PICKETING BY BUSINESS COMPETITORS

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As labor's right to picket employers in the course of labor disputes is becoming firmly established in most jurisdictions, traders are beginning to use this effective weapon against their competitors. Grocers, butchers, tailors, and barbers have, of late, picketed the stores of rivals who refused to close on Sundays, to raise prices, or to desist from allegedly false advertising. The purpose of the picketing was to make these rivals yield by deterring patronage. Since in a majority of cases suits to enjoin the picketing have been dismissed,[1] there is good reason to believe that traders, encouraged by judicial tolerance, will henceforth resort to picketing with increasing frequency. One court, in giving its sanction to this practice, has bluntly announced that we are "in the initial stages of a new type of economic rivalry".[2] Therefore, in the years to come there is likely to be a growing amount of litigation centering on the question whether, and under what circumstances, business men have the right to picket their competitors. It is this question which this article proposes to discuss.

It is not intended, either by argument or implication, to question the now prevailing policy which permits labor unions to picket employers in order that the situation of the working class may be improved. But when we ask ourselves whether other groups should be allowed to use the same weapon for very different purposes, we must have a clear understanding of what picketing is and what it does. Only then can we hope to arrive at a rational decision.

In *Bernstein v. Retail Cleaners and Dyers Ass'n*[3] and *Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n*,[4] the privilege of picketing has been extended to business competitors on the ground, among others, that picketing is merely a medium of publicity designed to advise the public of the existence of a controversy

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1. Rosman v. United Strictly Kosher Butchers, 164 Misc. 378, 298 N. Y. Supp. 343 (Sup. Ct. 1937); Bernstein v. Retail Cleaners and Dyers Ass'n, 31 Ohio N. P. (N. S.) 433 (C. P. 1934); Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n, 33 Pa. D. & C. 100 (1938), 16 B. U. L. REV. 640, 86 U. OF PA. L. REV. 556. *Contra:* Fillet v. Bartolomio, 253 App. Div. 815, 1 N. Y. S. (2d) 316 (2d Dep't, 1938).

2. Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n, 33 Pa. D. & C. 100, 107 (1938).

3. 31 Ohio N. P. (N. S.) 433 (C. P. 1934).

4. 33 Pa. D. & C. 100 (1938).

and to appeal for its support.[5] Courts which take this view find no essential difference between picketing and other means of publicity;[6] and they conclude that, "if the customers be not favorably impressed by the cause of the [pickets], they will effectively check the picketing by ignoring it".[7]

This assumption calls for closer scrutiny. Those who happen to read an advertisement, a circular or a letter urging them not to patronize a certain establishment and those who listen to a similar appeal over the radio are free, indeed, to do what they think best. If they are inclined to ignore the appeal, they can do so without embarrassment since the person who made the appeal will, as a rule, not be aware of their reaction. Therefore, it is reasonable to assume that only those who believe in the cause will accede to the appeal. On the other hand, people confronted with an appeal by picketing face a very different situation. Since the pickets are stationed near the entrance to the establishment, it is impossible for patrons to disregard their appeal without their knowing it. The question then before the customer is whether to defy the pickets openly or to accede to their wishes. Many people who know nothing about, and are not interested in, the cause of the pickets will nevertheless shrink from defying them openly. It is embarrassing to pass by hostile men and women and give them to understand that their grievances are of no account. This is true when the patron does not know the pickets; it is even more true when he does know them personally, as is often the case, particularly in smaller communities. Whether the pickets speak to the public or not, picketing tends to generate an unpleasant atmosphere which many people of ordinary sensibilities will seek to avoid even though they do not sympathize with the cause of the pickets. They will prefer the slight inconvenience involved in going to another nearby store or restaurant or theatre. The more establishments there are within easy reach, the more readily will large sections of the public take the line of least resistance and go elsewhere; and the damage suffered by the establishment picketed will often be irreparable since a customer, once he has found satisfaction elsewhere, may never return.

It matters little whether the signs carried by the pickets specifically request the public not to patronize, or whether they merely state the grievance without making such request. Many people do not read

5. See Wallace v. International Ass'n of Mechanics, 155 Ore. 652, 663, 63 P. (2d) 1090, 1095 (1936).

6. Schuster v. International Ass'n of Machinists, 293 Ill. App. 177, 194, 12 N. E. (2d) 50, 57 (1937).

7. Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n, 33 Pa. D. & C. 100, 110 (1938). Accord: Wallace v. International Ass'n of Mechanics, 155 Ore. 652, 663, 63 P. (2d) 1090, 1095 (1936).

carefully what is written on the signs. They are influenced by the presence of unfriendly men rather than by the language of the placards. A similar effect will be produced if the pickets, instead of carrying signs, distribute handbills. The public, it is true, may not read the handbills and, thus, may not realize at once what the purpose of the men may be. But as soon as the public discovers that the men are antagonistic to the store owner, their presence will deter patronage no less than if they carried signs.

