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Racial Picketing Protesting Discriminatory Employment Practices

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RACIAL PICKETING PROTESTING DISCRIMINATORY EMPLOYMENT PRACTICES[1]

The plaintiff contended that picketing by Negro members of the NAACP resulted in its losing business, trade and profits, and an injunction was requested restraining the picketing. The picketers alleged that the plaintiff was engaging in discriminatory hiring practices and also, would not serve them at the store's lunch counter. The trial court granted an injunction against the picketers, holding that the picketing constituted an unlawful interference with the plaintiff's business. On appeal, *held*, affirmed: The right of Negroes to picket, urging a customer boycott of the plaintiff's business because of its "alleged" discriminatory practices, was outweighed by the right of the plaintiff to manage its business free from external interference; the picketing was therefore unlawful and subject to injunction. *NAACP v. Webb's City, Inc.*, 152 So.2d 179 (Fla. 2d Dist. 1963).

The first reported case of formal picketing was in 1827, when a group of tailors protested the discharge of fellow workmen.[2] Since that time and until the early 1900's, picketing was considered an actionable tort and was seldom afforded the protection of freedom of speech, guaranteed originally by the first and later by the fourteenth amendments to the Constitution of the United States.[3] Practically any form of organized labor activity was termed a conspiracy.[4]

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the International Court adjudicates disputes between proper subjects of international law and if the claims are not espoused and pressed by the states involved, the Court may be reluctant to render advisory opinions. The claims were not espoused in the instant case.

Certain questions arise from the vague language of the Convention and remain unanswered. For example, a question exists as to whether disputes regarding airport charges were intended to be adjudicated administratively within the framework of the International Civil Aviation Organization rather than by outside judicial bodies. Article 15 states:

> the charges imposed for the use of airports and other facilities shall be subject to review by the Council. [The Council is a permanent body set up in Chapter IX of the Convention.]

Does "review" encompass the "adjudication" of disputes concerning airport charges? And if so, would the Council have exclusive or concurrent jurisdiction? This question is posed by Article 84 on Settlement of Disputes:

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.

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1. For the purpose of this paper, primary consideration will be given to racial picketing in regard to discriminatory employment practices. It is noted that the implications of such picketing reach into other areas of racial discrimination. However, for the sake of brevity, emphasis is placed on the Negroes' bid for equal employment opportunities.

2. Commonwealth v. Moore, Phil. Mayor's Ct. (Pa. 1827), reprinted in 4 COMMONS, DOCUMENT HISTORY OF AMERICAN INDUSTRIAL SOCIETY 97 (1910). See also Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842) (consideration was given to the objective of the picketing and the means employed by the picketers).

3. Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909); Moore v. Cooks' Union, 39 Cal. App. 538, 179 Pac. 417 (1919); Rosenberg v. Retail Clerks' Ass'n, 39 Cal. App. 67, 177 Pac. 864 (1918); Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888); Com-

Although picketing involving labor disputes had been permitted in some instances,[5] it was not until 1937,[6] and 1940,[7] that the United States Supreme Court set the precedents establishing "peaceful picketing"[8] as a lawful act. In these cases, while subjecting picketing to certain limitations, the Court brought the device within the confines of "freedom of speech."[9]

In *New Negro Alliance v. Sanitary Grocery Co.*,[10] Negroes picketed a store protesting employment practices, and urging employment of Negroes. The United States Supreme Court held that this picketing constituted a "labor dispute" under the Norris-LaGuardia Anti-Injunction Act,[11] and, as such, the picketing could not be enjoined.[12] In *Thornhill v. Alabama*,[13] the Court declared "unconstitutional" an Alabama statute imposing blanket restrictions on picketing. It stated that an abridgement of peaceful picketing "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[14] Other cases decided by the Supreme Court during

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monwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842); Rogers v. Evarts, 17 N.Y. Supp. 264 (Sup. Ct. 1891); People v. Kostka, 4 N.Y. Crim. 429 (N.Y. County Ct. 1886); People v. Wilzig, 4 N.Y. Crim. 403 (N.Y. County Ct. 1886).

4. Authur v. Oakes, 63 Fed. 310 (7th Cir. 1894); Toledo, A.A. & N.M. Ry. v. Pennsylvania Co., 54 Fed. 746 (N.D. Ohio 1893); Casey v. Cincinnati Typographical Union, 45 Fed. 135 (S.D. Ohio 1891); Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940*, 38 CORNELL L.Q. 1 (1953).

