The Invisible Hand and the Clenched Fist: Is There a Safe Way to Picket under the First Amendment

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THE INVISIBLE HAND AND THE CLENCHED
FIST: IS THERE A SAFE WAY TO PICKET
UNDER THE FIRST AMENDMENT?

It has now been more than three decades since the sweeping pro-
nouncements of the United States Supreme Court in Thornhill v. Ala-
bama, 1 which extended First Amendment protections to picketing in
connection with a labor dispute. There, the Court recognized that
picketing is a protected form of expression, but implied that under
certain circumstances the nature of the picketing and the manner in
which it is conducted may make it a permissible subject for regula-
tion by the State. 2 However, the decision failed to demarcate clearly
the boundary between protected and unprotected forms of picketing,
and thereby left unresolved the extent to which picketing is protected
by the First Amendment.

The inability to define "protected" picketing continued to
plague the Court in a rash of labor picketing cases following Thornhill.3
The issue eventually crystallized into the speech/conduct dichotomy
first alluded to by Justice Douglas in his concurring opinion in Bakery
& Pastry Drivers, Local 802 v. Wohl.4 Stated simply, the problem is
whether picketing is more than speech; and, if so, what aspects of
picketing make it such.

This note rejects the implication in the Court's decisions that all
picketing is "speech plus" and adopts the view of some commentators
that only picketing that seeks to coerce rather than persuade its audi-
ence is "conduct" and not "speech."5 An original analysis is pro-
posed in order to enable a court to determine whether the latter type
of picketing should be protected under the First Amendment. The
thrust of the approach taken in this note is that such picketing is in
fact advocacy and that, consequently, the First Amendment standard

1. 310 U.S. 88 (1940).
2. See id. at 105.
3. See, e.g., Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957); Hughes
   v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336
   U.S. 490 (1949); Carpenters & Joiners Union of America Local No. 213 v. Ritter's
   Cafe, 315 U.S. 722 (1942).
   Emerson]; Cox, Strikes, Picketing and the Constitution, 4 Vand. L.
   Rev. 574, 594 (1951) [hereinafter cited as Cox].

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to be applied to picketing is that which has evolved from cases dealing with other types of advocacy. In addition to creating more meaningful protections for picketing, it is hoped that this approach will serve to remove picketing from the anomalous position to which it has been relegated in the area of First Amendment doctrine for the last thirty years.

The Existing Law on Picketing

The Thornhill Doctrine

In the landmark case of *Thornhill v. Alabama,* the United States Supreme Court struck down an Alabama statute making it a misdemeanor for any person . . . without a just cause or legal excuse [to] go near to or loiter about the premises or place of business of any [business] for the purpose, or with intent of influencing, or induce . . . other persons not to trade with, buy from, or sell to, have business dealings with, or be employed by [such business], or [to] picket the works or place of business of [such business] for the purpose of hindering, delaying or interfering with or injuring [such business].

Thornhill was one of six or eight union pickets standing in front of the premises of the struck employer, Brown Wood Preserving Company. The picketers were attempting to prevent other employees from going to work. In reversing Thornhill's conviction under the Alabama statute, and striking down the statute itself, the Court stated:

In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

While acknowledging that the State may indeed have a legitimate interest in regulating employer-employee relations, the Court nevertheless felt that this could not serve to justify a blanket prohibition of all peaceful picketing. Though the Court examined the doctrines of vagueness and overbreadth in reaching its conclusions, it ultimately held that the constitutional standard violated in *Thornhill* was "the clear and present danger" test announced by Justice Holmes in *Schenck v. United States:*

The group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public inter-

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8. Id. at 91-92.
9. Id. at 102.
10. Id. at 100-01.
11. See id. at 104.
12. Id. at 104-05, citing Schenck v. United States, 249 U.S. 49, 52 (1919).
est merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgement of the liberty of such discussion can be justified only where the clear danger of substantive evil arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.13

Despite its sweeping pronouncements, the Thornhill Court was careful to confine its holding to the blanket prohibition against peaceful picketing contained in the Alabama statute, indicating that it probably would treat differently a narrowly drawn statute aimed at isolated evils.14

The following year the United States Supreme Court upheld a lower court's injunction against acts of picketing which involved the threat of violence. In Milk Wagon Drivers Union Local 753 v. Meadowmoor Dairies15 the Court ruled that, "a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed."16

The Retreat from Thornhill

A retreat from the broad holding of Thornhill began shortly after the Meadowmoor decision. In Carpenters & Joiners Union of America Local No. 213 v. Ritter's Cafe,17 the Court upheld an injunction granted by a Texas court against peaceful secondary picketing in the face of a First Amendment challenge. The case involved a dispute over the employment of non-union carpenters on the construction of a building commissioned by Ritter. The union chose to picket Ritter's Cafe, another business owned by Ritter which was wholly unconnected

13. Thornhill v. Alabama, 310 U.S. 88, 104 (1940). The clear and present danger test is the subject of heated debate among commentators. Even as originally conceived, the test had many flaws. For one, it is so excessively vague so that the outcome in any particular case is impossible to predict. In addition, in a complex society, expression must inevitably conflict with other societal objectives. A formula which permits "a state to cut off expression as soon as it becomes effective in influencing action is incompatible with the existence of free expression." Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 910-12 (1963). The prevailing view among commentators is that the clear and present danger test as it has developed is no different from a weighing of a variety of complex values. Strong, Fifty Years of "Clear and Present Danger"; From Schenck to Brandenburg—and Beyond, 1969 Sup. Cr. Rev. 41, 55-58. Due to the complexity of the factors to be considered, the lack of structure of such a test, and its consequent unsuitability for the judicial process, as applied, this balancing test "gives almost conclusive weight to the legislative judgment." Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 912-14 (1963).

