of the earlier objectionable convictions, and the word "threaten," were eliminated from the act. See WEBB, *op. cit. supra*, at 261 *et seq.* It still forbade "watching and besetting," but that term was defined so as to exclude the "attending at or near the house where a person resides or works or carries on business, or happens to be, or the approach to such house or place, in order merely to obtain or communicate information." The courts interpreted this act to forbid "watching and besetting" for the purpose of persuading workers to leave employment. *Lyons v. Wilkins* [1896] 1 Ch. 811; *Charnock v. Court* [1899] 2 Ch. 35.

The Trade Disputes Act of 1906 repealed the provision of the earlier act which excluded "attending for the purpose of communicating information," and affirmatively enacted that "It shall be lawful for one or more persons . . . to attend at or near a house or place where a person resides or works . . . or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." 6 EDW. VII, c. 47, §2 (1906). This statute has been sympathetically regarded by the courts as assuring all those engaged in a trade dispute the right to present their views and to win converts. See *Vacher & Sons v. London Soc. Comp.* [1913] A. C. 107, 123; *Larkin v. Belfast Harbour Comm'rs* [1908] 2 I. R. 214, 224 *et seq.*; SLESSER AND BAKER, *op. cit. supra* note 11, at 245 *et seq.*

In 1927 the Trade Disputes and Trade Unions Act placed a restriction upon the existing law of mass picketing, by forbidding watching or besetting "in such numbers, or otherwise in such manner as to be calculated to intimidate any person in that house or place, or to obstruct the approach thereto or egress therefrom, or to lead to a breach of the peace." 17 & 18 GEO. V, c. 22, §3 (1927). The term "to intimidate" is defined as causing "in the mind of a person a reasonable apprehension of injury to him or to any member of his family, or of violence or damage to any person or property"; and this definition is extended to the entire Conspiracy Act of 1875.

Thus the English history exhibits a general course of liberalizing the activity permitted to the picketer, by careful definition of the activities interdicted, and with the courts in recent times falling sympathetically in line with the legislative purpose of increasing the allowable area of conduct permitted.

<sup>12</sup> COMMONS AND ANDREWS, *PRINCIPLES OF AMERICAN LABOR LEGISLATION* (3rd ed. 1927) 106 *et seq.*

<sup>13</sup> See note 1, *supra*.

in this country,<sup>14</sup> the device of condemning combinations whether because the ends of the combination or the means employed by the group were regarded as illegal, is the basis of both judicial doctrine<sup>15</sup> and of numerous statutes which were enacted in this country in order to deal with organized action by workers.<sup>16</sup> Criminal convictions were frequent.<sup>17</sup> The elimination of the conspiracy conviction was, therefore, the end for which labor and its sympathizers struggled and toward which amelioratory legislation was directed until the nine-

<sup>14</sup> See COMMONS AND ANDREWS, *loc. cit. supra* note 12; Sayre, *Criminal Conspiracy* (1922) 35 HARV. L. REV. 393.

<sup>15</sup> See Sayre, *supra* note 14; OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) c. 21 et seq.

<sup>16</sup> In the following states the statutes provide, *inter alia*, that if two or more persons conspire to: (1) commit a crime, (2) to do any act injurious to the public health, morals or to the perversion or obstruction of justice or the due administration of the laws, they shall be guilty of a misdemeanor. FLA. COMP. LAWS (1927) §7541, passed 1868; IDAHO COMP. STAT (1919) §8204, p. 1885; MINN. STAT. (Mason, 1927) §10054; MO. REV. STAT. (1929) §4243, p. 1889; MISS. CODE ANN. (1930) §830, p. 1892; OKLA. COMP. STAT. ANN. (Bunn, 1921) §1649, p. 1890; S. D. COMP. LAWS (1929) §3598, p. 1877; TENN. ANN. CODE (Shannon, 1917) §6693, p. 1858; WASH. COMP. STAT. (Remington, 1922) §2382, p. 1909.

The following states have on their books the above statute, and in addition a provision that no conspiracies other than those enumerated are punishable criminally. ARIZ. CODE (Struckmeyer, 1928) §4581, p. 1864; CAL. PEN. CODE (Deering, 1923) §182-83, p. 1872, but *cf.* California statute, *infra* note 38; UTAH COMP. LAWS (1917) §8018, p. 1876.

In Mississippi and Washington, if two or more persons conspire to "prevent the exercise of a lawful calling or doing any other lawful act by threats, force or intimidation by interfering or threatening to interfere with tools, property or implements . . . or to commit any act injurious to health, morals, trade or justice" they are guilty of a crime. Mississippi, *supra* §830, p. 1892; Washington, *supra* §2382, p. 1909.

A recent Alabama statute forbids combinations without legal excuse "for the purpose of hindering, delaying or preventing the carrying on of a lawful business." ALA. CODE (Michie, 1928) §3447, p. 1921.

Two states punish a conspiracy with fraudulent or malicious intent to injure the person, character or property of another or to do any act injurious to the public trade. ME. REV. STAT. (1930) c. 138, §25, p. 1837; IOWA CODE (1927) §13162, p. 1851 (uses terms "wrongfully injure" and "health, trade or morals" instead of public trade).

A Wisconsin act makes criminal a "combination maliciously to injure another's trade or reputation by any means whatever, or maliciously to compel another to do any act against his will or preventing or hindering another from performing any lawful act." WIS. STAT. (1929) §343.681, p. 1887. Florida, in addition to the statute referred to above, has provided that a "conspiracy or combination to prevent any person from securing work in any firm or to cause the discharge of any person, or threat of injury by any person of life, property or business to prevent employment" is punishable. FLA. COMP. LAWS (1927) §7542, p. 1893.

Some of the statutes mentioned in notes 49 *et seq.*, *infra*, expressly apply to conspiracies. See, *e.g.* the Georgia and Rhode Island acts.

<sup>17</sup> COMMONS AND ASSOCIATES, HISTORY OF LABOR IN THE UNITED STATES, c. V; II *ibid.* 501 *et seq.*

ties. But when the famous *Debs*<sup>18</sup> case in 1894 dramatically brought the attention of employers to the possibilities of speedily and effectively curtailing labor's action through equitable relief and the courts sanctioned the use of the injunction in labor disputes, the indictment was relegated to relative insignificance.<sup>19</sup> The modern problem of picketing, which is presented to the courts chiefly in injunction cases, turns upon principles of tort. Thus the entire prohibitory penal legislation which affects picketing has been swept into equity, and must be there dealt with in injunction proceedings.<sup>20</sup>

#### A. Conspiracy Statutes With Limiting Clauses.

In 1867 Minnesota passed a conspiracy statute<sup>21</sup> forbidding the use of "threats, force, or intimidation to prevent the exercise of a lawful calling, or the doing of any other lawful act," with a proviso attached that "the orderly and peaceable assembling or coöperation of persons employed in any calling or trade or handicraft, for the purpose of obtaining an advance in the rate of wages or maintaining such rate" was not forbidden by the act. This device of condemning conduct carried on by workers in industrial controversies, and of then limiting the application of the statute by declaring certain types of conduct not to fall within the categories enumerated has been followed in substantially the same terms as those used by the Minnesota statute by North Dakota and New York.<sup>22</sup> A broad con-

<sup>18</sup> *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092 (1895).

<sup>19</sup> See II COMMONS AND ASSOCIATES, *op. cit. supra* note 17, at 505; FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930) 52; Witte, *Labor's Resort to Injunctions* (1930) 39 YALE L. J. 374. While previous restraining orders may have been issued in labor disputes in this country, the earliest of which there appears to be a record is an injunction granted in *Keystone Coal Co. v. Davis* (Iowa 1884).

<sup>20</sup> See note 19, *supra*.

<sup>21</sup> MINN. STAT. (Mason, 1927) §§10055-56. This act, like those of Nevada and New York, also forbids interference with the tools, property or implements of any person. In addition all of these acts, as well as those of Montana and North Dakota contain the prohibitions of the Florida and Idaho statutes set out above.

A West Virginia statute forbidding persons or combinations by "force, threats, menaces or intimidations" to prevent persons from working in mines provides that it "shall not be construed so as to prevent any two or more persons from using moral suasion or lawful argument to induce anyone not to work in or about a mine." W. VA. CODE (1931) c. 22, §80, p. 1890. *Cf.* the statutes in a number of states declaring combinations to raise wages or lessen hours not unlawful. See, *e.g.*, PORTO RICO REV. STAT. & CODES (1911) §1653, p. 1902; WASH. COMP. STAT. (Remington, 1922) §7612; WIS. STAT. (1929) §133 .07.

<sup>22</sup> N. D. COMP. LAWS ANN. (1913) §9443, p. 1895; N. Y. Penal Law (1909) §§580-82, p. 1881. These acts also provide that no conspiracy other than those expressly enumerated are punishable. *Cf.* the Massachusetts, New Hampshire, Pennsylvania and Wisconsin statutes, *infra* notes 49 *et seq.*, which are not conspiracy statutes but which deal with the conduct of individuals.

spiracy statute of Nevada<sup>23</sup> was drafted along the same lines, and excludes from its operation "peaceable combinations of employees to maintain or increase wage rates"; a similar statute in Montana<sup>24</sup> applies its limitation to hours of work as well as to wages. A Colorado<sup>25</sup> statute deals with the problem by reversing the order; it declares peaceable combinations of workmen in relation to employment and wages or for the protection of their interests "not unlawful," with a provision that the act does not permit "two or more persons by threats of bodily or financial injury or by display of force to prevent or intimidate" workers, or to boycott or intimidate employers.

When the New York statute came before the courts of that state, the saving clause excluding peaceable combinations from the operation of the act was held not merely to relieve workers from criminal prosecution, but also entirely to legalize and to render non-tortious picketing carried on in a peaceable and orderly manner.<sup>26</sup> The courts in both Minnesota<sup>27</sup> and Montana<sup>28</sup> reached the same result as to the legality of picketing, but in the Minnesota cases the view was adopted without any reference to or reliance upon the statute.<sup>29</sup>

#### B. *Independent Statutes Declaring Combinations Lawful.*

A second type of legislative device used in dealing with conspiracy is a statute, independent in itself, rather than as a limitation upon a conspiracy act, which declares it either lawful or not unlawful for two or more persons to combine in order "to persuade, advise or encourage by peaceable means any person or persons to enter into any combination for or against leaving or entering the employment

<sup>23</sup> NEV. COMP. LAWS (Hillyer, 1912) §§10061, 10482, p. 1861, 1887. This act states "No part of this act shall be construed to restrict or prohibit the orderly and peaceable assembling or coöperation of persons employed . . . for the purpose of securing an advance in the rate of wages or for the maintenance of such rate." This the typical restricting provision.