Some courts have noticed the factors here described. Said the Supreme Court of Arkansas: "Were [the pickets] not doing something more than giving notice to the public that they had an undecided issue with the business which they were picketing? . . . And was it not necessarily true that many people who had no knowledge or opinion in regard to the existing controversy, and who felt no interest in the terms of its final settlement, were deterred from according the patronage which might otherwise have been given appellee *simply because there was a controversy in which they did not desire to even appear to be parties?*" [8] This language, which discloses a realistic appreciation of ordinary psychology, was quoted with approval by the Supreme Court of Idaho.[9] Other courts, less articulate, but probably referring to the same psychological reaction, have said that picketing, even if peaceful, results in "moral intimidation".[10]

There is also the fear of disturbances which may keep people away. Experience has shown that disturbances are sometimes attendant upon picketing even though the pickets themselves may desire to remain within the bounds of the law. It is only natural, therefore, that timid people should take no chances and go elsewhere.

It may well be said, therefore, that picketing, even though peaceful, intimidates, both morally and physically. But whether or not we call it intimidating makes little difference. As Holmes has said, "We must think things, not words. . . ." [11] Moreover, there can be no dispute about the fact that picketing, even when carried on by a single individual, normally deters many customers and prospective customers who are not interested in, or do not believe in, the cause of the pickets;

8. Local Union No. 313 v. Stathakis, 135 Ark. 86, 95, 205 S. W. 450, 453 (1918) (italics supplied). The case is cited only for its analysis of the effect of picketing. No opinion is here expressed on the conclusion arrived at by the court. The same is true of the cases cited in notes 9, 10 and 13.

9. Robison v. Hotel and Restaurant Employees Local No. 782, 35 Idaho 418, 434, 207 Pac. 132, 136 (1922). *Cf.* note 8.

10. Vegelahn v. Guntner, 167 Mass. 92, 98, 44 N. E. 1077 (1896); Beck v. Railway Teamsters Protective Union, 118 Mich. 497, 527, 77 N. W. 13, 24 (1898); *In re* Langell, 178 Mich. 305, 309, 144 N. W. 841, 842 (1913); Danz v. American Federation of Musicians, 133 Wash. 186, 189, 233 Pac. 630, 631 (1925). *Cf.* note 8.

11. Holmes, *Law in Science and Science in Law* (1899) 12 HARV. L. REV. 443, 460.

and the greater the number of pickets, the more numerous the customers who will stay away.[12] It is this effect that picketing has on the mass of the disinterested and indifferent that distinguishes picketing from an appeal by newspaper, circular, letter or radio.

In still another respect does picketing differ from these usual means of publicity. Suppose *A* and *B* have a dispute, and *A* wishes to make *B* yield to his demands. If *A* appeals to the public over the radio or in newspapers, circulars and letters not to patronize *B's* store, the pressure he thereby exerts upon *B* is only indirect. He hopes to influence *B* through the loss of trade. If instead he pickets *B's* store, there is, in addition, a direct pressure upon *B*. In effect he says to *B*, as the Supreme Court of Maine recently pointed out: "Here I am . . . and here I shall remain until you accede to my demands." [13] The direct pressure is exerted through *A's* physical presence in front of *B's* store. The constant presence of a hostile person irritates, annoys and may cause fear—quite apart from the damage that is done by deterring patronage. Annoyance, irritation and fear are likely to affect *B's* morale; and after a time he may be willing to yield to *A* only in order that he may again breathe freely. Thus it may well be said that picketing has an element of coercion.[14]

Having established, then, that picketing differs in two respects from other means of publicity and persuasion, it is not difficult to answer the assertion that the right to picket is included under the constitutional guaranty of free speech.[15]

The right of free speech [16] guarantees the right to appeal for a cause by argument. But pickets, as we have seen, influence many people not by the strength of their arguments, but by their presence in front of the establishment picketed. It is physical pressure rather than reasoning which "persuades", and the exertion of such pressure goes beyond exercising the right of free speech. To forbid picketing would not prevent the advancement of a cause; it would merely prevent the advancement of a cause by a method which has "an element not appear-

12. In *Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n,* the court felt that the presence of three or more pickets would intimate customers but that two would not. Three pickets may, of course, exert a stronger pressure than two. But it is difficult to find a rational basis for assuming that three would exert pressure and two no pressure at all.

13. Keith Theatre v. Vachon, 134 Me. 392, 413, 187 Atl. 692, 702 (1936). *Cf.* note 8.

14. Local Union No. 26 v. Kokomo, 211 Ind. 72, 81, 5 N. E. (2d) 624, 628 (1937); Danz v. American Federation of Musicians, 133 Wash. 186, 188, 233 Pac. 630 (1925). FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 31, 44.

15. *Ex parte* Lyons, 81 P. (2d) 190 (Cal. 1938); Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n, 33 Pa. D. & C. 100 (1938).

