UIC Law Review

Volume 10 | Issue 1 Article 1

Fall 1976

Picketing and Freedom of Speech: Comes the Evolution, 10 J. Marshall J. Prac. & Proc. 1 (1976)

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PICKETING AND FREEDOM OF SPEECH: COMES THE EVOLUTION

by JESSE I. ETELSON*

In the landmark case of *Thornhill v. Alabama*,[1] the United States Supreme Court authoritatively established the existence of a relationship between peaceful labor picketing and the first amendment freedom of speech.[2] Since 1940, when *Thornhill* was decided, the constitutionally protected right to picket has been a popular topic for scholars and commentators.[3] The problems involved in this area of the law, however, are far from being resolved.[4] Over the years the Supreme Court has added layer upon layer of doctrinal paradox to the existing case law stemming from what appears to be a basic error of approach—an error which gradually crept into the decisions but which has never been fully articulated by the Court. The difficulty appears to stem from the Court's insistence on making *a priori* generalizations as to the location of picketing on a spectrum of conduct ranging from speech at one end, to action at the other. The overriding thesis of this article is that sensible results cannot consistently be achieved through *a priori* generalizations. Any analysis of the relationship between picketing and free speech protection must begin with a factual inquiry into the nature and the function of the picketing involved in each individual case.

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The author dedicates this work to the memory of his father, Louis Etelson, 1906-1976.

1. 310 U.S. 88 (1940).

2. The theory that picketing is a constitutionally protected part of free speech was first introduced by Justice Brandeis in Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937) (dictum):

> [C]learly 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.

3. *See, e.g.*, C. GREGORY, LABOR AND THE LAW 289-329 (2d rev. ed. 1961); Summers, *The Rights of Unions and Union Members*, in THE RIGHTS OF AMERICANS 591, 604 (N. Dorsen ed. 1970) [hereinafter cited as Summers]; Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951) [hereinafter cited as Cox]; Ratner & Come, *The Norris-LaGuardia Act in the Constitution*, 11 GEO. WASH. L. REV. 428 (1943) [hereinafter cited as Ratner & Come].

4. *See* Summers, *supra* note 3, at 604 where the author states that "the problem of picketing and free speech is neither dead nor resolved; we may only be beginning to understand its difficulty."

FRAMEWORK FOR ANALYSIS

Recognition of the Constitutional Right to Picket

The controversy in *Thornhill v. Alabama*[5] originated when Byron Thornhill, a member of a peaceful picket line on a private entrance to his employer's premises, confronted a non-striking employee and told him that the union was "on strike and did not want anybody to go up there to work."[6] The employee later testified that he was neither threatened nor intimidated by the communication and that he was approached in a peaceful manner. Because of his conduct, however, Thornhill was charged with and convicted of violating an Alabama statute which effectively prohibited all communications near a business establishment by anyone attempting to interfere with a lawful business. On appeal, the United States Supreme Court reversed the conviction holding that the Alabama statute was unconstitutionally broad. More importantly, however, the Court concluded that in peaceful picketing there is an element of "speech" which is protected under traditional first amendment doctrines.

Writing his first opinion as a member of the Supreme Court,[7] Justice Murphy acknowledged the fact that picketing and related activities might persuade a target audience to refrain from dealing with the picketed business. In his response to this familiar objection, Justice Murphy carefully articulated the philosophical basis for the Court's decision:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment 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 merit of ideas by competition for acceptance in the market of public opinion.[8]

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5. 310 U.S. 88 (1940). *See* text accompanying notes 1-4 *supra*.

6. *Id.* at 94.

7. Because of the attacks and erosions that the Court's decision later incurred, it is at least of historical interest to note that Justice Murphy's opinion was joined in by all but Justice McReynolds (who dissented without an opinion) and that most of the justices on the Court took the time to comment favorably on the balance and craftmanship of Justice Murphy's maiden opinion. *See* J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 248 (1968) [hereinafter cited as HOWARD].

8. Thornhill v. Alabama, 310 U.S. 88, 104-05 (1940). Justice Murphy soon had occasion to test the balance between free expression of labor views and the interests of governmental regulation where the expression of views was by the management side rather than the union side. In NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941), he again wrote the majority opinion, this time dealing with the freedom of speech

Although the "clear and present danger" standard announced in *Thornhill* has been criticized for flatly and unwisely equating all peaceful picketing with free speech,[9] it is now clear that such an interpretation of the *Thornhill* case must be regarded as a misconception. The alleged misconduct in the case merely involved a direct, non-threatening request by Byron Thornhill to a fellow employee asking him to support the union strike by not entering the premises. The actual holding, therefore, went no further than to establish constitutional protection for that aspect of the picketing which was undisputably "speech."

Retreat from the Broad Implications of the Thornhill Case

In the two decades following *Thornhill* the Court handed down a number of significant decisions attempting to limit and define the newly-declared first amendment protection for picketing.[10] In analyzing the current status of the law, two extremely important cases stand out as a link between the decisions of the *Thornhill* era and the cases decided during the 1970's.

In the first, *Giboney v. Empire Storage & Ice Co.*,[11] the members of an ice and coal drivers union were charged with the violation of a Missouri restraint-of-trade statute for picketing the business premises of an uncooperative distributor. The alleged purpose of the picketing was to force Empire Storage to stop

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of employers in attempting to influence their employees as to the selection of a union. The Court held that the National Labor Relations Board could not, under the authority granted to it to protect employee rights, restrain an employer's use of speech purely as a medium of persuasion. An employer's speech was *not* protected by the first amendment, however, when it went beyond *noncoercive persuasion* and engaged in other conduct, whether verbal or nonverbal, which permitted the inference that the assertedly protected speech really had a coercive message. This distinction, variously articulated, is familiar to all students of labor relations law. It also contains a clue as to the limits of the then newly-declared first amendment protection of picketing.

9. *See* HOWARD, *supra* note 7, wherein the author notes that *Thornhill* was "[d]enounced by eminent authorities . . . as 'one of the greatest pieces of folly the Supreme Court ever perpetrated,' the *Thornhill* case in fact became one of the most heavily criticized decisions since 1937." *Id.* at 248.

10. For an excellent analysis of the post-*Thornhill* decisions see Jones, *The Right to Picket—Twilight Zone of the Constitution*, 102 U. PA. L. REV. 995 (1954) *and* Samoff, *Picketing and the First Amendment: "Full Circle" and "Formal Surrender,"* 9 LAB. L.J. 889 (1958), wherein the following cases are discussed: International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Garner v. Teamsters Union, Local 776, 346 U.S. 485 (1953); Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953); Building Servs. Employees Int'l Union, Local 262 v. Gazzam, 339 U.S. 532 (1950); International Bhd. of Teamsters, Local 309 v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293 (1943); Bakery & Pastry Drivers, Local 802 v. Wohl, 315 U.S. 769 (1942); Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942); AFL v. Swing, 312 U.S. 321 (1941).

11. 336 U.S. 490 (1949).

selling ice to independent peddlers whom the union was attempting to organize. Although the union argued that it had a lawful objective of improving the wages and working conditions of peddlers and their helpers, the Court refused to ignore the totality of the circumstances and found that the union had violated the Missouri statute:

> Thus all of appellants' activities—their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing—constituted a single and integrated course of conduct, which was in violation of Missouri's valid law.[12]

The Court also rejected the contention that because the picketing merely amounted to a peaceful and truthful communication of facts about a labor dispute, it was consitituionally protected under the doctrine enunciated in *Thornhill.* Writing for a unanimous Court, Justice Black explained that *Thornhill*, while protecting the right to freely discuss industrial relations, was more specifically directed at the situation in which the state had prohibited "nearly every practicable, effective means whereby those interested—including the employees directly affected—may enlighten the public on the nature and cause of a labor dispute."[13]

It is significant to note that the Missouri statute in *Giboney* was not intended to interfere with free speech, but was directed at restraint of trade. The statute indirectly restricted speech only to the extent that speech inhibited the free-flow of commerce. In arriving at its decision, the Court recognized the fact that picketing may be examined for the real message of its non-speech elements and thus adopted as stated rationale the "speech-*plus*" concept of picketing. Justice Douglas, one of the strongest advocates of free speech on the Court, first articulated the rationale behind the "speech-*plus*" concept when he stated:

> Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another quite irrespective of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.[14]

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12. *Id.* at 498.
13. *Id.* at 499, *citing* Thornhill v. Alabama, 310 U.S. 88, 104 (1940).
14. Bakery & Pastry Drivers, Local 802 v. Wohl, 315 U.S. 769, 776-77 (1942) (concurring opinion). Justice Douglas was joined in this concurring opinion by Justices Murphy and Black, both of whom have had a great influence in this area of the law. In a later statement, Douglas placed a somewhat different emphasis on the "speech-*plus*" concept, "Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters. Hence the latter aspects of picketing may be regulated." Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 326 (1968) (concurring opinion).

The stated justification for enjoining the picketing in *Giboney* was not based upon the "speech-*plus*" concept, however, but upon Justice Black's "unlawful immediate objective" theory:

> Nor can we say that the publication here should have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts. . . . For the placards were to effectuate the purposes of an unlawful combination, and *their sole, unlawful immediate objective was to induce Empire to violate the Missouri law* by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here was in most instances brought about through speaking or writing. But it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.[15]

A close examination of the *Giboney* rationale indicates that the Court relied upon more than the "unlawful immediate objective" theory in arriving at its decision. An underlying basis for looking to the objective of the union's activity was that the speech was an essential and inseparable part of the union's overall conduct which transcended the speech aspect of the picketing. But the Court also relied upon the fact that there existed a clear and present danger that the union's unlawful objective would be fulfilled. As if to emphasize the necessity that there be some significant "danger," Justice Black reaffirmed the principle that freedom of speech cannot be abridged "to obviate slight inconveniences and annoyances."[16] Thus, to the extent that the "clear and present danger" test was relied upon, *Giboney* merely represents an application of *Thornhill*, which recognized the legitimacy of abridging the right to picket when "substantive evils" present a "clear and present danger" of closing down the free marketplace of ideas.[17] If, however, as Justice Black indicated, picketing can be prohibited solely on the basis of an unlawful objective, why was the Court even concerned with the "clear and present danger" standard announced in *Thornhill*? Although *Giboney* was a unanimous opinion by the Supreme Court, disagreement over the meaning of this controversial case has divided the Court.