<sup>24</sup> MONT. REV. CODES (Choate, 1921) §§10092-10098.

<sup>25</sup> COLO. ANN. STAT. (Mills, 1930) §463, p. 1899. But see the more recent statute which entirely forbids picketing. *Ibid.* §464.

<sup>26</sup> *Johnson Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393 (1880).

<sup>27</sup> *Minnesota Stove Co. v. Cavanaugh*, 131 Minn. 458, 155 N. W. 638 (1915); *Steffes v. Motion Pict. Mach. Oper. Union*, 136 Minn. 206, 161 N. W. 524 (1917).

<sup>28</sup> *Empire Theater Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107 (1917). This case also cites a later remedial statute which forbids the issuance of injunctions in labor disputes upon any ground upon which an injunction would not be issued in other disputes, but the court stated that this statute was merely declaratory of the common law.

<sup>29</sup> See note 27, *supra*.



of any person." New Jersey<sup>30</sup> adopted such an act in 1883, and Texas passed a similar enactment in 1899.<sup>31</sup>

An early New Jersey decision reached the conclusion that the statute had legalized picketing carried on peacefully.<sup>32</sup> But a few years later this view was repudiated,<sup>33</sup> and the court held that the effect of the statute was to prevent criminal prosecution, but that civil liability and injunctive relief were not affected, a construction which the English Conspiracy and Protection of Property Act of 1875 had met.<sup>34</sup> The view that all picketing and patrolling is unlawful was announced and followed in opinions and injunctions in later cases.<sup>35</sup> More recently, however, the New Jersey courts have disapproved their repudiation of the *Cumberland Glass Co.* case and have declared that the peaceful persuasion statute made orderly non-intimidating picketing legal; and the present doctrine in that state is that such picketing may be carried on.<sup>36</sup> Thus, New Jersey, with an affirmative, independent statute declaring peaceable combinations not unlawful has, after decades of vacillation, reached the doctrinal result which New York with a weaker, negative, limiting clause upon prohibited conduct achieved forty years earlier. The Texas statute was urged upon the Court of Civil Appeals in a recent picketing case as a ground for denying equitable relief, but the court held that the statute was inapplicable because there was no employer-employee relation between the picketer and the employer, and granted the injunction.<sup>37</sup>

<sup>30</sup> N. J. COMP. STAT. (1910) §3051, p. 1883. The wording of the Texas statute is that it "shall be lawful in combination or singly to induce by peaceable and lawful means any person to accept particular employment or enter any pursuit, provided such person shall not have the right to invade or trespass upon the premises of another."

<sup>31</sup> See TEX. STAT. (Vernon, 1928) Art. 1643, Penal Code, p. 1899.

<sup>32</sup> *Cumberland Glass Co. v. Glass Bottle Blowers' Ass'n.*, 59 N. J. Eq. 49, 55, 46 Atl. 208 (1899).

<sup>33</sup> *Frank & Dugan v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152 (1901); *Jonas Glass Co. v. Glass Bottle Blowers' Ass'n.*, 72 N. J. Eq. 653, 66 Atl. 953 (1907).

<sup>34</sup> See note 11, *supra*.

<sup>35</sup> See note 33, *supra*.

<sup>36</sup> *Keuffel & Esser v. International Ass'n. of Machinists*, 93 N. J. Eq. 429, 116 Atl. 9 (1922); *Forstmann & Huffmann Co. v. United Front Comm.*, 99 N. J. Eq. 230, 133 Atl. 202 (1926); *Snead & Co. v. International Molders' Union*, 143 Atl. 331 (N. J. Eq. 1928). But see the extremely hostile attitude toward picketing taken in *Gevas v. Greek Rest. Workers' Club*, 99 N. J. Eq. 770, 134 Atl. 309 (1926); *cf. Bayer v. Brotherhood of Painters*, 108 N. J. Eq. 257, 154 Atl. 759 (1931).

<sup>37</sup> *Webb v. Cooks', W. & W. Union*, 205 S. W. 465 (Tex. Civ. App. 1918).

*C. Statutes Limiting Conspiracy to Acts for Which a Single Individual Might be Punished.*

The third method used by legislators follows the lead of the English Conspiracy and Protection of Property Act of 1875, by which a combination to do any act in contemplation or in the furtherance of a trade dispute is made non-indictable as a conspiracy if the same act when committed by a single individual would not be punishable. California, Maryland and Oklahoma adopted such statutes;<sup>38</sup> and within recent years this device has often been employed in enactments<sup>39</sup> modelled after the Clayton Act, which will be considered independently.

The judicial history of the California legislation is noteworthy; it illustrates the shifting character of the treatment by the courts of picketing legislation and of picketing decisions. This act, like its English predecessor and the New Jersey persuasion statute, was construed to relieve the worker from criminal penalties, but was held to

<sup>38</sup> CAL. GEN. LAWS (Henning, 1920) p. 1903. The Maryland statute also declares that nothing in the act shall "affect the law relating to riot, unlawful assembly, breach of the peace or offenses against person or property." MD. ANN. CODE (Bagby, 1924) Art. 27, §43, p. 1884. OKLA. COMP. STAT. ANN. (Bunn, 1921) §7621.

An early Pennsylvania statute designed to modify the common law doctrine of criminal conspiracy was recently considered in a case arising out of a textile strike in Stroudsburg, Pennsylvania. The statute provides: "It shall be lawful for employees, acting either as individuals or collectively, or as the members of any club, assembly, association or organization, to refuse to work or labor for any person . . . whenever in his, her or their opinion the wages paid are insufficient, or his, her or their treatment is offensive or unjust, or whenever the continued labor or work by him, her or them would be contrary to the constitution, rules . . . of any . . . organization or meeting of which he, she or they may be a member or may have attended, and . . . *it shall be lawful for him, her or them to devise and adopt ways and means to make such rules, regulations . . . effective without subjecting them to indictments for conspiracy at common law or under the criminal laws of this commonwealth. . .*" (italics ours) PA. STAT. ANN. (Purdon, 1931) §43-199, p. 1872, 1876. Alfred Hoffman, an organizer of the American Federation of Full Fashioned Hosiery Workers, who came to Stroudsburg during a strike at the Mammoth Hosiery Mills, was indicted for conspiracy to commit assault upon employees of the mill and to destroy their property. The defendant contended that the statute forbade the indictment. The Superior Court, however, took the narrow view that the statute afforded no protection to persons who were not employed in the Mammoth Hosiery Mills before the strike began, and affirmed the defendant's conviction. Commonwealth v. Hoffman, Super. Ct., Pa., Nov. 30, 1931, reported by Federated Press.

<sup>39</sup> Most of the statutes which are modelled after the Clayton Act contain a provision legalizing conduct in combination which would be lawful in an individual. See notes 110 *et seq.*, *infra*; *cf.* Hall v. Johnson, 87 Ore. 21, 169 Pac. 515 (1917).

leave untouched the law of civil conspiracy.<sup>40</sup> But, unlike the other statutes, there was included in this act a provision that no restraining order or injunction might be issued in respect to combinations of workers in trade disputes.<sup>41</sup> The California Supreme Court held in 1906 that this statute could not be construed to forbid injunctive relief against picketing, for to do so would be violative of the plaintiff's constitutional right to acquire and enjoy property.<sup>42</sup> Three years later, in affirming an injunction forbidding picketing, the court declared it "idle to split hairs upon so plain a proposition . . . the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and fear."<sup>43</sup> This language has since been regarded as entirely excluding picketing in that state.<sup>44</sup>

In 1921 during a steel strike in California, groups of from two to eight pickets were established at a factory. At the hearing upon application for an injunction there was evidence of violence and abusive language; the court granted an injunction restraining, *inter alia*, the stationing of pickets for the purpose of inducing workers to quit their employment or persuading them to refuse to accept employment. The Supreme Court of the state explained its earlier cases as holding that picketing which was intimidating might be enjoined, but declared that the worker could both legally and factually carry on peaceful picketing, and modified the decree.<sup>45</sup> This decision completely ignores the statute which was designed in part at least to prevent the issuance of injunctions against picketing, and reaches a result which the court had earlier declared to be beyond the power of the legislature.

<sup>40</sup> *Goldberg, Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 86 Pac. 806 (1906); *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324 (1909); *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908); *Rosenberg v. Retail Clerks' Ass'n.*, 39 Cal. App. 67 (1918).

<sup>41</sup> "No agreement, combination . . . to do or procure to be done, or not to do or procure not to be done, any act in contemplation or furtherance of any trade dispute between employers and employees . . . shall be deemed criminal nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination . . . be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto." See note 38, *supra*.

<sup>42</sup> *Goldberg, Bowen & Co. v. Stablemen's Union*, *supra* note 40.

<sup>43</sup> *Pierce v. Stablemen's Union*, *supra* note 40, at 79, 103 Pac. at 328.

<sup>44</sup> See Sayre, *op. cit. supra* note 1, at 213, n.; COMMONS AND ANDREWS, *op. cit. supra* note 12, at 120, n.

<sup>45</sup> *Southern Cal. Iron & Steel Co. v. Amalgamated Ass'n.*, 186 Cal. 604, 200 Pac. 1 (1921).

Both Oklahoma<sup>46</sup> and Maryland,<sup>47</sup> which have criminal conspiracy statutes which place group conduct upon the same level as individual conduct have adopted the view that picketing is lawful if it is peaceable, but the statute played no part in the adoption of that view by the Maryland court.

