Washington and Lee Law Review

Volume 25 | Issue 1 Article 4

Spring 3-1-1968

Right To Picket On Quasi-Public Property

CASE COMMENTS

RIGHT TO PICKET ON QUASI-PUBLIC PROPERTY

The commercial use of private property which intentionally results in increased accessibility to the general public transforms the nature of the property from purely private to quasi-public.[1] Neither the right to picket, as an exercise of free speech,[2] nor a private property owner's right to prevent trespassory invasions of his property[3] is clearly established with respect to labor picketing on quasi-public property.[4] When an owner utilizes the trespass theory[5] in attempting to enjoin picketing on such property the two rights are drawn into conflict.[6] Where jurisdiction has not been pre-empted by

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[1]State v. Williams, 44 L.R.R.M. 2357, 2364 (Baltimore, Md. Crim. Ct. 1959).

[2]*See* Marsh v. Alabama, 326 U.S. 501 (1946) (concurring opinion). The Supreme Court of the United States has held that the constitutional right of free speech, which is secured against state invasion by the due process clause of the fourteenth amendment, will render a state powerless to prohibit *absolutely* all peaceful picketing without regard to purpose and circumstance. Carlson v. California, 310 U.S. 106 (1940); Thornhill v. Alabama, 310 U.S. 88 (1940); Senn v. Tile Layers Union, 301 U.S. 468, 478 (1937).

[3]*See* Fairlawn Meats, Inc. v. Amalgamated Meat Cutters Local 427, 99 Ohio App. 517, 135 N.E.2d 689, *appeal dismissed,* 164 Ohio St. 285, 130 N.E.2d 237 (1955), *rev'd on other grounds,* 353 U.S. 20 (1957); Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961) (concurring opinion). *See also* Hood v. Stafford, 213 Tenn. 684, 378 S.W.2d 766 (1964); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876, 879 (1962) (dictum); Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130, *reargument denied,* 245 N.Y. 651, 157 N.E. 895 (1927).

[4]Compare the following cases: Schwartz-Torrance Inv. Corp. v. Bakery Workers' Local 31, 61 Cal. 2d. 766, 394 P.2d 921, 40 Cal. Rptr. 223 (1964), *cert. denied,* 380 U.S. 906 (1965); Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963); Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961); Moreland Corp. v. Retail Store Employees Local 444, 16 Wis. 2d 499, 114 N.W.2d 876 (1962).

[5]Under common law, an unauthorized entry upon the premises of another without invitation, either express or implied, which resulted in an interference with possession, constituted a trespass. W. PROSSER, TORTS § 13 (3d ed. 1964). The basis upon which the theory of trespass is applied in attempting to enjoin picketing is that since pickets have not been invited, either expressly or impliedly, upon an owner's property, their presence upon such property constitutes an unauthorized entry; and since picketing acts as a deterrent to the public in patronizing commercial establishments, such acts therefore result in an economic interference with the owner's possession. *See* Nahas v. Local 905, Retail Clerks, 144 Cal. App. 2d 808, 301 P.2d 932, 936 (1956).

[6]*See* Schwartz-Torrance Inv. Corp. v. Bakery Workers' Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied,* 380 U.S. 906 (1965).

either the Norris-LaGuardia Act of 1932[7] or state anti-injunction acts,[8] resolution of this conflict has fallen upon the judiciary.[9]

Logan Valley Plaza, Incorporated v. Amalgamated Food Employees Local 509[10] involved union members who picketed in a parcel pick-up zone and occasionally on a porch in front of Weis' Market, a non-union store which was located within Logan Valley Mall shopping center. Union members did not confine their activities to the area immediately in front of Weis' Market but picketed in the parking lot and at entrances and exits of the shopping center. The picketing was a result of an unsuccessful attempt by the union to organize the employees of Weis. After the picketing had commenced, both Weis and Logan brought an action to enjoin the union's activity. The Supreme Court of Pennsylvania, in a four-to-three decision, affirmed the lower court's decision and held that the pickets were trespassing upon the private property of the store and shopping center owner and that such trespass constituted a reasonable ground upon which to grant a preliminary injunction.

The court, in *Logan Valley,* recognized that a private property owner has the right to be protected against unlawful invasion of his property. In determining the union's right to picket, the court considered three elements upon which the legality of the picketing turned: the nature of the picketing; the conduct of the pickets; and the purpose of the picketing. Since the court found that the picketing was peaceful in nature, the legality of the picketing turned upon the

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[7]29 U.S.C. §§ 101-115 (1964).