16. For the text of the constitutional provisions, see HALE AND BENSON, THE LAW OF THE PRESS (1933) 351.

ing in fair argument".[17] Therefore, the right of free speech does not compel the conclusion that picketing is lawful.[18]

We must now consider whether picketing, while not safeguarded by the constitutional guaranty of free speech, is nevertheless lawful in the absence of statutory prohibitions.

It is a well settled rule that intentional interference with another's business will give rise to an action in tort unless the damage can be justified.[19] There can be little doubt about the intention of the pickets or their principals. While ostensibly they may be appealing only to patrons sympathetic to their cause, we may safely assume that they cannot help but be aware that they will influence others as well. In any event the law presumes that a person has intended the necessary and natural consequences of his act.[20] Therefore, whatever loss of custom the establishment picketed suffers is caused intentionally. Since money damages are inadequate, a case is made out for equitable relief;[21] and the decision must turn on the question of justification. The fact that picketing by labor unions is regarded today as socially justifiable, however, should not blind our eyes to the peculiar nature of a weapon which causes customers to withhold patronage because of embarrassment and timidity rather than because of their own free will; and it would seem that only the most compelling reasons should justify resort to such a weapon by other groups.

In trying to determine whether a business man may be justified in picketing his competitor, it will be useful to distinguish two groups of cases; namely, those where the competitor picketed has violated some legal obligation, and those where he has not. Let us begin with the latter group.

In *Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n,* it appeared that there were approximately 200 food stores in the northwestern section of Philadelphia. Most of these en-

17. Keith Theatre v. Vachon, 134 Me. 392, 413, 187 Atl. 692, 702 (1936); *cf.* Evening Times Co. v. American Newspaper Guild, 124 N. J. Eq. 71, 199 Atl. 598 (1938).

18. Jordahl v. Hayda, 1 Cal. App. 696, 82 Pac. 1079 (1905); Robison v. Hotel and Restaurant Employees Local No. 782, 35 Idaho 418, 207 Pac. 132 (1922); Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13 (1898); Mitnick v. Furniture Workers' Union, 124 N. J. Eq. 147, 200 Atl. 553 (Ch. 1938); see American Federation of Labor v. Buck's Stove Co., 33 App. D. C. 83, 112 (1909). See also the following cases where statutes or municipal ordinances forbidding picketing were upheld as not violating the constitutional guarantee of free speech: Hardie-Tynes Mfg. Co. v. Cruse et al., 189 Ala. 66, 66 So. 657 (1914); *In re* Williams, 158 Cal. 550, 111 Pac. 1035 (1910); Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924); *Ex parte* Stout, 82 Tex. Crim. App. 183, 198 S. W. 967 (1917); *cf.* Senn v. Tile Layers Protective Union, 301 U. S. 468 (1937); Watters v. Indianapolis, 191 Ind. 671, 134 N. E. 482 (1922), 6 I. J. A. BULL. 137; Note (1938) 48 YALE L. J. 308.

19. COOLEY, LAW OF TORTS (Throckmorton's Student Ed. 1930) 734.

20. POLLOCK, TORTS (13th ed. 1929) 34.

21. WALSH, EQUITY (1930) 214.

terprises were conducted by the owners without the assistance of hired labor. The owners had for many years had their stores open for business more than 100 hours per week. The defendants, numbering about 150 out of the total of 200 store owners, became dissatisfied with this condition. They wanted shorter hours. So they formed an association whose purpose was to have all the food stores in the vicinity close on Wednesday afternoon, Saturday evening, and all day Sunday. Plaintiffs, the owners of the remaining 50 stores, refused to accede to the wishes of the association. Thereupon defendants began to picket the plaintiffs' stores, admittedly with a view to force plaintiffs to yield. They carried signs stating that the plaintiffs would not coöperate with the defendants in closing their stores. The court held that the case, while not a labor dispute in the technical sense, was closely analogous to a labor dispute, and for that reason it refused to enjoin the picketing. Said the court:

> "Certainly the end which the defendants seek to attain is not socially undesirable. The grocer combines in himself the function of the laborer as well as of the entrepreneur and the capitalist. His purpose to establish a maximum work-week for himself is as understandable and as justifiable as the similar desire of the man who is solely a laborer. Agreement by all his competitors is as essential to any grocer's closing on Wednesday afternoons as agreement by their employer and their fellow-employees is to the securing of improved working conditions by factory employees. It is now well established, not only by statute, . . . but by judicial decision as well, that employees may picket and thus impair their employer's right to carry on his business and also interfere with their fellow-employees' right to work, in their endeavor to improve the working conditions of all." [22]

However, there is a fundamental difference between the situation of the employee and that of the grocer. An employee cannot get shorter hours without the employer's consent. In case the employer refuses, the employee has, as a rule, no means of pressure. If he will not work as many hours as the employer requires, some one else probably will. So his alternatives are to accept the employer's terms or lose his job. The employee is powerless to gain for himself shorter hours because the employer and fellow workers stand in his way.

