Current Legal Periodicals

Picketing and Freedom of Speech. By CHARLES M. REHMUS. 30 Oregon Law Review: 115-139.

Before 1937 picketing in the United States appeared to be at the tender mercy of judicial allowance and legislative tolerance. The famous case of *Thornhill* v. *Alabama,* based inferentially upon *Senn v. The Tile Layer's Union,* established that, generally speaking, picketing was protected under the American constitution as a form of "free speech". "In the circumstances of our time the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion guaranteed by the constitution." This statement of the law, although open to serious doubt on the ground that picketing is not substantially "free speech" but rather is proscriptive and coercive in form, has nevertheless remained the firm base of the law in this field from the date of the *Thornhill* case to the present day.

Such a sweeping legal generalization demands obvious qualifications. The coercive elements of picketing, such as physical intimidation, do not fall within the *Thornhill* rule. These "non-speech" elements of picketing are not within the constitutional protection and therefore may be enjoined by state legislatures and courts. Picketing also appears open to attack when the information purveyed is false. Again, it has been decided that picketing must follow the subject matter of the dispute. Although the decision depends on the facts of the individual case, it has been held that a picketed restaurant a mile and one half from a home being constructed by non-union labour is beyond the subject matter of the dispute, whereas retail stores that sell merchandise delivered by picketed non-union pedlars are within the subject matter of the dispute.

The problem of picketing and freedom of speech may be summarized under six points:

1. The *Thornhill* case in all probability will not be directly overruled and, so long as it is not, picketing will remain a constitutionally protected form of free speech not subject to blanket prohibition by any state.

2. Picketing is a suspect form of speech involving coercion and physical force. Whenever picketing becomes, or it is apprehended that it will become, tainted with violence the non-speech element becomes paramount and constitutional protection lapses.

3. Picketing is open to attack on two other grounds. First, the truth or falsity of the information purveyed is an element in the constitutional protection afforded. Secondly, the court has often bolstered its opinion by mentioning the fact that other traditional methods of communication were open to the disputants.

4. Picketing must follow the subject matter of the dispute.

5. The picketing must not be for the purpose of compelling an illegal act by the person picketed.

6. Peaceful picketing may be reasonably curtailed by a state that feels the picketing will result in harm to the economy of the state.

Public opinion favoured the New Deal's aid to unionization. The court felt this social pressure in laying down the *Thornhill* doctrine at a time when unions were weak under the combined attack of employers, courts and legislatures. In the late 1930's the problem changed to one of curbing excesses of strong union power. It was realized that picketing could not have absolute protection. The courts decided to act as umpire in the allowable area of economic conflict rather than return picketing to the status of non-protection, at the same time curbing unjust excesses resulting from the non-speech elements of picketing — a decision with which the author finds himself in full agreement. (ROSS MCBAIN)

Justice Holmes and His Hecklers. By FRED RODELL. 60 Yale Law Journal: 620-624.

In a brief, crisp dissertation Professor Rodell of the Yale Law School raises the shield in defence of the memory of former United States Supreme Court Justice Oliver Wendell Holmes — of late subjected to a new bout of mud slinging and dirty-name calling — and at the same time vanquishes the foe. Professor Rodell is inspired to put pen to paper by recent outbursts of syndicated newspaper columnist Westbrook Pegler ("the only man who ever made a living out of the sort of stuff that small boys scrawl on back walls and fences"), who this time devotes his notorious personal invective against "one of the finest minds and greatest spirits that American civilization has produced".

Pegler would have Mr. Justice Holmes responsible for the subsequent sins of Alger Hiss, Lee Pressman and scores of unnamed

others. Were this just Pegler tilting at one of his many windmills, his savage assault could readily be dismissed without many second thoughts. But the columnist "got his lead from a group of men more responsible and thoughtful than he, most of whom would deplore Pegler's blast for its vulgarity and its vicious stupidity—but most of whom should recognize in what Pegler wrote a reaffirmation, however offensively phrased, of their own ideas about Holmes and his philosophy of law and life".