After deciding several cases in which the "unlawful immediate objective" reasoning of *Giboney* was followed[18]—if

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15. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (emphasis added).
16. *Id.* at 501-02.
17. *See* text accompanying note 8 *supra*.
18. Local Union No. 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953); Building Servs. Employees Int'l Union, Local 262 v. Gazzam, 339 U.S. 532 (1950); International Bhd. of Team-

sometimes loosely—the Supreme Court reached *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*[19] There, a union had unsuccessfully attempted to organize Vogt's employees. A picket line was then set up near the entrance to the firm with signs reading, "The men on this job are not 100% affiliated with the A.F.L." The employer suffered economic loss when the drivers of its suppliers and customers, presumably belonging to local teamster unions, refused to cross the picket line. The Vogt Company obtained a court order to enjoin the picketing on the ground that the purpose of the union's conduct was to coerce the employer to interfere with its employees' right not to join a union, thereby making the picketing an unfair labor practice under Wisconsin law.

In a 5-3 decision the United States Supreme Court upheld the validity of the injunction, Justice Frankfurter writing the majority opinion. He asserted that the Court had withdrawn from the "broad pronouncements, but not the specific holding, of *Thornhill*" in having adopted the "speech-*plus*" concept of picketing. Frankfurter also stated that the series of cases beginning with *Giboney* had established the constitutionality of injunctions against peaceful picketing "when such picketing was counter to valid state policy in a domain open to state regulation."[20] In enforcing its policy a state "could constitutionally enjoin such peaceful picketing aimed at preventing effectuation of that policy."[21] Thus, while a general prohibition against picketing was still proscribed under *Thornhill*, the *Vogt* majority held that an injunction may be constitutionally defensible if there is a rational basis for inferring that under the facts of the case the purpose of the picketing violated a valid state policy.

A characteristically vigorous dissent by Justice Douglas, joined by Justice Black and Chief Justice Warren, argued that the Court had abandoned *Giboney* as well as *Thornhill* and had given state courts a carte blanche to "permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."[22] Asking for a "return" to the principle of *Giboney*, Justice Douglas maintained that "picketing can be

sters, Local 309 v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950).

19. 354 U.S. 284 (1957).

20. *Id.* at 291. It is likely that if the Court had considered the question of whether state regulation of picketing had been preempted by the Taft-Hartley Act, the majority would have answered in the affirmative on the basis of the then-developing law of preemption. *See* Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 n.7 (1968); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Union, Local 776, 346 U.S. 485 (1953).

21. International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 293 (1957).

22. *Id.* at 297.

regulated or prohibited only to the extent that it forms an essential part of a course of conduct which the state can regulate or prohibit."[23]

Apparently the sole distinction between the majority view and the position of the dissenters in *Vogt* depended upon the type of conduct that can be regulated in furtherance of a valid state policy. The majority, citing the "speech-*plus*" concept, viewed picketing as necessarily more than speech which was subject to prohibition whenever it conflicted with a valid state policy. The dissent, gaining some authoritative weight from Justices Douglas and Black, the authors, respectively, of the original "speech-*plus*" concept and of *Giboney*, refused to treat all picketing alike. The dissenters demanded a closer look at the specific evil to be regulated by state policy and the specific conduct alleged to support the unlawful objective.

Perhaps the result reached by the majority in *Vogt* can best be justified by the reasoning of the dissent. Unquestionably, the state court had an adequate basis to conclude that the picketing in question was designed to force the Vogt Company to interfere with the right of its employees not to belong to a union. This, of course, was a specific evil under the applicable state law, and the means employed to achieve it, although peaceful, were better calculated to obtain union recognition by coercion, rather than to persuade the employees to freely join a particular bargaining unit. The fact that pressure was brought to bear on the Vogt Company, through the refusal of drivers employed by others to cross the picket line, follows a central theme in the "speech-*plus*" concept, *i.e.*, that the picket line may be a signal for action quite distinct from the message written on the picket signs. Here, for example, the written message consisted of the truthful statement that some of the employees working on the premises were not "affiliated with the A.F.L." Innocuous as that message may appear, the picketing was a signal for A.F.L. affiliated drivers not to enter the premises. While not conclusive, the fact that several drivers actually did refuse to cross the picket line provides some evidence of a common understanding to that effect. Had the picket sign included a caveat expressly disclaiming such an intention, such as a statement that the picketers had no dispute with the employer, then the fact that the drivers elected to honor the picket line may have been insufficient in and of itself to prove an unlawful objective.

Vogt was the last in a line of cases during the 1950's to limit *Thornhill* almost to its facts. The foregoing analysis of *Vogt* suggests, however, that the majority engaged in dialectic overkill

23. *Id.*

in its rationale. Subsequent cases offer some evidence that the *Vogt* rationale was no more permanent than the broad dicta in *Thornhill* which it purported to supersede. Because of the nature of the more recent cases dealing with the right to picket, the Supreme Court has been able to reach results one would not expect under the *Vogt* rationale, thereby making it possible to demonstrate that the rationale of that case has been called seriously into question.

Development of the Protected Speech Concept

The formulation of a new method for resolving picketing cases and a movement away from the *Vogt* rationale began with the concurring opinion in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*[24] (known in labor circles as *Tree Fruits*, after the Tree Fruits Labor Relations Committee, Incorporated, a representative of fruitpacking and warehouse firms in the state of Washington). In that case, the packers' union picketed forty-six Safeway stores in Seattle, in support of a strike against the packers and warehouses. The picketing, accompanied by distribution of handbills to Safeway customers, was expressly limited to an appeal to the public to support the strike by refusing to buy Washington State apples. The handbills specifically stated that the strike was not "against any store or market." Upon a charge filed by the Tree Fruits Committee, a complaint was brought before the National Labor Relations Board alleging that the union was engaging in a secondary boycott as defined in section 8(b)(4)(ii)(B) of the Labor-Management Relations Act (Taft-Hartley).[25] Under this section of the Act, it is an unfair labor practice for a union "to threaten, coerce, or restrain any person . . ." where the object thereof is "forcing or requiring any person to cease using, selling . . . or otherwise dealing in the products of any other producer . . . or to cease doing business with any other person . . . ."[26] The Board found that the picketing violated the Act, but the United States Court of Appeals for the District of Columbia reversed and remanded, holding that the picketing could be found to "threaten, coerce, or restrain" Safeway only upon proof that it had caused, or was likely to cause, a substantial economic impact upon that retailer. The Supreme Court granted *certiorari* and dismissed the complaint, holding that such limited consumer picketing did not con-

24. 377 U.S. 58 (1964).
25. 29 U.S.C. § 158(b)(4) (1970), *amending* 29 U.S.C. § 158(b)(4) (1947) (National Labor Relations Act, *as amended* by the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(a), 73 Stat. 542-43 (1959)).
26. *Id.*

stitute an unlawful secondary boycott irrespective of its economic impact.[27]

The basis of the majority opinion was statutory, not direct constitutional construction. After a long and tortuous analysis of the legislative history of the 1959 amendments to the secondary boycott provisions, the majority concluded that the picketing in question was primary, rather than secondary. The foundation for this conclusion was that the picketing, by being scrupulously limited to appeals not to buy the product of the employers with whom the union had a legitimate dispute, was limited in its objective to bringing direct pressure on the employers, the packing houses and warehouses. The Court held, therefore, that even though the picketing might fall within the literal statutory prohibition, its close confinement to the primary dispute meant that it did not "threaten, coerce, or restrain" Safeway in a manner which Congress had intended to prohibit.[28]

In setting the scene for its analysis of the legislative history, the majority stated that " '[i]n the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing.' "[29] Consequently, the Court held that it would not ascribe to Congress

> a purpose to outlaw peaceful picketing unless 'there is the clearest indication in the legislative history,' . . . that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment.[30]

Such dicta, almost isolated within a long opinion, falls short of the Court's avowed reliance on the doctrine of construing a statute in a manner which will permit avoidance of a constitutional issue. However, only five of the eight participating justices thought that the constitutional issue could be avoided at all. In a dissenting opinion Justice Harlan, joined by Justice Stewart, agreed that the statute prohibited this kind of picketing, but, following the approach of the post-*Giboney* decisions, found that a general prohibition against "secondary" consumer picketing interfered with no first amendment right.[31] Justice Black wrote a concurring opinion in which he disagreed with the majority view which maintained that the statute could be read so as to permit such picketing.

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27. 377 U.S. at 71-73.
28. *Id.* at 71.
29. *Id.* at 62-63.
30. *Id.* at 63.
31. *Id.* at 93-94.

Justice Black's opinion[32] merits special attention because it foreshadows what arguably has become a majority view on the constitutional issue. In what is in some respects an oversimplification of the "speech-*plus*" concept, he defined the two major components of picketing as patrolling and speech, the latter referring to the messages on placards. Because picketing includes patrolling, Black declared that "neither *Thornhill* nor cases that followed it lend 'support to the contention that peaceful picketing is beyond legislative control.' "[33] He further stated:

> However, when conduct not constitutionally protected, like patrolling, is intertwined, as in picketing, with constitutionally protected free speech and press, regulation of the nonprotected conduct may at the same time encroach on freedom of speech and press. In such cases it is established that it is the duty of courts, before upholding regulations of patrolling, 'to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights' of speech and press.[34]

Black's analysis of the facts led him to conclude that the statute in question effectively banned the speech, but not the patrolling aspects of picketing. Since the Act only outlawed picketing as a device to publicize one side of a labor dispute, he reasoned, it regulated the message rather than the method of the picketing. According to Black, the prohibition could not be justified under the *Giboney* theory of speech as a part of an unlawful undertaking because the objective of the picketing, the requesting of consumers to boycott a "struck product," was an objective which the statute itself recognized as unlawful:[35]

> In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgment of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.[36]

During the next term Justice Black expanded on his views in *Tree Fruits* in a manner that was expressly adopted by a

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32. *Id.* at 76-80.
33. *Id.* at 77. The interior quotation is from Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 500 (1949).
34. *Id.* at 77-78. The interior quotation is from Schneider v. State, 308 U.S. 147, 161 (1939).
35. 29 U.S.C. § 158(b)(4) (1970):
> [N]othing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer . . . .

36. 377 U.S. at 79.

majority of the Court only seven years later. The development of Black's views occurred in cases involving civil rights picketing. Interestingly, the attempts to prohibit such picketing, while at the same time permitting labor picketing, eventually proved to be of controlling significance. The first example of an attempt to prohibit civil rights picketing occurred in *Cox v. Louisiana*,[37] wherein a Louisiana law against obstructing streets or sidewalks but specifically exempting labor picketing[38] was invoked against a civil rights demonstration.

Cox, a civil rights leader, led a peaceful demonstration of black college students. The demonstration included a march from the state capitol to the courthouse where twenty-three fellow students were incarcerated after being arrested in an earlier demonstration against segregated lunch counters. The demonstration was allowed to proceed for a short time under controlled conditions, but when the participants failed to obey a police order to disperse, they were sprayed with tear gas. Cox was arrested and charged with criminal conspiracy, breach of the peace, obstructing public passages, and picketing before a courthouse. He was convicted of the last three aforementioned counts. Only the obstruction charge, and its denouement, are of immediate relevance.

The specific action which precipitated Cox's conviction was the obstruction of the sidewalk across the street from the courthouse. A majority of five justices reversed the conviction on the ground that as applied and enforced, the obstruction statute gave unfettered discretion to local officials to permit some parades or meetings that obstructed streets or sidewalks and to prohibit others. The vice was in giving such officials the power of censorship over views which they felt should not be expressed, without providing those officials with standards for exercising such power. The Court reaffirmed *Giboney* for the narrow proposition that it is not an abridgment of freedom of speech to prohibit a course of conduct merely because such conduct "was in part initiated, evidenced, or carried out by means of language. . . ."[39] However, the Court found this doctrine inapplicable to the Cox conviction because the conduct involved was neither uniformly prohibited nor proscribed within a definable range of discretion.

The majority noted in passing that the statute expressly exempted labor picketing.[40] In contrast, Justice Black found

37. 379 U.S. 536 (1965).
38. The statute did not "apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing . . . ." While this did not amount to a carte blanche for any labor picketing, the distinction was made according to the purpose of the demonstration.
39. 379 U.S. at 555.
40. *Id.* at 556 n.14.

that this feature of the law was decisive. Concurring in portions of the Court's decision, he repeated, as background, the views expressed in his *Tree Fruits* concurrence. Applying his viewpoint on selective regulation of picketing according to the message being conveyed, he found the obstruction statute to be unconstitutional on its face. The state could not justifiably allow labor picketing while prohibiting similar use of the streets to air other opinions. Black found, along with the majority, a form of censorship of ideas in the discriminatory sanctioning of obstructive activities. Although he mentioned the practice of city officials in permitting "favored groups other than labor unions to block the streets with their gatherings,"[41] Black's main emphasis was on the express legislative preference of allowing demonstrations for some kinds of lawful causes over others.

In 1972, seven years after *Cox*, the Court was confronted with the issue of whether it was constitutionally permissible to legislate one standard for all peaceful labor picketing and a different standard for all other peaceful picketing. In *Police Department v. Mosley*[42] a majority of the Court adopted Black's rationale and decided that it was not permissible to legislate such different standards.

Mosley, who regularly picketed a Chicago high school with a sign protesting alleged racial discrimination at the school, sued for declaratory and injunctive relief challenging the application to him of an ordinance which prohibited picketing of a school except "the peaceful picketing of any school involved in a labor dispute." Thus, this ordinance specifically described permissible picketing according to its subject matter. The Court's response to Mosley's allegations conclusively acknowledged Justice Black's view of picketing:

> The late Mr. Justice Black, who thought that picketing was not only a method of expressing an idea but also conduct subject to broad state regulation, nevertheless recognized the deficiencies of laws like Chicago's ordinance. This was the thrust of his opinion concurring in *Cox v. Louisiana*, 379 U.S. 536 (1965): '[B]y specifically permitting picketing for the publication of labor union views [but prohibiting other sorts of picketing], Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also

41. *Id.* at 581.
42. 408 U.S. 92 (1972).

> amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.' *Id.*, at 581. We accept Mr. Justice Black's quoted views. Cf. *NLRB v. Fruit & Vegetable Packers* [*Tree Fruits*], 377 U.S. 58, 76 (1964) (Black, J., concurring).[43]

Did this mean that governmental interests could never justify selective prohibitions of picketing? Returning to Black's rationale, Justice Marshall, writing for the Court in *Mosley,* postulated that there could be a legitimate and substantial governmental interest which would justify discrimination among pickets if such discrimination were narrowly tailored to serve that interest.[44] Declaring that any justifications for distinctions among pickets must be "carefully scrutinized," the Court concluded that the Chicago ordinance did not withstand such scrutiny. Chicago's justification for the ban was the prevention of school disruptions, but since the city had determined that peaceful labor picketing was not an undue interference with the functioning of a school it could not, in a manner consistent with the equal protection clause of the fourteenth amendment, ban other picketing as disruptive "unless that picketing is clearly more disruptive . . . ."[45] This, the Court held, was not shown by the city in the case of Mosley's peaceful nonlabor picketing.[46] The Court rejected the city's argument that nonlabor picketing as a class is more violence-prone than labor picketing because such an assumption did not meet the standard of "narrow tailoring" to serve legitimate governmental interests. Thus, the Court was led to the ultimate conclusion that:

> Chicago's ordinance imposes a selective restriction on expressive conduct far 'greater than is essential to the furtherance of [a substantial governmental] interest.' *United States v. O'Brien* . . . . Far from being tailored to a substantial governmental interest, the discrimination among pickets is based on the content of their expression.[47]

United States v. O'Brien,[48] cited by the Court in *Mosley,* provides a second, somewhat weaker link between *Tree Fruits* and *Mosley.* O'Brien, charged with a crime for burning his draft card, argued that the burning was an expression of his views protected by the first amendment. The Supreme Court disagreed, and in an opinion by Chief Justice Warren, held that O'Brien was justifiably convicted for the noncommunicative aspect of his conduct, prohibited by Congress in furtherance of a legitimate interest in the efficient functioning of the Selective

43. *Id.* at 97-98.
44. *Id.* at 99, 101-02.
45. *Id.* at 100.
46. *Id.* at 100-01.
47. *Id.* at 102.
48. 391 U.S. 367 (1968).

Service System. The Court distinguished this case from circumstances where the "alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful."[49] As one example of that type of case, the Court cited *Stromberg v. California*,[50] where the conduct sought to be prohibited was the displaying of flags, badges, or banners to express opposition to organized government. In explaining the result in *Stromberg* the *O'Brien* Court gave a gratuitous nod of approval to Black's views in *Tree Fruits*:

> Since the statute [in *Stromberg*] was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, NLRB v. Fruit & Vegetable Packers Union . . . [*Tree Fruits*] (concurring opinion).[51]

Four years after *O'Brien*, a reconstituted Court, in *Mosley*, endorsed Black's *Tree Fruits* and *Cox v. Louisiana* rationale. In retrospect, the concern over first amendment problems expressed almost in passing by the *Tree Fruits* majority, weighed much more heavily than was apparent when that case was decided. By the time that *Mosley* was decided, not only Black, but also Justices Warren, Goldberg, and *Tree Fruits* dissenter Harlan were gone, replaced by Justices Burger, Blackmun, and Rehnquist. Although, among the replacements, only Justice Powell joined the Court's opinion in full, no justice expressed disagreement with its rationale.[52]

Despite the existence of a clear line leading from the *Tree Fruits* concurrence to the *Mosley* opinion, it is natural to ask whether *Cox* and *Mosley*, being civil rights cases, really have any application to labor picketing. The question of whether labor picketing stands in the same first amendment light as political picketing arose, by historical quirk, in reverse in the *Cox* and *Mosley* cases. In prohibiting the government from discriminating in favor of peaceful labor picketing as against other kinds of peaceful picketing, the Court could hardly have intended to permit disparate treatment the other way around. The opinion in *Mosley*, in fact, leaves little doubt that with respect to the first amendment, labor picketing is not in a separate category. In reaffirming the principle that picketing involves expression within the protection of the first amendment, the *Mosley* Court

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49. *Id.* at 382.
50. 283 U.S. 359 (1931).
51. 391 U.S. at 382.
52. Chief Justice Burger stated in a concurring opinion that he joined the Court's *opinion*, but with reservations regarding some statements about the permissible limits of censorship. Police Dep't v. Mosley, 408 U.S. at 102-03 (1972).

relied primarily on *Thornhill* and on the subsequent labor and nonlabor cases which were decided on its authority.[53]

Picketing and the Private Property Dilemma

In the celebrated case of *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*[54] the Supreme Court adopted yet another approach to protection of first amendment rights in labor picketing. In *Logan Valley* the members of a food employers' union picketed a supermarket in a suburban shopping center which employed an entirely non-union staff. The picketers carried signs which stated that the supermarket was non-union and that the employees were not receiving union wages or other union benefits. The owners of the market and of the shopping center obtained an injunction which proscribed picketing within the confines of the shopping mall. The injunction was upheld by the Pennsylvania Supreme Court on the ground that the picketing constituted a trespass on private property,[55] but in a 6-3 decision the United States Supreme Court reversed.[56]

Writing for the majority, Justice Marshall carefully reviewed the general status of picketing in light of the post-*Thornhill*

53. *Id.* at 99. Another doctrinal link between *Mosley* and the earlier labor picketing cases is the requirement of "narrow tailoring." In *Tree Fruits* the majority construed the secondary boycott statute narrowly, in part over concern that a broader reading might not comport with first amendment guarantees. The District of Columbia Circuit recently attached considerable significance to that aspect of *Tree Fruits* in its decision in Local 14055, United Steelworkers of America v. NLRB, 524 F.2d 853 (D.C. Cir. 1975) [hereinafter referred to as *Dow Chemical*]. In *Dow Chemical* the Court reversed the National Labor Relations Board and held that a union's consumer boycott of the principle product sold by the picketed retailers was lawful. In *Thornhill* the antipicketing statute had been held unconstitutional because it was too broad, and the Court noted that it did not have before it "a statute narrowly drawn to cover the precise situation giving rise to the danger." Thornhill v. Alabama, 310 U.S. 88, 105(1940). The concept of "narrowly drawn" legislation, which may have originated with *Thornhill*, was carried forward into first amendment cases of other kinds in the form of its reciprocal doctrine, the "overbreadth" theory. *See* Strong, *Fifty Years of "Clear and Present Danger": From Schenk to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41, 69-72 (1969) [hereinafter cited as Strong]. It was also an important factor in the Court's decision in United States v. O'Brien, 391 U.S. 367 (1968), a significant case in the development of nonlabor "speech-*plus*" regulation.