The grocer, on the other hand, while we may perhaps call him a laborer, is a laborer of a peculiar kind. He need work no longer than he desires. He can open and close his store as he pleases. If he wishes to close on Wednesday afternoon or Sunday, his competitor cannot interfere and has no interest in interfering if he could. This is true

22. 33 Pa. D. & C. at 106.

whether we regard his competitor as a rival capitalist or, as the court suggests, as a fellow laborer. Picketing, therefore, is not needed to bring about shorter hours for the grocer. It is used to make sure that shorter hours will not result in losing customers to the competitor who keeps longer hours. Therefore, in picketing his competitor, the grocer acts in the capacity of entrepreneur rather than of laborer; and it would seem that the right of employees to picket furnishes no real analogy. If picketing by the grocer can be justified, it must be justified on other grounds.

It is, of course, understandable that the defendants or any other group of traders should desire to close their stores on Sunday, Wednesday afternoon and Saturday evening without losing any custom to their competitors. If that is their aim, they are at liberty to place signs in their store windows explaining their action and asking patrons to do no shopping while their stores are closed. They are free to resort to all other lawful means of publicity to advocate their cause and invite public support. Their appeal, to be sure, might fail; and their patrons might flock to plaintiffs' stores. But it is difficult to see why the public's lack of sympathy for, or indifference to, the cause of the defendants should justify picketing the plaintiffs. The plaintiffs have done nothing to divert the defendants' patrons to themselves, nor do they plan such an attempt. Whatever custom they may gain comes to them incidentally, without any effort on their part. The reason why they want their stores to remain open on Sunday is their desire to keep the trade they have rather than to gain the defendants' trade. It may be suggested that, if all grocers in a community closed at certain hours, trade would be lost to no one. The argument assumes that patrons who cannot buy at those hours will buy at some other time; it fails to take cognizance of the fact that much of a grocer's trade is transient, at least in larger cities and on main highways. People pass by and, if they find the store closed, will not return the next day. Therefore, even if all grocers closed Wednesday afternoon, Saturday night and Sunday, it would probably mean loss of trade and smaller profits to all of them. The defendants, of course, have the indubitable right to renounce some of their profits in favor of a less slavish life; but the plaintiffs have an equal right to work hard and long in order to earn as much as they can for their own benefit. Moreover, if all grocers closed at certain hours, the plaintiffs, because of the particular location of their stores or the type of their clientele, may possibly lose more trade than the defendants. Perhaps the plaintiffs might not survive. It is a rather striking proposition that the defendants should be privileged to handicap, if not defeat, business rivals in their economic

struggle only because the defendants feel that they themselves can afford to see their profits reduced.

The court, however, not only permitted the defendants, by picketing, to deprive the plaintiffs of their lawful trade; apparently it went further. There is no indication that the court meant to confine the picketing to those hours when the defendants' stores were closed. The defendants might choose to picket while their stores are open.[23] By doing that they would divert the plaintiffs' trade to themselves. So we have the curious result that the defendants, in order that they may keep their customers from patronizing the plaintiffs' stores on Sunday, are given the privilege of using pressure to drive the plaintiffs' customers into their own stores!

It is not here argued that it would be socially undesirable if all groceries closed on Wednesday afternoon, Saturday evening and Sunday, and if similar closing hours were established in other retail lines. But the legislature rather than the competitor should determine whether a man is to lose the right to open and close his store at such hours as he pleases. Statutes providing for compulsory closing of stores on Sunday have often been enacted and have been upheld, in most instances, as being a proper exercise of the state's police power.[24] On the other hand, it has been held in several jurisdictions that statutes providing for opening and closing hours on weekdays bear no substantial relation to the public interest, constitute an unreasonable attempt to regulate lawful private business, and are therefore unconstitutional as taking property without due process of law.[25]

It may be argued that, in jurisdictions where the courts have defeated legislation of this sort, picketing should be permitted as the only practicable means of achieving a desirable end. While this argument may have some appeal, let us not overlook the fact that to allow picketing under these circumstances would establish a precedent likely to create considerable difficulties in the future. Once we admit the principle that a group of tradesmen may picket competitors whose trade policies and practices, while lawful, happen to inconvenience the

23. This is what they actually did in several instances according to information received through the courtesy of Benjamin Frank, Esq., attorney for the plaintiffs.

24. *Ex parte* Andrews, 18 Cal. 678 (1861), *disapproving, Ex parte* Newman, 9 Cal. 502 (1858); McClelland v. Denver, 36 Colo. 486, 86 Pac. 126 (1906); Rosenbaum v. Denver, 81 P. (2d) 760 (Colo. 1938); State v. Dolan, 13 Idaho 693, 92 Pac. 995 (1907); Walter v. State, 16 Ohio Cir. Ct. (N. S.) 523 (1913); see 60 C. J. 1036, § 11c, and cases cited there, ns. 64, 65.