14. 310 U.S. at 105.
15. 312 U.S. 287 (1941).
16. Id. at 292.
17. 315 U.S. 722 (1942).
with the construction work that was the subject of the immediate dispute.

In holding that the Constitution did not prohibit Texas, in defining the boundary of permissible industrial warfare, from drawing the line at secondary picketing, the Court balanced the interest of the State in regulating labor-management relations with the interest of free speech asserted by the picketers. The Court viewed the economic contest between employer and employee as having inevitable repercussions on the well-being of the community at large and, therefore, felt that the state had a legitimate interest in limiting the scope of industrial disputes. Having reached this conclusion, the Court made no attempt to scrutinize the particular demarcation made by the state. Thus, the decision reached was essentially a deferral to the legislative judgment that the particular picketing before it was harmful to the well-being of the community.

However, previously the same year, the Court had struck down a New York injunction against secondary picketing in *Bakery & Pastry Drivers Local 802 v. Wohl*. In *Wohl*, non-union "peddlers," who were exempt from the social security and unemployment insurance laws of New York, rapidly had been making inroads into the collective bargaining agreements between baking companies and bakery drivers. Attempts to unionize the peddlers had failed. In a last-ditch effort to prevent the further erosion of union jobs, the union suggested to the peddlers that they drive only six days a week and employ an unemployed union driver one day a week. The offer was rejected. Thereafter, the union picketed both the bakeries from which the peddlers bought their goods and the retail stores to which they sold them. The New York court enjoined this activity. In striking down the injunction, the Supreme Court ruled that:

> We ourselves can perceive no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise.

What, then, made the Court reach such apparently contradictory conclusions in the two cases? Texas and New York tried to do essentially the same thing—make secondary picketing illegal. In *Ritter's*

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18. *See id. at 726.*
19. Interestingly enough, in *A.F. of L. v. Swing*, 312 U.S. 321 (1941), picketing by non-employee union members, who technically had no dispute with the employer picketed, was deemed protected under the First Amendment.
21. *Id. at 775.*
22. The activity in *Wohl* was secondary in the sense that the unions had a dispute with the peddlers but picketed the bakeries from which they bought and sold their goods. In *Ritter's Cafe*, the union's dispute was connected with the construction of a building commissioned by Ritter, yet they chose to picket the cafe owned by Ritter with which they had no dispute. In this sense their activity was secondary.
Cafe, the picketing led to a sympathy strike by both the unionized employees of Ritter's Cafe and truck drivers who delivered supplies to the Cafe and, consequently, to a loss of some 60 percent of Ritter's business.\textsuperscript{23} In \textit{Wohl}, the picketing was ineffective because no real economic pressure was exerted as a result of the picketers' efforts. But surely the applicability of First Amendment protection cannot rest solely on whether or not the picketers achieve their purpose. In \textit{Ritter's Cafe}, the Court made some attempt to rationalize its apparently inconsistent rulings, distinguishing \textit{Wohl} on the grounds that there, the \textit{business} of the retailers picketed was "directly involved in the dispute."\textsuperscript{24} However, the fact that the union picketed the employer with whom the dispute existed at a separate business operated by him does not seem to make him any less "directly involved."

Such hair-splitting distinctions were, in fact, soon to be abandoned. Justice Douglas' concurring opinion in \textit{Wohl} contained the rationale for what was to become a gradual erosion of the \textit{Thornhill} doctrine:

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 nature of the ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation.\textsuperscript{25}

This analysis of picketing allowed for the inference that all picketing might be classified solely as "conduct" rather than "speech." As such, it would be beyond the protection of the First Amendment. For a Court weary of the flood of litigation provoked by the \textit{Thornhill} decision, Justice Douglas' approach was a long-awaited and easily accepted solution to the speech/conduct dilemma underlying its previous decisions on picketing.

"Speech Plus" and the "Unlawful Purpose" Doctrine

The first of the cases to use Justice Douglas' analysis was \textit{Giboney v. Empire Storage & Ice Co.}\textsuperscript{26} In \textit{Giboney}, unionized ice peddlers picketed Empire Storage & Ice Company, a wholesale ice distributor,
in an attempt to compel the company not to sell ice to non-union ice peddlers. Unionized truck drivers employed by establishments doing business with Empire refused to deliver goods to or from Empire's place of business; in fact, had they done so, they would have been subject to fine or suspension by their own unions. As a result of these actions, Empire's business dropped 85 percent. The company contended that compliance with the union's demands not to sell ice to non-union peddlers would constitute a violation of Missouri's anti-trust law. The company subsequently obtained an injunction against the picketing, claiming that the union's activities were unlawful because their purpose was to compel Empire to violate valid state law.

Writing for a unanimous Court, Justice Black adopted Justice Douglas' approach in *Wohl* that picketing may include conduct other than speech and could, therefore, be regulated even when conducted in a peaceful manner. In his view, the pickets in *Giboney* were not attempting to "peacefully publicize truthful facts about a labor dispute"; rather their activities "constituted a single integrated course of conduct, which was in violation of Missouri's valid law." In deciding that the picketing in *Giboney* was more than speech, Black did not specify any criteria by which a reviewing court might make such a determination in the future. Instead, he based his conclusion on the combination of several factors such as the patrolling, unlawful objective, illegal transportation combination and threats of suspension by the union.