Thornhill, it should also be noted, held quite clearly that first amendment protection of speech is not diminished because the issues being discussed are of a nature that could be characterized as economic rather than political or religious. The Supreme Court recently held that even pure "commercial speech" is entitled to first amendment protection. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 44 U.S.L.W. 4686 (U.S. May 24, 1976).

54. 391 U.S. 308 (1968).

55. Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union, Local 590, 425 Pa. 382, 227 A.2d 874 (1967).

56. Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (Justices Black, Harlan and White dissenting).

decisions and attempted to reconcile the apparent inconsistency between cases such as *Vogt* and *Thornhill*. After noting that picketing often involves elements other than speech which may justify the imposition of controls that would not be constitutionally permissible in the case of pure speech, Marshall departed from the broad dicta of the *Vogt* case and pointed out that there are limits to the scope of these controls:

> Nevertheless, no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether.
>
> The majority of the cases from this Court relied on by respondents, in support of their contention that picketing can be subjected to a blanket prohibition in some instances by the States, involved picketing that was found either to have been directed at an illegal end . . . or to have been directed at coercing a decision by an employer which, although in itself legal, could validly be required by the State to be left to the employer's free choice . . . .[57]

According to Justice Marshall, the right to picket cannot be infringed by merely declaring that certain nonspeech elements in picketing are unlawful. Since peaceful picketing is protected by the first amendment in the abstract,[58] some substantial reason must be given to justify its prohibition.

Following this general review of the relevant picketing cases, the Court focused on the fact that the demonstration in question took place on private, rather than public property. The majority concluded that when private property takes on sufficient "public" qualities it becomes, for certain purposes, an arm of the state, *i.e.*, a municipality, and the owners are therefore prevented by the first amendment from interfering with the constitutionally protected right of freedom of speech. Thus, under limited circumstances, interested persons have what amounts to a constitutional easement to picket on private property in a manner that does not interfere with the owner's legitimate use of that property.[59]

Earlier decisions had established that public areas such as streets, sidewalks and parks are so historically associated with the exercise of first amendment rights that access to them for the peaceful dissemination of information cannot "broadly and

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57. *Id.* at 314 (citations omitted). In Police Dep't v. Mosley, 408 U.S. 92 (1972), Justice Marshall subsequently reaffirmed the converse of this idea when he stated that "picketing plainly involves expressive conduct within the protection of the First Amendment . . . ." 408 U.S. at 99; *see also* Cox, *supra* note 3, at 597.

58. Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313 (1968).

59. *Id.* at 319-21.

absolutely" be denied.[60] In *Marsh v. Alabama*[61] the Court had extended this reasoning to streets and sidewalks in the business district of a "company town" where the private owner operated the town like a municipality. In *Logan Valley* the Court went even further, analogizing the suburban shopping center to a company-owned business district. This extension was made over the objection of Justice Black, the author of *Marsh*, who maintained that the *Marsh* rationale only extended to nominally private property which had taken on *all* the attributes of a municipality.

In assessing the importance and the relevance of the *Logan Valley* decision, it is significant to note that a key portion of the majority's holding was not disputed by the dissenters. That is, although picketing involves elements other than speech, it is not unique in that regard and therefore cannot be subjected to broad prohibition as a special class of demonstrative activities. The majority compared picketing to handbilling, which already enjoyed constitutional protection under the first amendment:

> Handbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets on municipal property. If title to municipal property is, standing alone, an insufficient basis for prohibiting all entry onto such property for the purpose of distributing printed matter, it is likewise an insufficient basis for prohibiting all entry for the purpose of carrying an informational placard. While the patrolling involved in picketing may in some cases constitute an interference with the use of public property greater than that produced by handbilling, it is clear that in other cases the converse may be true.[62]

The Court's conclusion that picketing cannot permissibly be treated as a special class *per se*, foreshadows the *Mosley* decision,[63] which held that different types of picketing cannot be selectively prohibited unless one is clearly more disruptive than those that are allowed.

Shortly after *Logan Valley*, the Supreme Court, in *Lloyd v. Tanner*,[64] drastically limited the right to picket on private property. The *Lloyd* case involved five young opponents of the Vietnam War who were discovered distributing handbills at a shopping center having the same physical characteristics as Logan Valley Mall. The protesters were threatened with arrest by security guards and subsequently filed a declaratory judg-

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60. *Id.* at 315, *citing* Lovell v. Griffin, 303 U.S. 444 (1938); Hague v. CIO, 307 U.S. 496 (1939); Schneider v. State, 308 U.S. 147 (1939); Jamison v. Texas, 318 U.S. 413 (1943).
61. 326 U.S. 501 (1946).
62. Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315-16 (1968).
63. *See* text accompanying notes 42-47 *supra*.
64. 407 U.S. 551 (1972).

ment action, claiming that they had a constitutional right to continue distributing the handbills. The Supreme Court held that *Logan Valley* did not invalidate the injunction because the picketing in that case was directed at the manner in which a particular store within the shopping center was being operated, whereas in *Lloyd* there was no nexus between the functional use of the picketed property and the object of the picketing. Justice Powell, writing for the majority, found this distinction to be crucial for two reasons: First, he interpreted *Logan Valley's* extension of the company town concept to a privately-owned shopping center as an extension that was limited to the type of situation in which the first amendment activity was directly related to the shopping center's operation. To create a first amendment right in the absence of such a relationship would, in Powell's view, ignore the fact that the invitation to the public only extended to those persons doing business with the stores in the shopping center or to those patrons engaged in activities that were compatible with the interests of the store owners. Second, Powell noted that a crucial factor in the *Logan Valley* case was that the message on the picket signs was intended for the customers of a particular store who were only accessible through the shopping center. If the picketers did not have access to the store's property, then they would have been unable to convey their message. The majority in *Lloyd*, however, found that there was no need for access to the actual shopping area because the antiwar message could have been communicated just as effectively on the public streets and sidewalks surrounding the shopping mall. Therefore, the Court concluded that when picketing takes place on private property which has attributes of public property, it is only permissible to the extent that the designed purpose of the demonstration is specifically related to the activity that is conducted on the owner's property.

Writing for the dissenters, Justice Marshall claimed that the majority's holding was indistinguishable from *Logan Valley* because the shopping center was, according to the evidence presented, the functional equivalent of a public business district which had in fact been opened to the public for a broad range of other first amendment activities. The handbilling was therefore, in Marshall's view, "directly related" to the property's intended use. Marshall argued that the essence of the *Logan Valley* opinion was that when private property assumes sufficient indicia of a public business district, the first amendment right of freedom of speech overrides the property interests of the owner.

Essentially, the division within the Court centered on the

scope of the constitutional easement that arises from the variety of uses which the common areas of a large shopping mall often include. This division, however, did not extend to the issue of access to private property that is merely open to the public for a specific purpose, such as the parking lot of a free-standing store. In *Central Hardware Co. v. NLRB*,[65] a decision announced the same day as *Lloyd*, the Court was unanimous in concluding that in order for *Logan Valley* to apply it is *not* sufficient for the private property merely to be open to the public, but that it must also, to a significant degree, assume the functional attributes of public property.[66]

Viewed in its logical relation to the *Logan Valley* case, *Lloyd* is an inexplicable decision. Purporting not to overrule *Logan Valley*, the majority defined the limits of the constitutional easement enjoyed by the *Logan Valley* picketers in terms of the relationship between the invitation to the public and the object of the picketing. If the picketing were related to the invitation, even in a negative way, it would be constitutionally protected, but not so if unrelated.[67] This distinction, however, was tenuous, and had a short-lived existence. At its next opportunity to address the subject, in *Hudgens v. NLRB*,[68] the Court simply overruled *Logan Valley*.

In the *Hudgens* case the owner of a shopping mall threatened to arrest the employees of one of the mall's tenants for picketing the tenant's store in support of a lawful strike at the tenant's warehouse, which was not located on shopping center property. The National Labor Relations Board decided that the

65. 407 U.S. 539 (1972).

66. Justice Marshall, along with Justices Douglas and Brennan, dissented as to the proper remand order for the purpose of determining the respective rights of the parties under NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956), which governs the right of access to private property under certain circumstances pursuant to the National Labor Relations Act.

67. According to the *Lloyd* rationale, picketing or handbilling directed at a particular store within a shopping center for reasons having to do with the operation of that store is protected. Logically, the entire shopping center could be picketed to protest the manner in which it operated. Although the concept of a constitutional easement arose out of the broad invitation to the public to congregate in the shopping center, an invitation based on the hope that the stores would thereby be patronized, picketing which was designed to discourage patronage would be constitutionally protected, while practically all other types of picketing would be enjoinable. Only an extraordinary respect for stare decisis, or the desire for its appearance, can explain this reconstituted Court's willingness to follow *Logan Valley* (a decision which the new majority evidently abhorred) and to place the law of shopping center picketing in such an odd posture. Perhaps the greatest curiosity of *Lloyd* was that under its two-pronged standard it would be possible for almost all labor picketing, which is far more likely to deter customers from purchasing goods or services, to enjoy constitutional protection, while almost all political and social picketing would be banned.