5. *E.g.*, C.S. Smith Metropolitan Mkt. Co. v. Lyons, 16 Cal. 2d 389, 106 P.2d 414 (1940); Scofes v. Helmar, 205 Ind. 596, 187 N.E. 662 (1933); Vim Elec. Co. v. Retail Employees' Union, 128 N.J. Eq. 450, 16 A.2d 798 (1940); Walter A. Wood Mowing & Reaping Mach. Co. v. Toohey, 114 Misc. 185, 186 N.Y. Supp. 95 (Sup. Ct. 1921); La France Elec. Constr. & Supply Co. v. International Bhd. of Elec. Workers, 108 Ohio St. 61, 140 N.E. 899 (1923).

6. Senn v. Tile Layers Union, 301 U.S. 468 (1937) (5-to-4 decision). A dictum brought picketing within the confines of constitutional free speech. Senn v. Tile Layers Union, *supra* at 478.

7. Thornhill v. Alabama, 310 U.S. 88 (1940).

8. The following is a definition of peaceful picketing which best indicates the mood of this note:

> [P]eaceful "picketing" is a publicity device, a method of giving expression to opinions on vital economic, social and political issues. Thus it would be an instrument, whose aim is to convince the public that some wrong is being done which should be rectified by the force of public opinion. People v. Levner, 30 N.Y.S.2d 487, 490-91 (Magis. Ct. 1941).

9. Senn v. Tile Layers' Union, 301 U.S. 468 (1937) and Thornhill v. Alabama, 310 U.S. 88, 104 (1940):

> The safeguarding of these means [picketing] is essential to the securing of an informed and educated public opinion with respect to a matter which is of public concern .... [T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests.

10. 303 U.S. 552 (1938).

11. Jurisdiction of Courts in Matters Affecting Employer and Employee (Norris-LaGuardia Act), 29 U.S.C. § 101 (1958).

12. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 559 (1938).

13. *Supra* note 7.

14. *Id.* at 104-05.

the 1940's followed the rationale of the *Thornhill* decision in regard to picketing.[15]

In 1949, in a case enjoining picketing for an unlawful purpose, the United States Supreme Court held that a Missouri "anti-trade restraint" law was constitutional.[16] In an approach unanticipated by the more liberal holdings of the *New Negro Alliance* and *Thornhill* decisions, the Court, in 1950, held in *Hughes v. Superior Court*[17] that "picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."[18] In *Hughes*, the Supreme Court asserted that the purpose of the racial picketing was "unlawful" since the Negroes strove to make *race* rather than *merit* the basis for employment.[19]

The state appellate courts, faced with the problem of racial picketing against discriminatory hiring practices, have failed to establish a consistent precedent.[20] They have advanced the following reasons for granting injunctions against picketing: (1) the absence of a labor dispute;[21] (2) the threat of racial violence;[22] (3) the injury to business

15. Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943); Bakery & Pastry Drivers Local 802 v. Wohl, 315 U.S. 769 (1942); AFL v. Swing, 312 U.S. 321 (1941); Carlson v. California, 310 U.S. 106 (1940). See generally, Weinberg, *Thornhill to Hanke—The Picketing Puzzle*, 20 U. CINC. L. REV. 437 (1951); Williams, *Picketing and Free Speech—A Texas Primer*, 30 TEXAS L. REV. 206 (1951).

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

17. 339 U.S. 460 (1950).

18. *Supra* note 17 at 465-66.

19. In *Hughes*, Negro members of the Progressive Citizens of America demanded that a particular store hire a percentage of Negroes proportionate to the number of Negroes patronizing the store. The store refused the Negroes' demands and the picketing ensued. An injunction was granted and the decision was affirmed by the Supreme Court stating: "[I]f petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis." *Id.* at 464.