*Giboney* and its progeny were eventually interpreted as standing for the proposition that because picketing is more than speech, any picketing which sought to achieve a purpose that was contrary to valid state policy, whether enunciated through state statutory or decisional law, could be constitutionally regulated. On the basis of this reasoning, the Court in *Teamsters Local 695 v. Vogt, Inc.* upheld an injunction against "stranger picketing," a term of art in labor law used to describe picketing by non-employee union members. The Court accepted the state's justification that the picketing was violative of the state policy prohibiting employers from coercing employees in their choice of bargaining representatives. Essentially, the argument was that the union's objective in picketing was to organize the employees of the picketed establishment, and eventually to enter into a collective bargaining agreement with the picketed employer. The detrimental

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27. *Id.* at 501.
28. *Id.* at 498. Though the facts in *Giboney* are similar to those in *Ritter's Cafe*, conceptually they are totally different. *Giboney* is a departure from the cases preceding it in that the rationale for the decision is based on the premise that the picketing involved is more than speech.
29. *Id.*
economic impact of the picketing on the picketed establishment will coerce the employer in turn to coerce his employees to join the union. Therefore, the purpose of the picketing is to coerce the employer to force his employees to join the union against their wishes, and is consequently an unlawful one.

The most extreme application of the unlawful purpose doctrine, however, is the decision in *Hughes v. Superior Court*, a case arising in California. In *Hughes*, a black civil rights group picketed a grocery store located in a black neighborhood in an effort to compel the store to hire black retail clerks on a quota basis until the proportion of black clerks to white clerks equaled the proportion of black customers to white customers. The California Supreme Court held that the picketing could constitutionally be enjoined as contrary to California’s policy against racial discrimination enunciated through decisional law. The picketers argued that their actions sought to rectify the discriminatory practices of the store in the past. Nevertheless, the court held that, although picketing to protest such policies was unlawful, picketing to remedy past injustices through a quota hiring plan was not. In his dissent, Justice Traynor alluded to the irony in the court’s decision: the policy against discrimination that was invoked to justify restraint of the picketing was in fact designed to protect the very group of picketers against whom it was being used in *Hughes*.

The United States Supreme Court upheld the injunction under the “unlawful purpose” doctrine. However, the Court made little attempt to scrutinize California’s characterization of the picketing as unlawful, merely accepting the California Supreme Court’s policy determination as conclusive. This standard of review leaves room for neither the “clear and present danger” test nor for “balancing.” Thus, once the picketing is deemed to be for an “unlawful purpose,” it is entirely excluded from First Amendment protections. As Professor Emerson has noted:

This position, in effect, eliminates all constitutional protections for picketing, since the government can always make the objective of picketing contrary to public policy by enacting a law or by merely saying so.

**A Reprieve for Thornhill**

Did these cases, mentioned above, spell the demise of the *Thornhill* doctrine? Federal preemption of the labor area temporarily halted

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34. *Id.* at 855, 198 P.2d at 888.
36. *Emerson, supra* note 5, at 446.
the flood of labor picketing cases when some types of picketing previously outlawed by the states became permissible under the National Labor Relations Act. In 1964, however, the Court's decision in *NLRB v. Fruit Packers Local 760* hinted at some modification of the "unlawful purpose" doctrine enunciated in *Giboney* and the concurring opinion in *Wohl*.

In the *Fruit Packers* case, the Court was faced with construction of section 8(b)(4)(ii)(B) of the National Labor Relations Act, the provision outlawing secondary boycotts. The union was engaged in a strike against fruit packers and warehousemen in Washington. In order to exert economic pressure on the packers and warehousemen, the union instituted a consumer boycott of Washington apples, and picketed retail chain stores that marketed the apples. One such chain was Safeway. Pickets were placed in front of all the Safeway stores in Seattle to ask consumers not to buy Washington state apples.

The National Labor Relations Board found this activity to be a violation of section 8(b)(4)(ii)(B). The United States Supreme Court reversed, holding that section 8(b)(4)(ii)(B) did not outlaw picketing which persuaded consumers to boycott the struck product, but only prohibited the union from asking customers not to patronize the secondary employer. Though Justice Brennan, writing for the majority, grounded his decision on statutory construction of the words "threaten, coerce or restrain" in section 8(b)(4)(ii)(B), he perceived that a broad ban on peaceful picketing "might collide with the guarantees of the First Amendment."

Justice Black, in his concurring opinion, felt that section 8(b)(4)(ii)(B) did prohibit the activity before the Court, and hence he reached the constitutional issues. Under his analysis, picketing must be divided into two parts: "(1) Patrolling, that is, standing or marching back or forth or round and round on the street, sidewalks, private property, or elsewhere, generally adjacent to someone else's premises; [and] (2) speech, that is, arguments, usually on a placard, made to persuade other people to take the picketer's side of the controversy." Where the two parts are intertwined, the courts must "weigh the circumstances" and "appraise the substantiality of the reasons advanced."

38. Section 8(b)(4)(ii)(B) of the National Labor Relations Act makes it an unfair labor practice for a union to "threaten, coerce or restrain any person," with the object of "forcing or requiring any person to cease using, handling, transporting, or otherwise dealing in the products of any producer . . . or to cease doing business with any other person . . . ." 29 USC § 158(b)(4)(ii)(B) (1970).
40. 377 U.S. at 63.
41. Id. at 76 (Black, J., concurring).
in support of the regulation of picketing. Since the statute under scrutiny was not worded so as to ban all peaceful picketing, Justice Black concluded that it was aimed at the speech aspects of picketing. For this reason, he found it to be unconstitutional.

