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Labor Law - Constitutionality of Injuction Against Peaceful Picketing

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The categorical statement that a crime is committed when the offender performs his act is open to serious objection. Since some crimes occur over an extended period of time, it is only with extreme difficulty that the exact time of the commission of the crime can be established. These situations simply do not lend themselves to this type of factual analysis. Although this is true, it is at the same time possible to determine the time of *completion* of such crimes. It is not until some prescribed criminal consequences have been produced by an act that the crime is complete. A crime is not the individual's act, nor the consequences of his act. It is rather a combination of the two elements.[9] For a crime to exist, both must prevail; neither alone will suffice. The very fact that the court rationalized in terms of act plus consequences, instead of dealing with acts alone, indicates its realization of this concept. In the present case the careless installation of pipe by the defendants was a necessary factor of criminal liability; but standing alone, it did not constitute a crime.

It is respectfully submitted that this case calls for the plain application of the ex post facto theory, and nothing more; it was the time of the defendants' conduct alone that should have received the attention of the court.

That the court recognized the basic purposes for the prohibition against ex post facto statutes is evidenced by the ultimate result. But the fact that the consequences of the defendants' acts occurred after the effective date of Article 32 of the Louisiana Criminal Code confused the issue so that although the court decided correctly, it was drawn to tangents of irrelevancy which could produce unintended results. They attempted to reconcile the decision with a definition of when a crime was committed. Fortunately, there was no compulsion to do so.

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LABOR LAW — CONSTITUTIONALITY OF INJUNCTION AGAINST PEACEFUL PICKETING — Defendants, members of a labor union composed in part of retail ice peddlers, sought to induce non-union peddlers to join the union by obtaining from the wholesale ice distributors in Kansas City agreements not to sell ice to non-union peddlers. When the plaintiff, Empire Storage and Ice Company, refused to agree after all other distributors had

9. See the cases of Brockway v. State of Indiana, 192 Ind. 656 (1923) and Alderson v. State of Indiana, 196 Ind. 22 (1925).

entered into the proposed agreement, the union peacefully picketed plaintiff's place of business. After its business was reduced 85%, plaintiff obtained an injunction against the picketing. The Missouri Supreme Court affirmed[1] on the ground that defendants' conduct was unlawful because it was designed to compel plaintiff to make an agreement in violation of the state anti-trade restraint laws.[2] Defendants appealed to the United States Supreme Court, claiming that the injunction violated their right of free speech. *Held*, the injunction did not violate the federal constitutional guaranty of free speech because the picketing was "carried on as an essential and inseparable part of a course of conduct" in violation of a valid state law. *Giboney v. Empire Storage and Ice Company*, 336 U.S. 490, 69 S. Ct. 684, 93 L. Ed. 649 (1949).

The identification of picketing and free speech, which occurred only as recently as 1940,[3] has resulted in much confusion and uncertainty concerning the power of the states to regulate labor's use of one of its most potent weapons. The United States Supreme Court elevated picketing to its present status of constitutionally protected free speech when, in *Thornhill v. Alabama*[4] and in *Carlson v. California*,[5] it struck down broadly-drawn statutes which placed blanket prohibitions on all picketing activities. Holding in the *Thornhill* case that "the dissemination of information concerning the facts of a labor dispute must be re-

1. Empire Storage and Ice Co. v. Giboney, 357 Mo. 671, 210 S.W.(2d) 55 (1948).

2. Mo. Rev. Stat. Ann. (1939) §§ 8301, 8305, 8308.

3. Some writers believe that the identification of picketing and free speech occurred in 1936 because of certain dictum by Justice Brandeis in Senn v. Tile Layers Protective Union, 301 U.S. 468, 478, 57 S.Ct. 857, 862, 81 L.Ed. 1229, 1236 (1936). He said: "Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. 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." But, as one critic points out, this statement "has been sadly misconstrued by most American lawyers. They read Brandeis as having said that picketing—at least, peaceful picketing—is freedom of speech entitled to the guaranties of the federal Constitution. But a re-reading of this quotation will show that he did not say that at all or even imply it. He said simply that unions may make known the facts of a labor dispute, as a matter of free speech—a constitutional right they naturally enjoy with all other Americans—without saying *how* they may do this." Gregory, Labor and the Law (1946) 340.