20. See Hughes v. Superior Court, 186 P.2d 756 (Cal. App.) (dismissed injunction), *rev'd*, 32 Cal. 2d 850, 198 P.2d 885 (1948) (reinstated injunction), *aff'd*, 339 U.S. 460 (1950); NAACP v. Webb's City, Inc., 152 So.2d 179 (Fla. 2d Dist. 1963); Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc., 151 So.2d 877 (Fla. 2d Dist. 1963); Fair Share Organization, Inc. v. Mitnick, 188 N.E.2d 840 (Ind. App. 1963); Fair Share Organization v. Kroger Co., 240 Ind. 461, 165 N.E.2d 606 (1960); Green v. Samuelson, 168 Md. 421, 178 Atl. 109 (1935); Hark v. Green, 168 Md. 690, 178 Atl. 600 (1935); Brandenburg v. Metropolitan Package Store Ass'n, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961); Lifshitz v. Straughn, 261 App. Div. 757, 27 N.Y.S.2d 193 (1941); Stolper v. Straughn, 175 Misc. 87, 23 N.Y.S.2d 604 (Sup. Ct. 1940); Anora Amusement Corp. v. Doe, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939); A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934); Stevens v. West Phil. Youth Civic League, 34 Pa. D. & C. 612 (C.P. Phil. County 1937); Edwards v. Commonwealth, 191 Va. 272, 60 S.E.2d 916 (1950).

21. NAACP v. Webb's City, Inc., 152 So.2d 179, 182 (Fla. 2d Dist. 1963); Green v. Samuelson, 168 Md. 421, 429, 178 Atl. 109, 111 (1935); A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 369, 274 N.Y. Supp. 946, 953 (Sup. Ct. 1934). *But see* Fair Share Organization Inc. v. Mitnick, 188 N.E.2d 840, 846 (Ind. App. 1963) labor dispute found, yet inpunction granted because of the unlawful objective).

22. A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 370, 274 N.Y. Supp. 946, 954 (Sup. Ct. 1934).

interests;[23] (4) the possibility of similar action by other racial and religious groups;[24] (5) the infringment on the employers' free choice in hiring,[25] (6) the unlawful purpose of the picketing;[26] (7) the picketing's violation of public policy;[27] and (8) the availability of other avenues open for protest.[28]

Other state decisions following the *New Negro Alliance* case[29] have asserted that racial picketing involving employment opportunities was a labor dispute and could not be enjoined.[30] However, the number of picketers and their area of permissive picketing can be limited.[31] Justification has been given to racial picketing by asserting that the purpose of the picketing is lawful, the desirability of equal employment opportunities outweighing the resultant harm to business interests.[32] Additional impetus has been given to racial picketing by allowing peaceful dissemination of truthful statements about an employer, thus allowing patrons an opportunity to make their feelings known.[33]

Even though there have been restrictions on picketing in regard to employment, Negroes have been permitted to picket a production of "Uncle Tom's Cabin,"[34] and also, a movie they claimed approved of the activities of the Ku Klux Klan.[35] The decisions seem to be based more upon the whim or caprice of the moment rather than on any fundamental concept.[36]

23. NAACP v. Webb's City, Inc., 152 So.2d 179, 182 (Fla. 2d Dist. 1963); Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc., 151 So.2d 877, 878 (Fla. 2d Dist. 1963); Green v. Samuelson, 168 Md. 421, 428, 178 Atl. 109, 112 (1935); A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 369, 274 N.Y. Supp. 946, 953 (Sup. Ct. 1934).

24. Hughes v. Superior Court, 339 U.S. 460, 464 (1950); A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 370, 274 N.Y. Supp. 946, 954 (Sup. Ct. 1934).

25. NAACP v. Webb's City, Inc., 152 So.2d 179, 181 (Fla. 2d Dist. 1963); Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc., 151 So.2d 877, 878 (Fla. 2d Dist. 1963).

26. Hughes v. Superior Court, 32 Cal. 2d 850, 856, 198 P.2d 885, 887 (1948), *aff'd*, 339 U.S. 460 (1950); NAACP v. Webb's City, Inc., 152 So.2d 179, 180 (Fla. 2d Dist. 1963); Fair Share Organization, Inc. v. Mitnick, 188 N.E.2d 840, 844 (Ind. App. 1963); Brandenburg v. Metropolitan Package Store Ass'n, 29 Misc. 2d 817, 820, 211 N.Y.S.2d 621, 625 (Sup. Ct. 1961).