Black distinguished Giboney on the grounds that there, the purpose of the picketing was unlawful. The reasoning he employed to reach this conclusion is somewhat circuitous and, it is submitted, inconsistent with the Giboney-Wohl line of cases. In finding that the picketers in Fruit Packers had a lawful purpose, Justice Black relied heavily on the publicity proviso of section 8(b)(4)(ii)(B), which provides as follows:

[N]othing contained in § 8(b)(4)(ii)(B) . . . shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, 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. . . .

Under Black's view, since the purpose of the picketing in Fruit Packers was explicitly sanctioned by the statute the means employed to achieve that purpose, namely picketing, cannot serve to characterize the picketing itself as unlawful. In essence, his position is this: If information conveyed by the picketers is lawful, picketing to convey that information cannot be deemed unlawful. The necessary implication of such an analysis is that if "pure speech" carries a message that is immune from state regulation under the First Amendment, then any picket signs conveying the same message are likewise immune.

Black's view, laudable though it may be, undermines the very foundation of the "unlawful purpose" doctrine of Giboney and its progeny. In those cases, the proposition that picketing was more than speech triggered the application of the "unlawful purpose" doctrine. However, those decisions never implied that "pure speech" could be regulated on the mere assertion that it was contrary to some nebulous state policy. Indeed, a necessary concomitant of a finding that picketing may be constitutionally regulated is the underlying premise that picketing is more than speech. In other words, the Court must find both that the picketing has an "unlawful purpose" and that it is "speech plus." Perhaps Justice Black's approach is an attempt to treat picketing like other forms of expression rather than as a distinctive type of expression meriting the creation of a unique body of law.

In Police Department of Chicago v. Mosely, a picketing case of a slightly different genre, the Court invalidated as unconstitutional

42. Id. at 77-78.
43. Id. at 79.
45. 408 U.S. 92 (1972).
an ordinance prohibiting all picketing within 150 feet of a school other than that arising out of a labor dispute with the school. Prior to the enactment of the ordinance, Mosely had been picketing Jones Commercial High School in Chicago to protest the school's admission policies which he alleged favored black students. Subsequent to the enactment of the ordinance, he was told by police that a resumption of his activities would be deemed a violation of the ordinance. Mosley brought suit to invalidate the ordinance on the grounds that it was unconstitutional.

Although the Court's decision was based on the equal protection clause of the Fourteenth Amendment, Justice Marshall, writing for the majority, noted that "the equal protection claim is closely intertwined with First Amendment interests," and went on to reach the underlying First Amendment issues. He characterized the classification drawn by the ordinance in the following way:

The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of the school's labor management dispute is permitted but all other peaceful picketing is prohibited. But, above 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.

While holding that the ordinance was unconstitutional, Justice Marshall nevertheless conceded that picketing sometimes might be constitutionally regulated. However, the only limitations on picketing which he perceived as permissible were those of time, place and manner or threats to the public order, the very limitations generally applied to "pure speech."

It is important to note that the picketing in Mosley was of a different type than that involved in the Giboney-Wohl line of cases, because the picketing in the latter was designed to exert economic pressure, while in Mosley it was not. However, Justice Marshall made no attempt to distinguish Giboney and its progeny on their facts, nor did the Court in those cases ever make any distinction between economic and psychological pressure. In other words, conceptually, use of economic pressure to achieve an unlawful objective is not a necessary concomitant of the "unlawful purpose" doctrine.

Although this distinction was never expressly articulated by the Court, its importance cannot be summarily dismissed. It is submitted that the earlier picketing decisions were influenced in large part by

46. Id. at 95.
47. Id.
the fact that the picketers in those cases were using economic pressure to achieve their objectives. If this were not the case, it would appear that the Court has come full circle, and that Mosley represents a rejection of the Giboney reasoning and a reiteration of the Thornhill doctrine.

Even if Mosley is viewed as the Court's definitive position on picketing, the opinion offers incomplete guidance for the future analysis of picketing cases. For instance, there was no allegation in Mosley that the objective of the picketing was unlawful, but merely that the situs of the picketing was such. Had Chicago argued instead that the objective of the picketing was itself violative of the state policy favoring affirmative action programs, the result might have been different. Whatever the status of Mosley, however, the fact remains that development of a coherent set of rules governing picketing cannot be accomplished without first resolving which aspects of picketing are "conduct" and which are "speech."

**Picketing—Speech or Conduct?**

To what extent, then, is picketing "conduct" rather than "speech"? Is it only some picket lines which induce "action . . . quite irrespective of the nature of the ideas which are being disseminated," or is this a characteristic of all picket lines, as Justice Frankfurter believed:

> The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. Justice Frankfurter's view implies that picketing is blessed with some mystical quality not enjoyed by other forms of expression, a view which does not withstand critical examination.

Conceptually, all picketing can be divided into two broad categories on the basis of whether the support of the audience appealed to is sympathetically or coercively enlisted. The operative distinction in this analysis is whether the picketers are members of an organized and powerful combination by virtue of which they can impose economic sanctions, withhold economic benefits and threaten social ostracism of a degree and magnitude which would enable them to coerce their audience into doing what they demand. The kind of apprehensions and fears created by this type of picketing rise far above the minimal social embarrassment sometimes associated with crossing

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51. See generally Cox, supra note 5; Emerson, supra note 5.
picket lines. The merits of the dispute become irrelevant because the picketers’ appeal is directed towards a coerced audience; the support of the audience appealed to is ensured by “a system of power based upon common economic interests, loyalties, social pressures, economic sanctions and bureaucratic force.”