## II. STATUTES DEALING WITH THE CONDUCT OF INDIVIDUALS

There are in addition to conspiracy statutes numerous enactments affecting picketing which deal with the conduct of individuals. Every statute, of course, which interdicts the conduct of individuals may be utilized as the basis for a conspiracy conviction. The policy of complete suppression lying behind the early English statutes has cropped up in recent times in statutes making it criminal to picket or patrol or loiter about any place of business to dissuade others from becoming or remaining customers or employees.<sup>48</sup> But the desire to prevent excesses rather than to prohibit picketing entirely lies at the core of most of the criminal statutes in this country, whether dealing with conspiracy alone or extending to the conduct of individuals.

The use of "force,"<sup>49</sup> "violence,"<sup>50</sup> "threats,"<sup>51</sup> or "intimida-

<sup>46</sup> *In re Sweitzer*, 13 Okla. Crim. 154, 162 Pac. 1134 (1917). The court here declared invalid a city ordinance forbidding picketing on the ground that it conflicted with the statute.

<sup>47</sup> *International Pocketbook Workers v. Love*, 148 Atl. 826 (Md. 1930). No reliance is placed upon the statute to reach this result.

<sup>48</sup> ALA. ANN. CODE (Michie, 1928) §3448, p. 1921; COLO. ANN. STAT. (Mills, 1930) §464; KAN. REV. STAT. ANN. (1923) c. 44, Art. 617, limited to the proper confines of Industrial Court Act, p. 1920, *State v. Personett*, 114 Kan. 680, 220 Pac. 520 (1923); NEB. COMP. STAT. (1922) §§9752-54; Utah, Laws (1919) c. 19, §§1-2; HAWAII REV. LAWS (1925) §§4360-61, p. 1923. Section 464 of the Colorado act may be taken as typical. It forbids any person to "loiter about or patrol the streets, highways . . . or place of business of any person, firm or corporation . . . for the purpose of influencing or inducing others not to trade with or work for . . . or to picket . . . place of business for the purpose of interfering with or injuring any lawful business."

In addition to these statutes, city ordinances which forbid picketing have been enacted from time to time. See *Matter of Williams*, 158 Cal. 550, 111 Pac. 1035 (1910); *People v. Armentrout*, 1 Pac. (2d) 556 (Cal. Crim. App. 1931); *Watters v. Indianapolis*, 191 Ind. 671, 134 N. E. 482 (1922); *Ex Parte Stout*, 198 S. W. 967 (Tex. Crim. App. 1917); *Ferguson v. Peake*, 18 F. (2d) 166 (D. C. App. 1927) (police regulations). The following cases have held anti-picketing ordinances invalid. *St. Louis v. Gloner*, 210 Mo. 502, 109 S. W. 30 (1908); *In re Sweitzer*, *supra* note 46.

<sup>49</sup> ALA. ANN. CODE (Michie, 1928) §3450, p. 1885; Colorado, *supra* note 25, §466, p. 1905; MASS. GEN. LAWS (1921) c. 149, §19, p. 1875; Minnesota, *supra* note 21, §10431, p. 1885; MO. REV. STAT. (1929) §4246, p. 1889; Nevada, *supra* note 23, §10431, p. 1889; New York, *supra* note 22, §530, p. 1864; North Dakota, *supra* note 22, §10241, p. 1877; Oklahoma, *supra* note 16, §§1816-17; ORE. CODE ANN. (1930) c. 14, §860; PA. STAT. ANN. (Purdon, 1931) §§43-199-201,

tion"<sup>52</sup> by any person in order to prevent another from entering into, continuing, or leaving employment is a criminal offense in many states. In a few statutes, "coercion,"<sup>53</sup> "menaces,"<sup>54</sup> "interference,"<sup>55</sup> "hindrance,"<sup>56</sup> "disturbance,"<sup>57</sup> or "molestation,"<sup>58</sup> as a means of preventing workers or customers from carrying on relations with the employer, are forbidden. Two statutes have an omnibus clause prohibiting the use of "other unlawful means,"<sup>59</sup> following an enumeration of conduct interdicted; and one statute forbids the use of "threatening words"<sup>60</sup> in order to influence another to leave or not to engage in employment. Little attempt is made to define the terms used, except in the statutes which forbid all picketing, whose language is so drastic as to be unmistakable.<sup>61</sup> There is, however, some legislation, largely adapted from the English acts, which condemns specific conduct such as "persistently following in a disorderly manner,"<sup>62</sup> "injuring the property of any person,"<sup>63</sup> "depriving any

p. 1869, 1872, 1876, 1891; Porto Rico, *supra* note 21, §1674, p. 1902; R. I. GEN. LAWS (1923) §6054, p. 1873; S. D. COMP. LAWS (1929) §4374, p. 1887; VT. GEN. LAWS (1917) §§6995-96, p. 1867; Washington, *supra* note 21, §2614, p. 1909; Wisconsin, *supra* note 21, §343.683, p. 1887.

<sup>52</sup> GA. PEN. CODE ANN. (Michie, 1926) §§126-28, p. 1887; Maine, *supra* note 16, c. 138, §27; Utah, Acts (1923) c. 93, §§1-2; Texas, *infra* note 60; Missouri; Nevada; New York; Porto Rico; Rhode Island; Washington, all *supra* note 49.

<sup>53</sup> CONN. GEN. STAT. (1930) §6208, p. 1878; ILL. REV. STAT. (Cahill, 1929) c. 38, Par. 368, p. 1863; MICH. COMP. LAWS (1929) §8672, p. 1867; UTAH COMP. LAWS (1917) §§8329, 8493, p. 1905; Alabama; Colorado; Georgia; Mississippi; Missouri; Oklahoma; Oregon; Pennsylvania; Porto Rico; Washington; Wisconsin, all *supra* notes 49 and 50. The New York act, and statutes like it, use the terms "threaten violence or injury." The Vermont statute condemns conduct which "affrights" others.

<sup>54</sup> Alabama; Colorado; Connecticut; Illinois; Maine; Massachusetts; Michigan; Minnesota; Mississippi; North Dakota; Oklahoma; Oregon; Porto Rico; South Dakota; Texas; Utah; Vermont; Wisconsin, all *supra* notes 49-51. Cf. New York and Nevada. *Ibid.*

<sup>55</sup> Porto Rico; Utah (limited to "joining an organization"); Wisconsin. *Ibid.*

<sup>56</sup> Missouri; Pennsylvania; Porto Rico. *Ibid.*

<sup>57</sup> N. H. PUB. LAWS (1926) c. 380, §27; Utah, *supra* note 51, §3688, p. 1907; Illinois; Michigan, both *supra* note 51.

<sup>58</sup> Georgia; Pennsylvania, *supra* note 49.

<sup>59</sup> Alabama, *ibid.*, at §3990, p. 1885; Michigan, *supra* note 51.

<sup>60</sup> Michigan, *ibid.*

<sup>61</sup> Alabama, *supra* note 49; Georgia, *supra* note 50.

<sup>62</sup> TEX. STAT. (Vernon, 1928) Penal Code, Art. 1146, p. 1887.

<sup>63</sup> See note 48 *supra*.

<sup>64</sup> Connecticut, *supra* note 51.

<sup>65</sup> Connecticut; Maine; Mississippi; Nevada; New Hampshire; New York, all *supra* notes 49-51, 54.

person of tools or clothing or hindering"<sup>64</sup> him in their use, or using "offensive or annoying words."<sup>65</sup>

The device of enacting prohibitions upon the picketer's conduct, and of limiting those prohibitions by expressly excluding from the condemnation of the statute persuasion when carried on peacefully, a legislative method which is employed in some of the conspiracy statutes already considered, is used in a number of the statutes aimed at the conduct of individuals. Such a limitation is to be found in the prohibitions enacted in the Massachusetts, New Hampshire, Pennsylvania and Wisconsin statutes.<sup>66</sup>

The Massachusetts Court has never found its restricting clause applicable, although it has affirmed injunctions forbidding even the mildest type of patrolling.<sup>67</sup> The Pennsylvania decisions for years wavered between the doctrine that picketing may be peaceful and lawful, and the view that all picketing is illegal.<sup>68</sup> The most recent

<sup>64</sup> Nevada; New York; Washington, *supra* note 49.

<sup>65</sup> New Hampshire, *supra* note 55.

<sup>66</sup> In 1913 the Massachusetts Act was amended to exclude "persuading any other person to do anything unless the persuasion is accompanied by injury, threat of injury, disorder or unlawful conduct or is actionable as part of a conspiracy." MASS. LAWS (1921) c. 149, §24.

The Pennsylvania statute provides that the "use of lawful or peaceful means, having for their object a lawful purpose shall not be regarded as hindering," the term being limited to the use of "force, threats or menace of harm to person or property." Pennsylvania, *supra* note 49, at §43-201.

The Wisconsin statute declares that nothing therein shall prohibit any person off the premises "from recommending, advising or persuading others by peaceful means to refrain from working at a place where a strike or lockout is in progress." Wisconsin, *supra* note 21.

The New Hampshire act provides that it is "not unlawful to reason, talk or argue with or by arguments, persuade or induce . . . [any] person to do any lawful act." New Hampshire, *supra* note 55. This act goes beyond the others in that, like the New Jersey conspiracy statute, it is an independent enactment rather than a limitation upon a prohibition.

<sup>67</sup> See, e.g., *Harvey v. Chapman*, 226 Mass. 191, 115 N. E. 304 (1917); *Walton Lunch Co. v. Kearney*, 236 Mass. 310, 128 N. E. 429 (1920).

<sup>68</sup> In an early case, although the court actually found intimidation and violence, it declared that it was unlawful for the workers to interfere with the plaintiff's business by dissuading customers from dealing with him. *Brace Bros. v. Evans*, 35 Pitt. Leg. J. 399, 5 Pa. C. C. 163 (1888). The statute was interpreted to prevent criminal prosecution, but not to affect civil liability. *Ibid.* (Cf. *Commonwealth v. Silvers*, *supra* note 3, and *Commonwealth v. Hoffman*, *supra* note 38.) Four years later the Supreme Court of Pennsylvania affirmed the issuance of an injunction where, as in the earlier case, violence and threats by the picketers had been shown; this opinion declared that peaceful persuasion was lawful. *Murdock, Kerr & Co. v. Walker*, 152 Pa. 595, 25 Atl. 492 (1892). Ever since then the courts of that state have been shuttling between the two views as to the legality of peaceful picketing.

