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PEACEFUL PICKETING FOR UNLAWFUL OBJECTIVE

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With increasing frequency, injunctions against peaceful picketing are being granted in the state courts on the ground that, though the manner of picketing is unobjectionable, the goal sought by the pickets is not a lawful labor objective.[1] Though adherence to this unlawful purpose doctrine is remarkably uniform,[2] there is still considerable doubt both as to how to identify the objective in picketing, and by what standards to determine its legality. There is also some doubt as to how far the doctrine may be carried, since the right to picket is, at least for some purposes and under some circumstances, constitutionally protected as a form of free speech.[3]

The unlawful purpose doctrine seems to have two historical roots. The first is in the derivation of our modern labor law from the common law doctrine of criminal conspiracy,[4] which regarded any combination of persons as criminal which sought either a lawful objective by unlawful means or an unlawful objective by means ordinarily permissible.[5] The second, associated with the name of Justice Holmes,[6] is in the doc-

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[1] See comments in 16 U. OF CHI. L. REV. 701 (1949); 28 ORE. L. REV. 391 (1949); 5 WASH. & LEE L. REV. 259 (1948); and cases collected in Anno., 174 A. L. R. 593 (1948).

[2] There have been a few dissenting voices. The Supreme Court of Nevada stated in State *ex rel.* Culinary Workers Union v. Eighth Judicial District Court, 207 P. 2d 990, 993-4 (1949): "The right to peaceful picketing must not be circumscribed by vague and ephemeral notions of 'legitimate' and 'illegitimate' purposes for which it may or may not be exercised. Free speech, which includes the right to peaceful picketing, must be given the greatest possible scope and have the least possible restrictions imposed upon it, for it is basic to representative democracy." But on rehearing, though it declared that its earlier opinion was reaffirmed, the Court also remarked that picketing to accomplish unionization "was for a lawful objective." 25 L. R. R. M. 2023 (1949).

The Supreme Court of Washington rejected the unlawful purpose doctrine in favor of the clear and present danger test in State *ex rel.* Lumber & Sawmill Workers v. Superior Court, 164 P. 2d 662 (1945).

[3] "If picketing is a form of free speech, it may not be enjoined although carried on for an improper objective." TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1940), 1947 SUPPLEMENT 80. See also Armstrong, *Where Are We Going with Picketing,* 36 CALIF. L. REV. 1, 34-39 (1948).

[4] FRANKFURTER AND GREENE, THE LABOR INJUNCTION 1-24 (1930).

[5] Pettibone v. United States, 148 U. S. 197, 203 (1892).

[6] Holmes, *Privilege, Malice and Intent,* 8 HARV. L. REV. 1 (1894). See Holmes' opinions in Vegelahn v. Guntner, 167 Mass. 92 (1896); Plant v. Woods, 176 Mass. 492 (1900); Aikens v. Wisconsin, 195 U. S. 194 (1904).

trine of presumptive tort[7] which treats any intentional injury as actionable unless the actor can prove justification.

In the last decade the courts have increasingly resorted to the unlawful purpose doctrine as a convenient escape from the constitutional identification of picketing with free speech.[8] A simultaneous and parallel development has been the tendency to give a restricted definition to the term "labor dispute" for the purpose of narrowing the scope of state anti-injunction statutes.[9] In some recent cases, the question of what is a "labor dispute" and of what is a lawful labor objective have tended to become almost indistinguishable.[10]

Identification of Objective

From the complex of aims and motivations behind an instance of picketing, the selection of a single goal to be treated as the picketing objective is not so simple as it might sound.[11] In holding the objective of picketing lawful or unlawful, courts have focused the question at six different levels:

1) The effort to inform the public of the controversy;[12]

[7] 1 Teller, Labor Disputes and Collective Bargaining 183-193 (1940).

