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Constitutional Law—First Amendment Protection of the Right to Picket and State Public Policy.—Schwartz-Torrance Inv. Corp. v. Bakery & Confectionary Workers

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been: Give WQXR the opportunity for oral argument on its allegations of public interest. Decide, upon the basis of the facts alleged and upon all reasonable inferences which may be drawn from them, whether these facts, if proven, would show that the public interest demands that extraordinary protection be accorded WQXR's broadcasting service. If you decide that the allegations are insufficient to warrant additional protection, you must give a full explanation why they are insufficient. If you decide that they are sufficient, you must give WQXR an opportunity to prove them in a trial-type hearing.[32] Had the court done this, it would have contributed greatly toward a rational reconciliation of the conflicting demands of flexibility and predictability in the administration of the Communications Act.

JEROME K. FROST

Constitutional Law—First Amendment Protection of the Right to Picket and State Public Policy.—*Schwartz-Torrance Inv. Corp. v. Bakery & Confectionary Workers.*[1]—This action was commenced by respondent-corporation in the Los Angeles County Court to enjoin appellant-union's alleged trespass upon property which respondent had leased from the City of Torrance, California, and was operating as a shopping center. Appellant, in its attempt to organize the employees of Revels' Bakery Shop, a sub-lessee in the center, commenced and maintained, over respondent's objection, a peaceful organizational picket line on the center's sidewalk immediately in front of the sub-lessee's shop.[2] The county court granted an injunction on the basis that the center's sidewalk had been provided for use by the sub-lessee's actual and potential customers; appellant, by its maintenance of the picket line, was not using the sidewalk for its intended purpose; such action constituted a trespass.[3] The primary question on appeal was whether a lessee of property, who has the right to exclusive possession and is not a party to a labor dispute, can enjoin, as a trespass, peaceful organizational picketing directed at the business premises of a sub-lessee-employer. HELD: The dis-

[32] This is all that is required by the 1960 amendment. 74 Stat. 889, 47 U.S.C. § 309(d) (Supp. IV, 1959-62), which provides:

> (2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition.

In view of the inability of the Commission and the Court of Appeals of the District of Columbia to accomplish the Congressional objective of providing an expeditious means of hearing objections to the applications for construction permits, the best solution may well be to abolish the intervention and protest procedures altogether. The Commission could then admit adverse parties in interest at its discretion. Southwestern Publishing Co. v. FCC, 243 F.2d 829 (D.C. Cir. 1957).

[1] 222 Cal. App. 2d 378, 35 Cal. Rptr. 179 (1963).

[2] Respondent is not a party to any labor dispute.

[3] Restatement, Torts §§ 157-164 (1938) especially § 158.

trict court reversed and remanded[4] the case to the county court for a redetermination of the conflict between respondent's property rights and appellant's right of free speech as expressed through the medium of picketing, within the framework of five standards: (1) To what degree the private property involved is distinguishable from public property similarly devoted; (2) Whether the communication would be unobjectionable on public property; (3) Whether the communication was intended for persons naturally upon the premises because of its use; (4) Whether the owner's rights of privacy and enjoyment as distinguished from his right of control were involved; (5) Whether there were alternate means of communication available to the trespasser.[5]

It has been stated that the essential purpose and primary significance of the constitutionally guaranteed right of free speech is "that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ."[6] Although, in its terms, the grant of the right is unconditional and the right itself is considered a fundamental personal one,[7] it was not intended or at least has not been interpreted as an absolute right, *i.e.*, protecting every possible use of language.[8] However, infringement of this right is tolerated only when the mode of its use or its content creates a "clear and present danger" of a substantive evil and its restriction will prevent such evil.[9]

In *Thornhill v. Alabama*,[10] the United States Supreme Court held invalid, as an unconstitutional abridgement of free speech, an Alabama statute which, in broad terms, banned all picketing. In so doing the Court extended the protection of the First Amendment to picketing and declared that this activity could be prohibited only when the requisites of the "clear and present danger" standard were present. While it recognized the states' power "to set the limits of permissible contest open to industrial combatants,"[11]

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[4] As of this writing, the case is pending before the California Supreme Court.

