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## THE FICTION OF PEACEFUL PICKETING

*Frank E. Cooper\**

EFFORTS of labor organizations during the past decade to secure the enactment of legislation guaranteeing strikers the privilege of peaceably picketing their employers' places of business, appear to have gained for union members no more than a Pyrrhic victory. Although at least nineteen states<sup>1</sup> now have statutes intended to prohibit judicial interference with peaceful picketing,<sup>2</sup> a review of recent

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<sup>1</sup> Ariz. Rev. Code (1928), § 4286 et seq.; Colo. Sess. Laws (1933), c. 59; Idaho Sess. Laws (1933), c. 215; Ill. Rev. Stat. (1935), c. 22, par. 58; Ind. Ann. Stat. (Burns 1933), §§ 40-501 to 40-514; Kan. Rev. Stat. (1923), §§ 60-1104 to 60-1107; La. Laws (1934), Act No. 203, p. 600; Md. Laws (1935), c. 574; Mass. Stat. (1913), c. 690 [Mass. Gen. Laws (1933), c. 214, § 9], as supplemented by Laws (1935), c. 407; Minn. Stat. (Mason Supp. 1936), § 4256 et seq.; N. H. Pub. Laws (1926), c. 380, § 27, as amended by Laws (1935) c. 46; N. J. Comp. Stat. (Supp. 1930), § 107-131a; N. Y. Laws (1935), c. 477; N. D. Laws (1935), c. 247; Ore. Code Ann. (Supp. 1935), § 49-1901 et seq.; Utah Rev. Stat. (1933), §§ 49-2-6 to 49-2-8; Wash. Laws (Spec. Sess. 1933), c. 7; Wis. Stat. (1933), §§ 268.20-268.30, renumbered §§ 103.53-103.63 by Wis. Laws (1935), c. 551; Wyo. Laws (1933), c. 37 [Rev. Stat. (Supp. 1934), §§ 63-201 to 63-207]. Three other states have statutes prescribing certain procedural requirements (personal service of notice, taking of testimony in open court, etc.) intended to limit issuance of injunctions in labor disputes. These statutes are: Maine Laws (1933), c. 261, p. 439; Pa. Laws (1931), p. 926 [43 Pa. Ann. Stat. (Purdon Supp. 1935), § 202-205]; R. I. Acts and Resolves (Jan. 1936), c. 2359. In California and Oklahoma it is provided that in labor controversies no injunctions should be issued in restraint of combinations to do acts which would be lawful if done by a single individual. Cal. Gen. Laws (1931), act 1605; Okla. Stat. (1931), § 10878. In Montana, the statute provides that injunctions may be issued in labor disputes only under the same circumstances and conditions as would warrant the issuance of injunctive relief in other types of cases. Mont. Rev. Code (1921), § 9242. For a general review of the statutes, see Riddlesbarger, "State Anti-Injunction Legislation," 14 ORE. L. REV. 501 (1935).

<sup>2</sup> The task of framing a definition or description of picketing which would be accepted by the various courts whose decisions are discussed herein presents grave difficulties. The concept involves, of course, the parading of strikers or strike sympathizers in front of the establishment of an employer. Accurate description, however, would require an analysis of the variant purposes involved. The effort to interfere with the relations of employer and employee should theoretically be distinguished from the effort to interfere with the relations of merchant and customer. But such distinction is stated by few courts. Many judiciaries do not explicitly recognize this difference, and speak of the two purposes as one. But perhaps an implicit recognition of the distinction is to be found in the circumstance that in cases where picketing

cases in this ever timely field indicates that in general such laws have been construed to limit the privileges of pickets to activities so pusillanimous as to be of little aid to the strikers and of little annoyance to employers. In fact, the opportunities enjoyed by strikers to engage with impunity in public demonstrations are little better in states permitting peaceful picketing than in the many jurisdictions where the prevailing judicial doctrine permits or compels the enjoining of all forms of picketing.<sup>3</sup>

The emasculation of the peaceful picketing statutes has been accomplished by the same judicial process which in many states has

is conducted in front of a retail establishment, and will necessarily have some effect on customers, the courts are even more willing to find it unlawful than in cases where a factory is the scene of the picketing, and the employer's customers may never learn of it. This distinction will receive further attention in the text, *infra*.

<sup>3</sup> The Norris-LaGuardia Act, limiting the jurisdiction of federal courts to issue injunctions in labor disputes, presents special problems which are not found in the state acts. 47 Stat. L. 70, 29 U. S. C., § 101-113 (1932). See comment in 30 MICH. L. REV. 1257 (1932). The act has been little construed, although some district courts have referred to it in refusing to enjoin display of signs by strikers. *Cinderella Theater Co., Inc. v. Sign Writers' Local Union No. 591*, (D. C. Mich. 1934) 6 F. Supp. 164; *Miller Parlor Furniture Co. v. Furniture Workers' Industrial Union*, (D. C. N. J. 1934) 8 F. Supp. 209. But the act is not construed to permit incidental acts of violence accompanying an assembly of a large number of strikers in front of a factory, and such picketing is enjoined. *Knapp-Monarch Co. v. Anderson*, (D. C. Ill. 1934) 7 F. Supp. 332. For an indication that the act will be strictly construed by the higher courts, see *United Electric Coal Companies v. Rice*, (C. C. A. 7th, 1935) 80 F. (2d) 1.

