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CONSTITUTIONAL LAW - LABOR LAW - PEACEFUL PICKETING GUARANTEED BY DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT

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CONSTITUTIONAL LAW — LABOR LAW — PEACEFUL PICKETING GUARANTEED BY DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT — In the recent *Thornhill* and *Carlson* decisions¹ the Supreme Court of the United States declared an Alabama statute² and a California county ordinance³ prohibiting all picketing, peaceful or otherwise, unconstitutional on the ground that such broad legislation deprived employees and union members of their right of free speech, guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States. In holding that employees and workers have a constitutional right to publicize the facts of a labor dispute, the Court was but taking another step in its recent crusade for the preservation of civil liberties. The decisions are interesting because of the conflict among state courts as to the validity of legislation of this general type and because of the Court's expansion of the concept of free speech. Of further interest are two problems raised by the decisions—whether there is a reciprocal right in the employer to publicize his side of the labor dispute, and what steps legislatures may now take to regulate picketing.

I.

The problem of peaceful picketing is one which has vexed the courts of this country for many years. Although there have been sporadic attempts to regulate picketing by legislation, the issue has most often arisen through a suit by an employer to enjoin picketing by members of a labor union. The state of the law as it was evolved by the injunction cases, however, was perplexing because of the conflict among the various jurisdictions with regard to the legality of picketing. Some courts held that all picketing was illegal and therefore enjoined because of its coercive interference with the employer's business; others held it illegal because it was necessarily intimidating; but the majority

¹ *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736 (1940) and *Carlson v. California*, 310 U. S. 106, 60 S. Ct. 746 (1940).

² Ala. Code (1928), § 3448: "Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

³ Ordinance of Shasta County, California, similar in language and import to the Alabama statute quoted in note 2 supra, the pertinent section of which is set out at length in *Carlson v. California*, 310 U. S. 106 at 109, 60 S. Ct. 746 (1940).

conceded the legality of peaceful picketing.⁴ This agreement in principle among the majority of courts achieved conflicting results when applied to actual cases,⁵ since no concrete definition of peaceful picketing could be worked out⁶ and many courts were astute to find intimidation and coercion in any set of facts.⁷ Furthermore, most courts held that picketing, no matter how peaceful, was unlawful if the purpose of the picketing was not a legitimate object of union activity, and again the courts were at variance as to the legitimacy of particular demands.⁸ In the midst of this confusion were injected the various state acts, modeled either on the federal Clayton⁹ or Norris-LaGuardia¹⁰ acts, restricting the issuance of injunctions in labor disputes.¹¹ The effect of many of these acts, however, was very different from that anticipated by their promoters, inasmuch as the courts often construed them as merely declaratory of the common law in the particular jurisdiction, with the result that little change was effected by their passage.¹² Finally, various state labor relations acts, imposing restrictions on employers, and in some cases on employees as well, have been enacted.¹³ Thus, the attitude of the courts towards peaceful picketing has been forcibly

⁴ See Smith and DeLancey, "The State Legislatures and Unionism," 38 MICH. L. REV. 987 (1940); Hellerstein, "Picketing Legislation and the Courts," 10 N. CAR. L. REV. 158 (1932).

⁵ Hellerstein, "Picketing Legislation and the Courts," 10 N. CAR. L. REV. 158 (1932).

⁶ Most courts acknowledge the impossibility of defining peaceful picketing and then proceed to illustrate what constitutes *unlawful* picketing. For example, in *La France Electrical Const. & Supply Co. v. International Brotherhood of Electrical Workers*, 108 Ohio St. 61 at 86, 140 N. E. 899 (1923), the court said, "What peaceable picketing is under the law in this state depends upon the circumstances of the case. The number of pickets is not conclusive, nor can any special rule be laid down in detail to define peaceable picketing. This much is established. Picketing in such numbers as to prevent free access to the plant of the employer, or in itself to constitute a threat of physical force, is unlawful. Acts or threats, direct or indirect, made by pickets to workmen employed by their former employers, or to their families, which tend to amount to coercion or duress, or tend to substitute the will of the strikers for the will of those whom they approach in persuading employees to leave their work or inducing others not to seek employment with the strikers' former employer, are unlawful and subject to injunction."