It should also be pointed out that the decision in the *Senn* case simply held that there was nothing so inherently bad about peaceful picketing that would make it unconstitutional for a state to make it a lawful technique. Such a holding was far removed from a holding that picketing is protected by the Constitution.

4. 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940).

5. 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104 (1940).

garded as within the area of free discussion that is guaranteed by the Constitution,"[6] the Court concluded that the statute in question, in prohibiting *all* picketing, was unconstitutional since it abridged the right of free speech. That it was not the intention of the court to prohibit *all* state regulation of picketing is indicated by Justice Frankfurter's statement that the statute in question "leaves room for no exceptions based upon either the number of persons engaged in a prescribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and accurateness of the terminology used in notifying the public of the facts of the dispute."[7] However, the court indicated that permissible state regulation would be very limited in scope because it would henceforth be necessary to apply the traditional "clear and present danger" test to this new type of free speech before state interference could be justified. In the words of the court: "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."[8]

The decision in the *Thornhill* case caused many to believe that the court was prepared to treat picketing as free speech pure and simple.[9] This belief grew stronger as the high point in the protection of picketing as a form of free speech was reached in *American Federation of Labor v. Swing*.[10] There, the court found that the constitutional guaranty of free speech had been violated by an injunction against peaceful picketing issued on the ground that the common law policy of the state forbade picketing in the absence of the employer-employee relationship. Said the court: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."[11]

Decided the same day as the *Swing* case, *Milk Wagon Drivers Union v. Meadowmoor Dairies, Incorporated*[12] indi-

6. Thornhill v. Alabama, 310 U.S. 88, 102, 60 S.Ct. 736, 744, 84 L.Ed. 1093, 1102 (1940).
7. 310 U.S. 88, 99, 60 S.Ct. 736, 743, 84 L.Ed. 1093, 1101.
8. 310 U.S. 88, 104, 60 S.Ct. 736, 745, 84 L.Ed. 1093, 1104.
9. Teller, Picketing and Free Speech (1942) 56 Harv. L. Rev. 180, 184.
10. 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941).
11. 312 U.S. 321, 326, 61 S.Ct. 568, 570, 85 L.Ed. 855, 857.
12. 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836 (1941).

cated that picketing was not simply a matter of free speech after all and that the scope of the protection afforded picketing activities by the constitutional guaranty of free speech might not be so broad as had been indicated in the *Thornhill* decision. The decision in the *Meadowmoor* case upheld the issuance of a blanket injunction restraining peaceful picketing because of the "background of violence" in which the picketing was set.

Then, in March, 1942, in *Bakery & Pastry Drivers and Helpers Local 802 v. Wohl*,[13] the court refused to uphold the issuance of an injunction by a New York court on the ground that the "[state] courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and [the state courts] assumed that the legality of the injunction followed from a determination that such a dispute was not involved."[14] This language shows that the federal court misconstrued the decision of the New York tribunal. The case involved picketing which was designed to induce individuals who had no employees to hire union labor. Since New York had an anti-injunction statute[15] (very similar to the Norris-LaGuardia Act),[16] the first issue for the New York court's decision was whether the case fell under the provisions of that statute. Having determined that it did not, the state court was then free to decide the case according to the common law. This it did, basing its decision on the rule well-established in New York that picketing to induce an individual without employees to hire union workers is for an unlawful purpose and, therefore, enjoinable.[17] Thus the federal court erred in assuming that the issuance of the injunction by the state courts was based on nothing more than a finding that a "labor dispute" was not involved. Actually, therefore, the question before the court was whether New York might constitutionally restrain peaceful picketing which it found to be for an unlawful purpose under the common law as administered by its courts.[18] The court did not decide this question, but there was certain language in the opinion which seemed to intimate that the injunction would have been sustained had the

13. 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1942).
14. 315 U.S. 769, 774, 62 S.Ct. 816, 818, 86 L.Ed. 1178, 1183.
15. New York Civil Practice Act, § 876-a (1935).
16. 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115 (Supp. 1949).
17. Luft v. Flove, 270 N.Y. 640, 1 N.E.(2d) 369 (1936); Thompson v. Boekhout, 273 N.Y. 390, 7 N.E.(2d) 674 (1937).
18. In American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941), the court had based its decision on a finding that a state's common law policy which prohibits stranger picketing is unconstitutional.

court understood that the decision of the state court was based upon a finding that the picketing was for an unlawful purpose.[19]