[5] Appellant conceded that it had other means available to it to contact the employees. Opening Brief for Appellant, p. 4.

[6] Abrams v. United States, 250 U.S. 616, 630 (1919). See Brandwen, Battle of the First Amendment: A Study in Judicial Interpretation, 40 N.C.L. Rev. 273 (1962).

[7] E.g., Schneider v. State, 308 U.S. 147 (1919); DeJonge v. Oregon, 299 U.S. 353 (1937).

[8] Roth v. United States, 354 U.S. 476 (1957); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). Cf. Justice Black and the First Amendment Absolutes: A Public Interview, 37 N.Y.U.L. Rev. 549 (1962); Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821 (1962).

[9] Dennis v. United States, supra note 8; Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, supra note 8. In *Dennis* the Court departs from the "clear and present danger" test as originally formulated in the *Schenck* case. The original interpretation required an imminent danger. The departure requires a balancing of the gravity of the harm against the probability of its occurrence, i.e., the greater the gravity of the harm the less need be the probability of its occurrence. See Lusk, The Present Status of the "Clear and Present Danger Test"—A Brief History and Some Observations, 45 Ky. L. Rev. 576 (1957).

[10] 310 U.S. 88 (1940).

[11] Id. at 104.

the Court removed picketing, one of the most effective of union weapons, from the scope of that power.

The Court subsequently concluded, however, that picketing involved more than ordinary speech and more than the survival of communicated ideas in the "competition of the market."[12] While there was an element of communication in picketing, this element could not be treated in isolation from its other components.[13] The Court recognized that in actual practice picketing was geared to bring about its objectives, not through a change of intellectual conviction, but through the exertion of various economic and social pressures; thus, picketing necessarily involved both this coercion and pressure as well as the aspect of free expression. If picketing were granted the full protection of the free speech guarantee of the First Amendment and if, in consequence, could only be restricted upon meeting the requisites of the "clear and present danger" standard, then the states would neither be able to exert sufficient control over their domestic economies nor adequately regulate internal trade—acts admittedly within their power.[14]

Thus, the retreat from the *Thornhill* doctrine began. In a case where the union's picketing objective, if attained, would have resulted in a violation of the state's public policy as embodied in its antitrust laws, an injunction against the picketing was upheld.[15] Where the picketing objective was the creation of a union shop, the Court upheld an injunction prohibiting such activity on the basis that the state's public policy, striking the balance between protection of self-employers and maintenance of union standards, was not "so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice."[16] In *Teamsters Union v. Vogt, Inc.*,[17] the state court issued an injunction against picketing on the basis that its objective was to coerce the employer to interfere in his employees' choice as to whether they should unionize. The state's declared policy was that the employees should have freedom in such choice. The Court stated that the protection to be afforded picketing was not as broad as had been pronounced in the *Thornhill* decision and that a state could enjoin picketing which would prevent effectuation of its public policy. But the Court also stated that "the mere fact that there is picketing does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibition against picketing."[18]

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[12] Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942).

[13] "The factors on which the union primarily relies are fear, prudence, sympathy, and social embarrassment, rather than on reason or a change of intellectual conviction." Drinker, Some Observations on the Four Freedoms of the First Amendment 31 (1957).

[14] The Court upheld a state statute allowing picketing carried on without "intimidation or coercion" and which did not involve "fraud, violence, breach of the peace or threat thereof." However, the Court was not faced with the validity of a conviction under the statute. Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).

[15] Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

[16] Teamsters Union v. Hanke, 339 U.S. 470 (1950).

[17] 354 U.S. 284 (1957).