[8] For example: "If picketing is speech, it is certainly also much more. However peacefully it may be carried on, it possesses elements of compulsion upon the person picketed which bear little relation to the communication to anyone of information or of ideas. . . . Until we are more positively directed to the contrary we prefer to think . . . [that it can be enjoined] . . . at least in a case like this where the defendants' method of speaking involves an otherwise unlawful combination for an unjustified objective and a form of compulsion which is not speech and which strikes directly at the basic right of a man to use his hands to earn a living." Saveall v. Demers, 322 Mass. 70, 76 N. E. 2d 12, 14-15 (1947). See authorities cited notes 1 and 3 *supra*.

[9] See, *e.g.*, Amalgamated Meat Cutters v. Green, 119 Colo. 92, 200 P. 2d 924 (1948) (demand for closed shop after workers voted against union not a labor dispute). *Contra:* Baker Community Hotel Co. v. Hotel & Restaurant Employees, 207 P. 2d 1129 (Ore. 1949). Several state courts, however, have recently held restriction of the right of picketing to "labor disputes" unconstitutional. *Ex parte* Hunn, 357 Mo. 256, 207 S. W. 2d 468 (1948); Int'l. Union of Operating Engineers v. Cox, 219 S. W. 2d 787 (Tex. 1949); Ira A. Watson Co. v. Wilson, 187 Tenn. 402, 215 S. W. 2d 801 (Tenn. 1948). In the *Hunn* and *Cox* cases, statutes embodying the rule were held invalid.

[10] See, *e.g.*, Mayer Bros. Poultry Farms v. Meltzer, 80 N. Y. S. 2d 874 (Sup. Ct., App. Div. 1st Dep't. 1948) (picketing against out-of-state goods); Amalgamated Meat Cutters v. Green *supra* note 9. In Construction & General Labor Union v. Stephenson, 221 S. W. 2d 375 (Tex. Civ. App. 1949), picketing to demand unionization was enjoined on grounds of no labor dispute. On appeal, the Texas Supreme Court held the statute restricting picketing to labor disputes unconstitutional, but upheld the injunction on unlawful purpose reasoning. 25 L. R. R. M. 2228 (1950).

[11] For a psychologist's estimate of its complexity, see Stagner, *Psychological Aspects of Industrial Conflict: II. Motivation,* in forthcoming Spring, 1950 issue of Personnel Psychology.

[12] Int'l. Bro. of Teamsters v. Missouri Pacific Freight Transport, 220 S. W. 2d 219 (Tex. Civ. App. 1949) (purpose of picketing railroad depot was to inform public of principal-agent relationship between railway and the local transfer company with which union had dispute); *see* Foutts v. Journeymen Barbers, 88 N. E. 2d 317 (Ohio C. P. 1949) (though union might not lawfully take master-barber's shop card for refusing to become non-active member, it might lawfully picket to acquaint public with facts of dispute).

2) The nature of the aid sought from the persons whose support the picketing solicits;[13]

3) The nature of the intended pressure on the party picketed;[14]

4) The nature of the concession which the party picketed is desired to make;[15]

5) The union's more immediate reason for desiring that concession;[16]

6) The union's over-all institutional objective.[17]

It is clear that these are not alternatives but rather are all present together in a typical case. For example, the simplest possible case of "recognition picketing" has all the following aims, any one of which can be called its "objective": (1) to inform customers of the existence of the dispute; (2) to persuade customers to withhold their trade; (3) to cause the employer loss of income; (4) to induce the employer to sign a contract; (5) to strengthen the position of the union, thus making it a more effective instrument for attaining (6) more satisfactory arrangements for workers in the industry. It is clear that each step is simultaneously means and end, the objective of the previous step and the means toward the one following. It is also clear that the legality of a picketing objective can be considerably varied on the same state of facts by a somewhat arbitrary selection of an "objective."[18]

This wealth of possible approaches may lead to the recognition of two or more objectives, one of which is ruled lawful and the other unlawful. In this situation, it has been held that the pickting may be

[13] Enterprise Window Cleaning Co. v. Slowuta, 79 N. Y. S. 2d 91 (Sup. Ct. App. Div. 1948) (secondary boycott); Sterling v. Duke, 33 Ohio App. 482, 67 N. E. 2d 24 (1946) (picket line by one union caused members of another to cease work, violating contract).