Professor Rodell refers to a respectable San Francisco lawyer, Mr. Harold McKinnon, who, writing in the American Bar Association Journal two years ago, labelled Holmes either a fascist or a communist. McKinnon's article was later published in pamphlet form with an approving foreword by the University of Chicago's Professor Mortimer Adler (of "The Great Books" fame). But the assault on Holmes and what he stood for did not originate with them. In 1942 Fathers John Ford and Francis Lucey published separate attacks, and in 1945 Mr. Ben Palmer of the Minneapolis Bar wrote an article for the American Bar Association Journal entitled "Hobbes, Holmes, and Hitler".

"What lies at the bottom of all this desperate effort to discredit the almost legendary figure who at his death, and long before it, was hailed as the grand old man of U.S. law, and one of the great Americans of all time?" It is not an attempt to destroy the democratic ideal merely by destroying one of "democracy's dead heroes", as suggested by one writer. Nor is it simply a Catholic assault on one of the most outspoken non-believers in the existence of natural law and in more-than-human significance to human values. As much as Holmes was attacked by lay and clerical Catholics, he was defended with equal vigour in the Commonweal, a Catholic publication, and by the late Justice Murphy. Nor was the onslaught launched because Holmes was the great champion of individual liberties on the court.

The true basis of the anti-Holmes writings and orations lies in the fact that the late Justice would not accept a superhuman foundation for human conduct. "Holmes would have nothing to do with Absolutes. In religion he was an agnostic, in philosophy a skeptic, in law a realist. The notion that any sort of ultimate truth, above the capacity of the human mind to create or effect, was abhorrent to him." Those who have taken up the cudgels against Holmes, from all faiths, believe in some way in the absolute that he abhorred.

Holmes had enough faith in man's power to reason that he disliked dogmatism and having all answers handed down to him.

His realism caused him to proclaim many truths about the law which the "word believers" found hard to face (for example, "that all law really amounts to is what a bad man cannot get away with"; "the life of the law has not been logic; it has been experience"). What Holmes' critics overlook is that Holmes is describing what *is*; he is not purporting to say what *ought to be*. Often he repeated that this type of thinking had not led him to the cynicism of defeat and despair and "that in the realm of *ought-to-be*, he held strong moral and ethical views concerning decency and justtice among mankind".

So long as Holmes can be read, the philosophy and teachings of the Absolutists are insecure. "For Holmes saw that those who claimed for their ideas, as he never did, a validity apart from the facts of life, a validity said to be grounded in the abstractions of logic or the absolutes of Natural Law, were in essence trying to raise those ideas to a stature not inherent in the ideas themselves, and so scare away any irreverent skeptics who might want to ask Why." And, the author concludes, anyone who reads both Holmes and his hecklers will clearly see which one is more nearly the fascist and which the true democrat. (HAROLD BUCHWALD)

Changing the Beneficiary of a Life Insurance Contract. By GROVER C. GRISMORE. 48 Michigan Law Review: 591-602.

A cursory examination of the judicial reports will reveal that there is a constant stream of cases coming before the courts in which the principal questions at issue involve the disposition of the proceeds of matured life insurance policies.

In general there are two kinds of cases that cause difficulty: (1) those in which an insured who has reserved an option to make a change of beneficiary has taken some of the steps prescribed in his contract for affecting a change, but has died or become incapacitated before the procedure has been carried through to the end; and (2) those in which, an option having been reserved, no steps whatever have been taken toward complying with the prescribed formalities, but other conduct of the insured makes it clear that it was his intention that someone other than the formally designated beneficiary should receive the proceeds of the policy upon its maturity.

The real question at issue in all these cases would seem to be whether the formalities prescribed in the contract for affecting a change are to be deemed to be conditions subsequent to the right of the formally designated beneficiary as well as conditions pre-

cedent to the duty of the insurer to pay a claimant, or whether they are merely conditions precedent to the duty of the insurer to make payment to the claimant.