[8]*See, e.g.,* COLO. REV. STAT. ANN. § 80-4-16 (1963); CONN. GEN. STAT. ANN. § 31-113 (1960); ILL. ANN. STAT. ch. 48, § 2a (Smith-Hurd 1960); N.J. STAT. ANN. § 2a:15-51 (1952); PA. STAT. ANN. tit. 43, § 206d (1964). This comment will not deal with the topic of pre-emption but with judicial prohibition of picketing in light of the constitutional protection of free speech.

[9]In a number of decisions concerning an employer's property rights, the Supreme Court has upheld the right of labor to conduct organizational practices. NLRB v. Babcock & Wilcox., 351 U.S. 105 (1956); NLRB v. LeTourneau Co., 324 U.S. 793 (1945). Similarly the National Labor Relations Board has held that union activities can be conducted upon company owned streets. *See* General Dynamics/ Telecommunications, 137 N.L.R.B. 1725 (1962); Bausch & Lomb Optical Co., 72 N.L.R.B. 132 (1947); Brown Shipbuilding Co., 66 N.L.R.B. 1047 (1946); United Aircraft Corp., 67 N.L.R.B. 594 (1946). Despite the inferences that may be drawn from these decisions, none should be unequivocally applied to the problem discussed herein. In these decisions the Court or the Board was concerned with labor-management problems on the property of management. Picketing on quasi-public property involves two aspects not dealt with in these cases: (1) private property which is opened and used by the general public; and (2) the right of an owner, a distinterested party to the labor dispute, to prohibit trespassing upon his premises.

[10]425 Pa. 382, 227 A.2d 874 (1967), *cert. granted,* 36 U.S.L.W. 3167 (U.S. October 24, 1967) (No. 478).

conduct of the pickets—whether the picketing constituted an invasion of the private property of Weis and/or Logan—and the purpose for which the picketing was employed.

The court determined that the shopping center was open not to the general public but only to those members of the public who could possibly contribute to the financial success of the venture. Therefore, the shopping center retained its private property character. The invitation to the public was limited to those who might benefit Weis' and Logan's enterprises, including potential customers as well as employees of the shopping center businesses. Since the pickets were not within this class of persons[11] the picketing, although peaceful, constituted a trespass which was properly restrained. By determining that the conduct of the pickets constituted an unlawful invasion of property, it was unnecessary to consider whether the picketing was for an unlawful purpose.[12]

In *Thornhill v. Alabama*[13] the Supreme Court held that the dissemination of information concerning the facts of a labor dispute through picketing must be afforded the constitutional guarantee of freedom of speech.[14] Although *Thornhill* applied broad constitutional protection to picketing, it remained to be decided whether the protection extends to non-employees and whether the nature of the property upon which the picketing is conducted affects the exercise of the right.

In *AFL v. Swing*[15] the *Thornhill* doctrine was extended to cover situations where pickets were not employees of the picketed establishment. In this instance the pickets were members of a union which had made an unsuccessful attempt to organize Swing's employees. The union picketing was enjoined under a state statute which prohibited peaceful picketing when conducted by non-employees. In applying *Thornhill,* the Court held that the lack of an employer-employee relationship could not preclude protection of picketing as a right of free speech guaranteed under the Constitution.[16] *Thornhill* and *Swing* established picketing as a right enjoying constitutional protection

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[11]*Accord,* Hood v. Stafford, 213 Tenn. 684, 378 S.W.2d 766 (1964) (invitation to patronize not an invitation to entice customers away).

[12]227 A.2d at 878.

[13]310 U.S. 88 (1940); *accord,* Carlson v. California, 310 U.S. 106 (1940).

[14]310 U.S. at 102.

[15]312 U.S. 321 (1941).

[16]*Id.* at 326. The Court's opinion does not clearly indicate where the picketing occurred. However, the state court's opinion states that Swing was the proprietor of a beauty parlor in Chicago and that the picketing was conducted on the street in front of Swing's shop. Therefore, it appears that union activity occurred on public property and not on quasi-public property. *See* Swing v. AFL, 372 Ill. 91, 22 N.E.2d 857 (1939).

against arbitrary and indiscriminate prohibitions.[17] However, the inevitable collision between the right to picket and an owner's property rights, where that picketing is conducted upon quasi-public property, had not yet confronted the Court.[18]