In *Carpenters & Joiners Union of America Local No. 213 v. Ritter's Cafe*,[20] decided the same day, Ritter, the cafe owner, had contracted with an independent contractor for the construction of a building which was to be located a mile and a half from the cafe and which was to have no connection with the cafe business. When the contractor hired non-union labor, the union picketed the cafe. The Texas court enjoined the picketing on the ground that it was in violation of the state anti-trust law.[21] The United States Supreme Court affirmed, holding that no constitutional guarantee was abridged by the decision of Texas "to insulate from the dispute an establishment which industrially has no connection with the dispute."[22] Justice Black dissented (Justices Murphy and Douglas concurred in the dissent) claiming that the injunction impaired the right of free speech.[23] He mentioned but failed to discuss the fact that the Texas court had held the picketing to be for an unlawful purpose.

In the instant case it was pointed out that the states have the power to prohibit combinations and agreements in restraint of trade (of which the agreement not to sell to particular persons is a well-recognized example).[24] Here, Missouri had made such a prohibition in its anti-trade restraint law. Caught between this statute and the union activities, Empire faced prosecution for a felony, suits for triple damages if it agreed not to sell to non-union men, or destruction of its business if it refused to enter

19. "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-two dollars a week, to hire an employee at nine dollars a day for one day a week.' *Opera on Tour v. Weber*, 285 N.Y. 348, 357, 34 N.E.(2d) 349, 353, 136 A.L.R. 267, cert. denied 314 U.S. 615, 62 S.Ct. 96, 86 L.Ed. ——. But this lacks the deliberateness and formality of a certification." Bakery & Pastry Drivers and Helpers Local 802 v. Wohl, 315 U.S. 769, 774, 62 S.Ct. 816, 818, 86 L.Ed. 1178, 1183 (1941). See Teller, supra note 9, at 193.

Much of the apparent uncertainty among the state courts concerning their power to issue injunctions where picketing is deemed to be for an unlawful objective is traceable to this opinion. Note (1949) 16 U. of Chi. L. Rev. 701.

20. 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942).

21. Carpenters and Joiners of America, Local No. 213 v. Ritter's Cafe, 149 S.W.(2d) 694 (Tex. Civ. App. 1941).

22. 315 U.S. 722, 727, 62 S.Ct. 807, 810, 86 L.Ed. 1143, 1147.

23. 315 U.S. 722, 729, 62 S.Ct. 807, 810, 86 L.Ed. 1143, 1148.

24. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495, 69 S.Ct. 684, 687, 93 L.Ed. 649, 652 (1949); Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 61 S. Ct. 703, 85 L.Ed. 949 (1941).

into the proposed agreement. When Empire sought an injunction, neither the state court nor the United States Supreme Court had any difficulty in disposing of the defendants' contention that their right of free speech would be violated if the picketing were to be enjoined. Said Justice Black for a unanimous court: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."[25]

The decision is an important one, and is undoubtedly correct. Although the *Giboney* case is under the first of the picketing-free speech cases in which the United States Supreme Court has based its decision on the unlawfulness of purpose of the picketing, the state courts have almost without exception upheld injunctions where the picketing sought to induce a violation of a state statute.[26] It is submitted that the decision does not extend the area of permissible state regulation of picketing, but simply reaffirms principles which had already been indicated in earlier decisions. In other words, the decision serves only to define more sharply the extent of the area of permissible state regulation already roughly outlined by the court.

ELLIS C. MAGEE

SEARCH AND SEIZURE INCIDENT TO LAWFUL ARREST—On February 1, 1943, a printer who was in possession of plates for forging overprints on stamps was taken into custody. He disclosed that the defendant was one of the customers to whom he sold and delivered the forged overprints. On February 6, 1943, officers were sent to purchase from the defendant stamps bearing overprints. These stamps were reported to be forgeries on February 9, and on the 16th of the same month officers armed with a warrant for the arrest of the defendant went to the defendant's place of business, arrested him, and over his protest conducted a search of his desk, safe, and file cabinet, the search lasting approximately one and a half hours, during the course of which a large number of stamps upon which overprints had been forged were found. The second count of the indictment charged the defendant with keeping in his possession 573 forged stamps. At the trial the defendant made timely motion for the

25. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498, 69 S.Ct. 684, 688, 93 L.Ed. 649, 654 (1949).

26. Note (1949) 28 Ore. L. Rev. 391, 393, and the cases there cited.