Picketing by a union where the appeal for support is directed almost exclusively at other union members often falls within this category. The union picket line under these circumstances operates as a “signal” to other union members to cease working for the picketed employer, and to stop transporting goods to and from his place of business. The refusal of the union member to cross a union picket line is motivated largely by his fear of economic sanctions or loss of his union membership. The success of this type of picketing is therefore a result of the economic leverage wielded against the hapless union member and not of the fact that he is in basic sympathy with the picketers’ cause. This type of picketing, entitled “signal picketing” by Professor Archibald Cox, should therefore be excluded entirely from First Amendment protections.

However, not all picketing by unions can be classified as “signal picketing.” This is particularly true where the audience appealed to is the public at large. However powerful a union may be, it has no control over members of the general public and can only enlist their support by persuading them of the merits of the picketers’ position and the rightness of their cause. The audience appealed to is, therefore, an uncoerced one. Most non-union picketing is likewise directed at the general public and not at members of a group to which the picketers belong. Consumer, tenant and civil rights groups, for instance, are generally small and loosely organized and therefore can neither exact blind loyalty in their audiences nor invoke threats of economic sanctions. “Picketing under such circumstances is a call to reason, not the application of economic coercion, and as such must be characterized as expression.” This type of picketing is labeled “publicity picketing” by Professor Cox.

It should be made clear at the outset that classification as “publicity picketing” is not dependent upon the picketers’ success in convincing their audience of the merits of the particular dispute at issue. For instance, a consumer aware of the plight of migrant farm workers in California, and supportive of the union’s efforts to alleviate their situation, might observe a farm worker union picket line because of their basic sympathy, even though the consumer was not familiar with

52. EMERSON, supra note 5, at 445.
53. Cox, supra note 5, at 595-96.
54. EMERSON, supra note 5, at 445; accord, Cox, supra note 5, at 594.
55. Cox, supra note 5, at 594-96.
the facts of the particular dispute involved. This activity is no less "expression" because the persuasive power of the union was effective prior to the picketing. Publicity picketing embraces any activity which enlists support because of the beliefs and sympathies of the consumer and does not require that each consumer or union member become an instant convert upon seeing the message on the picket sign. It is only where the loyalty is exacted by the use of powerful economic threats that the picketing loses its protected character.

The first case to exclude picketing from First Amendment protections on the ground that the picketing was more than speech was Giboney v. Empire Storage & Ice Co., an example of signal picketing. Had the truck drivers in Giboney crossed the union picket lines, they would have been subject to fine or suspension by their unions. In Ritter's Cafe, the picketing involved was again primarily "signal picketing." The success of the union's picket line was achieved in large part because the unionized employees of Ritter's Cafe refused to cross the union picket line.

On the other hand, the picketing in Hughes v. Superior Court was an example of publicity picketing, as Justice Traynor implied in his dissent in the California Supreme Court. Similarly, in NLRB v. Fruit & Vegetable Packers Local 760, the union was seeking to enlist the support of Safeway customers over which it exercised no coercive influence; i.e., the picketing involved was again publicity picketing. Another example of union picketing of the same genre is the table grape boycott instituted by the United Farm Workers Union. The success of this boycott was achieved by an appeal directed exclusively to the consuming public. Consumers who decided not to purchase grapes did so because they believed that migrant farm workers should be represented by a union of their choice.

The practical difficulties inherent in classifying picketing as "publicity" or "signal" can be overcome by the use of an evidentiary rule. All picketing by unions which is directed primarily at union members would presumptively be deemed signal picketing. The union could, however, rebut this presumption by a showing that no economic leverage was either threatened or used in enforcing observance of the picket line. Conversely, all picketing by unions or other groups that is directed at the general public would presumptively be deemed publicity

57. Id. at 493.
59. See id. at 723-24.
61. 32 Cal. 2d at 867, 871, 198 P.2d at 895, 897.
picketing. This presumption could likewise be rebutted by a showing that the picketing group had available to it powerful economic weapons which had been threatened and used in securing the effectiveness of the picket line. (However, isolated instances involving the use of such threats would not serve to characterize the picketing as "signal picketing.") The classification should be based on whether the coercive elements are predominant or incidental:

"The critical inquiry is whether the employees' conduct involves an appeal to an uncoerced audience each individual in which is left free to choose his own course of conduct or invoke the power of an organized combination."

Professor Charles Gregory, a commentator in this field of law, finds such distinctions meaningless. In his view, the distinction between "signal" and "publicity" picketing only "places a premium on [the] ineffectiveness of the picketing, based on the differences in degree of the economic coercion sympathetically enlisted." The critical issue to Gregory is the coercive impact of the picketing on the picketed establishment, and not the coercive impact on those whose aid is enlisted. Thus, under his analysis, the fact that the coercion is achieved by means of picketing should be constitutionally irrelevant. In other words, if the use of economic pressure is the critical factor to be considered in determining whether a particular form of expression is protected, then appeals to consumers through newspaper advertisements and radio and television broadcasts, though technically "pure speech," would be treated no differently than picketing.

Most expression, however, is aimed at persuading the listener to embark on a course of action:

"Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts . . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.

The word "coercion" has a pejorative connotation, but in its literal sense, all expression that seeks a particular result is intended to "coerce." The purpose of anti-war demonstrators holding rallies in Washington was to "coerce" legislators to stop the Vietnam war; similarly, sit-ins at lunch counters in the South were designed to "coerce" private establishments to integrate their facilities.