27. Hughes v. Superior Court, 32 Cal. 2d 850, 856, 198 P.2d 885, 889 (1948); Fair Share Organization, Inc. v. Mitnick, 188 N.E.2d 840, 844 (Ind. App. 1963); Brandenburg v. Metropolitan Package Store Ass'n, 29 Misc. 2d 817, 820, 211 N.Y.S.2d 621, 625 (Sup. Ct. 1961).

28. NAACP v. Webb's City, Inc., 152 So.2d 179, 182 (Fla. 2d Dist. 1963); Green v. Samuelson, 168 Md. 421, 429, 178 Atl. 109, 112 (1935).

29. *Supra* note 10.

30. Lifshitz v. Straughn, 261 App. Div. 757, 758, 27 N.Y.S.2d 193, 194 (1941); Anora Amusement Corp. v. Doe, 171 Misc. 279, 281, 12 N.Y.S.2d 400, 403 (Sup. Ct. 1939).

31. Anora Amusement Corp. v. Doe, 171 Misc. 279, 282, 12 N.Y.S.2d 400, 403 (Sup. Ct. 1939).

32. *Ibid.*

33. Stevens v. West Phil. Youth Civic League, 34 Pa. D. & C. 612, 617 (C.P. Phil. County 1937); Edwards v. Commonwealth, 191 Va. 272, 284, 60 S.E.2d 916, 922 (1950).

34. Lawton v. Murray, 61 N.Y.S.2d 721 (Sup. Ct. 1946).

35. People v. Johnson, 117 Misc. 133, 191 N.Y. Supp. 750 (Ct. Gen. Sess. 1921).

36. See, *e.g.*, Rosman v. United Strictly Kosher Butchers, 164 Misc. 378, 298 N.Y. Supp.

In the instant case, the plaintiff, Webb's City, a general mercantile store, contended that the picketing, when done with a malicious intent to injure its business and to force it to manage its business in a manner dictated by the defendant, was unlawful.[37] The defendant, the St. Petersburg chapter of the NAACP, replied that a permanent injunction would violate its constitutional rights,[38] and asserted that the purpose of the picket was lawful, since it sought the betterment of the social and economic status of the Negro by procuring equal employment opportunities.[39]

In sustaining the injunction granted by the trial court, the district court of appeal quoted with approval the chancellor's reasons for granting injunctive relief, stating: (1) the personal rights of the picketers are qualified and must be exercised with due regard for others who have the right to differ; (2) business establishments have the right to pursue

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343 (Sup. Ct. 1937) (allowed picketing by kosher butchers protesting the advertising practices of a competitor); Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y. Supp. 250 (Sup. Ct. 1934) (allowed picketing by patrons of a bakery protesting "extortionist" prices); 1621, Inc. v. Wilson, 402 Pa. 94, 166 A.2d 271 (1960) (allowed picketing by citizens protesting the operation of a bar in their neighborhood); People v. Kopezak, 153 Misc. 187, 274 N.Y. Supp. 629 (Ct. Spec. Sess. 1934) (refused to allow tenants to protest the condition of a building in which they were living); and Steamwood Home Builders, Inc. v. Brolin, 25 Ill. App. 2d 39, 165 N.E.2d 531 (1960) (refused to allow housewives, asserting a need for schools, to picket a housing development).

37. NAACP v. Webb's City, Inc., 152 So.2d 179, 180 (Fla. 2d Dist. 1963); *cf.* Thornhill v. Alabama, 310 U.S. 88, 104 (1940) (holding mere injury cannot justify injunction). See also Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

38. The picketers alleged that an injunction would violate their rights under the fourteenth amendment to the Constitution of the United States; the precedent having been established by the United States Supreme Court in *Gitlow v. New York*, 268 U.S. 652, 666 (1925), stating:

> [W]e may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States.

In addition the picketers alleged infringment of their rights under the Florida Declaration of Rights, § 13, which states:

> Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right and no laws shall be passed to restrain or abridge the liberty of speech or of the press.