[18] Id. at 294-95. In Chauffeurs Local Union v. Newell, 356 U.S. 341 (1958) (per curiam), the Court, citing *Thornhill*, reversed a Kansas state court's decision enjoining union picketing. It seems that the injunction amounted to a blanket prohibition. For

None of these cases involved the question of whether a union has the right to picket on or otherwise use private property. Nevertheless, the rationale of these decisions is relevant to an examination of that question, especially in view of certain statements in the Supreme Court's decision in *Marsh v. Alabama*.[19]

In *Marsh*, a Jehovah's Witness was convicted under an Alabama trespass statute after refusing to discontinue the distribution of religious literature on the street of a company owned town which functioned as any other town in the country. The Court reversed the conviction, and in the course of its opinion stated that legal title alone did not always give the owner absolute dominion over the property in question. The more an owner, for his own purposes, allows the public to use his premises, the less may he restrict the constitutional rights of those who accept his invitation. It was further suggested that the right of free speech occupies a preferred position in any balancing process with the rights of property owners.

The few state courts which have dealt specifically with the problem of the right to picket in conflict with property rights have either refused to take cognizance of the controversy because of the pre-emption of state court jurisdiction by federal labor law,[20] or having recognized jurisdiction to enjoin a trespass,[21] have decided or implied that they would have decided the issue on the basis of the *Marsh* decision. Of these latter state decisions, one, by an evenly divided court, affirmed an injunction restraining the shopping center owner from interfering with the union.[22] A second decision affirmed an order denying the union's motion for summary judgment on the basis that it was a fact question as to whether the shopping center appeared to be public property.[23] A third decision dismissed a complaint on the basis that the tenant had no standing to enjoin a trespass.[24]

The five standards proposed by the *Schwartz-Torrance* court as the solution to this shopping center picketing problem incorporate the *Marsh* rationale in numbers one, two and four, which relate, respectively, to the degree of distinction between the private property involved and public property similarly devoted, to whether the communication would be unobjec-

a complete compilation of state picketing laws, see Bureau of National Affairs, Inc., Labor Relations Expediter § 59 (1961).

[19] 326 U.S. 501 (1946).

[20] Freeman v. Retail Clerks Union, 58 Wash.2d 426, 363 P.2d 803 (1961). State courts have no jurisdiction to entertain a controversy arguably within the provisions of the Labor Management Relations Act. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). See Hanley, Federal-State Jurisdiction in Labor's No Man's Land: 1960, 48 Geo. L.J. 709 (1960).

[21] The United States Supreme Court expressly left unanswered the question of whether a state court could enjoin a trespass by a union. Amalgamated Meat Cutters & Butchers Workmen v. Fairlawn Meat, Inc., 353 U.S. 20 (1957).

[22] Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963). This case involved the distribution of handbills and did not involve picketing.

[23] Moreland Corp. v. Retail Store Employees, 16 Wis.2d 499, 114 N.W.2d 876 (1962).

[24] Nahas v. Local 905, Retail Clerks Int'l Ass'n, 144 Cal. App.2d 808, 301 P.2d 932 (1956).

tionable on public property, and to whether the owner's rights of privacy and enjoyment as distinguished from his right of control were involved.

It is submitted that these standards are inapplicable to the shopping center picketing situation. Even if it were assumed by the court that the rationale of the *Marsh* decision should not be restricted to its facts,[25] there is no indication as to the factual situations to which it would or could be applied. Restricting the present consideration to the particular use of property involved in the *Schwartz-Torrance* case, would the rationale of *Marsh* encompass all shopping centers or only those of a certain size, or would it depend on the particular public conveniences provided in the center? Does the operation of a shopping center serve an essentially public function as does the operation of a company town? Indeed this was a factor which the *Marsh* court heavily relied on in reaching its decision. But even if the *Marsh* rationale is not limited to its factual context, it still would have no application to the shopping center picketing situation. The Court in *Marsh* was dealing with freedom of religion and speech; it was *not* dealing with picketing. In view of the recent decisional law which has affirmed restrictions on the right to picket—notwithstanding First Amendment protection—any reliance placed on the *Marsh* decision as a solution to the present problem would appear to be unwarranted. The right to picket is not equated with the right of free expression and has not been extended but restricted.