63. Cox, supra note 5, at 602.
65. Id. at 207.
66. Id.
67. Cox, supra note 5, at 601.
A recent case involving leafletting by a community group is illustrative. In Organization For A Better Austin v. Keefe, the United States Supreme Court struck down an Illinois injunction against leafletting. The Organization For A Better Austin (OBA) was engaged in an effort to stop Keefe, a real estate broker, from "panic peddling." According to the OBA, Keefe was engaged in practices that were designed to arouse in local white residents the fear that blacks were going to take over Austin. As a result of the emotions enflamed by these practices, Keefe was able to secure listings and sell to blacks. The OBA was engaged in an effort to stabilize the ethnic makeup of Austin and to pressure Keefe to stop his practice of soliciting real estate business in Austin by playing on racial fears. Toward this end, leaflets were circulated in the area in which Keefe's business was located, asking people to contact Keefe to urge him to sign a "no-solicitation" agreement.

Keefe argued that the leafletting was designed to force him to sign the "no-solicitation" agreement. In response to this allegation, the Court stated:

"The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper."

Thus the issue, as framed by the Court's analysis, is whether the application of economic pressure is a form of coercion so significantly different from the types of psychological pressure enumerated above as to warrant special treatment.

**Economics—Myth and Reality**

The application of economic pressure is a hallowed American tradition, although, when Adam Smith wrote Wealth of Nations in 1776, he did not foresee that the forces of supply and demand could bring about political as well as economic changes through the marketplace. Inherent in the nature of consumerism is the buyer's ability to make a choice. Traditionally, such choices have been governed by purely economic considerations: whether the product was inexpensive, how long it would last, how effective it was for the purpose intended, etc. Today's consumer, however, may look at several other non-economic factors: what effect will it have on the environment; whether the manufacturer exploits his employees; whether the product

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70. Id. at 419.
is manufactured in a country which has a repressive government. All of these considerations have a "coercive" impact on the particular producer, and the very function of the free market system is to weed out unpopular products and replace them with those which consumers desire.

Those who view economic pressure of the type involved in publicity picketing as a dangerous modern phenomenon that will destroy the free market system are laboring under a misapprehension. It is axiomatic that what is produced and the price it commands is a function of the interaction of supply and demand. However, what is most frequently misunderstood by the lay person is what determines demand. Professor Paul Samuelson puts it this way:

The Consumer, so it is said is king or rather, with every man king, each is a voter who uses his money as votes to have the things done that he wants done. His votes must compete with other men's votes, and the people with the most votes end up with the most influence on what gets produced and on where those goods go.\(^72\)

Economics makes no value judgments on the motives of consumers or on why the dollar votes are cast in a particular manner, but requires only that they be cast so as to maximize an individual consumer's well-being within the framework of priorities that that consumer sets for himself.

The economist studies mental states rather through their manifestations than in themselves and if he finds they afford evenly balanced incentives to action, he treats them \textit{prima facie} as for his purpose equal.\(^73\)

The assumption that a necessary concomitant of a viable free market system is that consumers make only those choices that are motivated by purely economic considerations is as insidious as it is false. It is this type of thinking that has relegated picketing to such an anomalous position in the area of First Amendment doctrine.

It does not affect the theory of demand in the least whether the individual maximizes wealth, religious piety, the annihilation of crooners, or his waistline.\(^74\)

The mandate of economics is clear: Choose as you want, as long as you choose what you want.

One of the prerequisites to the attainment of the perfect competition model is that consumers have complete information about the goods that are produced.\(^75\) If consumers are in fact motivated by "social" factors, the necessary implication is that they must have the rele-

\(^{72}\) P. SAMUELSON, ECONOMICS 58 (9th ed. 1973).
\(^{73}\) A. MARSHALL, PRINCIPALS OF ECONOMICS 16 (8th ed. 1948).
\(^{74}\) G. STIGLER, THE THEORY OF PRICE 63-64 (1946).
\(^{75}\) See id. at 63.
vant information in order to make their choices. Thus, rather than doing violence to the notion of a free enterprise system, publicity picketing serves a vital function in providing consumers with some of this information. In the area of such picketing, simplistic distinctions between "economic" and "political" spheres serve no useful purposes but result only in a perpetuation of the myth that this type of advocacy will destroy the economic fabric of American society.

Under Professor Gregory's view, the Thornhill line of cases should be overruled "saving the constitutional guarantee of free speech for the situations it was intended to cover." However, the success of publicity picketing is ensured by an appeal to the consumer's social views, and therefore, the First Amendment has a vital role to play. Gregory's approach would serve the purpose of making First Amendment protections meaningless.

The separation of picketing into signal picketing and publicity picketing thus goes a long way towards resolving the speech/conduct dilemma in the picketing cases and provides the court with a practicable basis on which to decide whether or not First Amendment protections are necessary.

**Picketing as Speech—The Applicability of the First Amendment**

Even "publicity picketing" may be subjected to some valid regulation under the First Amendment. The Court has repeatedly conceded that reasonable restrictions of "time, place and manner" on expression are constitutionally permissible. The First Amendment does not require states to tolerate violent conduct or obstruction of the public streets merely because the right to free speech is involved, and such regulatory statutes are permissible so long as they are narrowly drawn to protect only against such conduct and do not give public officials unfettered discretion in enforcing them. Similarly, picketing constitutionally may be subjected to such restrictions. However, this analysis is inapplicable where it is the subject matter of the picketing and not the manner in which it is conducted that is under attack.