A situation, rather suggesting that the formalities are merely conditions precedent to the insurer's duty to pay a particular person, has arisen in connection with the application of the so-called "facility-of-payment" clause, which is found in many industrial life insurance policies. When a specific beneficiary is named in a policy containing such a clause, but the insurer pays the proceeds to some one of the persons described in the "facility-of-payment" clause, to the exclusion of the named beneficiary, it has usually been held that, although the obligation of the insurer has been fully discharged by the payment, nevertheless the person receiving it holds the money in trust for the named beneficiary. The theory of this holding is that the "facility-of-payment" clause is designed solely for the convenience and protection of the insurer and that payment under it does not determine the ultimate right to the money.

The decided cases are in hopeless confusion. Nevertheless, where the first type of situation mentioned is involved, the decided cases are, for the most part, consistent with the view that the formalities are conditions subsequent to the right of the formally designated beneficiary and that, unless they have been observed or their fulfillment is legally excusable, the claimant is not entitled. But it does not follow from these decisions that literal compliance with every specified detail is essential. If the insured has done everything required of him to affect a change, and all that remains is for the insurer to record the change on its records or on the policy, then it is generally conceded that the newly designated beneficiary should prevail.

Continuing this line of thought, the courts have held that a requested change of beneficiary may be effective, where the insured has not done everything required of him, if the failure to take the omitted steps was due to unanticipated circumstances beyond his control.

It is obvious from the cases that the law on the subject is in a confused and uncertain state. There is much to be said for the view that the problem would be simplified were the courts to deal with the "change of beneficiary" clause in the regular life policy in all cases as a majority of the courts have dealt with the "facility of payment" clause in the usual industrial life policy. It would not be unreasonable to take the view that all of the formalities prescribed for changing the beneficiary are intended solely for the

protection of the insurer and are not at all designed to qualify the power of the insured to vest a beneficial interest in the proceeds in any third person without complying with those formalities. On this view of the matter, as was pointed out, the insurer would be fully protected, since payment to the formally designated beneficiary would discharge his obligation. On the other hand, the wishes of the insured in regard to the disposition of the money could be fully met, since the court, on interpleader or in a suit brought by the claimant against the person receiving the fund, assuming the formally designated beneficiary could not show a superior equity, could then award it to the claimant, provided he could show by trustworthy evidence that he was the person finally intended by the insured to have it. (R. M. McKAY)

Legal Education: Notes from the Third International Congress of Comparative Law. By A. H. CAMPBELL. 42 Juridical Review: 267-287.

This article consists of notes based on the reports made by delegates from Scotland, England, France, Germany, Spain and Canada, and by Professor Hazard on Soviet Law, at the Third International Congress of Comparative Law. Although the systems differ, not only in the content of their rules but also in the organization and qualifications of the legal profession, similar problems arise in the teaching of law.

The fundamental problem is to achieve a balance between cultural and vocational training. The lawyer should not only be technically skilled but he should be learned in the underlying principles of law. The general opinion of the delegates was that cultural training is more important in the formative years of the professional man, although they recognized that many students cannot afford the longer training made necessary by the inclusion of cultural subjects. The answer is to divide the legal profession into two classes: one calling for shorter courses and mainly concerned with practical and vocational study, for the man more interested in the practical side of the profession; and the other calling for a longer and more intensive course of study, with more attention devoted to the cultural and intellectual aspects of the legal system. But, even in the shorter courses, there should be an attempt to enrich the culture and awaken the critical understanding of the student, so that he may realize that law is more than a limited practical technique.

What extra-legal subjects should be studied in addition to the

purely legal subjects? There are two classes of subjects to be considered: those valuable as mental discipline to train the mind; and those valuable for their cultural content to add to the student's general knowledge and culture. Training of this sort is invaluable because it enables the lawyer to co-operate in the task of reforming the law to accord with the changing social pattern.

It was agreed at the Congress that the student's main concern should be with the law of his own country and that the method of teaching it should be independently solved in each country. Although the law is divided into subjects, the student should be made to realize also that many of them may be involved in a single case.

Certain particular subjects were considered. Public law and administration is increasing in importance due to the increasing tendency to state regulation of industry. Comparative law and Roman law bring a realization that there is more than one possible set of rules for the regulation of human relationships. A course of criminal law might be improved by including instruction in criminology and penology. The value of legal philosophy or jurisprudence was stressed, though it was not agreed whether it should be taught at the beginning or end, or both the beginning and end of the course.

