"People Crushed by Law Have No Hopes but from Power": Free Speech and Protest in the 1940s

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When an estimated 13,000,000 people took to the streets in 2020 to protest police killings of black people, systemic racism, and economic inequality, observers were reminded why picketing, sit-ins, strikes, and boycotts occupy a special place in the hearts and minds of scholars of social movements. In memoirs, and in popular and academic histories of both the labor movement and the civil rights movement, there is a romance and a triumphalist narrative of labor and civil rights, in which direct action by determined and militant working-class people built powerful social movements and temporarily overcame a generally repressive law and the forces of capitalism.[1]

1. Louis Waldman, *Labor Lawyer* (New York: E.P. Dutton, 1944), 142, 171; Victor Rabinowitz, *Unrepentant Leftist: A Lawyer's Memoir* (Urbana: University of Illinois Press, 1996), 23; Arthur Kinoy, *Rights on Trial: The Odyssey of a People's Lawyer* (Cambridge, MA: Harvard University Press, 1983); Risa L. Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (New York: Oxford University Press, 2016); Thomas Hilbink, "The Profession, the Grassroots and the Elite: Cause Lawyering for Civil Rights and Freedom in the Direct Action Era," in *Cause Lawyers and Social Movements*, ed. Austin Sarat and Stuart A. Scheingold (Stanford, CA: Stanford University Press, 2006), 60–83; Taylor Branch, *Parting the Waters: America in the King Years, 1954–1963* (New York: Simon & Schuster, 1988); Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919–1939* (Cambridge: Cambridge University Press, 1990); Ahmed White, *The Last Great Strike: Little Steel, the*

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In another narrative about labor and civil rights protest, David does not score an unequivocal victory over Goliath, even in the short term. The statutory and constitutional flowering of rights won in the upsurges of the 1930s and 1960s quickly wilted in the heat of reaction to labor power in the 1940s and froze in the cold of the Cold War. The growing power and sophistication of business campaigns in the 1950s crushed the radicalism of the 1960s.[2] As Laura Weinrib, Sophia Lee, and Jeremy Kessler have shown, the statutory and constitutional free speech protections that empowered the civil rights and labor Left have never been just rights of agitation against the powerful.[3] Businesses seized on the First Amendment to squelch union activity and civil rights radicalism by invalidating progressive regulation that impinges on corporate "speech."[4]

Labor histories recount how in the 1940s and 1950s, the Supreme Court removed constitutional protection for labor picketing and boycotts, which contributed to labor eschewing constitutional rights talk. In contrast, the First Amendment is often portrayed as the friend of civil rights. This only makes sense if judges view the two movements and their goals, tactics, and activists as being separate, but in the first two cases in which civil rights activists sought statutory and later constitutional protection for picketing, the court treated them the same. Protection for civil rights protest rose in 1938, when the New Negro Alliance won protection for civil rights picketing under a federal statute intended to protect labor picketing.[5] And then, in 1950, civil rights protest suffered the same fate as labor protest when the court ruled that the First Amendment did not protect John Hughes, a white Communist, and Louis Richardson, a black National Association for the Advancement of Colored People (NAACP) chapter

CIO, and the Struggle for Labor Rights in New Deal America (Oakland: University of California Press, 2016); Nelson Lichtenstein, *The Most Dangerous Man in Detroit: Walter Reuther and the Fate of American Labor* (New York: Basic Books, 1995); Robert H. Zieger, *The CIO 1935–1955* (Chapel Hill: University of North Carolina Press, 1995); William P. Jones, *The March on Washington: Jobs, Freedom, and the Forgotten History of Civil Rights* (New York: W.W. Norton, 2013); and Christopher W. Schmidt, *The Sit-Ins: Protest and Legal Change in the Civil Rights Era* (Chicago: University of Chicago Press, 2018).

2. Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011).

3. Laura Weinrib, *The Taming of Free Speech* (Cambridge, MA: Harvard University Press, 2016); Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* (New York: Cambridge University Press, 2014); and Jeremy Kessler, "The Early Years of First Amendment Lochnerism," *Columbia Law Review* 116 (2016): 1915–2004.

4. Kim Phillips-Fein, "Business Conservatism on the Shop Floor: Anti-Union Campaigns in the 1950s," *Labor: Studies in Working-Class History of the Americas* 7 (2010): 9–26.