In almost all the cases decided by the United States Supreme Court, the state injunctions were aimed at the subject matter

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of the picketing and not the manner in which it was conducted. Under Justice Black's view in *NLRB v. Fruit Packers Local 760*, and Justice Marshall's view in *Police Department v. Mosley*, classification of permissible picketing in terms of its subject matter is invalid. However, in neither *Mosley* nor *Fruit Packers* was the message on the picket sign itself characterized as unlawful. In *Fruit Packers*, for example, Justice Black found, by somewhat strained reasoning, that because section 8(b)(4)(ii)(B) expressly permitted use of means other than picketing to appeal to the public, the same appeal made through picketing was likewise lawful. Similarly, in *Mosley* there was no allegation that the purpose for which Mosely was picketing was unlawful, but merely that the Chicago ordinance did not permit that type of picketing in the vicinity of a school.

One way of deciding whether the picketing is protected is to determine whether it presents a "clear and present danger" of a "substantive evil" against which the state may validly protect its citizens, the test announced in *Schenck v. United States*. As pointed out earlier in this note, this approach has often amounted to nothing more than an ad hoc balancing test, where the weight given to First Amendment interests is not clearly articulated. Due to this major deficiency of the "clear and present danger" test, the outcome in a particular case is often merely a deferral to the legislative judgment before the Court, a standard of review that offers no meaningful protection for expression.

Critical examination of the "unlawful purpose" doctrine suggests a different line of analysis. When a state enjoins picketing because its purpose is unlawful, it is saying that the message the picketers wish to convey is unlawful. However, the views of the picketers are not just abstract beliefs. They are urging a particular course of action. When the state seeks to regulate these views, such regulation is aimed at suppression of this advocacy. In publicity picketing, the picketers are advocating a course of action for the patrons of the picketed establishment, and for the establishment itself. When the state enjoins that picketing on the grounds that it has a purpose which is contrary to a state policy, it is saying, in effect, that the action urged by the picketers would itself violate that policy. The determination that must be made, then, is to what extent the state can claim that the picketers are advocating a course of action that is "unlawful" and thereby proscribe such advocacy.

80. 377 U.S. 58, 78-89 (1964) (Black, J., concurring).
81. 408 U.S. 92, 95.
82. See text accompanying notes 47-49 supra.
83. 249 U.S. 47, 52 (1919).
84. See note 14 supra.
Under the rule announced by the United States Supreme Court in Brandenburg v. Ohio, a state can only proscribe advocacy of the use of force or violation of law where such advocacy is intended to incite imminent lawless action and is likely to produce such action. It is unclear whether the Brandenburg opinion represents a new standard of review in First Amendment cases or merely a restated version of the "clear and present danger" test; but, in any event, the analytical tools devised in Brandenburg are particularly appropriate in determining the extent to which picketing is protected by the First Amendment, because of the necessity of showing that the danger from the advocacy be demonstrable immediately rather than in the future. In other words, under the Brandenburg test, the state cannot proscribe advocacy where its alleged harmful effects are remote and speculative.

Whatever the defects of Brandenburg in relation to revolutionary advocacy, it can provide meaningful protections for picketing. The focus of this analysis is not on the "imminence" of the action advocated by the picketers, but on the imminence of that action violating the state policy used to justify restraint of the picketing. In other words, if the action urged does not itself violate the state policy used to justify restraint of the picketing, the advocacy of that action cannot be proscribed. If the Brandenburg standard is applied to publicity picketing, then the state is required to show that the action urged violates its laws before it can enjoin that picketing.

It is true that the line of cases culminating in Brandenburg involved proscription of such advocacy through state criminal law. However, injunctions are enforced by the sanction of civil contempt, a penalty no less onerous than a criminal one. Nor can it be said that Brandenburg only applies to advocacy of the violent overthrow of government. The rule as announced therein applies both to the use of force and of violation of law. The underlying premise of the Brandenburg holding is that restriction of speech cannot be justified where its allegedly harmful effects are a matter of conjecture.

The extent of protection afforded picketing should therefore be determined in light of the rules set forth in Brandenburg. Picketers in publicity picketing are generally advocating two ends: that consumers of the picketed establishment embark on a particular course of action, and that the picketed establishment itself embark on a particular course of action. On the basis of the Brandenburg holding, the state

86. Id. at 447.
88. See generally id.
can enjoin the picketing only if it is able to show that a state law would be violated if either the picketed establishment or its patrons agree to act as urged. It is submitted that in the overwhelming majority of situations the action urged by the picketers is unquestionably lawful.

Examination of different types of publicity picketing illustrates this proposition. *Hughes v. Superior Court*,\(^8^9\) for instance, was an example of this type of picketing. As previously discussed, the picketers in *Hughes* were engaged in an effort to get the picketed store to institute a hiring plan favoring black applicants in order to compensate for its past discriminatory employment policies. No law prohibited the store in *Hughes* from adopting such a plan. To say, then, that the picketers were urging a violation of California's policy against racial discrimination is absurd. Thus, the result of the holding in *Hughes* is to make advocacy of lawful action unlawful!

Furthermore, the action urged on the patrons of the picketed store by the picketers was also lawful. Consumers in *Hughes* had a choice—they could shop at a store that had discriminated on the basis of race, or they could patronize one that made good faith efforts to treat job applicants in a non-discriminatory manner. In this case they were being urged not to patronize a store that discriminated against black applicants, as indeed they had a right not to do, until such time as that store corrected its discriminatory practices. It is difficult to understand then how it could be argued that the picketers were advocating a course of action that violated state law.