⁷ See Cooper, "The Fiction of Peaceful Picketing," 35 MICH. L. REV. 73 (1936).

⁸ See Gelber, "Picketing," 14 NOTRE DAME LAWY. 11 (1938).

⁹ 38 Stat. L. 738 (1914), 29 U. S. C. (1934), § 52.

¹⁰ 47 Stat. L. 70 (1932), 29 U. S. C. (1934), §§ 101-113.

¹¹ Smith and DeLancey, "The State Legislatures and Unionism," 38 MICH. L. REV. 987 at 1013-1020 (1940).

¹² Cooper, "The Fiction of Peaceful Picketing," 35 MICH. L. REV. 73 (1936); Riddlesbarger, "State Anti-Injunction Legislation," 14 ORE. L. REV. 501 (1935).

¹³ Smith and DeLancey, "The State Legislatures and Unionism," 38 MICH. L. REV. 987 at 1021-1023 (1940).

modified, at least in theory, by various legislative enactments designed to regulate more minutely the relations between and the activities of employer and employee.

Perhaps as a reaction against the lenient attitude toward unions manifested by such acts, there have recently been passed a relatively large number of statutes and ordinances prohibiting picketing entirely or permitting it only under limited conditions. Some enactments of this nature, however, have been in existence since the latter part of the nineteenth century. At first, ordinances such as those prohibiting the carrying of placards or signs on the street were upheld as a legitimate exercise of the police power, and were held reasonable as applied to pickets.¹⁴ Later, ordinances aimed directly at peaceful picketing were upheld by several state supreme courts.¹⁵ In recent years, however, a few courts have held this type of legislation invalid for several reasons: because the ordinance conflicted with the policy of the state legislature as expressed in the anti-injunction¹⁶ or other statute;¹⁷ because it was too indefinite in regard to its definition of picketing;¹⁸ because it was beyond the powers conferred on the city by its charter;¹⁹ or because the statute or ordinance violated the due process clauses of the federal and state constitutions,²⁰ or the clause in the state constitution guaranteeing the right to free speech.²¹ Likewise, an ordinance which placed too rigorous restrictions on picketing was condemned.²² On the other hand, it has been held that all picketing might be outlawed on private property²³ or in businesses affected with a public interest.²⁴

¹⁴ See for example, *Commonwealth v. McCafferty*, 145 Mass. 384, 14 N. E. 451 (1888); *Watters v. Indianapolis*, 191 Ind. 671, 134 N. E. 482 (1922).

¹⁵ *Thomas v. Indianapolis*, 195 Ind. 440, 145 N. E. 550 (1924), later held, in *Local No. 26 v. Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937), to be no longer controlling because of the passage of the state anti-injunction act which declared peaceful picketing lawful; *Ex parte Williams*, 158 Cal. 550, 111 P. 1035 (1910); *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657 (1914).

¹⁶ *City of Yakima v. Gorham*, 200 Wash. 564, 94 P. (2d) 180 (1939); *Local No. 26 v. Kokomo*, 211 Ind. 72, 5 N. E. (2d) 624 (1937).

¹⁷ *In re Sweitzer*, 13 Okla. Crim. 154, 162 P. 1134 (1917).

¹⁸ *Diemer v. Weiss*, 343 Mo. 626, 122 S. W. (2d) 922 (1938); *Harder v. Lucot*, 9 Cal. App. (2d) 153, 49 P. (2d) 304 (1935).

¹⁹ *State ex rel. Meredith v. Borman*, 138 Fla. 149, 189 So. 669 (1939).

²⁰ *City of Reno v. Second Judicial District Court*, 59 Nev. 416, 95 P. (2d) 994 (1939); *People v. Harris*, 104 Colo. 386, 91 P. (2d) 989 (1939). Cf. dictum in *Hall v. Johnson*, 87 Ore. 21, 169 P. 515 (1917).

²¹ See cases in note 20. But cf. *Ex parte Stout*, 82 Tex. Crim. 274, 198 S. W. 967 (1917).

²² *People v. Tilkin*, 34 Cal. App. (2d) 743, 90 P. (2d) 148 (1939) and *People v. Gidaly*, 35 Cal. App. (2d) 758, 93 P. (2d) 660 (1939).