[14] Hanke v. Int'l. Bro. of Teamsters, 207 P. 2d 206 (Wash. 1949); Cline v. Automobile Drivers Union, 207 P. 2d 216 (Wash. 1949) (picketing self-employed); Pipe Machinery Co. v. DeMore, 76 N. E. 2d 725 (Ohio Ct. App. 1947) (picketing homes of non-strikers).

[15] Hobbs v. Poteet, 357 Mo. 152, 207 S. W. 2d 501 (1947) (induce dairy to boycott non-union drivers). This is the commonest approach. See cases cited *infra* notes 20 through 23.

[16] Baker Community Hotel Co. v. Hotel & Restaurant Employees, 207 P. 2d 1129 (Ore. 1949); Berger v. Sailors' Union of Pacific, 29 Wash. 2d 810, 189 P. 2d 473 (1948).

[17] Standard Grocery Co. v. Local 406, 321 Mich. 276, 32 N. W. 2d 519 (1948) (inducing employer to coerce workers into union justified by purpose of raising wages to union standard); Hennigh v. Teamsters Union, 18 L. R. R. M. 2213 (Colo. Dist. Ct. 1946) (inducing retail stores to boycott dairy justified by purpose to organize dairy workers); Lubbers v. Hurst, 78 N. E. 2d 580 (Ohio C. P. 1946) (closed shop means toward laudatory objective of organizing entire industry). The ultimate objective test was rejected in Burlington Transportation Co. v. Hathaway, 234 Ia. 135, 12 N. W. 2d 167, 13 L. R. R. M. 706 (1943) (inducing truck drivers to stop deliveries to grocery not justified by objective of organizing grocery) and apparently also in Giboney v. Empire Storage & Ice Co., 336 U. S. 490 (1949) (inducing violation anti-trust law not justified by desire to improve wages and working conditions).

[18] *Compare, e.g.,* Standard Grocery Co. v. Local 406, *supra* note 17, *with* Massachusetts cases cited *infra* note 32.

enjoined, if there is no evidence that the union has renounced its unlawful aim.[19]

TESTS OF LEGALITY OF OBJECTIVE

Recent cases applying the unlawful purpose doctrine seem to fall roughly into three broad classifications, which, for convenience of reference, may be called "illegal result cases," "balance sheet cases" and "ultra vires cases." "Illegal result cases" designates those in which picketing, if successful, will produce some arrangement or act which the law or public policy has attempted to prevent. "Balance sheet cases" describes those in which the court enjoins picketing because the objective which it seeks to achieve is not considered sufficiently necessary or important to justify the harm to the plaintiff's business which the picketing would bring about. "Ultra vires cases" refers to those in which the object sought, though not a violation of positive law, is nevertheless held to be outside "the allowable orbit of labor activity."

The strongest case for an unlawful purpose injunction is where the objective sought would violate a criminal statute, for example, a state anti-trust law[20] or a state "right to work" statute,[21] prohibiting union security agreements. A variation of this situation which furnishes the great bulk of the cases is that where the concession sought from the employer is one which, if granted, would constitute an unfair labor practice under state[22] or federal[23] labor relations acts.

Inducing a railroad or an express company to fail to perform its duty as a common carrier has been held to render picketing illegal, both where such non-performance was clearly a purpose sought by the pickets[24] and in situations where it may have been a mere accidental result.[25] Inducing breach of contract is also a frequent ground for

[19] Fred Wolferman, Inc. v. Root, 356 Mo. 976, 204 S. W. 2d 733, 174 A. L. R. 585 (1947), *cert. denied*, 333 U. S. 837 (1948). *But see* Iacomini's Restaurant v. Hotel & Restaurant Employees, 85 N. E. 2d 534 (Ohio C. P. 1948).