*The following cases use language declaring all picketing unlawful:* *O'Neil v. Behanna*, 182 Pa. 236, 37 Atl. 843 (1897); *York Mfg. Co. v. Oberdick*, 25 Pa. C. C. 321 (1901); *Marietta Casting Co. v. Thuma*, 28 Pa. C. C. 248 (1903);

pronouncement, however, by the Pennsylvania Supreme Court, in a carefully considered opinion definitely follows the view that there is a lawful area open to the picketer.<sup>69</sup> A New Hampshire case has held picketing legal provided it is carried on "reasonably"; the case, however, relies upon a statute which curtails the jurisdiction of equity to issue injunctions.<sup>70</sup> The Wisconsin courts have not passed upon the question.

### III. THE LEGALITY OF PICKETING

#### A. *Picketing Illegal Irrespective of Intimidation.*

The doctrinal controversy relating to picketing has revolved about the question of the legality of "peaceful persuasion" on the picket line. Roughly, the jurisdictions may be classified into three groups in considering their legal doctrine relating to picketing. Illinois has adopted the view that all picketing is unlawful, irrespective of whether it is peaceful, and carried on without intimidation.<sup>71</sup> The reasoning upon which this conclusion is reached is a consideration of the hazards which the administration of any other rule would subject the interests of the employer and his employees. Picketing, it is argued, may readily lead to violence and threats, which are an invasion of the employer's and the non-picketing employee's interests. To permit the court of first instance to decide in each case whether the picketer's conduct has crossed the allowable line is to subject these interests to the uncertainties of the judgment and the possible bias of the trial court; all picketing must therefore be enjoined.<sup>72</sup>

*Long v. Bricklayers' & Masons' Union*, 17 Pa. Dist. 984 (1908). *The language of the following cases adopts the view that picketing is lawful if carried on without violence or intimidation: Cook & Sons v. Dolan*, 6 Pa. Dist. Rep. 524, 19 Pa. C. C. 401 (1897); *State Line & Sullivan Rd. v. Brown*, 11 Pa. Dist. 509 (1901). In most of the above cases, however, the workers used actual violence or threats of physical injury (*O'Neil v. Behanna*, *Murdock, Kerr & Co. v. Walker*, *Cook & Sons v. Dolan*); abusive language (*Marietta Casting Co. v. Thuma*, *York M'fg. Co. v. Oberdick*); engaged in mass demonstrations (*State Line & Sullivan Rd. v. Brown*); or other conduct which the court regarded as intimidating (*Brace Bros. v. Evans*) and therefore warranting the issuance of injunctions. There is one case, however, in which a single picket engaged in no conduct which the court could condemn as violent or intimidating and in which there was no abusive language, but where nevertheless an injunction against the picketer's efforts at persuasion was granted. (*Long v. Bricklayers' & Masons' Union*, *supra*.)

<sup>69</sup> *Jefferson & Ind. Coal Co. v. Marks*, 287 Pa. 171 (1926).

<sup>70</sup> *White M'tn. Freezer Co. v. Murphy*, 78 N. H. 398, 101 Atl. 357 (1917).

<sup>71</sup> *Franklin Union v. People*, 220 Ill. 355, 77 N. E. 176 (1906); *Barnes v. Typographical Union*, 232 Ill. 424, 83 N. E. 940 (1908); *cf. Lyon & Healy v. Piano Workers Union*, 289 Ill. 176, 124 N. E. 443 (1919). But *cf. Christensen v. Kellogg Switchboard & Supply Co.*, 110 Ill. App. 61 (1903).

<sup>72</sup> See note 71, *supra*.

### B. Picketing Illegal Because Necessarily Intimidating.

In 1905 a Federal District Court reached the same conclusion as the Illinois court by a different rationale.<sup>73</sup> It declared that any type of picketing or patrolling of premises in an industrial dispute is of necessity intimidating, and therefore unlawful. This view is supported by the language of cases in Michigan, Washington, Arkansas, Idaho, Iowa, and Kansas.<sup>74</sup> One cannot, however, be too confident that a court has committed itself to such a view, or that such a doctrine will prevail in the jurisdiction, as is shown by the course of decision already detailed in California, New Jersey, and Pennsylvania.

The Washington cases afford an illuminating example of judicial acrobatics in this connection. An early case<sup>75</sup> declared all picketing unlawful because it tends to violence, and this view was repeated and affirmed in later cases which granted sweeping injunctions.<sup>76</sup> Recently the problem again came before the court; after an interlocutory injunction had been granted restraining all patrolling within one hundred feet from the plaintiff's theater, an effort was made to prevent the stationing of workers carrying banners who were outside the forbidden area. The trial court's denial of the injunction was upheld by the Supreme Court which repeated its former deliverances that all picketing is unlawful, but declared, however, there must be a point where "patrolling," which is lawful, is not "picketing"; and

<sup>73</sup> *Atchison, Topeka & S. F. Ry. v. Gee*, 139 Fed. 582 (S. D. Iowa, 1905); *cf. Otis Steel & Wire Co. v. Wire Drawers' etc. Union*, 90 Fed. 608 (C. C. N. D. Ohio, 1898).

<sup>74</sup> *Hotel & Rest. Emp. v. Stathakis*, 135 Ark. 86, 205 S. W. 450 (1918); *Robison v. Hotel & Rest. Emp.*, 35 Idaho 418, 207 Pac. 132, 27 A. L. R. 642 (1922); *Ellis v. Journeyman Barbers' Union*, 194 Iowa 1179, 191 N. W. 111 (1922); *Beck v. Railway Teamsters' Prot. Union*, 118 Mich. 497, 77 N. W. 13 (1898); *Bull v. International Alliance*, 119 Kan. 713, 241 Pac. 459 (1925); see Washington cases, *infra* notes 75-76.

Two Massachusetts cases, *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307 (1888), and *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1896), have often been cited for the proposition that all picketing is unlawful or that picketing is *per se* intimidating. See *Pierce v. Stablemen's Union*, *supra* note 40, at 79, 103 Pac. at 328; *COMMONS & ANDREWS, op. cit. supra* note 12, at 120. In the *Sherry* case there was a specific finding of intimidation by the trial judge. In the *Vegeahn* case, there had been some improper conduct; and the courts have often in such a case enjoined all picketing although recognizing the right of workers to maintain a picket line so long as there is no violence or intimidation. See Note (1931) 44 HARV. L. REV. 971.

<sup>75</sup> *Jensen v. Cooks' & Waiters' Union*, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302 (1905).

<sup>76</sup> *St. Germain v. Bakery & Confectionery Workers' Union*, 97 Wash. 282, 166 Pac. 665 (1917); *Danz v. American Federation of Musicians*, 133 Wash. 186, 233 Pac. 630 (1925).



that at one hundred feet from the theater in the case, "patrolling" had begun and "picketing" had ended.<sup>77</sup>

Particularly in those states in which but a single case is relied upon for the doctrine that all picketing is *per se* intimidatory and therefore unlawful, as is true in Arkansas, Iowa, Idaho and Kansas,<sup>78</sup> the chances that this language will be followed in future cases are probably not large. In this field in which difficult industrial problems are involved, with changing social and economic policies, the fluidity in the law makes the predictability of decision hazardous. The court may readily utilize either the method used by the California Court or that employed in Washington in order to permit picketing within limits.

### C. Peaceful Picketing Lawful.

Most of the courts in which the problem has arisen have adopted the view that picketing is neither unlawful *per se* nor necessarily intimidatory, but that there is a legitimate field of peaceful persuasion for which purpose a patrol may be established.<sup>79</sup> This has been true with little reference to the nature of the statutes which are on the books. It is true in jurisdictions which have statutes specifically forbidding the use of threats, force or intimidation; it is accepted doctrine in states which have no specific limiting proviso excluding

<sup>77</sup> *Sterling Chain Theatres v. Central Labor Council*, 155 Wash. 217, 283 Pac. 1081 (1930).

<sup>78</sup> See note 74, *supra*.

<sup>79</sup> *Southern Cal. Steel & Iron Co. v. Amalgamated Ass'n.*, 186 Cal. 604, 200 Pac. 1 (1921); *Truax v. Bisbee*, 19 Ariz. 379, 171 Pac. 121 (1918) (the court relied upon a statute similar to §20 of the Clayton Act); *Jones v. Van Winkle Gin & Mach. Works*, 131 Ga. 336, 62 S. E. 236 (1908); *Karges Furn. Co. v. Amalgamated Woodworkers' Union*, 165 Ind. 421, 75 N. E. 877 (1905); *International Pocketbook Workers v. Orlove*, 148 Atl. 826 (Ind. 1930); *Steffes v. Motion Pict. Mach. Op. Union*, 136 Minn. 200, 161 N. W. 524 (1917); *St. Louis v. Gloner*, 210 Mo. App. 502, 109 S. W. 30 (1908); *Empire Theater Co. v. Cloke*, 53 Mont. 183, 163 Pac. 107 (1917); *Johnson Harvester Co. v. Meinhardt*, 9 Abb. N. C. 393 (N. Y. 1880); *La France Elect. etc. Co. v. International Broth. Elec. Workers*, 108 Ohio St. 61, 140 N. E. 899 (1923); *Greenfield v. Central Labor Council*, 104 Ore. 236, 192 Pac. 783 (1920) (statute modelled after §20 of the Clayton Act involved); *Bomes v. Providence Local No. 233*, 155 Atl. 581 (R. I. 1931); *Everett Waddey Co. v. Richmond Typo. Union*, 105 Va. 188, 53 S. E. 273 (1906); *National Woolen Mills v. Journeymen Tailors' Union*, 100 W. Va. 627, 131 S. E. 357 (1926); see New Jersey cases *supra* notes 32 *et seq.*; *cf. Citizens' Co. v. Asheville Typo. Union*, 187 N. C. 42, 121 S. E. 31 (1924); *Pope Motor Car Co. v. Keegan*, 50 Fed. 148 (C. C. N. D. Ohio 1906); *Goldfield Cons. Mines Co. v. Goldfield Miners Union*, 159 Fed. 500 (C. C. N. D. Nev. 1908); *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. 7th, 1908); *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 Fed. 851 (S. D. Ohio 1917); *United Chain Theatres v. Philadelphia Mov. Pict. Op. Union*, 50 F. (2d) 189 (E. D. Pa. 1931).

persuasion carried on peaceably,<sup>80</sup> as well as in states which have enacted the provision. The absence of any sort of legislation dealing with picketing has not prevented the enunciation of the "intimidation" rule in five states.