²³ *Sea Gate Assn. v. Sea Gate Tenants Assn.*, 168 Misc. 742, 6 N. Y. S. (2d) 387 (1938).

²⁴ *State v. Personett*, 114 Kan. 680, 220 P. 520 (1923).

It is apparent from an investigation of the rationale of these decisions that an anti-picketing statute or ordinance merely raises the frequently litigated question of where the line should be drawn between a proper exercise of the police power and an exercise of that power which is improper because it unreasonably interferes with the constitutional rights to life, liberty and property. In view of these well-recognized limitations, it seems reasonable that legislation as broad as that involved in the principal cases should be condemned as an unwarranted exercise of the police power, since not all picketing will tend to imperil the health and safety of the general public, and the proscription will therefore unnecessarily restrict the acknowledged freedom of an individual to move about the streets. This conclusion, of course, rests upon the premise that there can be such a thing as peaceful picketing, that picketing neither tends necessarily toward breaches of the peace nor necessarily interferes unreasonably with the business of the employer. In the face of the various anti-injunction and labor relations acts to which the Supreme Court has accorded validity,²⁵ this proposition appears to be well established. Thus, although some types of picketing under certain circumstances might be prohibited by a proper exercise of the police power, that question was not presented by the *Thornhill* and *Carlson* cases, and the result of these decisions would appear to be sound if based on an unreasonable restriction on an individual's liberty of locomotion.

2.

The Supreme Court in the *Thornhill* and *Carlson* cases did not, however, expressly base its decisions on the ground of an improper exercise of the police power. The emphasis was placed on a correlative to that ground—an unreasonable interference with the defendants' right to freedom of speech. The identification of peaceful picketing with free speech is of fairly recent origin, and, so far as the Supreme Court is concerned, dates only from Justice Brandeis' statement in the *Senn* case.²⁶ Historically, freedom of speech and freedom of the press have dealt with the unrestricted expression of ideas on political subjects.²⁷

²⁵ For the general attitude of the Supreme Court on this subject, see *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 58 S. Ct. 703 (1938); *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615 (1937).

²⁶ *Senn v. Tile Layers Protective Union*, 301 U. S. 468 at 478, 57 S. Ct. 857 (1937): "Clearly the means which the [anti-injunction] 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."

²⁷ See Gregory, "Peaceful Picketing and Freedom of Speech," 26 A. B. A. J. 709 (1940). Previous restraint, but not subsequent punishment, is prohibited by the guaranty of free speech: *Patterson v. People of Colorado ex rel. Attorney General*, 205 U. S. 454, 27 S. Ct. 556 (1907).

Thus, the protection which the First Amendment affords has normally been sought by a person who teaches a particular doctrine of political belief²⁸ and who seeks to disseminate his beliefs through newspapers²⁹ or pamphlets.³⁰ But the right of free speech and press is subject to a proper exercise of the police power³¹ and to proscription in times of national emergency.³² Since it is firmly established that the freedom of speech and press guaranteed in the First Amendment is also protected against state aggression by the due process clause of the Fourteenth Amendment,³³ the concept of free speech and press employed under the latter clause should be no different from that expressed in the former. The Supreme Court, however, is not the only tribunal which has recently expanded the concept beyond its traditional limits. A few of the state courts began early to hold that free speech protected such acts as boycotting an employer's business,³⁴ assembling before his place of business and passing out cards and circulars,³⁵ or peacefully picketing such place of business.³⁶ Other courts first took an intermediate step by

²⁸ *Gitlow v. People of State of New York*, 268 U. S. 652, 45 S. Ct. 625 (1925); *Schenck v. United States*, 249 U. S. 47, 39 S. Ct. 247 (1919).

²⁹ *KVOS v. Associated Press*, 299 U. S. 269, 57 S. Ct. 197 (1936); *Associated Press v. N. L. R. B.*, 301 U. S. 103, 57 S. Ct. 650 (1937).

³⁰ *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666 (1938).

³¹ *In re Rapiere*, 143 U. S. 110, 12 S. Ct. 374 (1892). See also *Associated Press v. N. L. R. B.*, 301 U. S. 103, 57 S. Ct. 650 (1937), and *Frend v. United States*, (App. D. C. 1938) 100 F. (2d) 691.