Prior to the enactment of the Norris-LaGuardia Act, the federal courts exhibited extreme liberality in enjoining picketing. Probably the leading case is *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72 (1921), reviewed *infra*, p. 87. The district courts found themselves able to enjoin picketing, despite the provisions of the Clayton Act. 38 Stat. L. 737, 738 (1914), Comp. Stat., §§ 1243a, 1243d, 28 U. S. C., § 381, 29 U. S. C., § 52. As was said in *Great Northern Ry. v. Brosseau*, (D. C. N. D. 1923) 286 F. 414 at 420:

"many lower federal courts have studiously striven to disregard its plain language, as well as the actual intent of Congress, as disclosed by the history of the statute. Some have held that all strikes cause irreparable injury, and therefore the employer is entitled to an injunction to prevent such injury. Other courts have gone so far as to hold that the entire statute was a trick by Congress to so frame the measure that one part of it would nullify the other. Other courts have said there was no such thing as peaceful picketing, and hence no such thing as peaceful persuasion, and therefore the plain language of the statute must be disregarded by the court, and all picketing and all attempts by strikers to exercise their rights of peaceful persuasion were to be restrained, and injunctions have been accordingly issued. Other courts, notwithstanding the specific language of the last clause of section 20 that the doing of the acts which it permits should not be held to be in conflict with any federal law, have restrained strikes upon the ground that they violated the Sherman Anti-Trust Law and statutes forbidding the obstruction of the United States mails."

resulted in a blanket prohibition of all picketing. The attitude which prompted a federal court<sup>4</sup> to proclaim some years ago that "there is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching" has led other courts in repeated instances to condemn particular forms of picketing as not peaceful, even in the absence of physical violence, and to grant injunctive relief accordingly. The making of grimaces is considered a display of force, and the use of a single epithet brands the picket's conduct as unlawful. The mere display of banners may be deemed intimidating.

### *Nature of the Statutes*

Before examining the decisions holding acts of strikers to be unlawful and subject to injunction, despite the existence of statutes restricting the issuance of injunctions in labor disputes, the statutes under which striking union members claim immunity from judicial interference may be examined to determine whether or not the ineffectiveness of the statutes should be ascribed to any particular or characteristic shortcomings in the legislative acts themselves.

The most striking feature of a comparison of the peaceful picketing statutes of the nineteen states is their great similarity, not only in substance but in phraseology. They all take the form of prohibitions against the issuance of injunctions to prevent certain activities on the part of strikers. In eighteen<sup>5</sup> of the nineteen states, the statutes prohibit the issuance of injunctions against "peaceful persuasion" of any person to abstain from working or to employ or cease to employ any party to a labor dispute. In sixteen of the states,<sup>6</sup> the statutes also guarantee the right of "peaceful assembly" of strikers and sympathizers. In fifteen of the states,<sup>7</sup> the statutes provide that strikers may give publicity to the cause of the strike and the complaint of the strikers. Injunctions restraining the paying or withholding of strike

<sup>4</sup>Atchison, T. & S. F. Ry. v. Gee, (C. C. Iowa, 1905) 139 F. 582 at 584.

<sup>5</sup>Arizona, Colorado, Idaho, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Maryland, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oregon, Washington, Wisconsin, and Wyoming. See statutes cited *supra*, note 1.

<sup>6</sup>Arizona, Colorado, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota, New Jersey (subject to limitation that the pickets remain at least ten paces apart), New York, North Dakota, Oregon, Washington, Wisconsin, Wyoming. See statutes cited *supra*, note 1.

<sup>7</sup>Colorado, Idaho, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota, New Jersey, New York, North Dakota, Oregon, Washington, Wisconsin, Wyoming. See statutes cited *supra*, note 1.

benefits are prohibited in fourteen of the states.<sup>8</sup> And in thirteen of the states,<sup>9</sup> the statutes provide that no injunction should be issued against combinations to do acts in furtherance of labor disputes which would be lawful if done by one person. Many of the statutes also contain other provisions not directly pertinent to the attempted guaranty of peaceful picketing, such as prohibitions against issuance of injunctions restraining the termination of any relation of employment, or enjoining membership in labor organizations. Nearly all of the statutes also provide procedural restraints, the typical requirements including (1) service of personal notice on defendants, (2) taking of testimony in open court, and (3) proof of lack of adequate remedy at law, as conditions precedent to the issuance of equitable relief. In a few states, plaintiffs are required to show that public officers cannot or will not give protection, and are further required to post cost bonds upon the issuance of an injunction.