See generally Annot., 99 A.L.R. 533 (1935); Coons, *Non-Commercial Purposes as a Sherman Act Defense*, 56 NW U.L. REV. 705 (1962); Dodd, *Picketing and Free Speech: A Dissent*, 56 HARV. L. REV. 513 (1943); Jones, *The Right to Picket—Twilight Zone of the Constitution*, 102 U. PA. L. REV. 995 (1954); Teller, *Picketing and Free Speech: A Reply*, 56 HARV. L. REV. 532 (1943); Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180 (1942); 4 BROOKLYN L. REV. 91 (1934); 62 COLUM. L. REV. 475 (1962); 35 COLUM. L. REV. 121 (1935); 68 HARV. L. REV. 685 (1955); 62 HARV. L. REV. 1077 (1949); 48 HARV. L. REV. 691 (1935); 83 U. PA. L. REV. 383 (1935); 66 YALE L.J. 397 (1957).

39. Social objectives can undoubtedly be advanced economically through better jobs procured by equal opportunities for employment. Furthermore, the Negro cannot improve his lot without group activity, so he uses what is frequently his only weapon—picketing. In Stillwell Theatre v. Kaplan, 259 N.Y. 405, 182 N.E. 63 (1932) and in Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927), the courts commended labor unions for their activities (including picketing) in procuring employment for their members. A similar argument might be advanced in support of racial picketing.

policies not acceptable to others and the state can grant "relief against noxious encroachments upon such right";[40] (3) the defendant has the right to protest plaintiff's policies but not by "coercive and destructive" picketing;[41] and (4) where "picketing is inflammatory and damaging in purpose and effect," it is unlawful.[42] However, no authority was cited to support these statements.

The court of appeal skirted the question of "discriminatory hiring practices" and attempted to substantiate the employer's right to manage his business in any manner he desired.[43] The picketing was termed "unlawful," "destructive," "coercive," "noxious," "malicious," and "inflammatory," without explanation or cited authority other than the inference that the picketing had not been conducted in a peaceful manner. The court also failed to give consideration to the possibility of limiting the number of pickets or their area of picketing, other than complete condemnation and injunction.[44]

An interesting statement was made by the court when it stated: "this is a racial or social question and the rules of law applicable to labor disputes have no application here."[45] This glaring statement was left without further amplification. The applicability of labor law should have been determined by careful analysis.[46]

Although the crucial issue of discriminatory employment practices was buried by lack of consideration, *Hughes v. Superior Court* seemed to be relied upon as the controlling precedent.[47] It should be noted that *Hughes* is distinguishable from the instant case. In *Hughes*, the United States Supreme Court was enthralled by the unlawful objective of employing Negroes on a *percentage* basis. In the case at bar, the picketers sought

40. NAACP v. Webb's City, Inc., 152 So.2d 179, 181 (Fla. 2d Dist. 1963).

41. *Ibid.*

42. *Id.* at 182.

43. See note 50 *infra.*

44. See Pezold v. Amalgamated Meat Cutters and Butcher Workmen, 54 Cal. App. 2d 120, 128 P.2d 611 (1942) (limited the number of pickets utilized); Wise Shoe Co. v. Lowenthal, 266 N.Y. 264, 194 N.E. 749 (1935) (allowed picketing, but enjoined the shouting by the picketers); DeAgostina v. Holmden, 157 Misc. 819, 285 N.Y. Supp. 909 (Sup. Ct. 1935) (peaceful picketing was not forfeited because accompanied by unlawful act); Tree-Mark Shoe Co. v. Schwartz, 139 Misc. 136, 248 N.Y. Supp. 56 (Sup. Ct. 1931) (allowed picketing but restrained the use of false statements on signs); Starr v. Laundry Workers' Local 101, 155 Ore. 634, 63 P.2d 1104 (1936) (no injunction, but prescribed number of pickets, and place and manner of picketing); Blumauer v. Portland Moving Picture Mach. Operators' Union, 141 Ore. 399, 17 P.2d 1115 (1933) (confined picketing to a reasonable distance from theatre entrance); Weyerhaeuser Timber Co. v. Everett Dist. Council of Lumber Workers, 11 Wash. 2d 503, 119 P.2d 643 (1941) (could only picket at the entrance to the plant).

45. NAACP v. Webb's City, Inc., 152 So.2d 179, 182 (Fla. 2d Dist. 1963).

46. It is interesting to note that when New Negro Alliance v. Sanitary Grocery Co., 92 F.2d 510, 513 (D.C. Cir. 1937), was before the United States Court of Appeals for the District of Columbia, the court stated: "In our opinion this is a racial or social question, and as such the rules heretofore announced and applied to labor disputes have no application . . . ." The case was subsequently reversed by the Supreme Court in 303 U.S. 552 (1938).