Picketing by tenant groups likewise constitutes advocacy of lawful action. This is illustrated by the situation where tenants picket the apartment building of a slum landlord and urge that he repair the building and that tenants of that building refuse to pay their rent until such time as he does so. The state in such a case might argue, as the lower court found in *Organization For A Better Austin v. Keefe*,\(^9^0\) that such picketing was in violation of the state policy in favor of protecting an individual's privacy. Clearly, there is no law prohibiting a landlord from repairing his property. Thus, the action advocated as to him is lawful. Tenants who refuse to pay their rent may of course be evicted, and the landlord may bring a court action to collect the amount due. However, no law requires that they pay their rent as long as they are willing to take the consequences of their actions. Therefore, it cannot be said that the rent-strike picketers are advocating action that is unlawful.

The consumer boycott instituted by the farm workers union presents another example. There, the action urged is either that con-

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consumers refuse to patronize the store that buys the non-union product or that they refuse to buy the product itself. The use of "primary" or "secondary" boycott to characterize this activity, however important in labor law, is inappropriate when determining whether a particular form of expression is protected under the First Amendment. What must be determined under the analysis proposed is whether or not consumers can lawfully make such a decision. No law prohibits consumers from patronizing only those stores which exclusively sell products grown or manufactured by union labor. It cannot therefore be said that the picketers are advocating action that is unlawful.

The biggest problem with the "unlawful purpose" doctrine is that in most instances the alleged adverse effect of the advocated action on the state law invoked to justify regulation of the picketing is remote and speculative at best. The lawfulness of the advocacy must be determined in light of whether or not the person to whom the message is aimed lawfully can embark on that particular course of action urged.

The basic premise of the foregoing analysis is that consumers are continually making choices that are both economically and socially motivated. In fact, an increasing amount of commercial advertising of late is being devoted to enlisting the political and social sympathies of the consumer. Many large corporations spend substantial portions of their advertising budgets on "public image" advertisements which inform consumers of how much the corporation is doing for the environment, or how many jobs it has created for low income minority workers. One cannot escape the fact that there is a class of consumers today who regards its consumer dollar as a vote cast for or against the broader social issues with which it is concerned. In the vast majority of cases, the choice that is urged by the picketers is one of several equally valid and lawful alternatives open to the consuming public. It is submitted that there are no overwhelming policy reasons to justify restriction of such activities.

91. See, e.g., Promoting Nature's Friends, TIME, vol. 96, Aug. 17, 1970, at 58-59. Indeed corporations have themselves begun to perceive their role in society in different non-economic terms. Today, corporate decisions are influenced to a larger extent by the concept that business has a broader social obligation in addition to its profit-making one. See generally D. Votaw & S. Sethi, THE CORPORATE DILEMMA: TRADITIONAL VALUES VERSUS CONTEMPORARY PROBLEMS (1973); C. Walton, CORPORATE SOCIAL RESPONSIBILITIES (1967).

92. Where the action advocated is concededly unlawful, the analysis becomes twofold. Firstly, is the law in question the type of law that justifies an infringement on First Amendment rights? Secondly, is the application of the law to the particular action advocated overly broad? For example, is the state justified in applying its anti-trust laws to picketing aimed at consumers? Anti-trust laws are designed to enhance the efficient working of the marketplace. In publicity picketing, there is no concerted action on the part of consumers. Each consumer makes an independent decision on
Conclusion

The decisions of the United States Supreme Court regarding the applicability of First Amendment protections to picketing as a form of expression have left confusion in their wake. Following *Teamsters Local 695 v. Vogt*, it appeared that the Court had locked itself into a position that virtually excluded picketing from any protection under the First Amendment. *NLRB v. Fruit Packers Local 760* and *Police Department v. Mosley*, on the other hand, indicated that the Court was still searching, and that the *Thornhill* doctrine was not of purely historical interest.

Scrutiny of the law in this area cannot yield any meaningful tools for analysis without first resolving which aspects of picketing are “speech” and which are “conduct,” and the division of picketing into “signal” and “publicity” picketing goes the furthest toward resolving the speech/conduct dilemma which plagued the Court in the earlier picketing cases. Because publicity picketing appeals to an uncoerced audience, whose support can be enlisted only through persuasion, it must be classified as speech.

Once publicity picketing is so defined, the applicability of First Amendment protections should be determined in light of the test propounded in *Brandenburg v. Ohio*, because the state, by characterizing the picketers' purpose as unlawful, is in effect claiming that the picketers are advocating an unlawful course of action. Speculation as to the ultimate harmful effects of such picketing is not sufficient to justify its regulation; instead, there must be a direct connection between the action advocated and the law used to justify regulation of the picketing.

The importance of picketing as a mode of expression cannot be over-emphasized. For small and relatively weak groups, this is often the only avenue open to them in attempting to achieve their valid social objectives. Indeed, the First Amendment affords its most meaningful protections when the rights of the weak and the powerless are at stake. The mere fact that these views are being voiced in a non-traditional forum—the marketplace—does not diminish their impor-

whether or not to patronize the particular store, or buy the particular product. As was discussed before, the efficient working of the economic system depends on consumers making decisions based on any information they feel is relevant. “[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.” *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *cf.*, *NAACP v. Alabama*, 377 U.S. 288, 308 (1964), *accord*, *Aptheker v. Secretary of State*, 378 U.S. 500, 512-14 (1964).
tance. We must, therefore, remain ever vigilant against infringement of First Amendment rights not only by "heavy-handed frontal attack, but also from being stifled by more subtle governmental influence."^93

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