It can be fairly said that the statutes, although cast in general terms, are drawn with a considerable degree of care. While they do not undertake to legalize boycotting, nevertheless it appears that they would be adequate to guarantee to striking employees and to protesting union members substantial privileges of conducting peaceful public demonstrations, were they liberally construed. But they have not been so construed. The fact that they have proved ineffective must be ascribed to a deep-seated conviction on the part of the judiciary that picketing cannot be done in a peaceful manner.

*Injunctions Against Picketing in States Where Peaceful  
Picketing is Allowed by Statute*

A typical case illustrating the almost insuperable difficulties faced by an organization which attempts to conduct peaceful picketing is *Bull v. International Alliance*,<sup>10</sup> where the demonstration conducted by the strikers contained no hint of violence and no elements of nuisance, but was none the less enjoined. Three theatres were involved in a strike, and the union placed one picket in front of each theatre. The picket would greet each prospective customer by saying "hello," and

<sup>8</sup> Arizona, Colorado, Idaho, Indiana, Kansas, Louisiana, Maryland, Minnesota, New York, North Dakota, Oregon, Washington, Wisconsin, Wyoming. See statutes cited supra, note 1.

<sup>9</sup> Arizona, California, Colorado, Idaho, Kansas, Louisiana, Maryland, New York, North Dakota, Oregon, Washington, Wisconsin, Wyoming. See statutes cited supra, note 1.

<sup>10</sup> 119 Kan. 713, 241 P. 459 (1926).

adding the statement, "This theatre is unfair to organized labor." On application of the theatre owner for injunctive relief, it was strenuously contended by the defendants that the interference with plaintiff's business was mere peaceful picketing. The court, however, found otherwise, and granted the injunction, remarking:

"The right to carry on such a business for profit is property, and an interference with that right which resulted in depriving the plaintiff of patronage and business profits, entitled him to equitable relief. The conspiracy entered into by defendants with the intention to inflict injury on plaintiff's business was a tort, and their wrongdoing occasioned a substantial loss to plaintiff. Aside from the conspiracy the means used were unlawful, and *the picketing carried the implication of a threat*, as defendants told plaintiff that if he did not submit to their demands he would 'be turned over to the tender mercies of organized labor. . . . and a lot of unpleasant things follow.'" <sup>11</sup>

In Minnesota, the mere carrying of a banner by a single picket has been held to transgress the bounds of peaceful picketing. In *State v. Perry*,<sup>12</sup> it appeared that union strikers hired a picket to stand in front of the home of a non-striking employee, to display a banner reading "A scab lives here." It was held that the picket was properly convicted of disorderly conduct, since the peaceful picketing statute did not apply.

The Supreme Court of Oregon has ruled that picketing cannot be peaceful where more than one picket is employed, or where the picket attempts peaceable persuasion in "loud tones." In *Greenfield v. Central Labor Council*,<sup>13</sup> it was held that the statute did not authorize pickets to stand at a store entrance, or to patrol in front thereof, so as to somewhat obstruct the same, and to call out in loud tones, advising prospective customers not to patronize the store. It was ruled that only one picket would be allowed, and that he must not speak above a conversational tone. Further evidence of the strictness of the Oregon court is found in subsequent cases.<sup>14</sup>

<sup>11</sup> Bull v. International Alliance, 119 Kan. 713 at 718-719, 241 P. 459 (1926). Italics the writer's.

<sup>12</sup> (Minnesota 1936) 265 N. W. 302.

<sup>13</sup> 104 Ore. 236, 192 P. 783, 207 P. 168 (1922).

<sup>14</sup> In *Moreland Theatres Corp. v. Portland Moving Picture Machine Operators' Protective Union*, 140 Ore. 35, 12 P. (2d) 333 (1932), it was held that picketing was unlawful, and subject to injunction whether peaceful or not, in the absence of a bona fide dispute concerning terms and conditions of employment. The court has also

A number of state courts have found that picketing could be enjoined as unlawful, regardless of its peacefulness, because it was carried on with improper motives. Thus, if a strike is called for the purpose of compelling an employer to adopt a closed shop, the strike may be considered unlawful and all picketing done pursuant thereto illegal and subject to injunction, regardless of the peaceful picketing statutes.<sup>15</sup> Injunctive relief will likewise be granted where picketing is carried on by a union to which none of plaintiff's employees belong, at least if none of plaintiff's employees have joined the strike.<sup>16</sup> So also, picketing is not protected by the statutes where the signs displayed are untrue, as where the placards proclaimed that union bill-posters had been locked out, whereas there had been no technical lock-out.<sup>17</sup> Likewise, it is illegal to call a strike for the purpose of forcing collective bargaining with a union, rather than individual bargaining with each employee, and picketing done in furtherance of such a strike may be enjoined.<sup>18</sup>

While the courts have not in general attempted to define what constitutes peaceful picketing—indeed, some of them have stated that it is incapable of definition<sup>19</sup>—the New Jersey court has said that "Picketing is lawful if it does not have an immediate tendency to intimidation of the other party to the controversy, or to obstruct free passage such as the streets afford, consistent with the right of others to enjoy the same privilege."<sup>20</sup> Such definition (and it would prob-

declared that picketing was necessarily unlawful where the object was simply to injure the employer. *Blumauer v. Portland Moving Picture Machine Operators' Protective Union*, 141 Ore. 399, 17 P. (2d) 1115 (1933).