Fifty years of legislative action have resulted in the effective prohibition of all picketing by drastic acts in six states.<sup>81</sup> In twenty-one<sup>82</sup> out of the remaining twenty-eight states which have statutes dealing with picketing and in which the problem has arisen, whatever the variety of terminology employed in the statutes or the legislative devices used, the law declared is that picketing is lawful provided it is not violent or intimidatory. Four states have decisions whose language indicates a view that picketing is *per se* intimidating;<sup>83</sup> none of these states, however, is among those whose statutes specifically exclude peaceful persuasion from the operation of their acts.<sup>84</sup> Five states have adopted the view that picketing may be peaceable and lawful although there is no legislation on their statute books affecting picketing.<sup>85</sup>

<sup>80</sup> The rule is adopted in Montana, which has a broad general statute forbidding combinations although the term "intimidation" is not used in the act. The same rule is followed in New Jersey which has no prohibiting act, but whose statutes declare peaceful persuasion to be "not unlawful." The rule does not differ in Minnesota or New York where the statutes which forbid "intimidation" are limited by provisions excluding from their operation peaceful persuasion, nor in Pennsylvania whose act condemning "threats or menace of harm" is similarly restricted. The doctrine is the same in Arizona, Oregon and Georgia (where the act uses the term "hindering") whose statutes do not have such restricting clauses. New Hampshire, which has a statute forbidding "interference" to the injury of the business or property of another with a provision excluding reasoning, talking or arguing for purposes of persuasion has adopted the view that picketing to be lawful must be "reasonable." For the cases in these states, see note 79, *supra*.

<sup>81</sup> See note 48, *supra*; *cf.* *Hardie-Tynes Mfg Co. v. Cruse*, 189 Ala. 66, 66 So. 657 (1914).

<sup>82</sup> Arizona, Arkansas, California, Georgia, Indiana, Maryland, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Oklahoma, Pennsylvania, Rhode Island, Texas, Virginia and West Virginia. See note 79, *supra*. There is a *dictum* in a North Carolina case adopting the view that peaceful picketing is permissible. *Citizens Co. v. Asheville Typo. Union*, 187 N. C. 42, 51, 121 S. E. 31 (1924). *Cf.* Massachusetts cases, *supra* note 74.

<sup>83</sup> Washington, Idaho, Iowa, Michigan, and perhaps Massachusetts should be added. See note 74, *supra*. Kansas and Arkansas, which have, or in the case of Kansas which had, no statutes have taken the same view. *Ibid.* (See present Kansas anti-picketing statute, *supra* note 48). Illinois is the twenty-eighth state.

<sup>84</sup> The Washington statute dealing with the issuance of injunctions, which will be considered below, is not herein included.

<sup>85</sup> Indiana, Ohio, Virginia, West Virginia, and possibly North Carolina. See note 79, *supra*.

## IV. THE APPLICATION OF THE DOCTRINE

The entire legislation, therefore, has largely resulted in the doctrine that picketing, if it is permitted at all, is unlawful if it becomes intimidating or violent. But having stated the rule, the practical application in order to determine what is peaceful persuasion and what falls under the condemnation of intimidation remains untouched. The problem of deciding what is intimidation may be illustrated by several cases. Two picketers carrying a sign, "Lasters are requested to keep away from P. P. Sherry's," were held in an early Massachusetts case to have been properly enjoined for they were thereby intimidating lasters.<sup>86</sup> The same court a few years later, after the judge on hearing had restrained the use of violence and threats, but had permitted the maintenance of pickets, entirely enjoined the picketing on the ground that the stationing of two workers at the entrance to a furniture factory involved "moral intimidation."<sup>87</sup> In a Texas case in more recent times picketers, usually two in number, had been placed in front of the plaintiff's restaurant, where a strike was in progress; cards were handed to prospective customers which characterized the plaintiff as "unfair to organized labor." Now and then the pickets remarked, "Please don't go into that cafe," or "We are working for organized labor." There was no other evidence relating to threats or violence. The court concluded<sup>88</sup> that the acts complained of amounted to "coercion and intimidation." In a New Jersey case,<sup>89</sup> the conduct of four pickets patrolling the front of the plaintiff's restaurant, carrying signs denouncing the plaintiff as unfair to organized labor, was held to be intimidatory. The court took the view that a single picket might strike "terror to the souls of the employees." It also approved the language of an earlier New Jersey case,<sup>90</sup> that a picket may not "annoy" any person, and that an attempt to persuade a person who is unwilling to listen is such annoyance. The court's utter lack of appreciation of the nature of a strike is reflected by its suggestion that a picket who desired to remain within the limits allowed by law might accost a worker or a prospective customer of the employer and politely ask, "May I have a moment of your time, sir?"<sup>91</sup> and speak with him if he consented to listen.

<sup>86</sup> *Sherry v. Perkins*, *supra* note 74.

<sup>87</sup> *Vegeahn v. Guntner*, *supra* note 74.

<sup>88</sup> *Webb v. Cooks, W. & W. Union*, *supra* note 37.

<sup>89</sup> *Gevas v. Greek Rest. Workers' Club*, *supra* note 36.

<sup>90</sup> *Frank & Dugan v. Herold*, 63 N. J. Eq. 443, 52 Atl. 152 (1902).

<sup>91</sup> *Ibid.*, approved in the *Gevas* case, *supra* note 36.

On facts which closely resemble the New Jersey and Texas cases, the New York court<sup>92</sup> has held that the presence in front of a restaurant of two picketers wearing banners was not intimidatory, and was permissible. A Missouri court<sup>93</sup> has permitted four to ten pickets to stand in front of the plaintiff's factory to urge his employees to relinquish their employment and to dissuade prospective employees from accepting employment. And all of these cases purport to apply the rule permitting peaceful persuasion and interdicting intimidation. Mr. Justice Holmes' epigram that "general propositions do not decide concrete cases"<sup>94</sup> is in no field of the law more strikingly borne out. A closer examination of what the courts have done is imperative, since what they have said offers so little guide to an understanding of the state of the law of picketing.

#### A. *Calm, Temperate Persuasion and Use of Banners.*

Where a reasonably small number of pickets have been stationed in front of a factory or business house and have carried or worn banners, without speaking, there being no violence or threats of assault, the courts have been practically unanimous in permitting the conduct.<sup>95</sup> Where the pickets speak to the employees or customers and no abusive language is used, most of the cases declare the workers are within their rights.<sup>96</sup> The few cases which have taken a

<sup>92</sup> Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927).

<sup>93</sup> Church Shoe Co. v. Turner, 218 Mo. App. 516, 279 S. W. 232 (1926).

<sup>94</sup> Lochner v. New York, 198 U. S. 45, 76, 25 Sup. Ct. 539, 49 L. ed. 937 (1905), Holmes, J., *dissenting*.

<sup>95</sup> Steffes v. Motion Pict. Mach. Op. Union (single picket carrying "unfair" banner in front of theater); Empire Theatre Co. v. Cloke, both *supra* note 79; Exchange Bakery & Restaurant v. Rifkin, *supra* note 92; Clark Lunch Co. v. Cleveland Waiters etc. Local, 22 Ohio App. 265, 154 N. E. 362 (1926) (two pickets near a restaurant distributing "unfair" cards). *Contra*: Sherry v. Perkins, *supra* note 74 (a single picket carrying a banner at entrance of a shoe factory; in this case the trial court found as a fact that the conduct was intimidating). There are *dicta* declaring that a single picket tends to terrorize customers because he represents an organized group. Vice Chancellor Berry, writing in Gevas v. Greek Rest. Workers' Club, *supra* note 36, in which he made permanent an injunction against the stationing of two to four picketers at a restaurant (a case which rests in part upon the ground that no strike was found to exist) declared (p. 783): "A single sentinel, constantly parading in front of a place of employment for any extended length of time may be just as effective in striking terror to the souls of the employes, bound there by their duty, as was the swinging pendulum in Poe's famous story 'The Pit and the Pendulum' to the victim chained in its ultimate path."

<sup>96</sup> International Pocketbook Workers v. Orlove, *supra* note 47 (two to four picketers at factory, at times somewhat larger groups); Greenfield v. Central Labor Council, 104 Ore. 236, 192 Pac. 783 (1920) (a single picket only permitted); Root v. Anderson, 207 S. W. 255 (Mo. App. 1918) (theatre); Rogers v. Evarts, 17 N. Y. Supp. 264 (1891); Jonas Glass Co. v. Glass Bottle Blowers

contrary view have declared there is a "restraint of the mind," or a "moral intimidation," which is coercive and therefore enjoined.<sup>97</sup> At the other extreme of tactics used, there is no dissenting voice to the proposition that physical violence or actual threats of bodily injury may be restrained.<sup>98</sup>

### B. Denunciation and the Use of Epithets.

But it is the intermediate area—between the mild, dispassionate conduct described above and actual violence and assaults—which is of most serious concern to those engaged in industrial struggle. Unfortunately, the courts have tended without analysis to conclude that everything beyond the stationing of a few pickets who carry banners or in calm terms speak to customers or employees is beyond the lawful ambit permitted the worker. One court has allowed workers

Ass'n., *supra* note 33; Foster v. Retail Clerks' Prot. Ass'n., 39 Misc. 48, 78 N. Y. Supp. 860 (1902); Krebs v. Rosenstein, 31 Misc. 661, 66 N. Y. Supp. 42 (1900); cf. Sterling Chain Theatres v. Central Labor Council, *supra* note 77 (permissible beyond one hundred feet).