47. NAACP v. Webb's City, Inc., 152 So.2d 179, 182-83 (Fla. 2d Dist. 1963).

equal opportunity for employment on the basis of *merit* and *not* employment of Negroes based on the percentage of Negro patrons. Thus, the district court of appeal was in error in relying upon the Supreme Court's opinion.

It is hoped that the Florida Supreme Court, when faced with racial picketing, will not perpetuate the errors of the district court. The Florida Supreme Court should establish the legal bounds within which racial picketing may be lawfully conducted.

In determining the propriety of injunctive relief, courts of equity must weigh the divergent rights of the opposing parties.[48] Although business interests have been equated with property rights,[49] the employer's rights are not necessarily paramount to the rights of the picketers.[50] Employers have complained that if picketers' demands were allowed, they would be denied free choice in hiring.[51] On the other hand, Negro picketers have asserted that they were attempting to advance their race socially and economically, by procuring equal opportunities for employment.[52] Thus, picketing can inform the public of the employers' practices and the prospective patron can then compliment or criticize, and the employer can act accordingly.

The present state of the law has been misconstrued by the state appellate courts. The *Hughes v. Superior Court* decision[53] should be limited to its facts and *not* used as a "blanket" condemnation of racial picketing.[54] Although labeling *proportional* hiring as "unlawful," the Court in the *Hughes* case failed to consider the probability that had there not been discriminatory hiring practices, some Negroes would have been employed on a *merit* basis.[55]

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48. Edwards v. Commonwealth, 191 Va. 272, 284, 60 S.E.2d 916, 922 (1950):
> We have thus reviewed at length the apposite decisions of the [United States] Supreme Court in order to discern the pattern of its holdings in its effort "to strike a balance" between the constitutional provision of free speech and the power of the State through its courts or through its legislature to promote the health, morals, safety and general welfare of its people.

49. Traux v. Corrigan, 257 U.S. 312, 327 (1921); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921).

50. As the dicta of *New Negro Alliance* indicated, discrimination against workers based on color is even less acceptable than discrimination based on an individual's union affiliation; 303 U.S. at 561. It is difficult to ascertain how the right to discriminate should be superior to the right of the picketers to protest such discrimination. If a private employer has the right to discriminate in hiring, then picketing protesting such discrimination should be one of the perils of the employer's manner of operation.

51. However, the United States Supreme Court has held that free choice cannot be used as a subterfuge to disguise discriminatory practices. Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

52. See cases cited note 39 *supra*.

53. 339 U.S. 460 (1950).

54. See generally 37 CALIF. L. REV. 296 (1949); 36 IOWA L. REV. 566 (1951); 26 N.Y.U.L. REV. 183 (1951); 24 So. CAL. L. REV. 83 (1950); 22 So. CAL. L. REV. 442 (1949); 4 SW. L.J. 459 (1950); 28 TEXAS L. REV. 106 (1949).

55. When the *Hughes* case was before the Supreme Court of California, Justice Traynor, in a dissenting opinion noted the essential issue:

In view of the recent trend in the United States Supreme Court's decisions,[56] it is certain that the Supreme Court would declare unconstitutional any state statute making discriminatory employment practices lawful.[57] Therefore, an injunction of *anti*-discriminatory picketing could also be declared unconstitutional as amounting to a state sanction of discriminatory practices.[58] In the *Hughes* case, the Supreme Court acknowledged the propriety of picketing to "protest" discrimination stating:

> The California Supreme Court suggested a distinction between picketing to *promote discrimination*, as here, and picketing *against discrimination* [as in the noted case]: "It may be assumed for the purpose of this decision . . . that if such discrimination exists, picketing to *protest* it would *not* be for an unlawful objective.[59]

Accepting the premise that racial discrimination is an undesirable element in our society, picketing to destroy this element should not be enjoined. However, two problems are posed: (1) is the picketing being done to *protest* discrimination, or to *promote* discrimination?,[60] and (2) is the employer guilty of discriminatory hiring practices?[61] When these

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In the present case petitioners [Negroes] seek, not a monopoly of the jobs available, but only a share of those jobs that they believe they would have had if there had been no discrimination against them. 32 Cal. 2d 850, 867, 198 P.2d 885, 895 (1948).