25. McDermott v. Seattle, 4 F. Supp. 855 (W. D. Wash. 1933); *In re* Scaranino, 7 Cal. (2d) 309, 60 P. (2d) 288 (1936); Denver v. Achmid, 98 Colo. 32, 52 P. (2d) 388 (1935); *In re* Opinions of the Justices, 14 N. E. (2d) 953 (Mass. 1938), 87 U. OF PA. L. REV. 128; State v. Johannes, 194 Minn. 10, 259 N. W. 537 (1935); Amitrano v. Barbaro, 1 A. (2d) 109 (R. I. 1938). But *cf.* Feldman v. Cincinnati, 20 F. Supp. 531 (S. D. Ohio 1937); Wilson v. Zanesville, 130 Ohio St. 286, 199 N. E. 187 (1935); Note (1938) GEO. WASH. L. REV. 242.

group, where shall we draw the line? Should retail sellers of dresses be permitted to picket rivals who conduct their business in their private residence and, by saving the rent for a store, are able to undersell their competitors? The majority of retail sellers regard this practice as inimical to the trade.[26] Or should an association of retailers who are opposed to the granting of premiums as a selling device be allowed to picket the stores of rivals engaging in this practice? Or take a case where a group of merchants agree not to call at private residences for purposes of trade if unsolicited. Would it be lawful for them to picket rivals who refused to adhere to this agreement?

Two courses are open to the courts. Either they can permit picketing in all such controversies, irrespective of merit; in justice they would then have to extend the permission to both sides engaged in the dispute. This course will encourage picketing by store owners; retaliatory picketing is bound to follow;[27] and soon this kind of warfare may become the order of the day. Naturally traders with more limited resources will be at a disadvantage because of the expense of picketing.

Since it is highly unlikely that the courts will be inclined to open the door to such general picketing, the alternative would be to determine in each case which of two lawful trade policies is the more desirable socially or economically and to confine the privilege of picketing to the advocate of the better policy. But it is equally unlikely that the courts will be prepared to undertake such a task.

There would seem to be only one way out of this predicament: that is the adoption of the rule that in a controversy between the proponents of two lawful trade policies neither side has the right to picket the other.

The view here taken finds some support in the case of *Fillet v. Bartolomio*.[28] The five defendants each owned and operated a barber shop in Brooklyn. The plaintiff was a competing barber, charging lower rates than the defendants. The employees' union had called a strike to unionize both the plaintiff's and the defendants' shops, and in the course of the strike had resorted to picketing. The union had succeeded with the defendants but had failed with the plaintiff. Satis-

26. See Wolfenstein v. Fashion Originators' Guild, 244 App. Div. 656, 659, 280 N. Y. S. 361, 365 (1st Dep't, 1935).

27. It actually followed in the Philadelphia *Food Stores* case. After the court had held that the defendants could lawfully picket the plaintiffs, the plaintiffs began to picket some of the defendants. They carried signs urging the public not to patronize these defendants because the latter, in keeping closed on Wednesday afternoon, etc., were not offering a service to the consumer in Philadelphia. (The writer is indebted for this information to Herbert Syme, Esq., attorney for the defendants.)

28. 253 App. Div. 815, 1 N. Y. S. (2d) 316 (2d Dep't, 1938).

fied with its success, it abandoned the effort to unionize the plaintiff's shop. This effort was then resumed by the defendants, who believed that the plaintiff's lower rates were due, at least in part, to his maintaining lower than union standards. It does not appear whether the plaintiff's standards were really below the union standard. At any rate, the defendants began to picket the plaintiff's shop. The banners they carried urged the public not to patronize the plaintiff's shop because it was unfair to organized labor.[29]

It would seem that the defendants here had at least as strong a case as the defendants in the *Food Stores* case. In both cases, the defendants picketed because the plaintiffs had a competitive advantage. But in the *Food Stores* case the advantage was the result of the defendants' own action in closing their stores on Wednesday afternoon. Here, the advantage was due to the fact that the defendants had had to accede to the union's wishes. Yet the Appellate Division of the New York Supreme Court not only restrained the defendants from creating the erroneous impression that a labor dispute was involved,[30] but granted a sweeping injunction against all picketing. Said the court: "Defendants were picketing plaintiff's shop, not to advance the cause of labor, but to injure plaintiff's business by diverting her trade to themselves. Picketing to achieve such ends is illegal." [31] The rule so formulated clearly applies to all situations where a group of traders tries to compel a competitor, by picketing, to raise his prices to their level.