68. 96 S. Ct. 1029 (1976).

owner's action unlawfully interfered with the rights of his employees under the National Labor Relations Act.[69]

The Supreme Court, after reviewing the record, found that the position of the parties demonstrated "considerable confusion, engendered at least in part by decisions of this Court" as to the extent to which first amendment standards were relevant to the rights of the parties.[70] Speaking through Justice Stewart, the Court then proceeded to reexamine *Lloyd* and found that there was no legitimate way to distinguish that case from the *Logan Valley* decision.[71] Citing *Mosley*, which had been decided four days after *Lloyd*, Justice Stewart concluded that *Lloyd* and *Logan Valley* could not be reconciled. If, as *Logan Valley* held, the shopping center was the equivalent of a municipality and its owners were subject to the same strictures as public officials with respect to curtailing free speech, the distinction drawn by the Court in *Lloyd*, relating to the subject matter of the picketing, was impermissible.[72] Therefore, the Court found that *Lloyd* had overruled *Logan Valley* and that the picketers did not have a first amendment right to enter the shopping center. Moreover, by reiterating the *Mosley* principle, which prohibited regulation based on content, the Court impliedly promised to follow that

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69. Local 315, Dep't Store Union, 205 N.L.R.B. 628 (1973). Although the employees were not employed at the shopping center store, the Board treated them as being within that class of people to whom the mall was open. The Board, therefore, held that they could not be excluded from the shopping area solely on the basis that they had engaged in activities that were protected by the Act. *Id.*

The court of appeals affirmed the Board decision on the ground that that it was appropriate to borrow the constitutional considerations set forth in *Lloyd* for guidance in deciding the statutory question and that under those standards the employees were entitled to picket on mall property for the purpose of enlisting the aid of the store's employees and prospective customers in support of the strike. Hudgens v. NLRB, 501 F.2d 161 (5th Cir. 1974).

70. Hudgens v. NLRB, 96 S. Ct. 1029, 1033 (1976).

71. Justice Stewart had joined the majority in *Logan Valley* and had been a dissenter in *Lloyd*. He noted that the rationale of *Logan Valley* did not survive the Court's decision in *Lloyd* and emphasized that this argument constituted "the entire thrust of Mr. Justice Marshall's dissenting opinion in the *Lloyd* case." 96 S. Ct. at 1036 n.7.

72. The logic of this argument is disputable. The majority in *Logan Valley* did not equate shopping centers with public property for all first amendment purposes. As noted in the previous analysis of *Logan Valley, see* text accompanying notes 54-68 *supra*, the Court had done no more than to declare a constitutional easement commensurate with the degree to which the owner effectively had transformed his property into a public forum. Since the easement was in derogation of the private ownership, the ownership interest was a factor in the balancing of interests vis-à-vis first amendment rights in determining whether the first amendment interest should prevail. And since property ownership is not a factor when public streets or sidewalks are involved, not every use permitted in a publicly-owned forum need necessarily be permitted in a similar privately-owned one. *See* Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 319-20 (1968) and text accompanying notes 64-67 *supra*.

rationale in labor picketing cases, as well as in civil rights cases.[73]

The relationship between *Hudgens*, *Lloyd* and *Logan Valley* is indeed confusing. The residue of these three decisions, including the overruled *Logan Valley* case, must be carefully examined in order to fully understand the current status of the law with respect to the relationship between picketing and free speech. *Hudgens*, in short, totally decimated the concept of a constitutional easement to picket on private property. At the same time, *Logan Valley* clearly established the fact that picketing involves speech, as well as nonspeech elements and the latter cannot completely overshadow the first amendment rights of the speech element. By treating the picketing in *Hudgens* as the constitutional equivalent of the handbilling in *Lloyd*, the Court effectively reaffirmed the principle that picketing cannot be singled out for prohibition as a form of expression any more than picketing on some subjects may be selectively prohibited.[74] Taken as a whole, the residue of these three cases stands for the propositon that picketing must be allowed wherever other forms of expression are normally permitted on public property. Although public property may, under limited circumstances, be declared off limits for picketing and other demonstrations, such prohibition must be based on a valid exercise of the state's police power exclusive of the desire to stifle expression.[75]

The Permissible Scope of Protected State Interest

In order to determine what picketing would be permissible, it was necessary to explain the nature of a valid state police power which could prohibit picketing. Before the Supreme Court decided *Hudgens*, a clue as to the extent to which such state police power could prohibit peaceful labor picketing had been given in *American Radio v. Mobile Steamship Association, Inc.*[76] The post-*Tree Fruits* movement away from the broad

73. In fact, the *Hudgens* Court was so impressed with the following passage from *Mosley* that it quoted it twice in the course of its opinion: "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dep't v. Mosley, 408 U.S. 92, 95 (1972); *cited in* Hudgens v. NLRB, 96 S. Ct. 1029, 1037 (1976) (columns 1 & 2).

It may also be significant that in a picketing context the Court relied on Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), a case involving a prohibition of nudity, ostensibly for reasons of safety, in movies shown at drive-in theaters whose screens are visible from public highways. The Court in *Erznoznik* stated something which logically applies as much to picketing as it does to obscenity: that the first amendment strictly limits government's power "selectively to shield the public from some kinds of speech on the ground that they are more offensive than others." *Id.* at 209.

74. *See* text accompanying notes 62-63 *supra*.

75. *See* Adderly v. Florida, 385 U.S. 39 (1966).

76. 419 U.S. 215 (1974).

dicta of *Vogt*, therefore, requires reexamination in light of the Supreme Court's holding in *American Radio*.

American Radio is a rather unusual case with which to predict the ultimate posture of the Court regarding first amendment issues because four justices believed that the matters *sub judice* came within the exclusive jurisdiction of the National Labor Relations Board and therefore, chose not to debate the constitutional question. The majority, however, found that the state had properly asserted jurisdiction, and proceeded to resolve the constitutional controversy.

The picketing in question was conducted by six maritime unions at a dock in Mobile, Alabama, against a ship of Liberian registry. The picket signs appealed to the public not to "patronize [the] vessel" because the substandard wages and benefits paid to the crews of foreign flagships adversely affected American seamen. When longshoremen and other port workers refused to cross the picket line to load or unload the vessel their employers sought an injunction, alleging that the picketing was illegal in that it wrongfully interfered with their businesses. The Alabama Circuit Court, affirmed by the Alabama and the United States Supreme Courts, found that there had been a sufficient showing of the picket's unlawful purpose to justify a temporary injunction.[77]

In reaching their decisions, both appellate courts relied heavily upon the testimony of the supervising union official that he had hoped the picketing would eventually have caused the docks to shut down.[78] While this evidence by itself does not necessarily reflect the actual purpose of the picketing, the circumstances do bear out the conclusion that the picketing was intended to induce the dock workers not to cross the picket line.

The consumer boycott aspect of the picketing was transparent, not only because of the merely incidental overlap between the "public" and those who could patronize the ship, but also because it was doubtful that the public would know how to comply with the appeal. Rather, the picketing was classic signal picketing which, as described in the original formulation of the "speech-*plus*" concept, is calculated to induce action quite irrespective of the ideas being disseminated. Here, while the ostensible message urged the public not to patronize the vessel, the conduct was intended to induce union men employed by firms doing business with the employer to refuse to cross the picket line. All five justices who reached the constitutional issue deter-

77. *Id.* at 230-32.
78. *Id.* at 229.

mined that picketing of this nature was not constitutionally protected.

The problem faced by the majority was how to explain any result it reached, in light of the lack of coherent pattern of development of the relevant first amendment principles. The silence of the dissenters on this issue may have signified their appreciation of the difficulty of this task.

Vogt was the logical precedent for the Court to rely upon in *American Radio* in order to uphold the legality of the injunction, since the *Vogt* case was the most recent decision to discuss *labor* picketing in terms of the competing interests of state policy. Citing *Vogt*, the Court noted that the picketing cases "involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy."[79] The Court added, once again citing *Vogt*, that there was "a broad field in which a State, in enforcing some public policy . . . could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."[80]

By citing *Vogt* for the proposition that the "review of the balance struck by the state" is critical in resolving the constitutional questions raised by "speech-*plus*" picketing, the Court implied an important change in emphasis as regards the *Vogt* rationale. Rather than seeking solace in the broad *Vogt* dicta that bases the constitutionality of enjoining "speech-*plus*" picketing upon the validity of the state regulation involved,[81] the Court suggested that it *will* review the balance struck by the state. While the standard of review has not been clearly ascertained, the Court abrogated any contention that *Vogt* tacitly prohibited review of this delicate balance.[82] Since the Court utilized *Vogt* to delineate the source of this power of review, some continuity with the post-*Vogt* decisions remains.

The Court upheld the *American Radio* injunction on the ground that the picketing constituted "wrongful interference" with the business of the steamship companies. The Court characterized this interference, which it defined as "efforts by third parties to induce employees to cease performing services essential to the conduct of their employer's business,"[83] as analogous to the federal concept of secondary boycott.[84] And

79. *Id.*, *citing* International Bhd. of Teamsters, Local 695 v. Vogt, Inc., 354 U.S. 284, 290 (1957).
80. *Id.* at 230, *citing* 354 U.S. at 293.
81. *See* text accompanying notes 20-21 *supra*.
82. American Radio v. Mobil S.S. Ass'n, Inc., 419 U.S. at 228-32 (1974).
83. *Id.* at 230.
84. In IBEW v. NLRB, 341 U.S. 694 (1951), it was held that prohibi-

beyond protection of the employers of the employees who were induced to refuse to cross the picket line, the United States Supreme Court recognized a valid and supportive state interest in protecting its own economy from the cumulative effects of such picketing.

The Court was not asked to decide whether picketing for such a purpose *is* in fact an unlawful secondary boycott as defined by the Taft-Hartley Act. It is interesting to note, however, that the concept of secondary boycott, similar to the rationale of the *Giboney* line of cases, turns on the objective of the activity involved. Thus, while the *American Radio* holding rests on *Vogt*, the Court could have invoked its secondary boycott analogy to rely on *Giboney* instead.[85] Indeed, it may very well be that in the development of the "unlawful objective" limitation on *Thornhill*, the Court intended to prohibit secondary boycotts, although they were not the subject of federal statutes until 1947.[86] It may be more than coincidence that the actual term "unlawful objective" finally found its way into the Court's decisions only after Congress acted in this area and defined unlawful secondary boycott in terms of the "object" of the union's action.[87]

A Nonradical Reassessment

Whatever its origins, the "unlawful objective" theory has had relatively great staying power and, as noted, it is the last grand theory offered by the United States Supreme Court to justify the regulation of peaceful picketing. Unfortunately, this theory may be misused to prohibit picketing merely because it threatens to achieve results deemed undesirable by the judiciary. Such a misuse of the doctrine is possible under the broad dicta

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tion of picketing in support of a secondary boycott presented no first amendment problem.

85. *See* text accompanying notes 11-16 *supra*.