A discussion on methods of instruction revealed that the case method was used in England but only as a supplement to lectures and texts, and that even in the United States there is less reliance on it than formerly. The author feels that it is useful in studying the sources of law and as mental training. Although lectures are often criticized on the ground that they duplicate the work of texts, they have these advantages: (1) codified law is more easily taught by lectures; (2) students learn much from the arrangement of lectures; (3) auditory memory in some students is better than visual; (4) lectures induce research by the lecturer. They are useful as a supplementary form of instruction, although insufficient alone. The delegates advocated tutorial and discussion groups because they encourage the student's initiative and help spot individual difficulties. Various forms were discussed.

Other matters considered include: supplementary aids to teaching, films, debates, moots and libraries, and the need for practical training, with special reference to the systems used in Germany and France. (R. W. McMURRAY)

International Human Rights and Their Implementation. By LEONARD P. ARIES. 19 George Washington Law Review: 579-612.

From the Magna Carta of 1215 to the Universal Declaration on Human Rights man has fought for and legislated for a code of ethics leading to brotherhood and equality, today not a luxury but a necessity for survival, not of one group or nation but for the world. The General Assembly of the United Nations has proclaimed the Universal Declaration as a standard of achievement for all nations and urges all to recognize and observe its ideals.

The rôle of law, historically, has been to effect compliance with rules of conduct that will permit human society to live in peace and dignity. "Implementation", as used here, is the effort to secure compliance with human rights in the international field by legal means. In the concept of legal compliance we must be realistic, as is emphasized by the examples of, thus far, unsuccessful attempts to obtain compliance with treaty obligations on human rights in post World War II treaties with Hungary, Rumania and Bulgaria. The result is that the issue of alleged violation of human rights has not yet been considered on its merits, though the question has twice been before the International Court of Justice. This situation may be a contributory cause of World War III; it might have been averted if immediate action had been possible on the international law level, for example, under treaty provisions for compulsory jurisdiction in the International Court.

The day the General Assembly adopted the Universal Declaration on Human Rights it requested that priority be given the preparation of a draft Covenant on Human Rights. When this covenant is ratified by twenty states it will come into force and be legally binding. The Covenant contains civil and political rights for all men of all nations, but does not include economic and social rights as does the Universal Declaration, although the General Assembly has adopted a resolution asking that economic, social and cultural rights be covered.

To protect the individual there must be a law applying directly to him, with legal rights and duties, and nations will be forced to surrender sufficient of their sovereignty to allow of world government. A federal system such as exists in the United States, with each nation retaining its own sovereignty, but limited in some fields, would give flexibility and meaning to the protection of human rights. Encouraging beginnings are seen in the Universal Declaration and the draft Covenant. Four points are suggested to strengthen the implementation of human rights:

(1) Amend the Covenant to allow the International Court of Justice jurisdiction over any matter the Human Rights Committee is unable to dispose of amicably. Its jurisdiction would have

to be compulsory for all states ratifying the Covenant.

(2) Establish sub-committees on Human Rights in each State, party to the Covenant, to receive and investigate petitions by any person, non-governmental organization or group of individuals claiming to be victims of a violation.

(3) Amend paragraph 2 of Article 1 of the Covenant to oblige the States who are parties to the Covenant to enact supplementary municipal legislation to give effect to rights in the Covenant for which they do not already have municipal legislation. If a State failed to enact such legislation by a set date the provisions of the Covenant would be deemed to take its place.

(4) In all treaties to protect human rights, the jurisdiction of the International Court of Justice should be compulsory.

To establish an understanding of human rights, education must precede or accompany law. A proper understanding should ultimately persuade public opinion to strengthen world forces for the implementation by law of international human rights.

(W. J. FLYNN)

The Administrative Procedure Act: A Study in Overestimation. By REGINALD PARKER. 60 Yale Law Journal: 581-599.

