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Richard Blum, *Labor Picketing, The Right To Protest, and the Neoliberal First Amendment*, 42 **N.Y.U. Rev. L. & Soc. Change** 595 (2019).

In his article, *Labor Picketing, The Right To Protest, and the Neoliberal First Amendment*, Professor Blum argues that labor picketing, which has received diminished protection when viewed from the statutory lens of Section 8(b)(4) of the National Labor Relations Act, would receive greater protection if viewed primarily through a constitutional lens. Blum upfront acknowledges that many scholars—notably Cynthia Estlund, Catherine Fisk, Charlotte Garden, Michael Harper, James Gray Pope, and Mark Schneider—as well as several practitioners have made similar arguments. (P. 600, n. 14.) However, he brings a fresh approach to this important legal agenda by framing the problem not only as a legal challenge but also from the union lawyers' perspective, which he obtained through surveys and interviews. (Pp. 611–16.)

As a legal matter, Blum correctly notes that the halcyon days of labor picketing protection passed nearly eighty years ago when the Supreme Court, in *Thornhill v. Alabama*, held that the state's power to regulate labor picketing was limited by the First Amendment's free speech clause. But what the Justices giveth, the Justices may taketh away. Thus, labor picketing could lose its constitutional protection: (1) if accompanied by violence, *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*; (2) if the speech targeted a neutral party, *Carpenters and Joiners Union of Am., Local No. 213 v. Ritter's Cafe*; or (3) if the picketing had unlawful objectives, *Giboney v. Empire Storage & Ice Co.* During this time, the Court also began to view labor picketing as inherently involving conduct as well as speech, and therefore subject to greater state regulation for that reason too.[1] Indeed, by the time the Supreme Court penned *Int'l Bhd of Teamsters, Local 695 v. Vogt*, the transformation of labor picketing to activity benefitting from less than full constitutional protection was nearly complete.

As the surveyed union attorneys see it, the problem is multifaceted although it generally boils down to the fact that the rules governing secondary activity are incoherent. This makes it difficult and time consuming to train union members on the dos and don'ts of labor picketing. The abstruseness also undermines the ability of rank-and-file employees to act concertedly. Indeed, Board investigators, among the most knowledgeable labor experts, themselves often misunderstand the law and often presume that secondary picketing is unlawful even when it is not. These factors, together with an outmoded and incorrect belief that all labor picketing is coercive, chills and limits secondary activity. (Pp. 613–14.)

Blum next summarizes how legal prohibitions on secondary activity butt up against the First Amendment:

> [N]ormally, as long as a group's self-expression, including picketing, does not coerce the people they confront through violence . . ., the First Amendment protects that expression. There is no basis for treating secondary labor picketing, a form of union self-expression, any differently from any other kind of picketing, whether the target is primary, secondary, or both . . . . Like other forms of picketing, labor picketing is not inherently coercive of its audience, and any coercion by picketers should, under the First Amendment, be addressed through narrowly tailored restrictions. (Pp. 616–17.)

From here, Blum turns to recent developments in First Amendment jurisprudence, agreeing with scholars that decisions like *Citizens United v. FEC* and *Sorrell v. IMS Health, Inc.* facilitate the analysis that the NLRA's ban on secondary picketing is unconstitutional. (P. 631.) Nevertheless, Blum warns unions against buying into this Court's neoliberal construction of the First Amendment:

> It is fair enough to say that what is good for the goose, in this case, corporate and/or commercial speech, is good for the gander, i.e., labor speech. However, it would be a strategic error for labor to rely on these decisions in seeking to strike that ban under the First Amendment. Although the distinction between political and economic speech cannot be sustained, the First Amendment distinction between social movement, including labor, speech on the one hand and profit-motivated speech on the other can and should be sustained and breaking down that distinction has undesirable consequences for the labor movement and its constituents. (Pp. 638–39.)

Here, Blum offers three reasons unions should resist the temptation of relying on commercial or corporate speech decisions to extend greater protections to secondary boycott activity. First, the distinction between labor and commercial speech is "valid" because "[t]here is an essential difference between speech that proposes a commercial transaction in the marketplace and speech that defies market logic by insisting that human labor not be treated simply as a commodity." (P. 639.) Second, the Court has never characterized labor speech as commercial speech and has, indeed, treated the two categories of speech very differently. (P. 642.) The distinguishing features of these two categories of speech "demonstrate why there are compelling societal interests, rooted in knowledge and power differentials, in regulating commercial and corporate speech that do not apply to other kinds of speech." (P. 639.) In Blum's view, "[u]nions should advance those compelling interests and defend the state's regulatory authority, both to protect the state's ability to regulate labor relations and to defend regulatory systems that protect unions' members and broader constituencies." *Id*. Third, labor does not need to rely on these decisions because other avenues of First Amendment protection are available. *Id*.

This article continues the important debate on how the law should treat worker self-expression. Labor advocates for more than a century have advocated for treating workers as humans who possess dignity rather than as factors of production. The law's dignification of workers was short-lived and coincided with New Deal legislation. With the rise of the neoliberal paradigm of the late twentieth century and its law-and-economics judicial framework, the law returned to a labor-as-commodity lens. Accordingly, it is tempting to engage in a can't-beat-them-join-them strategy as commercial and corporate speech has gained increasingly robust constitutional protection. However, as Blum points out, that strategy is inauthentic and sells out the worker qua human. Buying into this paradigm is dangerous because it transgresses every human rights value for which labor advocates have fought in exchange for a possible short-term gain. Blum's vision allows for transformational change, rejecting the incremental breadcrumbs that *Citizens United* and *Sorrell* offer. Once those crumbs are accepted, labor is cabined. Workers, as humans who possess human rights deserve more than crumbs. Blum reminds us that our duty, as labor advocates, is to transform that neoliberal paradigm to one that treats workers with the human dignity that justly deserve.

1. *See* *Bakery and Pastry Drivers and Helpers, Local 802 v. Wohl* (Douglas, J., concurring).

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