In *Marsh v. Alabama*[19] a member of Jehovah's Witnesses used a sidewalk located within the shopping district of a company-owned town[20] for the distribution of religious literature. The issue before the Supreme Court was whether a state could, within the first and fourteenth amendments, impose criminal punishment under a trespass statute for the distribution of literature against the express wishes of the town's management. The Court held that since the facilities were operated primarily for the benefit of the general public, and since their operation was essentially a public function, a state could not impose penal sanctions upon individuals exercising their constitutionally protected rights. The Court, therefore, recognized that the right of free speech occupied a preferred position with respect to the rights of a property owner.[21] The Court stated:

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[17]*See* Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293 (1943); Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769 (1942) (concurring opinion). But the Supreme Court has not hesitated to uphold state restraints of conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957) (picketing for economic coercion rather than for publicity); Local 10, Journeymen v. Graham, 345 U.S. 192 (1953) (picketing in direct confrontation of State's right to work law); Building Service Employees Local 262 v. Gazzam, 339 U.S. 532 (1950) (picketing employed to coerce employer to force union membership); Hughes v. Superior Court, 339 U.S. 460 (1950) (picketing to secure compliance with demand that employees be hired in percentage to the racial origin of its customers); Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950) (picketing to impose unions' interest upon small business outweighed by public's interest that small business be free from dictation of business policy); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (picketing for coercing employer to violate antitrust law); Carpenter Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942) (picketing a cafe having no business connection with area where industrial dispute centered); Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941) (picketing found to be enmeshed in a background of violence).

[18]The argument that an adjoining land owner owns the fee to the center of the street and that picketing on such land constitutes a trespass has been rejected. Robinson v. Hotel & Restaurant Employees Local 782, 35 Idaho 418, 207 P. 132 (1922); Vonderschmitt v. McGuire, 100 Ind. App. 632, 195 N.E. 585 (1935).

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

[20]The Supreme Court noted that the town, a suburb of Mobile, Alabama known as Chickasaw, was owned by the Gulf Shipbuilding Corporation, and except for that possessed all the characteristics of any other American town. In addition, the town and its shopping district were accessible to and freely used by the general public and notably lacked any characteristics that would separate the company owned shopping district from that of any town or city. 326 U.S. at 502-03.

[21]*Id.* at 509. *Cf.* Watchtower Bible & Tract Soc'y v. Metropolitan Life Ins. Co., 297 N. Y. 339, 79 N.E.2d 433, *cert. denied,* 335 U.S. 886 (1948).

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[22]

Mr. Justice Frankfurter, in a concurring opinion, interpreted the issues presented in *Marsh* as being independent of property rights.[23] It was his conviction that while the law of an individual state would control *property* relations it could not control civil liberties. Although the company-owned town would be subject to the property laws of Alabama, the application of such laws could not preclude the exercise of guaranteed constitutional freedoms.

The *Marsh* doctrine was applied by the Court of Appeals for the Seventh Circuit in *Marshall Field & Company v. NLRB*[24] to cover the rights of non-employees to conduct organizational activities upon privately owned property. Union organizers entered upon a company owned court-way which bisected the main store at street level and was used to a limited extent as an entrance by both employees and the general public. Above the street level the two portions of the main building were joined. The court held that while the department store possessed the right to exclude non-employees from conducting their activity in private employee cafeterias,[25] it could not prohibit constitutionally protected activities on a private court-way, which by its very nature had assumed the appearance of a city street.[26]

The principles announced in *Thornhill* and *Marsh,* and applied in *Marshall Field,* have not been combined and applied by the Supreme Court of the United States in determining the right to picket upon quasi-public property.[27] However, state courts, not precluded by either federal or state pre-emption,[28] have not hesitated to apply these princi-

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[22]326 U.S. at 506; *accord,* Lombard v. Louisiana, 373 U.S. 267 (1963).

[23]326 U.S. at 510-11.

[24]200 F.2d 375 (7th Cir. 1953).

[25]*Accord,* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). The Court held that an employer may post his property against non-employee union activities where (1) adequate means of communication were available to the union in reaching employees and (2) where the employer does not discriminate against one union. Here, the employees could be adequately reached while entering and leaving the department store.

[26]200 F.2d at 380.

[27]*See* Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957). Federal pre-emption prevented the court from passing upon the question whether a state court could enjoin picketing under the theory of trespass.