In standards numbered three and five, relating to whether the communication was intended for persons naturally upon the premises because of its use, and to whether there were alternate means of communication available, the *Schwartz-Torrance* court seems to have incorporated the tests used in determining the rights of union organizers to utilize company property which are granted by federal labor law.[26] It is submitted that these standards are as equally inapplicable to the shopping center picketing problem as those gleaned from *Marsh*. These "federal labor law" tests determine the statutory rather than the constitutional rights of a union to make use of an employer's premises. In the present case the court is faced with the question of whether or not an application of state police power which results in the removal of labor union pickets from private property, not belonging to the employer, through the implementation of an injunction against trespassing upon the property, amounts to an unconstitutional exercise of that power as a denial of freedom of speech. In such a case it does not seem logical to place the conduct within the scope of a policy which was set down in a series of cases[27] that determined the rights of a union to carry on solicitation and informational activities—not picketing—on the *employer's* property. This is

[25] There is some authority that it should be. NLRB v. Stowe Spinning Co., 336 U.S. 226, 236 (1949) (dissenting opinion); Marsh v. Alabama, supra note 19 (dissenting opinion); People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385 (1961), noted in 3 B.C. Ind. & Com. L. Rev. 289 (1962).

[26] See NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Stowe Spinning Co., supra note 25; Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). See Hanley, Union Organization on Company Property—A Discussion of Property Rights, 47 Geo. L.J. 266 (1958).

[27] Ibid.

particularly so when such policy is the product of a "federal public policy" declared as legislation, the express purpose of which is to promote labor organization.

In conclusion, it is submitted that the utilization of the injunctive device to deny unions the right to picket on shopping center property is not an abridgement of the constitutionally guaranteed right of freedom of speech. Since the *Vogt* decision, it is not doubted that prohibitions against picketing will be sustained where the manner in which the picketing is conducted or the attainment of the picketing objective would prevent effectuation of a state's public policy formulated pursuant to a valid exercise of its police power.[28] Certainly, a policy protecting the integrity of a non-employer's property rights is such a valid public objective,[29] and is not such a choice, as between the competing interests of the union and of the property owner, as to be "so inconsistent with rooted traditions of a free people"[30] as to be unconstitutional.

VINCENT A. SIANO

Corporations—Entity Theory—Derivative Actions—Pro Rata Individual Recovery.—*Shlensky v. South Parkway Bldg. Corp.*[1]—In a prior action, minority shareholders brought a derivative suit against the corporation's directors. The trial court decided for the plaintiffs, and ordered an accounting from the defendant directors of transactions which led to corporate losses. On appeal, the intermediate appellate court reversed. Plaintiffs then appealed to the Supreme Court of Illinois which reversed the intermediate decision and reinstated the trial court's decree for an accounting. On remand, the trial court ordered an accounting which, however, was never made since both sides agreed to a compromise whereby the defendants agreed to buy the shares of the minority holders at five times their value, and to pay all legal and court costs. At this point, a third party, owner of forty-five shares, petitioned to intervene on grounds that the compromise imperiled an adequate recovery on the part of the corporation. The court denied the petition and approved the compromise. The instant case is the petitioner's appeal, in which, Burke, P. J., dissenting, it was HELD: The lower court erred in approving the compromise inasmuch as it varied from the Supreme Court's order for an accounting, and in denying the intervenor's petition inasmuch as his ownership of forty-five shares gave

28 "Today, the Court signs the formal surrender . . . . State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing. . . ." Teamsters Union v. Vogt, Inc., supra note 10, at 297 (dissenting opinion). See Jones, The Right To Picket—Twilight Zone of the Constitution, 102 U. Pa. L. Rev. 995 (1954).

29 "[A] state, in enforcing some public policy, whether of its criminal or civil law, and whether announced by its legislature or its courts could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." Teamsters Union v. Vogt, Inc., supra note 10, at 293.

30 Supra note 16, at 479.

1 ——Ill. App.——, 194 N.E.2d 35 (1963).