³² *Schenck v. United States*, 249 U. S. 47, 39 S. Ct. 247 (1919); *Abrams v. United States*, 250 U. S. 616, 40 S. Ct. 17 (1919).

³³ *Stromberg v. California*, 283 U. S. 359, 51 S. Ct. 532 (1931); *Grosjean v. American Press Co.*, 297 U. S. 233, 56 S. Ct. 444 (1936); *Herndon v. Lowry*, 301 U. S. 242, 57 S. Ct. 732 (1937); *DeJonge v. Oregon*, 299 U. S. 353, 57 S. Ct. 255 (1937); *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666 (1938); *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 59 S. Ct. 954 (1939).

³⁴ *Marx & Haas Jeans Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391 (1902); *Ex parte Lyons*, 27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938).

³⁵ *Ex parte Heffron*, 179 Mo. App. 639, 162 S. W. 652 (1914); *Clark Lunch Co. v. Cleveland Waiters & Bev. Disp. Local No. 106*, 22 Ohio App. 265, 154 N. E. 362 (1926).

³⁶ *Schuster v. International Assn. of Machinists*, 293 Ill. App. 177, 12 N. E. (2d) 50 (1937), following Justice Brandeis' statement in the *Senn* case. But where it became a question of upholding the personal right to free speech as against a conflicting property right, or where no labor dispute existed, more courts abandoned the idea of allowing the concept of free speech to justify the injury sustained by the employer. See *Moreland Theatres Corp. v. Portland Moving Picture Machine Operators Protective Union*, 140 Ore. 35, 12 P. (2d) 333 (1932); *Cooks', Waiters' and Waitresses Local Union v. Papageorge*, (Tex. Civ. App. 1921) 230 S. W. 1086; *Jordahl v. Hayda*, 1 Cal. App. 696, 82 P. 1079 (1905); *Mitnick v. Furniture Workers Union*, 124 N. J. Eq. 147, 200 A. 553 (1938); *Meadowmoor Dairies v. Milk Wagon Drivers' Union*, 371 Ill. 377, 21 N. E. (2d) 308 (1939); *Crosby v. Rath*, 136 Ohio St. 352, 25 N. E. (2d) 934 (1940). Nor would free speech justify a libelous boycott or the use of force or

extending the concept of free speech to include the limited distribution of handbills and circulars, whether the purpose of such publication was the dissemination of ideas and beliefs or simply the statement of facts and information.³⁷ Having included such acts within the purview of free speech, it was not difficult for several state courts and the Supreme Court to take the next step and hold that peaceful picketing, which involves the expression of facts and sentiments by the pickets, likewise fell within the concept. The purpose of peaceful picketing, however, is not limited to mental persuasion, or even to the statement of facts, but includes in addition the element of economic coercion. To say that such coercion is constitutionally protected as an exercise of the right of free speech is to introduce an element altogether foreign to the traditional conception of that right. For this reason the rationale of the decisions in the principal cases has been criticized.³⁸ The wisdom of such an extension of the concept may also be considered doubtful in view of the difficult problem raised thereby: to what extent and under what circumstances shall economic coercion be given constitutional protection? A further practical difficulty is presented by giving constitutional recognition to a term as difficult of precise definition as "peaceful picketing." The Supreme Court might well have avoided a number of trying questions which are certain to be litigated soon, by merely holding that the legislation on its face was an arbitrary exercise of the police power, bearing no rational relation to the preservation of the health, safety and security of the general public, and it could still have carried on its crusade for the protection of civil liberties.

3.

Once it is established, however, that employees and labor union members have a constitutional right to picket peacefully, whatever the

violence: *Swing v. American Federation of Labor*, 372 Ill. 91, 22 N. E. (2d) 857 (1939); *Busch Jewelry Co. v. United Retail Employees Union*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939).

³⁷ *People v. Johnson*, 117 Misc. 133, 191 N. Y. S. 750 (1921); *Schneider v. New Jersey*, 308 U. S. 147, 60 S. Ct. 146 (1939). But cf. *City of Milwaukee v. Kassen*, 203 Wis. 383, 234 N. W. 352 (1931); *Almassi v. City of Newark*, 8 N. J. Misc. 420, 150 A. 217 (1930).