". . . A strongly marked, long sought, and widely heralded advance in democratic government . . . [that despite its brevity] is a comprehensive charter of private liberty and a solemn undertaking of official fairness . . . intended as a guide to him who seeks fair play and equal rights under law. . . . It upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our government and brings into relief the ever essential declaration that this is the government of law rather than of men." With this resonant verbiage the Hon. Patrick A. McCarran, United States Senator for Nevada and principal panegyrist of the Administrative Procedure Act, heralded the passage of the bill by the United States Congress in 1946. Four short years later Senator McCarran was to proclaim his legal brainchild "the most important statute affecting the administration of justice in the federal field since the passage of the Judiciary Act of 1789".

By careful examination of the Act itself, and with thorough consideration of cases that have arisen through it and rulings of administrative agencies made in spite of it, Professor Parker (Visiting Professor of Law, University of Arkansas) shows the Senator's words to be little more than soap box buffoonry. The author does

not in any way disclaim the need for definition of the powers and limits of administrative procedure or the importance of improved judicial consideration of the conduct and conclusions of governmental tribunals. He does, however, feel that this statute, whose full title is "An act to improve administration of justice by prescribing fair administrative procedure", falls far short of accomplishing its end and does little towards changing the situation that existed before its passage.

The Act was designed to see to it "that the governors shall be governed and the regulators shall be regulated". At the outset it was evident that the statute did not regulate or endeavour to regulate *the* — that is, every — administrative procedure. It was merely aimed at rule making and the adjudication of individual cases, and certain matters ancilliary to both. It did not reduce the number of administrative agencies or prevent their growth, or change their powers materially, or subject them to the control of either the President or the Congress to a greater extent than before its passage.

The Act does not codify administrative procedure as such or those types of rule making and adjudication to which it applies. Rather than name the instances when hearings are required in administrative proceedings, it leaves this most important consideration to the existing law. Modes of notice are not provided; instead the Act restates the established principle that parties are to be informed. The question of who has standing to seek judicial review is avoided by saying anybody "suffering a legal wrong" or being "adversely affected or aggrieved" within the meaning of the law.

The Act does not lessen the variance between the rules of procedure of the various agencies. Its only advance in this regard is that where there is a doubt as to procedure certain sections of the Act may be consulted.

The only changes, other than restatements of existing law, introduced by the Act have the effect of bettering the position of private parties (for example, guaranteeing parties the right to expression, to be issued subpoenas, and to have counsel) and limiting the freedom within which the agencies can operate. These limited changes, however, do not come close to an effective curb of the administrative branch of the government. Such evils as delegated legislation and agency-made rules are left untouched. The virtue of publishing regulations (now required by the Act) is a limited one at best, since the only sanction against unpublished regulations is that they are voided.

The sponsors of the Act claimed that it guaranteed substantial evidence in all cases determined by the various agencies, but Professor Parker points out that this had been established before the enactment, when the Supreme Court made it clear that cases not based on substantial evidence would not be upheld. In the realm of judicial review, itself, the Act merely restates in wide and vague terms the grounds upon which judicial review may be sought.

But the statute has brought several clarifications and a few improvements. The substantial evidence rule has now an hitherto-sought definiteness. The utilization of independent trial examiners and the acceptance of agency evidence without re-appraisal (without denying trial *de novo*) by the review court, if it is substantial, are regarded as steps forward.

Where the Act falls down worst is in its definitions, many of which perpetuate existing doubts without clarifying anything, and hence the statute does not constitute too great a technical improvement of the law. "Agency" under the Act could conceivably include the office of President of the United States. It is not always clear that a "court" is not an administrative agency (for example, a tax court is actually an agency, yet under the Act it could receive the same treatment as a constitutionally created court). "Party" is a person or agency named or admitted or entitled to be a party. There is no categorical division between the various kinds of norms, including laws, regulations and decisions.

The author admits that some of his examples may seem far-fetched, but he points out that ". . . the purpose of statutory definition is to be precise. Any definitional section may raise difficulties in borderline cases. One that does not solve even obvious cases falls far short of its objective." (HAROLD BUCHWALD)

The law of nations is a peculiar kind of law, and it is generally settled by recourse to powder and shot, so that the law of nations is in the long run much the same thing as the cannon law.—Gilbert Abbott A Beckett: The Comic Blackstone (1856 ed.)