<sup>15</sup> *Wasilewski v. Bakers' Union*, 118 N. J. Eq. 349, 179 A. 284 (1935); *218-220 Market Street Corp. v. Delicatessen and Cafeteria Workers' Local No. 410*, 118 N. J. Eq. 448, 179 A. 689 (1935).

<sup>16</sup> *Safeway Stores, Inc. v. Retail Clerks' Union*, 184 Wash. 322, 51 P. (2d) 372 (1935). As to picketing in the absence of a labor dispute, see 40 HARV. L. REV. 896 (1927).

<sup>17</sup> *Olympia Operating Co. v. Costello*, 278 Mass. 125, 179 N. E. 804 (1932).

<sup>18</sup> *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass. 537 at 544, 130 N. E. 86 (1920). The same case held that "the maintenance by the union of relays of pickets from twenty-five to seventy-five in number, patrolling the streets in the vicinity and at the main entrance to the company's factory calling out at various times the epithets recited in the report, while not sufficient as the master finds to frighten or coerce other employees, was unjustifiable."

<sup>19</sup> *LaFrance Electrical Constr. & Supply Co. v. International Brotherhood of Electrical Workers*, 108 Ohio St. 61, 140 N. E. 899 (1923); *Scofes v. Helmar*, 205 Ind. 596, 187 N. E. 662 (1933); *McMichael v. Atlanta Envelope Co.*, 151 Ga. 776, 108 S. E. 226 (1921).

<sup>20</sup> *Bayonne Textile Corp. v. American Federation of Silk Workers*, 116 N. J. Eq. 146 at 163, 172 A. 551 (1934).

ably be accepted by courts of many other states) smacks of liberality, but in view of repeated holdings that the mere presence of pickets may tend to intimidate, and that three or four pickets may be enough to block the free passage of the streets,<sup>21</sup> the liberality of such a standard appears to be largely rhetorical.

*Picketing Enjoined as not Peaceful in States where Peaceful Picketing is Permitted at Common Law*

While the peaceful picketing statutes, because of their comparatively recent origin, have not yet received extensive judicial consideration, there are clear indications that the doctrine of the cases above reviewed will be adopted elsewhere throughout the country.

Persuasive evidence that other courts will strictly construe peaceful picketing statutes is furnished by decisions in states where the right of peaceful picketing is recognized as a common-law doctrine. In such jurisdictions, where the propriety of picketing has long been established, it might reasonably be anticipated that the courts would be more indulgent of minor disturbances attending labor demonstrations than would be expected in states where the legislatures have compelled departure from well-established practices of enjoining peaceful picketing. The fact is, however, that even in those states which have always recognized the theoretical right of labor to establish peaceful picket lines, any deviation from prescribed norms of conduct is found to be unlawful, and is enjoined. Indeed, states which have purported to recognize a common-law right of peaceful picketing seem to be even more loath to find that picketing is peaceful than are states in which picketing is permitted only by virtue of statute.

In some jurisdictions, even the display of signs by a small group of pickets has been found to be unlawful. Thus, in *Robison v. Hotel & Restaurant Employees' Local No. 782*,<sup>22</sup> where pickets paraded in front of a restaurant bearing placards reading "This beanery is on the bum" and "Why not patronize a union house and you won't have to turn your back to the public and be ashamed," it was held:

"We conclude that the stationing of pickets in front of or near to respondents' places of business in this case was necessarily intimidating in character, and was properly enjoined."<sup>23</sup>

<sup>21</sup> The decisions referred to are cited and discussed in various parts of our text.

<sup>22</sup> 35 Idaho 418, 207 P. 132 (1922). The case was decided eleven years prior to the enactment of that state's peaceful picketing statute. Idaho Sess. Laws (1933), c. 215.

<sup>23</sup> *Robison v. Hotel & Restaurant Employees' Local No. 782*, 35 Idaho 418



And in Georgia, it was held that a trial court had abused its discretion in refusing to issue a temporary injunction where pickets giving out handbills had cut down a theatre owner's business.<sup>24</sup> According to this case, picketing would seem to be peaceful only so long as it is not effective.

The Connecticut court has held that where an assembly of six to twenty pickets "gave threatening looks" to groups of thirty-five employees coming in and out of the factory where the strike had been called, and carried placards indicating that the whole power of the American Federation of Labor was back of the strike, the picketing was not peaceful.<sup>25</sup> The court said that the carrying of the signs was "well calculated to overawe and intimidate" the non-striking employees. The case is of especial interest because the court held that since the pickets had exceeded permissible bounds, they would be held to have sacrificed their ordinary right of peaceful picketing, and would not be permitted to make any public display at all.