³⁸ Gregory, "Peaceful Picketing and Freedom of Speech," 26 A. B. A. J. 709 at 714 (1940): "Now if freedom of speech is to prove a valuable social asset, it will be because unrestricted expression educates and convinces others intellectually. It is submitted that peaceful picketing is not an argument intended to achieve an intellectual conquest. It is . . . a type of coercion. . . . But to call such coercion constitutionally guaranteed freedom of speech, thereby placing it beyond the reach of the regulatory legislation deemed practicable by the majority, seems ridiculous policy and sheer misunderstanding of the concept under discussion." Also, Davis, "Revolution in the Supreme Court," 166 ATLANTIC MONTHLY 85 at 94 (1940).

term may denote, the problem immediately arises as to whether, and to what extent, a reciprocal right exists in the employer to state his side of a labor dispute. Although the Court made no mention of such a right in the *Thornhill* and *Carlson* cases, some of the language used is broad enough to imply its existence.³⁹ The activity of the employer protected by the right of free speech should be coextensive with the right in the employee. To what extent may the employer be forbidden by the federal⁴⁰ and state labor relations acts from addressing argument, persuasion and propaganda to his employees in opposition to unionism, without depriving him of his right of free speech? At the present time the labor relations boards and the courts are far apart in their understanding of where the line should be drawn between acts of the employer which are within his constitutional right and those which may properly be condemned as unfair labor practices. Thus, the National Labor Relations Board has consistently condemned the employer's use of pamphlets, newspaper advertisements and plant notices as media for expressing his views on labor relations,⁴¹ while the federal circuit courts have, in the absence of peculiar facts, generally held such acts to be within the right of free speech.⁴²

A designation by the Court of the area within which an employer may properly discuss labor relations will serve as a valuable standard for harmonizing the views of the labor boards and the courts. Each case,

³⁹ See for example, *Thornhill v. Alabama*, 310 U. S. 88 at 101-102, 60 S. Ct. 736 (1940): "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. . . . 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." Other cases have definitely stated that a correlative right exists: *Humble Oil & Refining Co. v. N. L. R. B.*, (C. C. A. 5th, 1940) 113 F. (2d) 85; *N. L. R. B. v. Union Pacific Stages*, (C. C. A. 9th, 1938) 99 F. (2d) 153; *Jefferson Electric Co. v. N. L. R. B.*, (C. C. A. 7th, 1939) 102 F. (2d) 949; *Midland Steel Products Co. v. N. L. R. B.*, (C. C. A. 6th, 1940) 113 F. (2d) 800; *N. L. R. B. v. Ford Motor Co.*, (C. C. A. 6th, 1940) 7 L. R. R. 163.

⁴⁰ 49 Stat. L. 452 (1935), 29 U. S. C. (Supp. 1939), § 158.

⁴¹ For example, *In re Ford Motor Co.* (April 29, 1940) 6 L. R. R. 407, 23 N. L. R. B., No. 28; *In re North Electric Mfg. Co.*, (June 10, 1940) 6 L. R. R. 596, 24 N. L. R. B., No. 42; *In re Jahn & Ollier Engraving Co.*, (June 21, 1940) 6 L. R. R. 656, 24 N. L. R. B., No. 94.

⁴² *N. L. R. B. v. Union Pacific Stages*, (C. C. A. 9th, 1938) 99 F. (2d) 153; *Continental Box Co. v. N. L. R. B.*, (C. C. A. 5th, 1940) 113 F. (2d) 93; *N. L. R. B. v. Falk Corp.*, (C. C. A. 7th, 1939) 102 F. (2d) 383, reversed on other grounds in 308 U. S. 453, 60 S. Ct. 307 (1940); *N. L. R. B. v. Express Publishing Co.*, (C. C. A. 5th, 1940) 111 F. (2d) 588. Of especial interest is the sixth circuit's approach, illustrated by two recent decisions: *Midland Steel Products Co. v. N. L. R. B.*, (C. C. A. 6th, 1940) 113 F. (2d) 800, and *N. L. R. B. v. Ford Motor Co.*, (C. C. A. 6th, 1940) 7 L. R. R. 163.