[20] Harper v. Brennan, 311 Mich. 489, 18 N. W. 2d 905 (1945); Giboney v. Empire Ice and Storage Co., 336 U. S. 490 (1949).

[21] Construction and General Labor Union v. Stephenson, 221 S. W. 2d 375 (Tex. Civ. App. 1949). *But cf.* Hotel & Restaurant Employees v. Greenwood, 249 Ala. 265, 30 So. 2d 696 (1947), *cert. denied*, 332 U. S. 847 (1948).

[22] Consumers Sand & Gravel Co. v. Kalamazoo Trades Council, 321 Mich. 361, 32 N. W. 2d 531 (1948); Wisconsin Emp. Re. Brd. v. Journeymen Barbers, 39 N. W. 2d 725 (Wis. 1949).

[23] Douds v. Local 1250, Retail, Wholesale Union, 170 F. 2d 700 (2d Cir. 1948); Swenson v. Seattle Central Labor Council, 27 Wash. 2d 193, 177 P. 2d 873 (1947). *Contra* Park & Tilford Import Corp. v. Teamsters' Union, 27 Cal. 2d 599, 165 P. 2d 891, 162 A. L. R. 1426 (1946); Gerry of Calif. v. Super. Ct., 32 Cal. 2d 119, 194 P. 2d 689 (1948).

[24] Burlington Transportation Co. v. Hathaway, 234 Ia. 135, 12 N. W. 2d 167 (1943); Northwestern Pacific R. R. v. Lumber & Sawmill Workers Union, 31 Cal. 2d 441, 189 P. 2d 277 (1948).

[25] Turner v. Zanes, 206 S. W. 2d 144 (Tex. Civ. App. 1947); Simons v. Retail Clerks Union, 21 L. R. R. M. 2685 (Cal. Super. Ct. 1948). *But cf.* Int'l. Bro. of Teamsters v. Missouri Pacific Freight Transport, 220 S. W. 2d 219 (Tex. Civ. App. 1949).

anti-picketing injunctions,[26] and this also has been extended from purpose to result.[27]

A few cases have held that picketing may be enjoined where its purpose is one which, though not a violation of positive law, is nevertheless contrary to public policy.[28] An interesting application of this view is the California rule that a closed union may not picket for a closed shop.[29] This rule was recently held to render illegal the picketing of stores with the demand that they hire Negro help in proportion to their Negro clientele.[30]

Some few cases take the "balance sheet" view that, though a labor objective is not *per se* objectionable, it may still be of insufficient importance or the union's interest in it may be too indirect to justify picketing.[31] Thus, Massachusetts, long before the Taft-Hartley Act, held that though closed shop agreements were legal and enforceable, picketing for a closed shop was unlawful.[32] Even where the labor interest is treated as a form of free speech, it has been held outweighed by the right to conduct a lawful business with a minimum of interference.[33]

[26] Markham & Callow, Inc. v. Int'l. Woodworkers, 170 Ore. 517, 135 P. 2d 727 (1943); Pacific Navigation & Trading Co. v. Nat'l. Org. of Masters, 207 P. 2d 221 (Wash. 1949); Int'l. Asso. of Machinists v. Downtown Employees Asso., 204 S. W. 2d 685 (Tex. Civ. App. 1947); Fay Loevin Apparel Shops, Inc. v. Harlem Labor Union, 24 L. R. R. M. 2567 (N. Y. Sup. Ct., Special Term, Part V 1949). *Contra* Lichtenberger-Ferguson Co. v. Int'l. Jewelry Workers, 20 L. R. R. M. 2785 (Cal. Super. Ct. 1946); Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P. 2d 631 (dictum).

[27] Sterling v. Duke, 33 Ohio App. 482, 67 N. E. 2d 24 (1946).