In the *Fillet* case, the plaintiff, in underselling the defendants, was within his rights. We now come to the question whether picketing is justified when a trader, in underselling his competitors, violates some obligation, either statutory or contractual. This question was presented in *Bernstein v. Retail Cleaners and Dyers Ass'n,* where the defendant association picketed the store of a rival who sold below the prices fixed by the NRA Code. The sign read as follows: "Notice! This tailor shop is engaged in unfair competition, violating the Code of Fair Competition for the Dry Cleaning Industry. Retail Cleaners and Tailors Association." The court refused to enjoin.

29. The facts here stated do not appear in the opinion. They were obtained through the courtesy of Stanley Wolder, Esq., who was on the brief for plaintiff.

30. In this case the statement appearing on the sign pointed to the existence of a labor dispute. But even when no deceptive language is used, the public may be led to believe that a labor dispute exists. Picketing so far has been mainly the weapon of employees and many people will therefore associate all picketing with a labor dispute without stopping to read the signs the pickets may carry. This is perhaps another reason why courts should hesitate to extend the privilege of picketing to non-labor groups.

31. 253 App. Div. 815, 1 N. Y. S. (2d) 316, 317 (2d Dep't, 1938).

While the NRA is dead,[32] the legal problem raised by the *Bernstein* case is still alive because a similar situation might well arise today under the Fair Trade Acts which have been passed in 43 states.[33] Under these acts, manufacturers of trade-marked articles may prescribe the price at which such articles shall be resold at retail. Suppose a retailer sells below the price fixed by the manufacturer. Shall his competitors be privileged to picket him? It has recently been held that retailers loyal to their contractual obligations have a cause of action for unfair competition against a price cutting rival.[34] To picket instead of using this legal remedy would be to resort to self-help. Now in a few situations the party injured by a tortious act is allowed to resort to self-help.[35] "But the cases in which this is permitted are not numerous, and they are in the main cases of urgency, in which a resort to the ordinary remedies would be inadequate to complete justice. A general permission for every man to take the law into his own hands for his own redress would be subversive of civil government." [36] It would destroy public order and the public peace.[37] Since in an action for unfair competition a temporary injunction may be obtained in case of urgency,[38] and as the remedy seems adequate in other respects as well, self-help should be prohibited.

Those who may be inclined to take a more lenient attitude toward self-help in general should still object to self-help by picketing because by picketing the injured party obtains more than he is entitled to under the law. When a civil wrong has been committed, the normal purpose of the law is to restore, as far as possible, the status quo ante.[39] In the field of unfair competition, this is accomplished by granting an injunction and compelling the wrongdoer to pay compensation in money for any damage he may have caused.[40] Picketing goes further in that it diverts the trade of the wrongdoer to the injured party and thus secures to the latter a competitive advantage which is undeserved.

It may be argued that, no matter how undesirable picketing may be as a means of self-help, the "clean hands" doctrine [41] stands in the

32. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935).

33. See 2 C. C. H. Trade Reg. Serv. (8th ed.) 10,001 *et seq.*; *Courts Look at Fair Trade Acts* (1938) 2 TRADE REG. REV. No. 2, p. 14 *et seq.*; HANDLER, CASES AND MATERIALS ON TRADE REGULATION (1937) 1089; OPPENHEIM, CASES ON TRADE REGULATION (1936) 911 *et seq.*

34. Port Chester Wine & Liquor Shop, Inc. v. Miller Bros. Fruiterers, Inc., 253 App. Div. 188, 1 N. Y. S. (2d) 802 (2d Dep't, 1938); Weisstein v. Freeman's Wines and Liquors, Inc., 7 N. Y. S. (2d) 234 (Sup. Ct. 1938).

35. HARPER, LAW OF TORTS (1933) 101 *et seq.*

36. 1 COOLEY, LAW OF TORTS (4th ed. 1932) 58.

37. BURDICK, LAW OF TORTS (4th ed. 1926) 98.

38. DERENBERG, TRADE-MARK PROTECTION AND UNFAIR TRADING (1936) 770 *et seq.*

39. HOLLAND, ELEMENTS OF JURISPRUDENCE (12th ed. 1917) 322.

40. DERENBERG, *op. cit. supra* note 38 at 752 *et seq.*

41. *Id.* at 659 *et seq.* HANDLER, *op. cit. supra* note 33, at 706.

way of injunctive relief. It seems that the court in the *Bernstein* case was strongly impressed by this argument: "Plaintiff's conduct in violating the price provisions of the code was contrary to public policy. *For that reason* his petition, seeking equitable intervention, is untenable and must be dismissed." [42] But the rule is not inexorable that a plaintiff who comes into a court of equity with "unclean hands" is to be denied relief. It has been held that relief should be granted where an inequitable result would otherwise follow.[43] In a case where retailers picket a price-cutting rival the result is inequitable because, as we have seen, they thereby divert his trade to themselves. Moreover, they deprive him of whatever equitable defenses he might have if they brought an action against him. Perhaps they have also disregarded their contractual obligations or have been guilty of other unlawful conduct. If so, he could raise the defense of unclean hands in an action brought by them.[44] Or perhaps they have slept on their rights. In that event, he might raise the defense of laches.[45]