<sup>97</sup> *Vegeahn v. Guntner*; *Bull v. International Alliance*, both *supra* note 74; *Webb v. Cooks, W. & W. Union*, *supra* note 37; *Robison v. Hotel & Rest. Emp. Local*, 35 Idaho 418, 207 Pac. 132 (1922) (two waitresses carrying banners in front of restaurant, and mildly speaking to patrons; conduct declared "moral intimidation"). In the *Vegeahn* case, where two pickets was the number usually kept, although at times a larger group collected, there had been threats and acts of violence, but these had already been enjoined by Holmes, J., sitting as trial court, who dissented from the decision of the Supreme Judicial Court which enjoined all picketing. The Texas Court in the *Webb* case falls into the unfortunate tendency of some tribunals to confuse the effectiveness of a picket line with intimidation; it declares "restraint of the mind just as *potent* as a threat of physical violence." (Italics ours.) Cf. the statement by Taft, C. J., in *Truax v. Corrigan*, 257 U. S. 312, 328, 42 Sup. Ct. 124, 66 L. ed. 254 (1921). The case rests partly upon the court's conclusion that the picketing would probably result in violence, relying curiously enough, upon the employer's testimony that "I feel just like I ought to go out and kill him" (the picketer). In *Hotel & Rest. Employees v. Stathakis*, *supra* note 74, the court declares it unlawful for strikers to deprive customers of opportunity "to reflect" before entering an establishment.

The Supreme Court of Rhode Island, in a recent case, *Bomes v. Providence Local No. 233*, *supra* note 79, in which it passed upon the legality of picketing for the first time, affirmed the finding of the trial court that two picketers who paraded in front of a theatre with banners and who warned the patrons that it would be dangerous to enter, and on one occasion jostled a patron, were engaged in coercive picketing. Two judges dissented. The majority relies in part upon the fact that the picketers obstructed traffic. The case is another illustration of the identification of effective picketing and coercion, for the majority of the court uses the testimony relating to the decrease in the amount of the complainant's business as evidence of the illegality of the conduct.

<sup>98</sup> *Karges Furn. Co. v. Amalgamated Woodworkers' Union*; *La France Elect. etc. Co. v. International Broth. Elect. Workers*, both *supra* note 79; *Herzog v. Fitzgerald*, 74 App. Div. 110, 77 N. Y. Supp. 366 (1902); *Horseshoers Prot. Ass'n. v. Quinlivan*, 83 App. Div. 459, 82 N. Y. Supp. 288 (1903); *Jefferson & Ind. Coal Co. v. Marks*, *supra* note 69.

loudly to announce the existence of a strike, and that the plaintiff is unfair to workers.<sup>99</sup> But the use of abusive language, profanity or calling employees "blacklegs" or "scabs" has usually been regarded as improper.<sup>100</sup> Certainly, when a picket yells "scab" or curses a strike breaker or a customer, he is unmistakably expressing his contempt for the employee or the customer, and is voicing his vehement disapproval of the latter's conduct. Furthermore, he is attempting to hold up the employee's or the customer's conduct to the community for its disapproval. This type of conduct has been condemned as "coercive" and "intimidating." That it has a force and potency beyond calm persuasion is unquestioned; it tends to shame the worker or the customer by categorizing him as a person fighting against the interests of organized workers, and it subjects him to the contempt of members of the community who are not directly participating in the industrial dispute. But why that should make the conduct unlawful is not manifest. Vehement expression of displeasure and the branding of the employee as a non-union worker, which is hardly a falsehood, may often prevent him from working on the job not because of fear of violence or physical injury but because he is ashamed to be known as a "scab" or "blackleg."

It is exceedingly important to recognize that there is a strong emotional force which can be here exerted, which has no relation to a threat of physical injury or violence, a moral force which labor has every right to exert in industrial struggles, and that it greatly handicaps the worker to deprive him of the use of this weapon. The courts have, nevertheless, largely identified this type of appeal with intimidation,<sup>101</sup> and have prevented the non-union worker and strike-breaker from being subjected to the pressure of this emotional force.

A more sympathetic view of the use of terms such as "scab" and "blackleg" was taken in one of the earliest cases in this country

<sup>99</sup> *Truax v. Bisbie*, 19 Ariz. 379, 171 Pac. 121 (1918), *rev'd*, in *Truax v. Corrigan*, *supra* note 97.

<sup>100</sup> *Jones v. Van Winkle Gin & Mch. Works*, *supra* note 79 (profanity, calling workers "scabs" and using other abusive language declared improper; four to twelve pickets); *Minnesota Stove Co. v. Cavanaugh*, *supra* note 27; *La France Elect. etc. Co. v. International Broth. Elect. Workers*, *supra* note 79 (abusive language enjoined; no more than three pickets allowed in a group); *Jones v. Maher*, 62 Misc. 388, 116 N. Y. Supp. 180 (1909) (also occasional instances of violence; all picketing apparently enjoined); *Cook & Sons v. Dolan*, *supra* note 67 (ten to fifteen pickets; also mass picketing); *O'Neil v. Behanna*, *ibid.* (use of terms "scabs" and "blacklegs" forbidden, although the court states it is evident no violence was intended); *Marietta Casting Co. v. Hiestand*, *ibid.*

<sup>101</sup> See notes 97 and 100, *supra*.

which permitted picketing, a case decided in New York, where the court denied an injunction although abusive language had been used.<sup>102</sup> The latest pronouncement<sup>103</sup> by the highest court in that state, reflecting a spirit akin to that of the early case, suggests the "ludicrous character" of a "solemn mandate" by a court of equity enjoining a picketer from declaring his belief that employees are "scabs."

### C. *Mass Picketing.*

#### 1. The Appeal of the Group.

A strategy employed by picketers which is a powerful force in strikes and unionization campaigns is mass picketing. Twenty pickets are placed in front of a mill as the employee comes to work; he must run the gauntlet of being asked to join the union or of being characterized as a "scab" twenty times. A hundred workers parade up and down the street in front of a mill, with a band playing and singing strike songs. The force of the numbers is far greater than the appeal which a single picket can make. The emotional effect of the mass of picketers in intensifying the discomfort of being denounced as a worker who is fighting against a large group of fellow-workers, is a force which counts for much in winning or losing in industrial disputes. While it is true that the possibility of violence or actual threat of physical injury may be increased as the number on the picket line grows, nevertheless, there is little justification for granting an injunction to guard against such an occurrence, when the mass picketing has been carried on without such misconduct or without serious likelihood thereof.

#### 2. Decisions on Mass Picketing.

The present state of the law of mass picketing is a resultant of the treatment by the courts of legislative efforts within the last twenty years to relieve the worker of the harshness of the increasing crop of injunctions issued against picketing. Instead of employing the method used in the earlier statutes which have already been described, which were designed to widen the field of conduct in which the worker carrying on a trade dispute might lawfully engage, labor has sought to secure relief in more recent times by curtailing equitable jurisdiction in industrial disputes. The earliest statute in this country attacking the problem from the remedial standpoint is a

<sup>102</sup> Johnson Harvester Co. v. Meinhardt, *supra* note 26.

<sup>103</sup> Nann v. Raimist, *supra* note 9, 174 N. E. at 691.

California act,<sup>104</sup> which forbids the issuance of any restraining order in respect to any combination in furtherance of a trade dispute, unless the acts if done by individuals, would be indictable as a crime. The fate which this act met at the hands of the California courts has already been considered;<sup>105</sup> the statute did not prevent the issuance of a broad injunction forbidding all patrolling.<sup>106</sup> In 1913, Arizona<sup>107</sup> and Kansas<sup>108</sup> passed more elaborate acts seeking to cut down equity jurisdiction in trade disputes, adopting provisions which were copied almost verbatim the following year into Section 20 of the Clayton Act.<sup>109</sup> By the time the Federal Act came to the Supreme Court of the United States for interpretation four additional

<sup>104</sup> See note 41, *supra*.

<sup>105</sup> See pp. 166-167, *supra*.

<sup>106</sup> See note 40, *supra*.

<sup>107</sup> ARIZ. CODE (Struckmeyer, 1928) §4286, p. 1913.

<sup>108</sup> KAN. REV. STAT. (1923) c. 60, §1107, p. 1913.

<sup>109</sup> 38 STAT. 738 (1914), 29 U. S. C. §52 (1926).

§20. "No restraining order or injunction shall be granted by any court of the United States, or a judge or judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent an irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." The history of this legislation is set forth in FRANKFURTER AND GREENE, *op. cit. supra* note 19, at 155-64.

The Arizona statute is practically identical with §20 of the Clayton Act, except that it does not contain the last clause in the first paragraph requiring a verified application, and that it omits the words "whether singly or in concert" in the first part of the second paragraph and the final clause declaring none of the acts specified to be a violation of law. See note 107, *supra*. The Kansas statute follows the Clayton Act in all respects. See note 108, *supra*.



states had enacted substantially identical statutes,<sup>110</sup> and two others had passed similar acts but containing important variations.<sup>111</sup>

Following a steel strike in Granite City, Illinois, a picket line was established with groups of four to twelve workers stationed at various points near the foundry. After violence and assaults by the picketers had occurred, the mill secured an injunction in the Federal District Court against the Tri-City Central Trades Council and twelve individual defendants, which forbade, *inter alia*, the use of "persuasion," and the carrying on of "picketing." The Circuit Court of Appeals<sup>112</sup> modified the decree by striking out the term "persuasion" from the order and by limiting the restraint upon picketing, by adding the words "in a threatening or unlawful manner." The Supreme Court<sup>113</sup> first considered the scope of the injunction with reference to the defendants who had left the plaintiff's employment when the strike

<sup>110</sup> MINN. STAT. (Mason, 1927) §§4256-57, p. 1917; ORE. CODE ANN. (1930) §§49-902, 903, p. 1919; UTAH COMP. LAWS (1917) §§3652-53, p. 1917; WIS. STAT. (1929) §133.07. All of these acts are virtually copies of §20 of the Clayton Act; the Wisconsin statute has an additional provision which is referred to *infra* in note 137.

The Massachusetts legislature passed an act which is identical with the Arizona statute, but with an additional provision that the "right to enter into the relation of employer and employee, to change that relation, and to perform and carry on business in such relation in any place shall be construed to be a personal and not a property right." Mass. Acts and Resolves 1914, c. 778. This act was held unconstitutional. *Bogni v. Perotti*, 224 Mass. 152, 112 N. E. 853 (1916).