Other states have gone nearly as far in prohibiting any demonstration which gave promise of successful results, despite continued lip-service to the language of the peaceful picketing doctrine. Thus, in California<sup>26</sup> it was held that where striking employees of a restaurant exhibited placards reading "Rainbow Cafe Now Non-Union," and made "grimaces and insulting gestures" at plaintiff's scab employees, they were guilty of physical intimidation. The court, in enjoining such actions, said:

"It is evident, however, that the acts found to have been committed went beyond the bounds of peaceful picketing and amounted to physical intimidation of respondents' employees and patrons; and it is well settled by the decisions above cited that such acts will be enjoined. . . . In this regard it is held that in order to prove physical intimidation and fear it is not necessary to show that there was actual force or express threats of physical violence used, that such result may be accomplished

at 435, 207 P. 132 (1922). The court also held, however, that it would be permissible to display signs reading "This store is unfair to organized labor."

<sup>24</sup> *Robinson v. Bryant*, 181 Ga. 722, 184 S. E. 298 (1935).

<sup>25</sup> *Levy & Devaney, Inc. v. International Pocketbook Workers' Union*, 114 Conn. 319, 158 A. 795 (1932). Cf. 44 HARV. L. REV. 971 (1931).

<sup>26</sup> *Lisse v. Local Union No. 31*, 2 Cal. (2d) 312, 41 P. (2d) 314 (1935). Although earlier California cases had denied the possibility of picketing ever being peaceful, the language of this case appeared to recognize that picketing if peaceful would not be enjoined.

as effectually by obstructing and annoying others and by insult and menacing attitude as by physical assault."<sup>27</sup>

Shouting at customers is sufficient to brand picketing as non-peaceful in New York.<sup>28</sup> In other states, a single assault is sufficient to brand picketing as illegal.<sup>29</sup> Other courts have found that picketing which was otherwise peaceful could be enjoined on the ground that it amounted to a nuisance.<sup>30</sup> If the picketing is conducted in front of a store, or other establishment where a retail business is conducted, the court is more likely to enjoin it as a nuisance than in cases where a factory is picketed. This distinction can properly be supported on the ground that where a retail establishment is involved, the picketing will necessarily affect customers as well as employees.<sup>31</sup>

Many other cases could be cited in further support of the proposition that almost any form of picketing may be found to be instinct with a threat of intimidation. Thus, in an early case in Massachusetts,<sup>32</sup> decided before the enactment of that state's peaceful picketing statute,<sup>33</sup> it was held that where the activities of the pickets rendered

<sup>27</sup> *Lisse v. Local Union No. 31*, 2 Cal. (2d) 312 at 317, 41 P. (2d) 314 (1935).

<sup>28</sup> *Wise Shoe Co. v. Lowenthal*, 266 N. Y. 264, 194 N. E. 749 (1935). The case was apparently decided independently of New York's statute. N. Y. Laws (1935), c. 477. The court also held that it was permissible for strikers to exhibit signs reading, "Please do not patronize this store. They refuse to employ union shoe salesmen."

Earlier New York decisions, however, showed a somewhat greater reluctance on the part of that court to intervene in labor disputes. As said in *Stillwell Theatre v. Kaplan*, 259 N. Y. 405 at 409, 410, 182 N. E. 63 (1932):

"The Court of Appeals has for many years been disposed to leave the parties to peaceful labor disputes unmolested when economic rather than legal questions were involved. . . . The law of the State of New York, as declared by this court, is perhaps more favorable to the defendant than that of the United States Supreme Court or other jurisdictions."

In its opinion in the Kaplan case, the Court reviews many of the picketing cases decided by it over a period of years. These cases show an extreme reluctance to interfere in any way in labor disputes, so long as neither of the parties thereto resort to violence, deceit, or misrepresentation to bring about desired results.

<sup>29</sup> *McMichael v. Atlanta Envelope Co.*, 151 Ga. 776, 108 S. E. 226 (1921); *F. C. Church Shoe Co. v. Turner*, 218 Mo. App. 516, 279 S. W. 232 (1925).

<sup>30</sup> *Music Hall Theatre v. Moving Picture Machine Operators Local No. 165*, 249 Ky. 639, 61 S. W. (2d) 283 (1933); *F. C. Church Shoe Co. v. Turner*, 218 Mo. App. 516, 279 S. W. 232 (1925); *Ellis v. Journeyman Barbers' International Union*, 194 Iowa 1179, 191 N. W. 111 (1922).

<sup>31</sup> *Robison v. Hotel & Restaurant Employees' Local No. 782*, 35 Idaho 418, 207 P. 132 (1922).

<sup>32</sup> *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077 (1897).