however, must of necessity be decided on its own facts, to determine whether the employer has overstepped the limits of free discussion and the expression of opinion. An employer under one set of conditions might be entirely within his constitutional right in posting notices concerning the attitude of the company toward the union, or in distributing cards to or speaking personally before his employees, or even in sending pickets to the street to picket the union pickets, whereas under other circumstances any one or all of these practices would amount to intimidation and coercion. Thus, it seems clear that an order of a labor board, ordering an employer to desist from one of the above practices, should be held arbitrary and unconstitutional as violative of the First or Fourteenth Amendments if it is apparent that the employer's acts have not operated coercively on the minds of his employees. This proposition, simple to state, introduces extremely delicate and difficult fact questions. But the critical theoretical question, in the light of the *Thornhill* and *Carlson* cases, appears to be to what extent employer statements which do operate coercively on the minds of his employees are nevertheless privileged by the right of free speech. The recent decision of the Circuit Court of Appeals for the Sixth Circuit in the *Ford* case⁴³ seems to give an employer considerable leeway. Further delineation by the Supreme Court of the employee's right, however, is necessary before the reciprocal right in the employer can be given its proper scope.

4.

Once it is assumed as a general principle that peaceful picketing is protected by a constitutional guaranty, courts will find a difficult problem in determining what the term "peaceful picketing" denotes and whether there is a constitutional right to such picketing under all circumstances. These questions will be raised not only by further attempts on the part of the legislatures to regulate picketing, but also by court decisions which authorize or refuse the issuance of injunctions in labor controversies.⁴⁴ Justice Murphy, in his opinions in the *Thornhill* and *Carlson* cases, without pointing out specifically how legislatures could henceforth frame valid statutes, leaves the impression that such acts could be drawn.⁴⁵ It is certain that non-peaceful picketing, involving

⁴³ *N. L. R. B. v. Ford Motor Co.*, (C. C. A. 6th, 1940) 7 L. R. R. 163.

⁴⁴ A problem will arise when a state court issues an injunction restraining what the Supreme Court thinks falls within the term peaceful picketing as guaranteed by free speech, as to whether such judicial action is state action within the meaning of the Fourteenth Amendment. A few cases tend to support the conclusion that it is. See *Smith and DeLancey*, "The State Legislatures and Unionism," 38 *MICH. L. REV.* 987 at 1012 (1940).

⁴⁵ "The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion

threats, intimidation, coercion and violence, could be outlawed.⁴⁶ A difficulty arises, however, in drawing the line between acts that are intimidating and coercive and those which are merely illustrative of peaceful persuasion.⁴⁷ It is apparent that the courts must evolve a universal definition of "peaceful picketing" before the doctrine of the principal cases can be fully applied. Such definition, of course, must of necessity be framed in general language so as to serve as a standard for judging the legality of the variety of acts which occur in the course of labor disputes. It will probably state, in effect, that only those acts will constitute peaceful picketing which in the ordinary course of events will not tend to provoke breaches of the peace or other acts of violence injurious to persons or property. Once this is established, legislatures may, consistently with the opinions in the principal cases, forbid picketing which falls outside this definition.

The validity of any particular legislative restriction on peaceful picketing is highly conjectural. Considering the language used by Justice Murphy in regard to the breadth of the Alabama statute,⁴⁸ however, it is doubtful that the Court will hold that peaceful picketing is constitutionally guaranteed under all circumstances. In view of this and other language appearing in the opinions, it seems probable that mass picketing could be proscribed as tending toward obstruction of the streets and breaches of the peace.⁴⁹ Likewise, picketing attended by libelous statements and abusive language might be outlawed, since the free speech concept may not protect the publication of such statements.⁵⁰ There is the further possibility that peaceful picketing in the absence of

of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter. We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger." *Thornhill v. Alabama*, 310 U. S. 88 at 105, 60 S. Ct. 736 (1940).

⁴⁶ *Busch Jewelry Co. v. United Retail Employees Union*, 281 N. Y. 150, 22 N. E. (2d) 320 (1939); *Jordahl v. Hayda*, 1 Cal. App. 696, 82 P. 1079 (1905).

⁴⁷ See notes 6 and 7, *supra*.

⁴⁸ "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the proscribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute." *Thornhill v. Alabama*, 310 U. S. 88 at 99, 60 S. Ct. 736 (1940).

⁴⁹ Cf. *Carey v. District Court*, 226 Iowa 717, 285 N. W. 236 (1939).