86. This hypothesis is suggested in part by the pre-1947 analysis of Ratner & Come, *supra* note 3. It is suggested therein that Justice Frankfurter was heavily influenced, in the constitutional distinctions he made in this area, by concepts borrowed from the Norris-LaGuardia Act. Frankfurter, who was instrumental in the enactment of the Norris-LaGuardia Act, wrote most of the Court's majority opinions in the major picketing cases between 1941 and 1957. *See, e.g.*, Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe, 315 U.S. 722, 727-28 (1951). In IBEW v. NLRB, 341 U.S. 694, 705 (1951), the Court found no first amendment protection for secondary boycotts under the Taft-Hartley Act. Citing the *Giboney* line of cases, the Court noted that:

> The substantive evil condemned by Congress in § 8(b) (4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives.

87. *See* note 86 *supra* and accompanying text. For a discussion of the Court's pre-1947 treatment of the "unlawful objective" theory, see Ratner & Come, *supra* note 3, at 453-57.

found in *Vogt*. Nevertheless, the "unlawful objective" theory seems destined to be a reasonably permanent fixture, if not the cornerstone, of the constitutional law of picketing. Assuming that the Supreme Court will continue to adhere to this theory, the problem is to assure that the competing interests and values involved in future cases will be sensibly accommodated within its amorphous outlines. In order to understand the problem, the first step is to analyze and reach a common understanding of the nature of the activity at which the theory is directed.

Picketing is a form of demonstration which usually consists of elements of speech as well as elements of conduct which are not speech. But the observation that picketing is "speech-*plus*" should not be overemphasized. While it is true that picketing necessarily involves more than pure speech, treating that proposition as an axiom creates mischief since the mere presence of the nonspeech element may be used to justify the automatic invocation of the "unlawful objective" theory. To illustrate this, consider two examples, one extreme in order to emphasize the inherent danger, and one closer to reality but logically bound to the first:

1. A single peaceful picketer carries a sign which says: "SUPPORT CIVIL DISOBEDIENCE."

2. A small group of peaceful picketers stands around public buildings urging citizens not to pay taxes that are being used to finance, (a) a war, or (b) welfare payments.

Both situations are examples of demonstrations which feature conduct that is not strictly speech but which is incidental to the speech, just as occupying ground and gesticulating are incidental to the speech of the soapbox orator. Both of these demonstrations arguably cause some inconvenience to other members of the public. Thus, neither example would enjoy first amendment protection if the nonspeech aspect, which necessarily accompanies picketing, were to lead inevitably to characterizing the demonstration as more than speech and therefore enjoinable whenever it had an "unlawful objective."

Is this unfortunate result avoidable? The answer lies in a more detailed analysis of the relationship between the speech and nonspeech elements. The direction which that analysis should take has been debated for at least twenty-five years.[88] I choose as my points of departure the desirability of treating each picketing demonstration according to its own peculiar combination of speech and nonspeech elements, and the assumption that the reasons for attempting to enjoin such a demonstration

88. *See* note 3 *supra*.

could include an allegedly "unlawful objective." Therefore, there are two sets of relationships to be considered, the relationship between the speech and nonspeech elements of the demonstration, and the relationship between each of those elements and the demonstration's objectives. Additionally, there is the problem of devising standards for determining whether there is an unlawful objective, whether there is more than one objective, and what to do if there is an unlawful objective.

"Speech" and "Plus"

Since picketing, like all demonstrations, consists of speech as well as other conduct, there is a temptation to treat all picketing as hybrid and attempt to formulate a rule that will be universally applicable. But attempts to do so have not yielded satisfactory results, leaving in their wake the simplistic excesses of the "unlawful objective" theory, as evidenced by the broad dicta in *Vogt*, or a total lack of guidance. Formulation of such a rule was foredoomed because any brush broad enough to cover all picketing in a single stroke is too unwieldy to handle minor details such as facts. Essentially, the problem lies in the oversimplification of treating all picketing as a monolithic classification without allowing for differences among particular demonstrations.

How then, can picketing demonstrations realistically be categorized? One method is to determine whether the picketing is *essentially* speech or *essentially* nonspeech conduct. The two examples of political demonstrations discussed earlier are essentially speech, as is consumer picketing of the kind treated in *Tree Fruits*.[89] Their common characteristic is that the peaceful conduct accompanying the speech is used strictly to effect delivery of the message communicated by the speech. Other kinds of picketing exhibit the opposite characteristic, *i.e.*, the speech ingredient is merely incidental to the conduct. This characteristic is exhibited most clearly in picketing demonstrations where the written message is a code requesting action which is not openly sought. "Signal" picketing is thus a prototype for picketing which is essentially nonspeech. Picketing may also expressly ask for certain action by union members, but the stated message should not be afforded first amendment protection if the appeal implicitly contains a threat of reprisal from the union, such reprisal being similar to a coercive message from an employer.

89. *See* text accompanying notes 24-35 *supra* and 101-03 *infra*; Waldbaum, Inc. v. United Farm Workers, — Misc. 2d —, 383 N.Y.S.2d 957 (Sup. Ct. 1976). An extended and thoughtful discussion of consumer picketing as "speech" may be found in Comment, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?*, 26 HASTINGS L.J. 167 (1974).

In demonstrations which are essentially speech, the nonspeech conduct is inseparable from and incidental to the speech. Where the demonstrations are essentially nonspeech, the speech is inseparable from the conduct, and its coexistence with the conduct does not affect the basic nonspeech nature of the demonstration. In *American Radio*,[90] for example, the speech element of the picketing, the appeal at the dock asking the public not to "patronize [the] vessel," was not the real message. It was merely a part of the demonstration which had as its primary message: *Do not cross this line; do not do any work on this vessel.*

Assuming that picketing consists of inseparable elements of speech and nonspeech, the distinction between picketing which is protected and picketing which is not protected is reduced to a search for that special kind of persuasion covered by the first amendment umbrella. Such protected persuasion may be an appeal to intellect, pecuniary interest, or even emotion, but it is a direct appeal using language or visual images. It may even intimidate, but to remain protected it must intimidate through force of argument rather than through threats or coercion. A coded message, on the other hand, does not appeal to its addressee in the manner that "speech" does. A coded message merely informs the addressee as to what conduct is expected from him, and the pressure to comply comes from sources extraneous to the message's facial meaning.

This fundamental distinction between demonstrations which are essentially speech and those which are essentially nonspeech is not a novel concept.[91] Although this approach is no more than a beginning, since it sorts out only the easiest cases, it may be a helpful guide in analyzing the more difficult cases as well. But the application of this concept has a value independent of sorting out the easiest cases: if *some* picketing demonstrations are essentially speech, then they should be treated as such, and although subjected to the same limitations as speech, they should not be enjoinable simply because their objectives are deemed undesirable.

An analysis of concepts of protected picketing must ascertain whether the *Giboney-Vogt* line of cases effectively foreclosed the possibility of finding any picketing demonstration to be essentially speech. In at least one of those cases, *Hughes v. Superior Court*,[92] a majority of five justices, speaking through Justice Frankfurter, stated that picketing is "inseparably something

90. 419 U.S. at 231-32.
91. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 444-47 (1970) [hereinafter cited as EMERSON]; *cf.* COX, *supra* note 3, at 593-602.
92. 339 U.S. 460 (1950).

more and different" than communication,[93] and concluded that picketing, "not being the equivalent of speech as a matter of fact, is not its *inevitable* legal equivalent."[94] In that case the net was cast rather broadly since the picketing involved was consumer picketing. However, in an adjacent passage, Frankfurter explained that "[h]owever general or loose the language of opinions, the specific situations have controlled decision."[95] Although Frankfurter was referring to the opinions in *Thornhill* and its immediate progeny, his admonition is equally applicable to an analysis of the *Hughes* opinion itself.

In the majority opinions which he wrote, Frankfurter emphasized that picketing was more than speech and that its purpose could justify enjoining it. This view is exemplified in *Hughes*, a case in which the California courts had held that picketing was unlawful where its purpose was to force an employer to establish a strict quota system for increasing the proportion of Blacks in its employee complement. The Supreme Court affirmed California's right to outlaw such an objective, and Frankfurter, after rehearsing the possibilities of harm which justified the state's policy, stated that: "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations."[96]

Grafting its conclusions as to the objective of picketing to its notions of the nature of picketing, the majority relied in part on *Giboney* and upheld the injunction. Three justices, including Black, concurred on the basis that the rationale of *Giboney* alone was sufficient to decide the case. In *Giboney* the Court had expressly found that the speech involved was in fact an inseparable part of an unlawful course of conduct. By finding the *Giboney* rationale applicable to the facts of *Hughes*, without the necessity of extending or expanding the rationale, the concurring justices implicitly drew the same conclusion from the facts in *Hughes*: inseparable conduct and clear and present danger. Indeed, Frankfurter's statement, quoted above, concerning the

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93. *Id.* at 464.

94. *Id.* at 465. The emphasis is added to note the Court's unwillingness to close the door completely. There were, to be sure, other reasons for qualifying that particular conclusion.

95. *Id. Cf.* the following compliment to the New York Court of Appeals in the years of its preeminence, from F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 42 (1930) [hereinafter cited as FRANKFURTER & GREENE]:

> Thus, the judges of a great tribunal indicate their conviction that when dealing with legal problems enmeshed in dynamic social forces, courts ought to decide only the case before them and to remain open to all the wisdom the future may hold.

96. Hughes v. Superior Court, 339 U.S. 460, 464 (1950). I read this as balancing the interest in free speech not against the "mischief," but against the prevention of mischief, a less light-hearted undertaking.

mischief furthered by the use of picketing to promote racial hiring quotas, suggests that the majority also thought that there was a clear danger of achieving that unwanted result.

Although the Court split over the desirability of broadening the *Giboney* rationale, all the justices who participated in *Hughes*[97] apparently relied on the assumption that there was at least a substantial danger. This observation, if valid, casts Frankfurter's heavy reliance on the "speech-*plus*" nature of picketing in a somewhat different light. "Speech-*plus*" or "hybrid," as Frankfurter characterized picketing in *International Brotherhood of Teamsters, Local 309 v. Hanke*,[98] a plurality opinion issued the same day as *Hughes*, are not labels which deny the existence of the speech element or the possibility that a particular demonstration is essentially speech. Although those labels have been used that way in dictum, they can be viewed, consistently with the actual decisions, as catchwords for the observation that picketing is generally more effective than other modes of communication in the limited kinds of situations in which it is ordinarily used.[99] Recognizing the relative effectiveness of picketing vis-à-vis other forms of communication, courts are naturally led to conclude that there is a clear and present danger of its success. Thus, even if it is speech, it will ordinarily be subject to more restriction than other forms of speech.