[28]Federal pre-emption has in some instances precluded state court action to enjoin picketers on quasi-public property. *See* Freeman v. Retail Clerks Local 1207, 58 Wash. 2d 426, 363 P.2d 803 (1961). *See also* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

ples in protecting the right to picket upon such property.[29]

In *State v. Williams*[30] union members engaged in peaceful picketing upon walkways which surrounded a drugstore located within a shopping center. The owner of the shopping center had specifically posted his property against peddlers, solicitors, and picketers. Despite this protection, the court reversed a conviction based upon trespass, holding that when private property is open to the public the owner's property rights must yield to the interest of free speech. The court specifically referred to the transformation from private property to quasi-public property.

> [B]ecause the private property . . . has been opened to the public it has taken on the nature of a quasi-public place. By opening it to the public, the owner's property rights have become secondary to broad use by the public which *includes* the right of a labor union to engage in peaceful picketing. The fact that the property is posted makes no difference at all.[31]

Relying on the principles of *Thornhill* and of *Marsh* the court concluded that picketing upon quasi-public property could *not* be prohibited as a trespass.

In *Amalgamated Clothing Workers v. Wonderland Shopping Center, Incorporated*[32] a divided court upheld the right of labor to picket by affirming the issuance of an injunction against the shopping center interfering with the union activity on the center's property. The court noted the applicability of the above principles and pointed out that the change from a single proprietorship to a multiple commercial area changes the very nature of the operation from purely private to public or quasi-public. While the single proprietor would be entitled to prevent an unauthorized intrusion upon his private property, the owner of a multiple commercial complex is divested of such right by the very nature of the property's physical appearance. The identity of private property attributed to a single commercial establishment is forfeited in a large, multipurpose shopping center.[33]

The Supreme Court of California in *Schwartz-Torrance Investment*

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[29]Schwartz-Torrance Inv. Corp. v. Bakery Workers' Local 31, 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied*, 380 U.S. 906 (1965); State v. Williams, 44 L.R.R.M. 2357 (Baltimore, Md. Crim. Ct. 1959); Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963); People v. Mazo, 44 L.R.R.M. 288 (Ill. Cir. Ct. 1959). *But cf.* People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385 (1961), *cert. denied*, 368 U.S. 927 (1961).

[30]44 L.R.R.M. 2357 (Baltimore, Md. Crim. Ct. 1959).

[31]*Id.* at 2360 (emphasis added).

[32]370 Mich. 547, 122 N.W.2d 785 (1963).

[33]*Id.* at 794. *But see* Spohier v. Cohen, 3 Misc. 2d 248, 149 N.Y.S.2d 493 (Sup. Ct. 1953).

Corporation v. Bakery Workers' Local 31[34] recognized the problem as one of accommodating conflicting interests: the right of property owners to exclusive use and possession of their land to which the public has been invited, and the right of a union to communicate its position through the constitutionally protected right to picket. The court held that the interest of labor outweighed the interest of the shopping center owner in vindicating a theoretical trespass. The court noted that by opening private property for use by all who would patronize it, the owner had made that property a quasi-public area. A union's right to communicate freely is preserved through constitutional guarantees, while the right of a shopping center owner "lies within the shadow cast by property rights worn thin by public usage."[35]

The dissent in *Logan Valley* recognized the above principles and their applicability to the issue before the court and refused to resolve the issue solely by an analysis limited to the rights associated with private property. In applying the principles of *Marsh,* the dissent pointed out that the rights of an owner of quasi-public property become subrogated to the constitutionally protected rights of those individuals who utilize such property. Since picketing was constitutionally protected, and since the shopping center was quasi-public in nature, management could not curtail constitutional liberties. The right of non-employees to picket, as announced in *Swing,* afforded the pickets constitutional protection and, therefore, an injunction based upon trespass was error.

In accordance with the principles of *Thornhill, Swing, Marsh* and *Marshall Field,* a shopping center open to that part of the public which benefits it economically should not be closed to that part of the public seeking to disseminate an adverse message concerning the facts of a labor controversy. The shopping center takes the community in its entirety or not at all. The theory of trespass, which shopping center owners have relied on in seeking to enjoin picketing, should not be a basis upon which to restrain labor from disseminating to the public their grievances with management. As pointed out by Mr. Justice Frankfurter: "[T]he technical distinctions on which a finding of 'trespass' so often depends are too tenuous to control decision regarding the scope of the vital liberties guaranteed by the Constitution."[36] Although recognizing the rights of an owner of private property, the

[34]61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied,* 380 U.S. 906 (1965).

[35]394 P.2d at 926.

[36]Marsh v. Alabama, 326 U.S. 501, 511 (1946) (concurring opinion).