Crossing the Line: Labor Dispute Protestors Deemed Trespassers

By Wendy E. Lane

Until last week, two California laws — Code of Civil Procedure Section 527.3 (also known as the Moscone Act) and Labor Code Section 1138.1 — made it all but impossible for businesses to prevent labor dispute demonstrations on private sidewalks directly in front of their business. Last week, a three-judge panel from the 3rd District Court of Appeal found both of those statutes unconstitutional, deeming union members who picketed outside of a grocery store as trespassers, and granting the grocery store the ability to seek an injunction against the protestors in the labor dispute to the same extend that it would be permitted to enjoin trespassers who were not engaged in activity or speech related to a labor dispute.

In *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, union agents peacefully picketed five days a week, eight hours per day on the privately-owned front sidewalk apron of a Ralphs-owned store, which separated the store from the parking lot. The union representatives walked back and forth in front of the store's doors, carrying picket signs and handing out flyers encouraging people not to shop at the store because its employees were not represented by a union. As alleged in court documents, Ralphs customers complained about the picketers and one customer said she called police after a picketer yelled at her, telling her not to shop there.

Picketers ignored Ralphs's repeated requests that the protesters relocate off company-owned property to a distance of at least 20 feet from the store's front doors.

After nine months of continuous protests, Ralphs filed a complaint for trespass against the union in Sacramento County Superior Court. Ralphs further sought injunctive relief to prevent the union from using the store's front sidewalk as a forum for expressing its views. The union opposed the requests for relief under the Moscone Act, which denies courts jurisdiction to issue any restraining order or injunction barring specified conduct (such as peaceful picketing) relating to a "labor dispute," and Section 1138.1, which restricts a court from issuing a preliminary or permanent injunction in a case involving a labor dispute except in the most limited circumstances.

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Specifically, Section 1138.1, which was enacted in 1999, precludes the issuance of injunctive relief in a labor dispute unless the court can make findings of fact, after a hearing with live witnesses, that the party seeking injunctive relief has received threats of unlawful acts and that such acts will be committed unless restrained and that the threatened act will cause substantial and irreparable injury to the party seeking the relief. Section 1138.1 further requires a showing that the injury inflicted on a party seeking injunctive relief would, if the requested relief were denied, be greater than the injury inflicted on the defendants by the granting of the relief, and that the party seeking the relief has no adequate remedy at law. Finally, pursuant to Section 1138.1, a party cannot obtain an injunction in a labor dispute unless it can show that the "public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

The trial court held that the Moscone Act, enacted in 1975, violated the First and 14th Amendments of the U.S. Constitution, which grant and protect the fundamental personal right to free speech. However, the court still denied the application for an injunction, holding that Ralphs failed to meet its burden of establishing any of the aforementioned prerequisites for obtaining injunctive relief as set forth in Section 1138.1.

Specifically, the Court of Appeal agreed with the trial court's determination that the Moscone Act was unconstitutional because it amounted to "governmental discrimination based on the content of speech," which "favors speech related to labor disputes over speech related to other matters based on the content of the speech" and "declares that labor protests on private property are legal, even though a similar protest concerning a different issue would constitute trespassing."

Unlike the trial court, the appellate court further concluded that Section 1138.1 "suffers from the same constitutional defect as the Moscone Act," and therefore violates the constitutional right to free speech, because it "adds requirements for obtaining an injunction against labor protesters that do not exist when the protest, or other form of speech, is not labor related," forcing the private property owner "to provide a forum for speech with which the owner disagrees and it bases that compulsion on the content of the speech." Acknowledging the U.S. Supreme Court's holding that "the choice to speak includes within it the choice of what not to say," the appellate court found that Section 1138.1, in barring businesses from having any remedy to stop labor protestors from continuously trespassing on private premises, violated employers' rights to choose what not to say.

Rather than see Section 1138.1 be invalidated, the union argued that the appellate court should apply Section 1138.1 to essentially preclude courts from issuing injunction relief in *all* speech-related cases, whether they were related to labor disputes or not. The appellate court firmly rejected that argument, stating that the Legislature's clear intent to promote speech related to labor disputes further reflects an unstated goal of promoting all forms of speech regarding all topics in a private forum.