<sup>33</sup> Mass. Stat. (1913), c. 690, supplemented by Laws (1935), c. 407.

working conditions unpleasant for non-union workers, there existed a moral intimidation which was not peaceful. The court there said:

“Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal.”<sup>34</sup>

In *International Pocketbook Workers' Union v. Orlove*,<sup>35</sup> the court found picketing was not peaceful because girl employees hesitated, out of fear, to go on the street. And in *Jefferson & Indiana Coal Co. v. Marks*,<sup>36</sup> where it appeared that parades of seventy-five or more strikers marched through the streets of a mining town and close to the mines, the court, in enjoining the picketing, used rather broad language, directing that the decree should

“restrain picketing on or near the premises of the complainant, or on the highways leading thereto, that is, in any manner with the purpose and for the effect of intimidating, annoying, embarrassing, or, through fear, exercising moral coercion over those lawfully employed by the appellee, whether actual force or violence be used or not.”<sup>37</sup>

Most if not all of the courts which hold that peaceful picketing should be recognized as a common-law privilege of labor organizations go no further than to refuse to prohibit demonstrations confined to the display by a small group of pickets of signs which are entirely truthful and are not so phrased as to carry any suggestion that the strikers are backed by a powerful organization. If these strict limits be exceeded, the picketing will be enjoined.

#### *Decisions in States Where All Forms of Picketing are Enjoined*

So strong is the current of decisions finding even the mildest forms of demonstration to carry some threat of coercion which takes them beyond the permissible limits of peaceful picketing, that the simple question is often put whether any form of picketing can be peaceful. Many courts have resolved this inquiry in the negative.

The language used by courts which prohibit all forms of picketing as being ipso facto unlawful, bears so close a resemblance to that

<sup>34</sup> *Vegelahn v. Guntner*, 167 Mass. 92 at 98, 44 N. E. 1077 (1897).

<sup>35</sup> 158 Md. 496, 148 A. 826 (1930).

<sup>36</sup> 287 Pa. 171, 134 A. 430 (1926).

<sup>37</sup> *Jefferson & Indiana Coal Co. v. Marks*, 287 Pa. 171 at 184, 134 A. 430 (1926).

of the decisions above examined that a comparison may prove instructive. Some courts have so phrased their decisions that it is not easy to determine whether they hold merely that the controversy passed upon did not present an instance of peaceful picketing, or whether they mean to say that picketing cannot be peaceful under any circumstances.

The Supreme Court of Arkansas,<sup>38</sup> for example, in enjoining the display of banners in front of a restaurant, declared that the placing of signs in the immediate neighborhood of the restaurant was evidence that the intention of the strikers was not alone to give notice of their grievance, but to warn the public of what would happen to anyone who incurred the strikers' displeasure. The court remarked:

“while the tendency of the earlier cases was to uphold picketing as an exercise of the right to free speech, the tendency of later cases is to restrict that right as an act of coercion in its tendencies, and one which in its practical applications tends generally to breaches of the peace and other disorders.”<sup>39</sup>

Similar doubts as to the possibility of picketing being peaceful are entertained by the Supreme Court of Iowa. In *Ellis v. Journeyman Barbers' International Union*,<sup>40</sup> that court enjoined defendants from maintaining a single picket who stood in front of a barbershop and carried a sign stating that the shop was unfair to union labor. It appeared that although the lone picket had been instructed to say nothing, he had in fact spoken to some customers, requesting them not to patronize the shop. The court ruled:

“The maintenance of a picket in the manner indicated in this record was an unlawful interference with the legal rights of the plaintiff, and partook of the nature both of a private nuisance and of a conspiracy.” “Aggressive picketing has been quite uniformly denounced by the courts, including the United States Supreme Court. Such court has held that ‘peaceful picketing’ is a contradiction in terms. . . . Picketing is usually an invitation to violence. Where it is persisted in with a declared purpose to

<sup>38</sup> Local Union No. 313, Hotel & Restaurant Employees International Alliance v. Stathakis, 135 Ark. 86, 205 S. W. 450 (1918). The decision contains an interesting intimation that it would be permissible to display placards in remote parts of the city, but not in the immediate vicinity of the employer's place of business. Perhaps this will be the definition of peaceful picketing that some courts will adopt.

<sup>39</sup> Local Union No. 313, Hotel & Restaurant Employees International Alliance v. Stathakis, 135 Ark. 86 at 92, 205 S. W. 450 (1918).

<sup>40</sup> 194 Iowa 1179, 191 N. W. 111 (1922).

continue until its victim is destroyed, it is a *challenge* to violence of the most effective kind. It is not in normal human nature to submit to it, except under the duress of superior force."<sup>41</sup>

The Florida Supreme Court has recently declared:

"The cases in the various jurisdictions are in hopeless conflict . . . but the decided current of Federal authority is to the effect that picketing is unlawful. Some state jurisdictions hold that it is not unlawful, others hold that it is, while the growing tendency appears to hold it illegal because inseparably associated with acts which are illegal."<sup>42</sup>

<sup>41</sup> *Ellis v. Journeyman Barbers' International Union*, 194 Iowa 1179 at 1190, 1183, 191 N. W. 111 (1922). The court climaxed its opinion with this highly vitriolic exuberation, which is of some interest as indicating the attitude with which many judges approach the general problem:

"A humble American citizen who seeks by sheer industry to make a modest living is driven into covert in his own shop, like a cowering dog into his kennel, while a powerful organization, through its officers, camps upon his shop entrance, and holds a scorpion over his door. Its vigilant thrust is intended to wound every entrant, whether owner or employee or patron. If this is not the beginning of a disturbance of the peace, it is only because the forces arrayed are too unequal for combat. One may be strong enough to spit in the face of an adversary, without fatality or immediate disturbance, but the reaction is still to be reckoned with. From such beginnings, combats, riots, and homicides follow. Such oppression is so intolerable to the American spirit that fatalities are its natural and quite sure sequel."