⁵⁰ *Swing v. American Federation of Labor*, 372 Ill. 91, 22 N. E. (2d) 857 (1939); *Robertson v. Baldwin*, 165 U. S. 275, 17 S. Ct. 326 (1897); *Evening Times Printing & Pub. Co. v. American Newspaper Guild*, 124 N. J. Eq. 71, 199 A. 598 (1938); *KVOS v. Associated Press*, 299 U. S. 269, 57 S. Ct. 197 (1936).

a labor dispute could be prohibited, in the light of Justice Murphy's repeated emphasis upon the dissemination of information concerning the facts, causes and nature of a labor dispute as falling under constitutional protection.⁵¹ Such a conclusion would, of course, be in accord with the decisions of several state courts and with the provisions of most of the anti-injunction acts.⁵² The term "labor dispute," however, is subject to the same infirmity as "peaceful picketing," and a uniform and universal definition will therefore be imperative, else free speech would guarantee peaceful picketing under certain conditions in one part of the country but not in another. The Supreme Court's conception of what the term denotes would probably be based upon the definition found in the Norris-LaGuardia Act,⁵³ although it seems likely that some modification of the broad language therein contained might be made. Thus, while union members would be exercising a constitutional right in picketing peacefully for the attainment of such objectives as unionization, changes in the term of employment, and possibly the closed shop and check-off, they would not have constitutional protection in picketing during a jurisdictional dispute, or to oust the majority union which had a contract with the employer, or to inflict economic injury upon the customers of the employer in order to gain their objectives.⁵⁴ The difficulty, of course, which will inhere in any such differentiation will be in finding a rational basis for its adoption. It is arguable, however, that the Court may with reasonable justification say that the proscription of picketing under the latter circumstances is a valid exercise of the police power on the ground that it tends toward breaches of the peace and unreasonable interferences with the rights of third parties.⁵⁵

This course of allowing the legislatures some discretion in determining what will best serve the interests of the general public would be in accord with the Court's traditional approach to such questions and is preferable to the Court's constituting itself a reviewing body whose attitude on questions of policy will prevail over that of the

⁵¹ For example, *Thornhill v. Alabama*, 310 U. S. 88 at 102, 103, and 104, 60 S. Ct. 736 (1940).

⁵² *Swing v. American Federation of Labor*, 372 Ill. 91, 22 N. E. (2d) 857 (1939); *Moreland Theatres Corp. v. Portland Moving Picture Machine Operators Protective Union*, 140 Ore. 35, 12 P. (2d) 333 (1932); *Mitnick v. Furniture Workers Union*, 124 N. J. Eq. 147, 200 A. 553 (1938); but cf. *Ex parte Lyons*, 27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938).

⁵³ 47 Stat. L. 73 (1932), 29 U. S. C. (1934), § 113.

⁵⁴ See *Smith and DeLancey*, "The State Legislatures and Unionism," 38 MICH. L. REV. 987 at 1010-1012 (1940); *Evening Times Printing & Pub. Co. v. American Newspaper Guild*, 124 N. J. Eq. 71, 199 A. 598 (1938). But cf. 4 TORTS RESTATEMENT, §§ 799-801 (1939).

⁵⁵ See again Justice Murphy's statement in note 45, supra.

legislatures.⁵⁶ On the other hand, there is actually no need to allow legislatures too free a hand, inasmuch as the public safety and security in many instances can adequately be protected through the enforcement by local police of such ordinances as those prohibiting unlawful assemblies, loitering and disorderly conduct.⁵⁷ Such ordinances, when properly enforced, appear to be sufficiently within a valid exercise of the police power to escape condemnation as violative of freedom of speech.

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⁵⁶ Davis, "Revolution in the Supreme Court," 166 *ATLANTIC MONTHLY* 85 at 95 (1940). Likewise, the principle so often applied by the Court of presuming the constitutionality of a statute should, in doubtful cases such as that under discussion, prevail. Justice Murphy, however, indicates that any enactments by legislatures concerning cases of this type will be subjected to close scrutiny by the Court. See *Thornhill v. Alabama*, 310 U. S. 88 at 106, 60 S. Ct. 736 (1940).

⁵⁷ 48 *YALE L. J.* 308 (1938).