Authority is not lacking for the propositions here laid down. The Supreme Court of Massachusetts recently enjoined a labor union from picketing an employer who had breached a contract entered into with the union. The court held that picketing was unlawful since the defendant had an adequate remedy for breach of contract and that the defense of unclean hands was of no avail.[46]

It is submitted that, for the reasons stated, the *Bernstein* case should not be followed in analogous situations. There is, however, another objection to the case, an objection relating to the language used by the Dry Cleaners on their placard. It will be remembered that in the *Philadelphia Grocers* case, the pickets confined themselves to statements of fact. In the *Bernstein* case they stated an opinion or, if you wish, a legal conclusion: "This tailor shop is engaged in unfair competition. . . ." [47] Now it is easy to surmise why they did not state the plain facts. Had they said, "This tailor shop is selling below the prices fixed by the NRA Code," they might have attracted, instead of deterred, the multitude of those who are more interested in the imme-

42. 31 Ohio N. P. (N. S.) 433, 435 (C. P. 1934) (italics supplied).

43. See Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co., 95 F. (2d) 978, 983 (C. C. A. 6th, 1937).

44. Ray Kline, Inc. v. Davega-City Radio, Inc., 4 N. Y. S. (2d) 541 (Sup. Ct. 1938).

45. DERENBERG, *op. cit. supra* note 38, at 647.

46. Samuel Hertzig Corp. v. Gibbs, 3 N. E. (2d) 831 (Mass. 1936). Accord: Jensen v. Saint Paul Moving Picture Mach. Operators, 194 Minn. 58, 259 N. W. 811 (1935). *Cf.* People v. Kopezak, 153 Misc. 187, 274 N. Y. Supp. 629 (N. Y. City Ct. 1934), where tenants who picketed in protest against fire trap conditions were found guilty of disorderly conduct. The court held that the lawful and orderly manner would have been to file complaints with city officials. But *cf.* Segenfeld v. Friedman, 117 Misc. 731, 193 N. Y. Supp. 128 (Sup. Ct. 1922).

47. 31 Ohio N. P. (N. S.) 433, 435 (C. P. 1934).

diate advantage to their pocketbooks than in the lofty ideals of public policy and sanctity of contract. At least the dry cleaners were afraid that this might happen, and did not deem it wise strategy, therefore, to tell the public the plain truth. They needed language which would conceal, rather than convey, the truth; the term "unfair competition" does just that. Most patrons of a tailor shop are untrained in the law, and to them unfair competition will mean some conduct injurious to *their own interests,* such as fraud or dishonesty. They are likely to think that this tailor treats *them* unfairly. Even the specialist in the field could not possibly know what a tailor accused of unfair competition had actually done. While public policy today looks with disfavor upon a retailer who sells below the prices at which he has contracted to sell, there is no reason why such retailer should be represented to the public as a man who is cheating them. It is well settled that pickets must not present their cause by false and derogatory implications.[48]

It is no answer to say that pickets have been permitted to express their opinion by stating that the store picketed is "unfair to organized labor". This term has come to have a meaning well understood by large sections of the public. It means that the person so designated is unfriendly to organized labor and refuses to accede to its demands. It implies no fraud or other dishonorable conduct[49] while the term "unfair competition" does. The distinction was clearly perceived by the Supreme Court of Idaho in a case where the defendant labor union carried two placards, one stating that the plaintiff was unfair to organized labor, and the other announcing that "This house is unfair, and will be unfair to you". The court, while permitting the first, held the second objectionable on the ground that it "carried an implication of dishonesty or lack of integrity" towards customers.[50] It would seem that the term "unfair competition" has the same effect. Therefore, if permitted to picket at all, competitors should be confined to statements of fact.

The principles here developed should govern not only when a retailer sells below the price fixed by a manufacturer, but also when he

48. A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N. Y. Supp. 946 (Sup. Ct. 1934), 83 U. OF PA. L. REV. 383 (1935); Bieber v. Bininbaum, 6 N. Y. S. (2d) 63 (Sup. Ct. 1938); see Paramount Enterprises, Inc. v. Mitchell, 104 Fla. 407, 413, 140 So. 328, 331 (1932).

49. Cinderella Theatre Co. v. Sign Writers' Local Union No. 591, 6 F. Supp. 164 (E. D. Mich. 1934); Dehan v. Hotel and Restaurant Employees, Local No. 183, 159 So. 637 (La. Ct. of App. 1935); Steffes v. Motion Picture Mach. Operators, 136 Minn. 200, 161 N. W. 524 (1917).

50. Robison v. Hotel and Restaurant Employees, Local No. 782, 35 Idaho 418, 430, 207 Pac. 132, 135 (1922).

violates a *statutory* provision forbidding selling at less than cost.[51] His competitors should seek to enforce the statute, rather than resort to self-help by picketing.