<sup>111</sup> N. D. COMP. LAWS (Supp., 1926) §7214, al-a2, p. 1919. This statute avoids the term "peaceful" which is used in the Clayton Act, and upon which the Supreme Court relied in construing the act as being merely declaratory of existing practice. The term "peacefully," used twice in the second paragraph of the Clayton Act is deleted, the term "peaceably" used in the clause dealing with assembling does not appear in the North Dakota statute. The qualification of the "recommending, advising and persuading" clause at the beginning of the paragraph by the words "by peaceful means so to do," and the restriction of the "patronage" clause by "peaceful and lawful means so to do" are not made. The latter clause in the North Dakota Act, however, does not include the words "or to employ."

The Washington Act is narrower in its scope than any of the others. After the words "to perform any work or labor" in the first clause of the second paragraph of §20 of the Clayton Act, it entirely eliminates the "recommending and advising" clause which follows the "attending" clause and the "patronage and employment" provision. It includes the strike benefit protection, but not the clause relating to "peaceably assembling." WASH. COMP. STAT. (Remington, 1922) §7612, p. 1919.

<sup>112</sup> *American Steel Foundries v. Tri-City Central Trades Council*, 238 Fed. 728 (C. C. A. 7th, 1917). This ruling was in accordance with the decision of the same court made nine years earlier. *Iron Molders' Union v. Allis-Chalmers Co.*, 166 Fed. 45 (C. C. A. 7th, 1917).

<sup>113</sup> *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 Sup. Ct. 72, 66 L. ed. 189 (1921). Brandeis, J., concurred specially, and Clarke, J., *dissented*, both without opinion.

was called. Attaching a sinister connotation to the term "picketing," which Chief Justice Taft, writing for the court, regarded as "inconsistent with peaceable persuasion,"<sup>114</sup> he declared that the modified decree "ignores the necessary element of intimidation in the presence of groups as pickets."<sup>115</sup> The Court, therefore, reinstated the District Court's blanket restraint upon "picketing." Section 20 of the Clayton Act, said the Court, forbids judicial restraint upon peaceable persuasion, but this introduces no new principle into the law; it is merely declaratory of the best existing equity practice.<sup>116</sup> The Circuit Court of Appeals properly deleted the prohibition of "persuasion." But because of the impropriety of group picketing, the Court limited the exercise of the right of peaceable persuasion, a right which it expressly recognized, to the stationing of one representative of the workers at each point of ingress and egress to the foundry.

The Supreme Court, in *Duplex Printing Press Co. v. Deering*,<sup>117</sup> had already decided that Section 20 of the Clayton Act applies only to persons who are ex-employees or those seeking employment; it was therefore inapplicable to the Tri-City Central Trades Council, and twelve of the individual defendants. Proceeding to pronounce one of the most glowing paeans in the books upon the necessity of trade unionism in modern industrial society,<sup>118</sup> the Court declared that the defendants who were not subject to the act, were nevertheless entitled to engage in the same conduct which the striking workers were allowed.

While the Court disclaimed any intention of establishing a rigid rule as to the number of workers who might be stationed in exercising the right of peaceable persuasion, and declared that each case must depend upon its own circumstances, the weighty influence of this decision has been reflected not only in the Federal Courts, but also in the state tribunals. The case has dealt a death blow to the legality of mass picketing in this country. Before the *Tri-City* decision, few cases made any reference at all, either in opinion or in injunctions which were granted against violent or intimidating picketing but which permitted peaceful conduct, to the actual number of workers who

<sup>114</sup> *Ibid.*, at 205.

<sup>115</sup> *Ibid.*, at 207.

<sup>116</sup> *Ibid.*, at 203.

<sup>117</sup> *Duplex Printing Press Co. v. Deering*, *supra* note 7.

<sup>118</sup> 257 U. S. 209 (1921).

might be placed on the picket line.<sup>119</sup> Since the *Tri-City* case, however, it is almost universal practise carefully to limit the number of pickets.<sup>120</sup> The device of requiring the persons stationed to be registered<sup>121</sup> and to wear distinguishing bands or numbers is now being frequently resorted to;<sup>122</sup> and the distance which the "representatives" must constantly keep between each other is sometimes prescribed in the injunction.<sup>123</sup> One court has even placed a limitation upon the hours when the workers may maintain a patrol.<sup>124</sup> The treatment of the matter by the courts takes on a ludicrous aspect. It is industrial struggle with which the courts are dealing. If strikers observe the law under the rules which have been laid down, the picket line must be carried on with the decorum of a college debate, with one or two men at each entrance representing the workers, registered, and even limited in the hours in which they may exhort, the tone of

<sup>119</sup> *Jones v. Van Winkle Gin & Mach. Works* (group of four to twelve pickets stationed at entrance to factory); *Karges Furniture Co. v. Amalgamated Woodworkers' Union* (six hundred men on strike), both *supra* note 79; *Minnesota Stove Co. v. Cavanaugh*, *supra* note 27; *Rogers v. Evarts*, *supra* note 96 (three thousand cigar makers in Binghamton on strike); *Butterick Pub. Co. v. Typographical Union*, 50 Misc. 1, 100 N. Y. Supp. 292 (1906); *Everett Waddey Co. v. Richmond Typo. Union*, *supra* note 79. But *cf.* *O'Neil v. Behanna*, *supra* note 68; *cf.* *St. Germain v. Bakery & Confectionery Workers Union*, 97 Wash. 282, 166 Pac. 665 (1917).

<sup>120</sup> *International Pocketbook Workers v. Orlove*; *La France Elect. etc. Co. v. International Broth. Elect. Workers*, both *supra* note 79 (groups may not exceed three in number); *Forstmann & Huffman Co. v. United Front Comm.*; *Snead & Co. v. International Molders' Union* (pickets limited to four in number), both *supra* note 36; *Rentner v. Sigman*, 216 App. Div. 407, 215 N. Y. Supp. 325 (1926); *Bloomfield Co. v. Joint Board* (Ohio County Ct. 1930), unreported, see 1930 LAW AND LABOR (two pickets at each entrance); *Falls Yarn Mills v. United Textile Workers* (R. I. Super. Ct. 1921), unreported, see (1921) LAW AND LABOR 125 (six pickets regarded as intimidating); *Jenckes Spinning Co. v. McMahan* (R. I. Super. Ct. 1922), unreported, see (1922) LAW AND LABOR 251; *Goldfield Cons. Mines v. Goldfield Miners Union*, *supra* note 79; *Great Northern Ry. v. Brosseau*, 286 Fed. 414 (D. C. N. D. 1923) (three pickets at each door); *Niles-Bement-Pond Co. v. Iron Molders Union*; *United Chain Theatres v. Philadelphia Mov. Pict. Op. Union* (two pickets), all *supra* note 79; *cf.* *Jefferson & Ind. Coal Co. v. Marks*, *supra* note 69. See statement in FRANKFURTER AND GREENE, *op. cit.* *supra* note 19, at 180, as to the effect of the decision on the Wisconsin practice. But *cf.* *Church Shoe Co. v. Turner*, 279 S. W. 232 (Mo. App. 1926) (four to ten pickets allowed).

<sup>121</sup> *La France Elect. etc. Co. v. International Broth. Elect. Workers*, *supra* note 79 (registration with secretary of union); *Bloomfield Co. v. Joint Board*, *supra* note 120; *Snead & Co. v. International Molders Union*, *supra* note 36; *Mullins Body Corp. v. International Ass'n. Machinists* (N. D. Ohio 1921), see 1921 LAW AND LABOR (registration with clerk of court in last three cases cited).

<sup>122</sup> *Bloomfield Co. v. Joint Board*, *supra* note 120.

<sup>123</sup> *Snead & Co. v. International Molders Union*, *supra* note 36.

<sup>124</sup> *Snead & Co. v. International Molders Union*, *supra* note 36; *United Chain Theatres v. Philadelphia Mov. Pict. Op. Union*, *supra* note 79.

voice they may use, and the gestures they may make in addressing workers in a plant which may employ a thousand workers. The irony which labor has often experienced in the courts, is reflected in these results, for the outlawry of group appeal on the picket line, one of labor's most effective weapons, has grown out of the construction of organized labor's Magna Charta at the hands of a court eloquently praising trade unionism.<sup>125</sup>

The *Tri-City* case has had an unfortunate effect even beyond mass picketing and the limitation of the scope of remedial statutes. The court's condemnation of "persistence, importunity, following and dogging," which it declared "becomes unjustifiable annoyance and obstruction, which is likely soon to savor of intimidation" has received frequent quotation as an aid greatly to limit<sup>126</sup> the proper extent of individual conduct on the picket line.<sup>127</sup>

<sup>125</sup> The limitations which the Supreme Court has placed upon the scope of disputes and parties protected by §20 of the Clayton Act have been applied by state courts to the state acts similarly drawn. *Bull v. International Alliance*, *supra* note 74; *Heitkemper v. Central Labor Council*, 99 Ore. 1, 192 Pac. 765 (1920); *Crouch v. Central Labor Council*, unreported, see (Jan. 1931) *LAW AND LABOR* (Ore. 1930); *Pacific Coast Coal Co. v. United Mine Workers of America*, 122 Wash. 423, 210 N. W. 253 (1922); *Pacific Coast Typesetting Co. v. International Typo. Union*, 125 Wash. 273, 210 Pac. 953 (1923). *Cf.* holdings of lower Federal courts: *International Organization U. M. W. A. v. Red Jacket Coal Co.*, 18 F. (2d) 839 (C. C. A. 4th, 1927), *certiorari* denied, 275 U. S. 536 (1928); *Quinlivan v. Dail Overland Co.*, 274 Fed. 56 (C. C. A. 6th, 1921) (strike "practically over"); *Western Union Tel. Co. v. International Broth. Elect. Workers*, 2 F. (2d) 993 (N. D. Ill. 1925) (act does not cover efforts to induce employees not to perform their duties); *Canoe Coal Co. v. Christinson*, 281 Fed. 559 (D. Ky. 1922) (court held act does not apply to strikers for they are no longer employees), *rev'd.*, on another ground, *sub. nom. Sandefur v. Canoe Creek Coal Co.*, 293 Fed. 379 (C. C. A. 6th, 1923), 266 U. S. 42, 45 Sup. Ct. 18, 69 L. ed. 162 (1924). See FRANKFURTER AND GREENE, *op. cit. supra* note 19, at 173 *et seq.*

<sup>126</sup> See *Gegas v. Greek Rest. Workers' Club*, *supra* note 36; *Ellis v. Journey-men Barbers' Union*; *Robison v. Hotel & Rest. Emp.*, both *supra* note 74; *Webb v. Cooks, W. & W. Union*, *supra* note 37; *Citizens Co. v. Asheville Typo. Union*, *supra* note 79.