56. NAACP v. Button, 83 Sup. Ct. 328 (1963) (upheld right of NAACP and its lawyers to meet to aid individuals denied constitutional rights); Gibson v. Florida Legislative Investigation Comm., 83 Sup. Ct. 889 (1963) (NAACP President could not be compelled to produce membership list which he was to refer to in investigation); Edwards v. South Carolina, 372 U.S. 229 (1963) (reversed criminal conviction of Negroes picketing on state capitol grounds protesting discrimination); Bailey v. Patterson, 369 U.S. 31 (1962) (no state may require segregation of inter or intra state transportation facilities); United States v. Alabama, 362 U.S. 602 (1959) (district court could entertain action against state when voting rights were restricted on racial basis); NAACP v. Alabama, 357 U.S. 449 (1958) (state could not require production of NAACP membership list); Brown v. Board of Educ., 349 U.S. 294 (1955) (declared the segregation of public schools unconstitutional); Barrows v. Jackson, 346 U.S. 249 (1953) (held state action enforcing racially restrictive covenants was unconstitutional); Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945) (forbade racial discrimination in labor organizations).

57. For an annotation of state civil rights statutes prohibiting discrimination see 87 A.L.R.2d 120 (1963).

58. Barrows v. Jackson, 346 U.S. 249 (1953) (damages for breach of restrictive covenant held unconstitutional because it would be state sanction of discrimination); Shelley v. Kraemer, 334 U.S. 1 (1947) (injunction upholding restrictive covenant was unconstitutional because it would amount to state imposed discrimination).

59. Hughes v. Superior Court, 339 U.S. 460, 466 (1950). (Emphasis added.)

60. A unique problem might arise if picketers are not satisfied until one of their group is hired. Thus, even though an employer is hiring on a merit basis and no Negroes qualify, he might hire a Negro to avoid continued picketing, but in doing so he would be discriminating against Caucasians and other races.

61. Although this presents a difficult problem, courts have on occasion dealt with it in states which have fair employment practice acts. See Annot., 44 A.L.R.2d 1138 (1955); Comment, 56 YALE L.J. 837, 860 (1947); 68 HARV. L. REV. 685, 693-94 (1955).

If the employer is not guilty of discriminatory hiring practices, picketers might be liable for an unlawful picket and also for business slander. PROSSER, TORTS 590, 756 (2d ed. 1955).

two questions are considered by the court, a just decision can be reached. Courts should then take the initiative and prescribe the permissible bounds for racial picketing.

It seems evident that it is but a short time until peaceful picketing by racial groups protesting discriminatory practices will be one of the pursuits protected by the constitutional guarantee of "freedom of speech." It should be remembered when dealing with racial picketing:

> The right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression . . . is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions.[62]

ROBERT R. BEBERMEYER

LIABILITY OF AUTOMOBILE MANUFACTURER— NEGLIGENCE WITHOUT FAULT?

The headlights of the plaintiff's Ford automobile failed as the result of a defective dimmer switch. The vehicle veered off the road in the darkness and collided with a tree causing property damage and personal injuries to the plaintiff. The dimmer switch had been manufactured by an independent supplier for the Ford Motor Company. Ford had conducted a reasonable inspection of the dimmer switch which was found to have been negligently manufactured, without discovering the defect. The plaintiff's action against Ford was successful and on appeal to the United States Court of Appeals, Fifth Circuit, *held*, affirmed: a manufacturer is liable for injuries caused by defective parts negligently constructed by another, although the defect could not have been discovered by a reasonable inspection. *Ford Motor Co. v. Mathis*, 322 F.2d 267 (5th Cir. 1963).

In dealing with the liability of manufacturers for injuries caused by defective products, the law has gone through various stages and it is far from uniform today. Two theories of liability are available: (1) negligence; and (2) strict liability on the basis of an implied warranty that the goods are fit for the purpose for which they are sold. Under the negligence theory, *MacPherson v. Buick Motor Co.*,[1] the landmark case in this area, eliminated the necessity for privity between the manufacturer and the injured party and it is followed today in all jurisdictions.[2] Sub-

62. Julie Baking Co. v. Graymond, 152 Misc. 846, 847, 274 N.Y. Supp. 250, 251-52 (Sup. Ct. 1934).

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).