[28] R. H. White Co. v. Murphy, 310 Mass. 510, 38 N. E. 2d 685 (1942); Gazzam v. Bldg. Service Employees' Union, 29 Wash. 2d 488, 188 P. 2d 97 (1947) (closed shop); Los Angeles v. Bldg. Trades Council, 210 P. 2d 305 (Cal. Dist. Ct. App. 2d Dist. 1949) (demand that city water works employees be reclassified).

[29] James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329, 160 A. L. R. 900 (1944) (Negroes excluded from full membership); Riviello v. Journeymen Barbers, 88 Cal. App. 2d 499, 199 P. 2d 400 (1948) (worker-proprietors excluded from full membership); Bautista v. Jones, 25 Cal. 2d 746, 155 P. 2d 343 (1944) (union picketed for jurisdiction over work done by peddlers ineligible to membership).

[30] Hughes v. Super. Ct., 32 Cal. 2d 850, 198 P. 2d 885 (1948). In the Hughes case, the Negroes' demand was regarded as equivalent to a closed union seeking closed shop treatment as to a certain proportion of available jobs. For other approaches to this problem, see Green v. Samuelson, 168 Md. 421, 178 Atl. 109, 99 A. L. R. 528 (1935) (held objective of Negro employment lawful, but picketing not lawful means toward such objective) and New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938) (held picketing for Negro employment is "labor dispute" within Norris-LaGuardia Act, hence not enjoinable in federal court).

[31] Dinoffria v. Int'l. Bro. of Teamsters, 72 N. E. 2d 635 (Ill. App. Ct. 2d Dist. 1947). See also cases cited *infra* notes 32 and 33.

[32] Davis Bros. Fisheries v. Pimentel, 78 N. E. 2d 93 (Mass. 1948); Colonial Press v. Ellis, 321 Mass. 495, 74 N. E. 2d 1 (1947); Fashioncraft v. Halpern, 313 Mass. 385, 48 N. E. 2d 1 (1943).

[33] Dinoffria v. Int'l. Bro. of Teamsters, *supra* note 31, Lafayette Dramatic Productions, Inc. v. Ferentz, 305 Mich. 193, 9 N. W. 2d 57 (1943); Shively v. Garage Employees Union, 6 Wash. 2d 560, 108 P. 2d 354 (1940).

"Ultra vires cases" were relatively frequent a decade ago.[34] Though this version of the unlawful purpose doctrine is probably not dead,[35] it seems to be growing less common in the more recent decisions.

A few state courts have drawn from the identification of picketing with free speech the logical conclusion that the injunction should be aimed only at the unlawful purpose and that the right to picket for other purposes should be left open.[36] In the great majority of instances, however, the decrees are formulated as absolute prohibitions of any further picketing.

THE CONSTITUTIONAL QUESTION

As recently as 1921, it was regarded as an unconstitutional discrimination against employers to limit the use of the injunction in labor disputes more narrowly than in other types of disputes.[37] Even the liberal minority of the court, though supporting the right to picket, regarded it as having no constitutional sanction.[38] The change in the national attitude toward labor which produced the Norris-LaGuardia and Wagner Acts gave birth also to a new constitutional doctrine. In the *Senn* case,[39] in 1937, in upholding a state anti-injunction statute, Justice Brandeis made the fateful remark that "Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."[40]

During the same period a few state courts began to hold that picketing was a constitutional right.[41] In the *Thornhill*[42] case, in 1940, the United States Supreme Court held that a statute embodying sweeping

[34] 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 346-51 (1940) and cases there cited.

[35] Dinoffria v. Int'l. Bro. of Teamsters, 72 N. E. 2d 635 (Ill. App. Ct. 2d Dist. 1947) (dictate working hours to self-employed gas station operator); Saveall v. Demers, 322 Mass. 70, 76 N. E. 2d 12 (1947) (dictate prices to self-employed barber).

[36] Park & Tilford Import Corp. v. Teamsters Union, 27 Cal. 2d 599, 165 P. 2d 891 (1946); Gerry of Calif. v. Super. Ct., 32 Cal. 2d 119, 194 P. 2d 689 (1948); Iacomini's Restaurant v. Hotel & Restaurant Employees, 85 N. E. 2d 534 (Ohio C. P. 1948).