<sup>42</sup> *Paramount Enterprises, Inc. v. Mitchell*, 104 Fla. 407 at 415, 140 So. 328 (1932). The case involved a display at the entrance to a theatre of placards bearing assertions that the theatre owners refused to employ union labor and that admission prices were too high. The trial court had refused to issue a temporary injunction, and the upper court held that since it could not pass on the facts upon an interlocutory appeal, the chancellor's discretion would not be disturbed. But the court remarked that if the facts alleged were proved upon the hearing, an injunction should issue.

Two courts, in enjoining picketing where it occurred otherwise than in the course of a labor dispute between an employer and his employees, have indicated their doubts as to whether picketing would be permissible even in case of such a dispute. In *Parker Paint & Wall Paper Co. v. Local Union No. 813*, 87 W. Va. 631 at 642-643, 105 S. E. 911 (1921), it was held that where a painter had entered into a contract to paint a store building, it was unlawful for others to carry banners in front of the store with the words: "This store is unfriendly to union labor." The court remarked:

"Even some of the state courts which hold that a reasonable boycott is lawful, condemn 'picketing,' holding that the end to be attained thereby, however artful may be the means employed, is the injury of the boycotted business through physical molestation and physical fear caused to the employer, and his employed, or who may seek his employment, and to the general public."

In *Sarros v. Nouris*, 15 Del. Ch. 391, 138 A. 607 (1927), where it appeared that a strike was called solely for the purpose of compelling restaurant owners to unionize

Many other courts, however, have gone much further than to indicate that they entertain doubts as to whether picketing may ever be peaceful, and have held squarely that it cannot be. Perhaps the leading case is *Beck v. Railway Teamsters' Protective Union*,<sup>43</sup> which has been cited with approval by many other courts, including the Supreme Court of the United States.<sup>44</sup> In that case it appeared that members of a teamsters' union had requested plaintiffs, who were operating a general milling business, to sign a so-called "union contract," providing for a closed shop; and that when the plaintiffs refused to sign the contract, members of the union paraded in front of plaintiffs' place of business carrying signs requesting the public not to deal there. No violence occurred. The court held that all picketing must be stopped, remarking: "To picket complainants' premises . . . is unlawful. It itself is an act of intimidation. . . ."<sup>45</sup> The doctrine of the *Beck* case has been many times re-affirmed by the Supreme Court of Michigan.<sup>46</sup> The language of some of the Michigan cases indicates that the trial court has no discretion whatever in the matter, but must grant interlocutory relief upon petition (and final injunction upon hearing) wherever there is proof of picketing.<sup>47</sup>

That "peaceful picketing" is a contradiction in terms has been

their restaurants, the court held that the strike was unlawful and that picketing should be enjoined regardless of its peaceful or coercive nature.

<sup>43</sup> 118 Mich. 497, 77 N. W. 13 (1898).

<sup>44</sup> *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72 (1921); *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 31 S. Ct. 492 (1910).

<sup>45</sup> *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497 at 520, 77 N. W. 13 (1898).

<sup>46</sup> For convenience, the cases may be collated as follows: (1) On appeal from final decree: *Clarage v. Lufhringer*, 202 Mich. 612, 168 N. W. 440 (1918); *Schwartz v. Cigar Makers International Union*, 219 Mich. 589, 189 N. W. 55 (1922); (2) Contempt proceedings: *Ideal Mfg. Co. v. Ludwig*, 149 Mich. 133, 112 N. W. 723 (1907); *idem*, 149 Mich. 699, 113 N. W. 20 (1907); *In Re Langell*, 178 Mich. 305, 144 N. W. 841 (1913); (3) Duty of court to issue injunction: *Escanaba Mfg. Co. v. Trades & Labor Council*, 160 Mich. 656, 125 N. W. 709 (1910); *Ideal Mfg. Co. v. Wayne Circuit Judge*, 139 Mich. 92, 102 N. W. 372 (1905); (4) Appeal from interlocutory decree: *Baltic Mining Co. v. Houghton Circuit Judge*, 177 Mich. 632, 144 N. W. 209 (1913); *United States Heater Co. v. Iron Molders' Union of North America*, 129 Mich. 354, 88 N. W. 889 (1902); (5) Secondary boycott: *Baldwin v. Escanaba Liquor Dealers' Assn.*, 165 Mich. 98, 130 N. W. 214 (1911); (6) Publication of libel: *Pratt Food Co. v. Bird*, 148 Mich. 631, 112 N. W. 701 (1907).