After invalidating the Moscone Act and Section 1138.1, the appellate court concluded that Ralphs was entitled to injunctive relief, holding that a private property owner need not establish an unlawful act beyond continuing trespass in order to satisfy the "unlawful act" element of injunctive relief. The appellate court further held that there is irreparable harm when "a trespasser engages in activities to discourage the public from patronizing a business" because "there is no way of knowing who would have patronized the business but for the trespasser's activities." The Court of Appeal remanded the matter to the trial court with directions to grant the preliminary injunction sought by Ralphs.

While retailers welcome the *Ralphs* decision as a major win, many questions remain unanswered. Will the union appeal to the state Supreme Court? Given the fact that the case involves speech rights under the federal constitution, could the case ultimately end up before the U.S. Supreme Court? Will courts in other states look to the *Ralphs* decision?

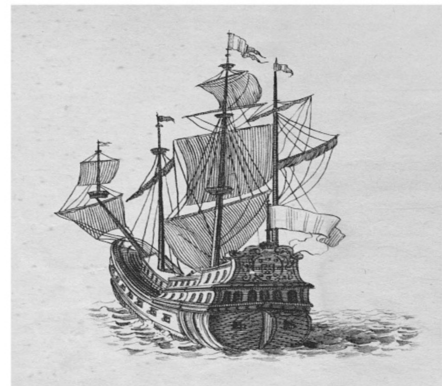
And assuming the decision is upheld, how will it be applied to future cases? For example, while the *Ralphs* court found an injunction proper based on the union's many months of "continuous trespass" in that case, how often and frequently must demonstrators be present at a business before their conduct rises to the level of a "continuous trespass" that warrants injunctive relief?

Furthermore, because the *Ralphs* decision does not alter the state Supreme Court's 1979 holding in *Robins v. Pruneyard Shopping Center* that persons protesting labor disputes can still reasonably exercise their right to free speech and petition in public forums, it is likely that more courts will grapple with questions regarding what activities by business owners might turn an otherwise private forum into a public forum, where labor demonstrations will be more liberally allowed?

It will obviously take time for all of these questions to be answered. In the meanwhile, California retailers, many of whom have been forced or nearly forced out of business in a struggling economy, will surely welcome relief from demonstrations that could further reduce their sales.

Who Owns America?

By Christopher Tomlins



Arizona's attempt to pass and enforce its own immigration law has prompted much local and national debate — reasoned, impassioned, occasionally ugly. Debate, even when heated, always raises interesting questions. Sometimes answers can be found in strange places. History, for instance.

A recent Anaheim demonstration in support of Arizona's law and its declared objective to halt illegal immigration raised an interesting — and very old — question. Who belongs here? Who owns America? The question came via two members of the Brown Berets, a Mexican American organization that dates to the Chicano rights movement of the 1960s. Speaking for *La Raza* — the mestizo fusion of European, Indigenous and African peoples that began in the 16th century Iberian New World empires — the Brown Berets "invited" Americans of Northern European heritage to return to Europe. "This is America," they told those rallying in Anaheim, and America did not belong to them. They were too white. "You don't belong here. Go back to Europe."

Like so much law, immigration law is about jurisdiction. Arizona's law has posed one kind of jurisdictional question — whether or not a state can enforce its own immigration regime without infringing upon powers reserved to the federal government. But the federal claim to exclusive definition of the legalities of immigration simply raises the same jurisdictional question at a more basic level: does occupation of a piece of territory carry with it a right to refuse access to a subsequent entrant, to declare who is a legal immigrant and who isn't, who can enter and who cannot?