[37] Truax v. Corrigan, 257 U. S. 312 (1921).

[38] See Brandeis (joined by Holmes and Clarke) dissenting in Duplex Printing Press Co. v. Deering, 254 U. S. 443, 488 (1921).

[39] Senn v. Tile Layers Protective Union, 301 U. S. 468 (1937).

[40] *Id.* at p. 478. Gregory contends this remark has been misinterpreted and was not intended to imply that picketing is free speech. GREGORY, LABOR AND THE LAW 340 (1946).

[41] Reno v. Second Judicial District Court, 59 Nev. 416, 95 P. 2d 994, 125 A. L. R. 948 (1939); *Ex parte* Lyons, 27 Cal. App. 2d 293, 81 P. 2d 190 (1938). For a vague dictum which might be interpreted as suggesting a constitutional right to picket, see Citizens Co. v. Asheville Typographical Union, 187 N. C. 42, 49-50, 121 S. E. 31, 35 (1924).

[42] Thornhill v. Alabama, 310 U. S. 88 (1940). See also companion case, Carlson v. California, 310 U. S. 106, *rehearing denied*, 310 U. S. 657 (1940) (statute forbidding display of placards and banners in aid of picketing invalid).

prohibitions against picketing is void on its face both as unconstitutionally vague and as a violation of the freedom of speech guarantees of the First Amendment as embodied in the Fourteenth.[43] Though the *Thornhill* holding was limited to a statute which did not regulate picketing, but banned it entirely,[44] some of the language of the opinion seemed to imply a much broader doctrine. Thus, it is said that "in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." And the Court added:

> "Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion. We hold that the danger of injury to an industrial concern is neither so serious nor so imminent as to justify the sweeping proscription of freedom of discussion embodied in section 3448."[45]

In the *Swing* case[46] in the following term, the *Thornhill* doctrine was extended to the invalidation of a state labor injunction, the Court remarking that:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. . . . Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case."[47]

Simultaneously, the Court approved a blanket injunction against picketing in the *Meadowmoor* case,[48] holding that a context of violence may give even peaceful picketing a coercive effect. The doctrine, however sound, was of such dubious applicability to the case at bar[49] as to suggest that the Court was eager for an opportunity to limit the scope of the *Thornhill* case.

[43] Since Gitlow v. New York, 268 U. S. 652 (1925) (dictum); Near v. Minnesota, 283 U. S. 697 (1931) (free press); and Herndon v. Lowry, 301 U. S. 242 (1937).

[44] Thornhill v. Alabama, 310 U. S. 88, 104 (1940).

[45] *Id.* at pp. 104-105.

[46] Amer. Fed. of Labor v. Swing, 312 U. S. 321, *rehearing denied,* 312 U. S. 715 (1941).

[47] *Id.* at pp. 325-326.

[48] Milk Wagon Drivers v. Meadowmoor Dairies, 312 U. S. 287 (1941).

[49] The violence in Meadowmoor, though considerable, was over long before the injunction suit commenced and there was no finding that the union had authorized or encouraged it. See Justice Reed's dissent, *id.* at p. 317.

In the *Wohl* case,[50] in the following term, the Court reversed an injunction which had apparently been granted on unlawful purpose reasoning, though with a remark[51] which some courts and commentators have interpreted as implying that the unlawful purpose doctrine would have been upheld had it been clearly presented.[52] Simultaneously, the Court affirmed the injunction in the *Ritter's Cafe* case,[53] holding that a state may confine the right to picket in a labor dispute to "the area of the industry" in which the dispute arises.[54]

After holding in the *Angelos* case[55] that picketing may not be prohibited merely on the ground that it does not satisfy the state's definition of the term "labor dispute," the Court retired for six years from active leadership in the picketing question.