In *Hughes* the Supreme Court came closer than it ever has, before or since, to treating a demonstration which was essentially speech without regard for its distinctiveness. The real test for such indiscriminate treatment would be a case where the absence of a "clear and present danger" is clearly established. Of course, a similar test would be possible under the current standard for first amendment speech, (whatever that standard may be).[100] In any event, such a test must be run. Indeed, if it were run today in the context of consumer boycott picketing, the Court would be hard-pressed to deny such picketing the first amendment protection which it has recently accorded "commercial speech." Thus, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[101] the Court, Justice Blackmun writing for the majority, stressed the importance, in first amendment terms, of a free flow of information to consumers

97. Justice Douglas did not participate in the *Hughes* case.
98. 339 U.S. 470, 474 (1950).
99. But perhaps its effectiveness has diminished even in the traditional situations. *See* Raskin, *Is the Picket Line Obsolete?*, Saturday Review/World, Oct. 19, 1974.
100. *See* EMERSON, *supra* note 91; Linde, *"Clear and Present Danger" Reexamined: Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970); Strong, *supra* note 53.
101. 44 U.S.L.W. 4686 (U.S. May 24, 1976).

regarding the commercial products among which they must make their choice:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.[102]

Since consumer picketing is directed at precisely the kinds of private economic decisions which the Court speaks of in *Virginia State Board of Pharmacy*, this dictum is hardly consistent with *Hughes*, if the latter is construed as denying the message conveyed by consumer pickets any first amendment protection. That the Court, in *Virginia State Board of Pharmacy*, specifically eschewed commenting on speech in the context of labor disputes,[103] therefore, does not mean that its decision is without significance in analyzing the emerging concepts of first amendment protection of picketing.

Justice Douglas, in *Bakery & Pastry Drivers, Local 802 v. Wohl*,[104] where he first articulated the "speech-*plus*" concept, warned that the first amendment must be held to protect effective picketing as well as ineffective picketing. Use of the "clear and present danger" standard, or its successor, seemingly does subject effective picketing to restriction which ineffective picketing is spared. However, effective picketing is prohibited only when its effectiveness threatens to achieve an unlawful objective. This raises a whole new package of problems.

A Suggested Guideline for Identifying Objectives and Their Significance

A particular demonstration can be categorized as essentially speech, as essentially nonspeech, or as a mixture, without considering whether its objectives are lawful or unlawful. If a demonstration which is essentially speech has an unlawful objective, then the presence of such an objective will properly enter into the determination of whether the demonstration has lost its first amendment protection. After due regard is given to any protection owed its speech element, the demonstration can be prohibited solely on the basis of the unlawful objective.

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102. 44 U.S.L.W. at 4691. *Cf.* Comment, *The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket Under the First Amendment?*, 26 HASTINGS L.J. 167, 183-89 (1974).
103. 44 U.S.L.W. at 4690 n.17.
104. 315 U.S. 769, 775-77 (1952).

There are potential dangers to civil liberties in this approach, but perhaps adequate safeguards are available. It may be too easy for legislatures or courts to formulate policies tailored to proscribe picketing by unpopular groups or for unpopular causes. This danger, to the extent that it exists, is largely unavoidable, but it is a matter of substantive law rather than constitutional law, except as to the regularity of the promulgation of the policy. Before statutes protected the right of employees to organize and strike, American courts utilized various theories, including the criminal conspiracy doctrine, to prohibit picketing by employees simply because the judiciary disapproved of employee objectives.[105] If union representation of employees were prohibited today, "speech-*plus*" picketing in support of recognition of a union would clearly be enjoinable under *Giboney*. That is a political and economic problem that calls for the formulation of policy determinations by the legislative entity. To a great extent, those battles were fought and resolved in the 1930's. Today, in the labor field, judicial disputes as to the lawfulness of objectives turn on the interpretation of existing statutes. Similarly, the juridicial problem in most cases of nonlabor picketing is not so much one of defining the lawfulness or unlawfulness of the action which the picketing advocates as it is one of properly identifying the objective.

The task of identifying objectives consists of three separate problems. First, what standards of proof will insure a rational judgment regarding the purpose of the picketing? The Supreme Court, in striking down a temporary restraining order which was granted *ex parte*, has said:

> The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise.[106]

Since the danger of infringing first amendment rights is substantial, something akin to a "clear and convincing proof" standard may be justified.[107] A review of major cases reveals that the

105. *See generally* FRANKFURTER & GREENE, *supra* note 95. One of the ironies of Justice Frankfurter's career is that many years after successfully attacking such use of the injunction in this classic book, he wrote the statements in *Vogt* which reopened the possibility of a similar use of the injunction.

106. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).

107. "Clear and convincing proof is a standard frequently imposed in civil cases where the wisdom of experience has demonstrated the need for greater certainty. . . . This high standard may be required to sustain claims which have serious social consequences . . . ." United States v. Bridges, 133 F. Supp. 638, 641 n.5 (N.D. Cal. 1955) and authorities cited therein.

real objective will rarely be so difficult to establish that use of such a standard would substantially impair the availability of injunctive relief against truly illegitimate or extortionate picketing. In any event, where limitations on freedom of expression are concerned, the burden of proof should rest heavily upon the party seeking to invoke the government's power to impose the restraint.[108] Moreover, since an injunction constitutes a prior restraint in the first amendment sense,[109] it must carry with it the heavy burden of justifying that restraint.[110]

The second problem lies in determining how to identify the motivating objectives from among the objectives arguably present in a demonstration. Picketing which is obviously for some permissible objective should not be condemned because, arguably, there may be a residual hope that a prohibited end will also be realized.[111] In some exceptional situations, a remote objective might be found to be a motivating objective. However, where there is a specific, immediate objective, a remote and general objective is hardly worthy of consideration in deciding whether there is a constitutional right to hold the demonstration. Once the specific objectives have been identified, the search for additional, nonspecific objectives seems pointless and dangerous unless there is reason to believe that they will illuminate the specific ones.

Third, how should the courts deal with the Solomonic task of deciding whether the speech element is separable from the nonspeech element or whether it is all one piece, as articulated in *Giboney*? Determining the significance of each element in a picketing demonstration is the severest test of the "unlawful objective" principle or any alternative approach that recognizes differences among demonstrations with regard to first amendment protection. The term "separable" may be used in two different senses, and therefore, we must distinguish at the outset between literal separability and analytical separability. A demonstration in which some picketers carry legally inoffensive placards while other picketers threaten physical violence is subject to actual dissection, *i.e.*, the elements are literally separable and part of the demonstration can be enjoined. But in most of the hard cases, the nonspeech element cannot be isolated, and the judicial choice is limited to permitting the entire demonstration to proceed with limited restrictions, if necessary, relating

108. Speiser v. Randall, 357 U.S. 513, 526 (1958).
109. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180-85 (1968).
110. Nebraska Press Ass'n v. Stuart, 44 U.S.L.W. 5149 (U.S. June 30, 1976) (press gag case).
111. *See* NLRB v. Local 50, Bakery & Confectionary Workers Int'l Union, 245 F.2d 542, 548 (2d Cir. 1957).

to physical obstruction, or prohibiting the entire demonstration as an impermissible mode of pursuing the motivating objectives. Where the nonspeech elements cannot be enjoined separately, the elements may be analyzed separately in order to reach a rational conclusion about the legal status of the demonstration as a whole.

If the speech and nonspeech elements of a "hybrid" demonstration have but one objective, and are not separable in the literal sense, for constitutional purposes the speech is merged into the nonspeech and may be banned solely on the basis of the objective. If, however, the literal message on the picket signs promotes a lawful objective and constitutes a real statement of the picketing's objective rather than a subterfuge, the communication of that message is entitled to some first amendment protection, notwithstanding the additional presence of an unlawful objective.[112] How should the existence of an independent, bona fide attempt to communicate a lawful message be determined? Here again, since the first amendment right to communicate the ostensible message of the picket signs is at stake, negation of the stated objective should require clear and convincing proof. Thus, there may be proof of an unlawful objective, but this proof should not be deemed sufficient to proscribe the entire demonstration unless it is also shown that the lawful speech element is a facade. This does not place too great an evidentiary burden on the party seeking to enjoin the picketing since failure to meet the burden does not exempt the picketing from all regulation; in fact, the court must still balance the free speech interests against the legitimate interests of others.

Balancing Interests and Scope of Judicial Review

Under the analysis suggested herein, conduct which is more than speech and which has an unlawful objective can be enjoined. Absent clear and convincing proof that the conduct has these attributes, however, courts must decide whether the demonstration, including its speech aspects, may be enjoined in order to curb the unlawful conduct. As stated in *Vogt* and echoed in *American Radio*, this determination requires that a balance be struck between the value of permitting the demonstration and competing policy interests which militate in favor of the demonstration's proscription. As noted in the *Hughes* case, a legislature, or even a state court, may identify these competing interests

112. It is conceivable, but unlikely, that picketers will announce to the public an unlawful appeal in order to mask another one. Therefore, the cases usually involve communications which are lawful on their face, but which have another objective "quite irrespective of the ideas that are being disseminated." *See* text accompanying note 14 *supra*.

as a matter of state policy.[113] The balance is then struck by resort to legislation, if it is sufficiently specific, or by the court itself, subject to judicial review.

When the selective prohibition of peaceful picketing is involved, the appropriate scope of review should be determined in light of *Police Department v. Mosley*.[114] Basically, a reviewing court must determine whether regulation of the picketing is narrowly tailored so as to further the policy with which the demonstration conflicts. Discrimination among demonstrations, according to *Mosley*, must be "carefully scrutinized" to insure that the restriction is no greater than necessary to accommodate the conflicting policy. The *Mosley* Court placed a heavy burden on the city of showing that the kind of demonstration it sought to regulate was clearly more destructive than other demonstrations which the city continued to permit. There is little doubt that Justice Frankfurter would not have sanctioned this degree of judicial activism.[115] And in the case of true hybrid picketing, it may not be appropriate to expand the judicial role to the full extent suggested in *Mosley*, the Court having implicitly viewed the picketing in that case as essentially speech.