The Brown Berets *and* those rallying in Anaheim, *and* the state of Arizona *and* the federal government, all agree that prior occupancy vests rights to control access in the occupant. What they are disagreeing about is who has priority — who gets to exercise the right to refuse. So far as the federal government is concerned, it has exclusive jurisdiction. According to the Justice Department's pending suit to block enforcement of the Arizona law, "The Constitution and the federal immigration laws do not permit the development of a patchwork of state and local immigration policies throughout the country." So far as Arizona and those supporting it are concerned, a state can take action to protect itself and its citizens, as Gov. Jan Brewer has stated, "from violent Mexican drug and immigrant smuggling cartels." The state can police the boundaries of the terrain it occupies. So far as the Brown Berets are concerned, it is up to the original indigenous occupants, and their descendants, to say who can enter America and who can't.

In an early 21st century beset by terrorism and global economic crisis, it is difficult to imagine flows of population unrestrained by authority. We embrace many freedoms, but freedom of movement across frontiers (of people, as opposed to goods) isn't one of them. Witness the fear of hordes of Polish plumbers menacing the new Europe of open borders stoked by British and French tabloids only a few years ago. It is interesting to reflect, then, on how much of the immigration that built this nation of immigrants was, by our standards, "illegal" — unrestrained.

Four hundred years ago, when English colonizers began venturing westward to create settlements on the North American mainland, they sought no permission save that of their own monarch, who claimed a vaguely defined empire somewhere in the North Atlantic. Elizabeth Tudor, and after her, James Stuart, granted the adventurers leave to exit England. After that they were on their own. On landfall they built crudely defended settlements and resisted clear indigenous indications that their presence was unwelcome. They had every right to be there, they told themselves, for there was room enough for all, and land was meant to be used, not — as it seemed to them — left to lie idle. And by the law of nations (a European ideal, part natural law, part biblical, part Roman in origin) the existing inhabitants had no right to refuse strangers who came to trade with them, or to preach to them, or to cultivate their vacant places.

The English were prepared to take what they wanted by force, although being practical men they recognized that it was usually cheaper to acquire the land they craved by offering "some consideration" than by killing for it. Once land had been obtained, whether by guns or money, the English began importing population — free and enslaved — to fill what they had won. They sought population avidly, for they knew population was the multiplier for the wealth they sought. They manned no check points, inspected no passports, granted no entry visas. They did not particularly care where the people they "imported" came from, how old they were, whether they came willing or unwilling, sickly or well. The one law they all obeyed was the law of "loco-motion" — of movement.

So matters would continue for the better part of 300 years. Population entered eastern ports and flowed westward. Often those who moved westward became squatters, trespassers, "in defiance of law" as the eminent American historian Willard Hurst wrote in 1956, "without color of title other than that created by the impact of a popular feeling that would not be denied." Our romance of American history celebrates that popular feeling as "enterprise," we don't condemn it as illegal migration. Hurst called it "the release of energy."

People on the move always make those who have settled down anxious, even when those who have settled down are themselves simply the previous generation of people on the move.

Nomads everywhere excite suspicion. Many of the earliest English migrants to North America had been "the strolling poor" in England — vagrants, which is to say criminals by the English law of their day. When they were shipped westward to America they died in droves, both during the voyage and after. But at least no one sent the survivors back.

When those who want to move in and settle among us are also of different races or ethnicities, our fears tend to run riot. The Irish, Jews, Southern and Eastern Europeans, Africans, Asians and Mexicans have all been the subjects of exclusion of one kind or another at one time or another. This is how, in fact, our immigration laws first came about — not out of some original rational desire to manage inclusion but out of an impulse to refuse it. In the process we have usually forgotten that we were once on the move ourselves. We have "settled down," occupied a place, and decided our occupancy gives us title to exclude.

No one can now recreate some pristine New World moment before the European empires arrived. Those who speak for *La Raza* should remember — proudly — that they speak for mixture, the mixture of migrant and indigenous peoples. We can remind them — respectfully — that even the indigenous were once migrants. But while we are reminding others of their origins the rest of us have some remembering of our own to do, about ours. We should try to remember how we came to be here, where we have settled down; and how, at some point, somewhere, we (or our ancestor) were most likely a poor stranger from elsewhere — someone who could easily have been refused entry if our standards had been applied, but was not.

Laws that manage the process of including newcomers make sense. Laws that make coming into a crime do not because America "belongs" to no one. That is how we all ended up here.

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