The long silence was broken in 1949 with the *Giboney* case,[56] which requires a more detailed examination. A Union of ice deliverers had organized four of the local ice plants. The fifth, Empire, employed the peddler system, *i.e.* they sold ice at the plant to drivers who owned their own trucks and who resold it to customers on their routes. The union picketed Empire, demanding that ice be delivered only by union drivers. Considering Empire's drivers as independent business men rather than employees, the Missouri court concluded that the agreement asked was one not to sell to non-members of the union and violated that state's anti-trust law, a felony statute carrying a sentence of five years imprisonment. The picketing, admittedly peaceful, was enjoined.[57]

In upholding the injunction, the United States Supreme Court remarked that:

> ". . . the placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to non-union peddlers."[58]

[50] Bakery and Pastry Drivers v. Wohl, 315 U. S. 769 (1942).

[51] "The respondents say that the basis of the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said with regard to the present case that 'we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty dollars a week, to hire an employee at nine dollars a day for one day a week' . . . . But this lacks the deliberateness and formality of a certification and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered." *Id.* at p. 774.

[52] Bautista v. Jones, 25 Cal. 2d 746, 155 P. 2d 343 (1944); TELLER, *op. cit. supra* note 4, 1947 SUPPLEMENT 78.

[53] Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722, *rehearing denied*, 316 U. S. 708 (1942).

[54] The dissenters pointed out that no such qualification applies to other forms of free speech. *Id.* at p. 732.

[55] Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943).

[56] Giboney v. Empire Storage & Ice Co., 336 U. S. 490 (1949).

[57] Empire Storage & Ice Co. v. Giboney, 357 Mo. 671, 210 S. W. 2d 55 (1948).

[58] Giboney v. Empire Storage & Ice Co., 336 U. S. 490, 502 (1949).

Despite this language, the Court's opinion does not discuss the unlawful purpose doctrine developed in numerous state cases. Instead, it places as the central question whether a state may constitutionally apply its anti-trust statute to labor unions. Having decided that it may, it finds no difficulty in concluding that conduct in violation of a valid criminal statute is not constitutionally protected "merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed."[59]

This sheds confusion rather than light on the constitutional status of the unlawful purpose doctrine. On the one hand, it is more consistent with the unlawful purpose doctrine than with *Thornhill*. On the other, it cites *Thornhill* with approval[60] and makes no mention of any of the numerous authorities, both cases and commentators, which might have been cited in support of the unlawful purpose doctrine. The reasoning of *Giboney* could not be applied directly to any purpose less unlawful than the violation of a criminal statute. One is tempted to conclude that the Court desires, for the time being, both to facilitate the use of the unlawful purpose doctrine by state courts and to avoid an express commitment in its favor.[61] It seems clear, however, that the unlawful purpose doctrine and the identification of picketing with free speech spring from opposite premises and it is difficult to see how a choice between them can be avoided indefinitely.

New light on the Supreme Court's attitude may be expected soon. As this article goes to press, four cases in which unlawful purpose injunctions are challenged by the unions involved as violative of their constitutional rights have recently been argued before that tribunal and are awaiting decision.[62]

CONCLUSIONS

The simultaneous nourishing of two inconsistent theoretical premises has left the law of picketing peculiarly exposed to confusion, uncertainty and judicial subjectivity.

That part of the confusion which has arisen from the arbitrary

[59] *Ibid.*

[60] *Id.* at pp. 497-499.

[61] The same day the *Giboney* decision was handed down the Court denied certiorari, 336 U. S. 945 (1949), in Wilbank v. Chester, etc. Bartenders Union, 360 Pa. 48, 60 A. 2d 21 (1948) (picketing for closed shop by minority union was for unlawful purpose.