The acknowledgement that discovery of an unlawful objective does not end the inquiry into whether a demonstration is enjoinable, however, begins to provide the requisite element of restraint against the promiscuous banning of picketing. If the speech element has an independent, lawful objective, then banning the demonstration altogether will interfere with the participants' right to advocate that lawful objective. Such interference, according to *Mosley*, is justified only to the extent that it is necessary to defeat the *unlawful* objective.

By way of example, assume that some pharmacists are dissatisfied with their long hours and decide to picket the premises of their respective employers in protest. Their working day is dictated by a municipal ordinance which requires all the drug stores in the community to have a pharmacist on duty twenty-four hours a day, a minimum of one day per week. The pharmacists claim that this requirement is unreasonable and wish to have it reduced. Their picket signs appeal to the public to support a modification of the requirement and to patronize

113. Hughes v. Superior Court, 339 U.S. 460, 466 (1950). By analogy, federal substantive policy conceivably could be what a lower court or administrative agency says it is, subject to review on the merits by the Supreme Court.

114. 408 U.S. 92 (1972). *See* text accompanying notes 41-44 and 68-75 *supra*.

115. *See, e.g.*, Justice Frankfurter's concurring opinion in Dennis v. United States, 341 U.S. 494, 550-51 (1951).

only those drug stores that have alleviated the problem by hiring more pharmacists. An irresolvable conflict may arise, however, if there are an insufficient number of pharmacists available to satisfy the demand for their services, particularly if the prospects of modifying the ordinance are remote. The pharmacists, therefore, can only obtain immediate or short term relief if the drug stores disobey the ordinance. In this type of situation a court could infer that the pharmacists intended to force the store owners to violate the law and that the picketing did in fact have an unlawful objective. The critical question then becomes whether a court should be allowed to enjoin the picketing.

Under *Mosley*, the answer may be found by inquiring into the necessity of enjoining the expression in order to protect the policies served by the ordinance. However, this merely leads to the realization that there is yet another inquiry to be made. Since we are contemplating a proscription which includes a curb on lawful expression, "necessity" connotes the kind of judicial balancing that typically occurs in traditional first amendment cases. To affirmatively determine what factors should be involved in the balancing process would be tantamount to providing a general theory of the first amendment.[116] But some broad guidance may be found in the opinion of Judge Learned Hand in *United States v. Dennis*,[117] a decision adopted by a plurality of the justices then on the Supreme Court: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[118]

Hand's adaptation of the "clear and present danger" test seems reasonably well suited for application to the problem of hybrid picketing. It incorporates the theme of "narrow tailoring" found in *Mosley*, and requires judges to consider legitimate competing interests. It guarantees protection to effective and ineffective picketing alike, restricting the effective picketing only when it has an unlawful objective. Even then, effective picketing could not be enjoined if the evil sought to be prevented were trivial, as compared to the lawful objective of the speech element. Rather than a strong bias in favor of protecting the expression of ideas, a bias which is appropriate when dealing with speech without the "*plus*," there is a commitment to neutrality in balanc-

116. *See* EMERSON, *supra* note 91 *and* Strong, *supra* note 53, at 52-60. In the latter work Dean Strong provides a compilation of the views of many commentators who see the "clear and present danger" test as having evolved into a freewheeling balancing test, even as it applies to pure speech. *See also* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

117. 183 F.2d 201 (2d Cir. 1950).

118. Dennis v. United States, 341 U.S. 494, 510 (1951), *citing* 183 F.2d at 212.

ing the competing interests.[119] Perhaps this type of inquiry would invite a greater exercise of judicial discretion than many jurists and commentators would prefer. However, Judge Hand's imprimatur should prove persuasive to advocates of judicial restraint. His dictum reflects a realization that matters such as this unavoidably call for the application of judicial wisdom and conscience. Articulation of the subjective element, rather than reliance on mechanical formulas, is the better method of insuring that the judge himself recognizes his role in making a policy decision that demands the best he has to offer.

Judge Hand's reformulation of the "clear and present danger" test, as applied to speech, has been soundly criticized from the civil libertarian point of view which considers it too vague, too subjective, and *too neutral.*[120] However, when applied to "speech-*plus*" demonstrations, a balancing test does not imply neutrality toward the speech element. On the contrary, the speech element is considered presumptively protected by the first amendment. It is only because the demonstrators have chosen to combine speech with conduct that the protected status of the speech must be weighed against the mischief threatened by the demonstration as a whole.[121]

In *United States v. O'Brien*,[122] the draft card burning case, the Supreme Court came close to Judge Hand's "clear and present danger" test in describing its approach to conduct involving speech and nonspeech elements:

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[123]

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119. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 78 (1970):

> The basic proposition is that the First Amendment need not prevent government from regulating speech that impinges on other legitimate interests. But the value of speech and the other interests that government may be concerned to protect must be balanced, and this is the judicial task.

120. *See, e.g.*, EMERSON, *supra* note 91, at 114-16. On the other hand, Justice Frankfurter, in his concurring opinion in the *Dennis* case, rejected the "clear and present danger" standard as impinging too much on the legislative prerogative.

121. Professor Emerson, *supra* note 91, gives the Hand formula credit for taking into consideration the relevant factors and evaluating their significance.

122. 391 U.S. 367 (1968).

123. *Id.* at 376-77.

O'Brien was a rather controversial opinion on its own facts,[124] and there is certainly room for argument that "hybrid" picketing is not analogous to "symbolic speech," such as draft card burning. Symbolic speech is an act comprised of both speech and conduct. The use of the term "incidental limitations on First Amendment freedoms" in *O'Brien* could be construed as proceeding from the assumption that the speech being limited is itself merely incidental to the conduct being regulated. Picketing, on the other hand, has separately identifiable, if not literally separable, speech and nonspeech elements. We have already concluded that "hybrid" picketing includes an independent, bona fide first amendment message. To characterize the prohibition on communicating that message as an "incidental limitation" could be dangerously misleading and could encourage judges to countenance such prohibitions lightly. Justice Harlan may have recognized the danger of such characterization when, in a concurring opinion, he reserved judgment on the use of the Court's formula where the "incidental" restriction upon expression has the effect of entirely preventing the communication of the message to a significant audience.[125] This effect will often result when picketing is involved. Picketing is often the only suitable means of reaching the intended audience. Moreover, even in cases where other means are available, picketing, or some form of patrol in conjunction with handbilling, may be the only means of communication that is economically feasible.

On the positive side, *O'Brien* leaves the door open for the development of a body of constitutional principles to guide courts in dealing with activities that partake of speech but not exclusively of speech. If the danger in speaking of "incidental" limitations or restrictions on first amendment freedoms can be avoided, use of the term "incidental" may be constructive. It may be constructive, albeit somewhat redundant, as a reflection of the principle, implicit in the Hand formulation and spelled out by Chief Justice Warren in *O'Brien*, that governmental interests justifying the suppression of speech must be unrelated to the content of the speech. Thus, the courts must be skeptical of restrictions ostensibly aimed at the conduct part of "hybrid" demonstrations where the circumstances make it appear that at least part of the purpose of the restriction is suppression of speech. If the restriction has this ulterior purpose, then the suppression of speech is not merely incidental. For just as the courts must look behind the palpable objective of a demonstration to examine its legitimacy, they have the corresponding

124. *See* EMERSON, *supra* note 91, at 79-87 and sources cited therein.
125. United States v. O'Brien, 391 U.S. 367, 388-89 (1968) (concurring opinion).

responsibility to discover and avoid suppression of first amendment rights, even when the suppression is hidden behind constitutionally respectable and superficially sufficient interests.

CONCLUSION

The judiciary today is faced with the critical problem of determining when governmental intervention is justified to limit the pressures that can be brought by some citizens against others by communicating a message to neutrals and potential allies. If someone, especially a small businessman, is threatened with severe economic consequences as the intended or unintended result of picketing, the temptation to find some legal basis by which to rescue him is great indeed, and understandable. The vicissitudes of running a business are clear enough, and few would add to the economic uncertainties without a strong counterbalancing reason. At the same time, the risks of economic hardship are part of the price members of society must pay to maintain a free enterprise system. When the balance of power shifts in favor of unions, consumer groups, or other former underdogs, the desirability of continuing the free enterprise system should be viewed in relation to the whole system, not just in reaction to individual hardship cases.[126] For government to intervene merely on the basis of impending injury is tantamount to establishing a kind of no-fault liability for picketing. The inarticulated, well-intentioned desire of the courts to come to the rescue may be the greatest threat of all to first amendment rights.[127]

In essence this article has demonstrated that first amendment rights are involved more often than is commonly recognized. The basic principle of *Thornhill*, that picketing is itself a form of communication and that the speech element of that communication stands in the same constitutional status as any other speech, is inviolable. To establish that the content of that

126. *Cf.* FRANKFURTER & GREENE, *supra* note 95, at 203-05.

127. In a recent case challenging the validity of a statute declaring it unprofessional for pharmacists to advertise the prices of prescription drugs, the Supreme Court stated:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best intersts if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . But the choice among these alternative approaches is not ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 44 U.S.L.W. 4686, 4692 (U.S. May 24, 1976).

communication is objectionable to the point of making the picketing enjoinable requires a heavy burden of persuasion. Likewise, to show that the effects of the picketing, if successful, are so antithetical to the interests of society that the right to peacefully pursue such goals may be abridged, should be a formidable task if the first amendment is to be taken seriously.

Aside from the necessity of drawing careful factual distinctions among picketing demonstrations, the foregoing analysis raises a serious question concerning the constitutionality of section 8(b)(4)(ii)(B) of the Labor-Management Relations Act as applied to consumer picketing. In his concurring opinion in *Tree Fruits* Justice Black observed that section 8(b)(4)(ii)(B) runs afoul of the first amendment since it bans picketing which is otherwise lawful, "only when the picketers express particular views."[128] While not going as far as Justice Black's conclusion that the provision is unconstitutional on its face, this analysis suggests that the majority in *Tree Fruits* understated the potential collision between a literal application of the provision and the guarantees of the first amendment. For absent adequate proof that the message to consumers has been merged into a nonspeech pattern of conduct, *i.e.*, that the stated objective of the speech element is not bona fide, prohibition of the picketing without first weighing the proprietary and constitutional interests should, under this analysis, be impermissible.

128. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 79 (1964) (concurring opinion); *see* notes 24-36 *supra*.