<sup>47</sup> *Escanaba Mfg. Co. v. Trades & Labor Council*, 160 Mich. 656, 125 N. W. 709 (1910); *Ideal Mfg. Co. v. Wayne Circuit Judge*, 139 Mich. 92, 102 N. W. 372 (1905).

avowed by several courts. Thus, the Supreme Court of Washington<sup>48</sup> declared:

“the term sometimes used of ‘peaceful picketing’ is self-contradictory and meaningless. . . . picketing, in and of itself, is coercive, and that is its purpose and effect.”

And a California appellate court exclaimed:<sup>49</sup>

“Peaceful picketing! There is no such thing. . . . We are in full accord with the doctrine enunciated in the case of *Atchison etv. Ry. Co. v. Gee*,<sup>[50]</sup> where it is held that ‘there is, and can be, no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.’”

In another case it has been said that peaceful picketing exists mostly in the imagination.<sup>51</sup>

### *Cases Permitting Peaceful Picketing*

Even in the relatively few cases in which courts have refused to enjoin picketing, declaring that it was peaceful, the doctrine has been so thickly hedged with limitations as to effectively limit labor demonstrators to mere passive resistance. Thus, in Ohio the number of pickets is limited to two or three persons.<sup>52</sup> Other courts have warned that picketing must not become a nuisance,<sup>53</sup> and that pickets must not obstruct the streets.<sup>54</sup> And it has been said that what is peaceful picketing cannot be defined, but that the trial court must determine in each

<sup>48</sup> *Danz v. American Federation of Musicians*, 133 Wash. 186 at 188, 233 P. 630 (1925). The case was decided prior to the enactment of the peaceful picketing statute which now obtains in that state.

<sup>49</sup> *Moore v. Cooks', Waiters', and Waitresses' Union*, 39 Cal. App. 538 at 541, 179 P. 417 (1919). The courts of California have frequently denounced picketing, although the legislature has recently adopted a statute prohibiting issuance of injunctions in labor disputes except upon full showing of necessity. Cal. Gen. Laws (1931), Act 1605. *Goldberg Bowen & Co. v. Stablemen's Union*, 149 Cal. 429, 86 P. 806 (1906); *Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027 (1908); *Berger v. Superior Court*, 175 Cal. 719, 167 P. 143 (1917); *Lisse v. Local Union No. 31*, 2 Cal. (2d) 312, 41 P. (2d) 314 (1935).

<sup>50</sup> (C. C. Iowa, 1905) 139 F. 582.

<sup>51</sup> *Schwartz & Jaffe Inc. v. Hillman*, 115 Misc. 61, 189 N. Y. S. 21 (1921).

<sup>52</sup> *LaFrance Electrical Constr. & Supply Co. v. International Brotherhood of Electrical Workers*, 108 Ohio St. 61, 140 N. E. 899 (1923); *Brost Pattern Works v. Reid*, 24 Ohio N. P. (N. S.) 60 (1922).

<sup>53</sup> *Music Hall Theatre v. Moving Picture Machine Operators Local No. 165*, 249 Ky. 639, 61 S. W. (2d) 283 (1933).

<sup>54</sup> *Waddey Co. v. Richmond Typographical Union*, 105 Va. 188, 53 S. E. 273 (1906).

case whether the picketing was peaceful or was of such nature as to interfere with the picketed business.<sup>55</sup> The United States Supreme Court, in the famous *Tri-City Case*,<sup>56</sup> held that it was idle to speak of picketing being peaceful where three or four groups of pickets, made up of four to twelve men in a group, picketed a factory building which occupied a twenty-five acre tract, and decided that the strikers could have only one representative at each point of ingress and egress in the factory.

Under what circumstances, and in what manner, striking employees may picket their employers' places of business, cannot be precisely stated, except with reference to those jurisdictions which prohibit all forms of picketing. Where the privilege of peaceful picketing exists, by virtue of statutory enactment or independently thereof, employees may probably announce their intention of peaceably picketing certain premises, but whether they can go further, and actually conduct any form of demonstration, is open to serious doubt. The mere display of signs may be held to amount to a threat of coercion, and to be subject to the restraining hand of equity. If the pickets, in violation of contrary instructions from their superiors, accost employees or customers, the court will quite surely find an element of intimidation which is unlawful, and it is quite possible that in prohibiting such unlawful conduct the court will go further and prohibit all picketing, in order to make sure that its decree will be effective. And if there should occur any actual disturbance, by design or otherwise, the case is a clear one for injunctive relief. The privilege of picketing a store or restaurant is recognized even more grudgingly than the privilege of picketing a factory, where there is relatively little chance for a mere display of signs to interfere with the business of the employer. It is extremely doubtful, in short, whether labor organizations can lawfully engage in any forms of picketing which attract enough public notice to be effective.

<sup>55</sup> *Scofes v. Helmar*, 205 Ind. 596, 187 N. E. 662 (1933).

<sup>56</sup> *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72 (1921). The court also declared that it would be unlawful for a group of two or more pickets to talk to a single employee, and that pickets should be prohibited from dogging the steps of an employee who did not care to talk with them.