[62] These four cases are: Hughes v. Super. Ct., 32 Cal. 2d 850, 198 P. 2d 885 (1948) (picketing for proportional hiring of Negroes); Hanke v. Int'l. Bro. of Teamsters, 207 P. 2d 206 (Wash. 1949) (picketing self-employed); Cline v. Automobile Drivers Union, 207 P. 2d 216 (Wash. 1949) (picketing self-employed); Cline v. Automobile Drivers Union, 207 P. 2d 216 (Wash. 1949) (picketing self-employed); Building Service Employees v. Gazzam, 207 P. 2d 199 (Wash. 1949) (picketing for closed shop). The oral argument in the *Gazzam* case is reported in 18 U. S. L. WEEK 3229 (U. S. Feb. 14, 1950).

selection of a picketing objective might be partially avoided if the courts would adopt the Restatement definition that:

> ". . . an object of concerted action by workers against an employer is an act required in good faith by them of the employer as the condition of their voluntarily ceasing their concerted action against him."[63]

But the tests by which the legality of the objective is determined also need critical analysis.

The older "ultra vires cases" proceeded on the theory that the ambitions of the labor movement can be rendered static. The fact that what was yesterday an unquestioned management prerogative is often today a customary topic of collective bargaining suggests the contrary.[64]

The "balance sheet" test frequently overlooks the fact that the interests, either of labor or management, can be stated either in a narrow economic form or generalized into a public principle.[65] Some thumb-on-the-scale balancing may result from generalizing the interests of one side more broadly than those of the other.[66] Yet, even without this factor, the "balance sheet" test leads to a form of compulsory arbitration of the merits of the primary dispute, rather than of the right of one party to resort to the tactic of picketing.

Where a result which is plainly illegal is threatened, the courts cannot be blamed for seeking to find preventive measures. Yet even in these cases, one might question whether chancery is a well-adapted tribunal or injunction a socially desirable remedy for dealing with labor disputes.[67] Few things have caused more labor bitterness or distrust of the judiciary than the record of the labor injunction in the period

[63] RESTATEMENT, TORTS §777 (1939).

[64] Clifton, *Management Functions* in N. Y. U. CONFERENCE ON LABOR 89 *et seq.* (1948).

[65] For example, in Shively v. Garage Employees Union, 6 Wash. 2d 560, 108 P. 2d 354 (1940), where a gas station was picketed to sign a union contract, the court stated: "In the instant case, we are concerned with balancing appellant's right to carry on a lawful business, free from unreasonable interference, and respondent's right to freedom of speech."

[66] For example, in Saveall v. Demers, 322 Mass. 70, 76 N. E. 2d 12, 15 (1947), where an independent barber was picketed to charge the union price scale, the court stated: "If we are correct in supposing that the right to picket is subject, for the protection of paramount public welfare, to some balancing of the conflicting interests of the parties immediately involved, we have before us a case where, on the one hand, the contribution of the defendants' acts to the free interchange of thought in Fitchburg reaches the vanishing point, while on the other hand there is danger that the fundamental right of the plaintiff to work with his own hands to what he regards as his best advantage may be destroyed."

[67] "Injunctions in labor disputes have not generally proved to be an effective means of settling them; frequently they have aggravated rather than allayed a conflict. They have the deceptive appeal of the quick and easy and therein lies their danger, for disputes between workers and employers, now often complicated by internecine disputes among workers themselves, are not always of comparable simplicity." Park & Tilford Import Corp. v. Teamsters Union, 27 Cal. 2d 599, 608, 165 P. 2d 891, 897 (1946).

from the *Debs* case[68] to the adoption of the Norris-LaGuardia Act.[69]

Nor should it be overlooked that, to the extent that picketing has a free speech aspect, the unlawful purpose injunction is a form of prior censorship.[70] Whatever else picketing may do, it conveys a message of protest for which there is usually no other practicable channel. It is a serious matter summarily to deprive a dissatisfied group of its only effective means of giving peaceful expression to its dissatisfaction.

[68] *In re* Debs, 158 U. S. 564 (1895).
[69] FRANKFURTER AND GREENE, THE LABOR INJUNCTION 131-133 (1930).
[70] *Cf.* Near v. Minnesota, 283 U. S. 697 (1931).