<sup>127</sup> A New Jersey statute passed after the decision in the *Tri-City* case, and drawn apparently to avoid this narrow construction was held by the New Jersey court, which apparently noticed no difference between its statute and the Clayton Act, to be similarly limited. *Gegas v. Greek Rest. Workers' Club*, *supra* note 36. Here a strike had been instituted but the court took the view that when the jobs of striking workers had been filled, no dispute existed under the terms of the statute. *Accord*, under the Clayton Act, *Quinlivan v. Dail-Overland Co.*, *supra* note 125. The New Jersey statute provides:

"No restraining order or injunction shall be granted by any court in this state in any case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising, or persuading others so to do;

## V. FUTURE LEGISLATION AND CONSTITUTIONAL RESTRICTIONS

Attempts to widen the field within which the picketer may operate face constitutional barriers. In *Truax v. Corrigan*,<sup>128</sup> a writ of error was taken to review the affirmance by the Supreme Court of Arizona of the dismissal of a bill to enjoin the conduct of striking workers, who were picketing the plaintiff's restaurant, and were loudly announcing the existence of a strike. They denounced employees and customers with abusive epithets, and made statements which were regarded as libelous; no violence, however, was charged. The state court declared that prior to the enactment of a statute similar to Section 20 of the Clayton Act, all picketing was unlawful in Arizona, but that under the statute the conduct charged was not enjoined.<sup>129</sup> The Supreme Court held that the denial of the injunction was a violation of the Fourteenth Amendment. This conduct, said Chief Justice Taft, was not "lawful persuasion." "It was compelling every customer to run the gauntlet of the most uncomfortable publicity, aggressive and annoying importunity, libelous attacks, and fear of consequences, illegally inflicted to his reputation and standing in the community. . . . Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction and it was thus plainly a conspiracy."<sup>130</sup> If this conduct is legal, said the Court, it violates the due process clause. To the argument that the denial of equitable relief is not a deprivation of property, the Court replied or from peaceably and without threats or intimidation being upon any public street or thoroughfare or highway for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or to abstain from working, or to employ or to peaceably and without threats or intimidation cease to employ any party to a labor dispute, or to peaceably and without threats or intimidation recommend, advise, or persuade others so to do, provided said persons remain separated one from the other at intervals of ten paces or more." The effort to deal with mass picketing in the last clause of the act is probably the only statutory attempt which attacks the problem. N. J. COMP. STAT. (Supp., 1931) §§107-131a, LAWS 1926, c. 206.

A similar act was passed in Illinois, ILL. REV. STAT. (Cahill, 1929), p. 1925, which is practically a verbatim copy of the New Jersey statute except that it does not contain the mandate in the latter act as to separation of pickets; and the clause immediately preceding that proviso is not qualified by the words "peaceably and without threats or intimidation." There is an intimation in a recent case that the Illinois court, like the New Jersey court, appreciates no substantial differences between its statute and the Clayton Act. See *Ossey v. Retail Clerks' Union*, 326 Ill. 405, 158 N. E. 162 (1927). Cf. also *Webb v. Cooks, W. & W. Union*, *supra* note 37 (a Texas case).

<sup>128</sup> *Truax v. Corrigan*, *supra* note 97. Holmes, Pitney, Clarke and Brandeis, JJ., *dissented*.

<sup>129</sup> *Truax v. Bisbee*, *supra* note 79.

<sup>130</sup> *Supra* note 128.

that since the act applied only to persons in the employer-employee relation, a special class had been created, and the employer is thereby denied equal protection of the laws.<sup>131</sup>

Two states have attempted to avoid the condemnation of the Arizona statute on the ground of the equal protection clause.<sup>132</sup> In neither state has the question of the constitutionality of the act been yet raised.<sup>133</sup> An important attempt to change the Federal Law is being made in the proposed Shipstead bill.<sup>134</sup> The chief merit of the bill is the particularity with which it deals with the conduct which it seeks to withdraw from equity's jurisdiction. It discards the frequent use of the terms "peaceful" and "lawful" in the Clayton act; and avoids the limitation of its force to the finding of an employer-employee relation. Its use of the terms "violence" and "fraud" as its sole condemnatory terms is notable.

A satisfactory handling of the problem of picketing requires similar legislation from the substantive angle.<sup>135</sup> The specific con-

<sup>131</sup> See argument of dissent, *ibid.*, 350-51; FRANKFURTER AND GREENE, *op. cit. supra* note 19, at 179 *et seq.*; (1922) 31 YALE L. J. 408.

<sup>132</sup> New Jersey and Illinois. See note 127, *supra*; see also, Bayer v. Brotherhood of Painters, *supra* note 36.

<sup>133</sup> Cf. Ossey v. Retail Clerks' Union, *supra* note 127; Gevas v. Greek Rest. Workers' Club, *supra* note 36.

<sup>134</sup> See FRANKFURTER AND GREENE, *op. cit. supra* note 19, at App. IX.

§4. "No court of the U. S. shall have jurisdiction to issue any restraining order or injunction in cases involving or growing out of any labor dispute to prohibit any person or persons participating and interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

... (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act."

<sup>135</sup> The courts have scarcely scratched the surface of the problem in analyzing the various types of conduct in which a picketer engages, but have with a broad sweep crudely condemned conduct as intimidating. A picketer may:

(1) Merely observe workers or customers. (2) Communicate information, e.g., that a strike is in progress, making either true, untrue or libelous statements. (3) Persuade employees or customers not to engage in relations with the employer: (a) through the use of banners, without speaking, carrying, true, untrue or libelous legends; (b) by speaking, (i) in a calm, dispassionate manner, (ii) in a heated, hostile manner, (iii) using abusive epithets and pro-

duct interdicted must be described with more particularity. We have much to learn from the English legislation,<sup>136</sup> which we have largely ignored. Much would be gained by eliminating the terms "intimidation" and "threats" from the statutes and literature, and by following the example of the Shipstead bill of confining conspiracy and statutes affecting individual conduct to the use of violence and fraud, and if desired to the "threat of physical injury."<sup>137</sup>

## VI. CONCLUSION

Legislation alone cannot result in a solution of the problem of picketing, for interpretation and administration lie with the courts. The most striking feature of this survey of picketing legislation is the ignominious rôle which the statutes have played in the decisions. So long as the courts remain hostile to forceful trade-union activity, amelioratory acts will be held declaratory of the common law, they will be construed out of existence, or be held unconstitutional. Trade union activity and militant picketing will go on irrespective of the law. The result of the failure of the courts in this field to heed the admonition of sociological jurisprudence<sup>138</sup> that the main problem of the jurist is intelligently to take account of the social facts upon which the law must proceed has resulted in the past in a defiance of the law and a bitter feeling among labor organizations towards the courts.<sup>139</sup>

fany, (iv) yelling loudly, (v) by persisting in making arguments when employees or customers refuse to listen; (c) by offering money or similar inducements to strike breakers. (4) Threaten employees or customers: (a) by the mere presence of the picketer; the presence may be a threat of, (i) physical violence, (ii) social ostracism, being branded in the community as a "scab," (iii) a trade or employees' boycott, *i.e.*, preventing workers from securing employment and refusing to trade with customers, (iv) threatening injury to property; (b) by verbal threats. (5) Assaults and use of violence. (6) Destruction of property. (7) Blocking of entrances and interference with traffic.

The picketer may engage in a combination of any of the types of conduct enumerated above. The picketing may be carried on singly or in groups; it may be directed to employees alone or to customers alone or to both. It may involve persons who have contracts with the employer or those who have not or both.

<sup>136</sup> See note 11, *supra*.

<sup>137</sup> The consequences arising out of the issuance of restraining orders *ex parte* and the inadequate hearings held on applications for injunctions based upon affidavits have brought legislative efforts to secure a more satisfactory procedure. See N. Y. Civil Practice Act, §882, as amended by Laws, 1930, c. 378; WIS. STAT. (1927) §133.07 (*ex parte* restraining orders abolished); MASS. GEN. LAWS (1921) c. 214, §9; FRANKFURTER AND GREENE, *supra* note 18, at 180 *et seq.*

<sup>138</sup> Pound, *Scope and Purpose of Sociological Jurisprudence* (1912) 25 HARV. L. REV. 512-13.

<sup>139</sup> See Sayre, *loc. cit. supra* note 7.

With the growth of technological unemployment, and the increasing dis-skillification of workers,<sup>140</sup> labor organization and industrial strife are likely to increase. Until the courts, unlike the late Chief Justice himself, sympathetically accept as a postulate in handling picketing cases and picketing legislation Chief Justice Taft's declaration that trade unionism is a social necessity,<sup>141</sup> a workable adjustment based upon present day economic facts of the interests of organized workers, unorganized workers, employers and the public cannot be made.

<sup>140</sup> See CHASE, *MEN AND MACHINES* (1929) *passim*.

<sup>141</sup> *American Steel Foundries v. Tri-City Central Trades Council*, *supra* note 113.

[For a recent book discussing the use of the strike injunction, including its effect on picketing, see McCracken, *STRIKE INJUNCTIONS IN THE NEW SOUTH* (1931), reviewed in this issue at page 230.

The latest development in picketing, as reported in recent newspaper accounts, is in the field of commercial aviation. Striking pilots of the Century Air Lines flew planes carrying placards to the effect that Century was unfair to pilots. These planes were flown alongside Century planes operated by strikebreaking pilots so that passengers could read the placards. *TIME*, Vol. 19, No. 8, at p. 55. Ed.]