The same principles should, indeed, apply in all cases where a group of traders feel that a rival is engaged in unfair competition.[52] False advertising furnishes another illustration. In *Rosman v. United Strictly Kosher Butchers,*[53] it appeared that the plaintiff, a so-called "progressive" butcher in the Bronx, New York City, who had previously sold only non-Kosher meat in his market, added a Kosher poultry department. A sign in this department stated truthfully that the poultry sold was Kosher. The defendant, an association of Kosher butchers, believed that the plaintiff had opened the Kosher poultry department only for the purpose of profiting from the business of unwary purchasers who might infer from the sign in the poultry department that the entire market sold Kosher meat. Therefore, they began to picket plaintiff's store with signs advising the public that his meat was non-Kosher. Although it is not stated in the case, the purpose of the picketing apparently was to bring pressure to bear on the plaintiff to erect a sign stating that his meat was non-Kosher. The court refused to enjoin. Now the gist of the defendants' grievance was that the plaintiff, by deceiving the public, was capturing part of the trade that normally would have gone to one or several of them. In other words, the plaintiff was charged with unfair competition. If this charge was well-founded, then the defendants had an equitable remedy. In several recent cases, injunctions against a trader's misrepresentation of his wares were granted at the suit of a trade association composed of that trader's competitors.[54] The lawful conduct of the Kosher butchers was to institute an action for unfair competition against Rosman. If that action should be decided in favor of the association, picketing would be unnecessary. Dismissal of the action, on the other hand, would establish that Rosman acted within the bounds of permissible competition and, in refusing to erect a sign in his non-Kosher department, did his competitors no legal wrong. In that event it would seem that his competitors should have no more right, by picketing, to force him to erect such sign than the grocers should have

51. Statutes prohibiting selling below cost have been adopted in a number of states. Note (1938) 47 YALE L. J. 1201. *Cf.* Wholesale Candy & Tobacco Dealers' Bur. v. National Candy & Tobacco Co., 82 P. (2d) 3 (Cal. 1938); Rust v. Griggs, 172 Tenn. 565, 113 S. W. (2d) 733 (1938), 86 U. OF PA. L. REV. 780.

52. As to the concept of unfair competition, see Handler, *Unfair Competition* (1936) 21 IOWA L. REV. 175.

53. 164 Misc. 378, 298 N. Y. Supp. 343 (Sup. Ct. 1937).

54. American Philatelic Soc. v. Claibourne, 3 Cal. (2d) 689, 46 P. (2d) 135 (1935), 86 U. OF PA. L. REV. 428 (1936); Furniture Mfrs. Ass'n v. Grand Rapids Guild of Exhibitors, 268 Mich. 685, 256 N. W. 595 (1934).

in the Philadelphia case to compel their rivals to close on Wednesday afternoon.[55]

The picketing has been justified on the ground that the defendants were performing a public service in notifying customers that Rosman's meat was not Kosher. However, if it is at all desirable that business men enlighten the public about the conduct of a rival,[56] they should employ no method which will exert pressure on customers not to patronize that rival.

It appears to the writer that picketing is an improper competitive weapon, no matter whether it is used by an individual or a group.[57] But it is interesting to note that in all cases that have so far arisen, an individual trader or a small group were picketed by a powerful group of competitors. In labor disputes picketing is, as a rule, the weapon of the weaker party in the bargaining struggle. In the competitive field, it is the weapon of the strong to impose their will on the weak.

Picketing, then, differs from other means of publicity in that it deters the patronage of many who are not interested in, or do not believe in, the cause publicised. Picketing, therefore, goes beyond an exercise of the right of free speech and is not guaranteed by the Constitution. In a controversy between competitors, either a tort has been committed or it has not. If it has, a legal remedy exists and should be used. If it has not, such pressure as has been described is unwarranted. Therefore, picketing as a competitive weapon cannot be justified, and should be enjoined.

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55. In a case where no cause of action lies, other remedies may exist to stop false advertising or other unfair competitive practices. They are listed in Handler, *supra* note 52, at 195. See also Utah Laws 1937, c. 19, § 14, creating a Trade Commission which is empowered to enjoin unfair methods of competition.

56. For a discussion of this question, see Wolff, *Unfair Competition by Truthful Disparagement* (1938) 47 YALE L. J. 1304, 1327 *et seq.*

57. If it is unlawful for a retailer to picket a rival's store, it would seem equally unlawful for a manufacturer or a wholesaler to picket the store of a retailer who carries merchandise of a manufacturer or wholesaler. *Cf.* Scavenger Service Corp. v. Courtney, 85 F. (2d) 825 (C. C. A. 7th, 1936); People v. Distributors Division, Smoked Fish Workers Union, Local 20377, 7 N. Y. S. (2d) 185 (Sup. Ct. 1938).