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

president, who had picketed a grocery store urging the hiring of blacks.[6] Unfortunately for the cause of civil rights, *Hughes v. Superior Court* arrived at the Supreme Court in the same term as constitutional challenges to the anti-labor Taft–Hartley Act and several state restrictions on labor protest. Calling them "the picketing cases" in internal memoranda, the justices handed down decisions rejecting all the picketing free speech claims on the same day.[7]

The few histories of *Hughes* have not situated it in the context of postwar repression of labor and the radical left, but instead have portrayed it as an early test of the legality of affirmative action.[8] On this account, the Supreme Court disapproved of "racial classifications," and the case was the one civil rights loss in a term that was a "largely successful one for civil rights groups."[9] This is not wrong, but it is not what *Hughes* was about. The issue was not whether an employer could engage in affirmative action, but whether civil rights activists could stand on a sidewalk to ask consumers not to shop at a store that engaged in flagrant, and occasionally violent, race discrimination. The antiracial classification frame was invented by the employer's lawyer and was adopted by Justice Felix Frankfurter to make the case about racial reconciliation rather than suppression of civil rights protest.

The case began with radical Bay Area labor-civil rights activists exasperated by the legislature's repeated failure to enact fair employment law, and it was adopted by lawyers for the American Civil Liberties Union (ACLU), Congress of Industrial Organizations (CIO), and, reluctantly, NAACP as a way to carve out First Amendment protection for direct action on a set of

6. *Hughes v. Superior Court*, 339 U.S. 460 (1950).

7. *International Brotherhood of Teamsters v. Hanke*, and *Automobile Drivers Local Union No. 882 v. Cline*, 339 U.S. 470 (1950); *Building Service Employees International Union v. Gazzam*, 339 U.S. 432 (1950); and Justice Tom Clark Papers, Supreme Court Case Files, October Term 1949, Box A3, Folder 1.

8. Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972* (Baton Rouge: Louisiana State University Press, 1997); Mark Brilliant, *The Color of America Has Changed: How Racial Diversity Shaped Civil Rights Reform in California, 1941–1978* (New York: Oxford University Press, 2010), 120–22; Frederick White, "Justice Carter's Dissent in *Hughes v. Superior Court of Contra Costa County*: Harbinger of the 60s Civil Rights Movement and Affirmative Action?" in *The Great Dissents of the "Lone Dissenter,"* ed. David B. Oppenheimer and Allan Brotsky (Durham, NC: Carolina Academic Press, 2010), 59–69; David Freeman Engstrom, "The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972," *Stanford Law Review* 63 (2011): 1129–30; Paul D. Moreno, "Direct Action and Fair Employment: The *Hughes* Case," *Western Legal History* 8 (1995): 1–34; and David B. Oppenheimer, "Dr. King's Dream of Affirmative Action," *Harvard Latinx Law Review* 21 (2018): 55–86.

9. Moreno, "Direct Action and Fair Employment," 33.

facts more sympathetic to the cause of working people than the labor secondary boycott and picketing cases that were reaching courts in the late 1940s. Both the clients and their trial lawyers were part of an effort to build progressive, racially inclusive unions throughout the West, in agriculture and food processing, and in warehouse and port work.[10] They sought to create a people's law and, like the general strikers and sit-downers of the 1930s and the sit-inners of the 1960s, insisted that the true meaning of free speech was the right to speak truth to power. They invoked a tradition of activism that labor was gradually being forced to abandon even as it was about to become the defining feature of the civil rights movement.[11] The free speech rights consciousness they invoked challenged the conservative conception of rights and law that had come to prevail in the National Labor Relations Board (NLRB), Congress, and most courts.

For these activists, direct action was a form legal argument, an expression of solidarity that was lawful in itself. It was not, as civil rights protest is often portrayed, a form of civil disobedience to law. At a pivotal moment in the history of the two major social movements of the era, labor protest and civil rights protest were *two faces of same thing* rather than a tactic that two separate movements both used. What is sometimes narrowly called "rights consciousness" was, as Richardson and Hughes used it, a subaltern *law*.[12] What happened during and after *Hughes* reveals how this subaltern law and formal law began to diverge as the legal histories of these two transformative social movements began to diverge.

A Radical Labor-Civil Rights Alliance

Hughes' and Richardson's activism grew out of the frustrations of the tens of thousands of African Americans who moved from the South to the San Francisco Bay area during World War II to work in the booming shipbuilding and war-related manufacturing and transit industries. Many found jobs, but they also found also discrimination and segregation. As the war

10. Charles W. Romney, *Rights Delayed: The American State and the Defeat of Progressive Unions, 1935–1950* (New York: Oxford University Press, 2016).

11. Leon Fink, "Labor, Liberty, and the Law: Trade Unionism and the Problem of the American Constitutional Order," *Journal of American History* 74 (1987): 904–25.

12. Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American History* 74 (1987): 1013–34; and John Phillip Reid, "In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution," *New York University Law Review* 49 (1974): 1043–91.

wound down, thousands were laid off, and unemployment hit the black community especially hard.[13]

The coalition of Bay Area labor and civil rights activists and lawyers behind the *Hughes* litigation had won important litigation victories when they persuaded the California Supreme Court to hold that a union that excluded blacks from membership could not enforce a closed shop agreement.[14] But the rulings did not prohibit unions or employers from continuing to discriminate. Fair employment practices legislation had been introduced and had died in every California legislative session since 1944. A month before Hughes and Richardson picketed, California voters had rejected a ballot measure that would have prohibited race discrimination in employment. Activists had no choice but to work locally to persuade consumers and businesses to end discrimination.[15] They were connected to the local radical and progressive community in nearby Oakland, the western headquarters of the Brotherhood of Sleeping Car Porters. Brotherhood leader A. Philip Randolph had been involved in the Don't Shop Where You Can't Work campaigns of the 1930s and emphasized racial inequality as being an economic problem that should be addressed through unionizing and building a multiracial grassroots social movement for racial equality.[16]

Louis Richardson, the President of the Richmond NAACP chapter who had recently run unsuccessfully for the Richmond City Council,[17] joined forces with John Hughes, a white man active in the local Communist Party[18] and the Richmond chapter of Progressive Citizens of America,[19] a third party organization supported by the CIO and Left intellectuals and activists to oppose the racism of Southerners in the Democratic Party and the conservative and Cold War initiatives of the Truman Administration.

13. Robert O. Self, *American Babylon: Race and the Struggle for Postwar Oakland* (Princeton: Princeton University Press, 2003), 54–82; Brilliant, *The Color of America Has Changed*, 15–27; and Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* (New York: Cambridge University Press, 2015).

14. *Williams v. International Brotherhood of Boilermakers*, 27 Cal. 2d 586 (1946); *James v. Marinship Corp.*, 25 Cal.2d 721, 745 (1944); and Schiller, *Forging Rivals*, 48–80.

15. Brilliant, *The Color of America Has Changed*, 119.

16. Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008), 36.

17. See John Valery White, "The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality," *Nevada Law Journal* 5 (2004): 42; and *Richmond Record Herald*, June 24, 1947.

18. Shirley Ann Wilson Moore, *To Place Our Deeds: The African American Community in Richmond, California 1910–1963* (Berkeley: University of California Press, 2000), 90.

19. "Court Picket Ruling Held 2-edged Sword," *People's Daily World*, May 14, 1950.

Hughes and Richardson were engaged in the joint labor-civil rights activism that the CIO was seeking to develop nationwide during 1946–48.[20]

Over the course of several months in early 1947, Hughes and Richardson tried to persuade Bay Area store managers to hire black employees. One of their targets was Lucky Stores, an Oakland-based grocery store chain that did not employ a single black.[21] At Lucky's store on Canal Street, in a predominantly black Richmond neighborhood, store employees had beaten a black customer named McKennly Jackson whom they suspected of shoplifting bacon, and the store manager had fired a pistol at Jackson as he fled from the beating. When Hughes and Richardson met with Lucky company representatives about the incident, they were told that the manager had been fired. This, they later learned, was a lie.[22] Eventually, Lucky managers told Richardson and Hughes that a few Richmond stores would experiment with hiring one black clerk each to see whether it angered white customers. Token hiring, which employers confronted with civil rights protests often promised, simply perpetuated race discrimination.

Having gotten nowhere with negotiation, Hughes and Richardson decided to picket, calling for a consumer boycott. Consumer-focused picketing to protest race discrimination by white-owned stores that catered to black shoppers but refused to hire black staff had been a successful tactic in the 1930s in cities across the country, including Oakland.[23] The Don't Shop Where You Can't Work campaign had won statutory protection under the Norris–LaGuardia Act of 1932, which stripped federal courts

20. Herbert Hill, *Black Labor and the American Legal System: Race, Work, and the Law* (1977; repr., Madison: University of Wisconsin Press, 1985); Robert Rodgers Korstad, *Civil Rights Unionism: Tobacco Workers and the Struggle for Democracy in the Mid-Twentieth-Century South* (Chapel Hill, NC: University of North Carolina Press, 2003); Bruce Nelson, *Divided We Stand: American Workers and the Struggle for Black Equality* (Princeton, NJ: Princeton University Press, 2001); and Roger Horowitz, *Negro and White, Unite and Fight! A Social History of Industrial Unionism in Meatpacking, 1930–1990* (Urbana: University of Illinois Press, 1997).

21. Brilliant, *The Color of America Has Changed*, 120.

22. Affidavits of Hughes and Richardson.

23. Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Vintage, 2003), 45–47; Edward Peeks, *The Long Struggle for Black Power* (New York: Scribner, 1971), 268; August Meier and Elliot Rudwick, *Along the Color Line: Explorations in the Black Experience* (Urbana: University of Illinois Press, 1976), 269; Gilbert Ware, "The New Negro Alliance: 'Don't Buy Where You Can't Work,'" *Negro History Bulletin* 49 (1986): 3–8; Michele F. Pacifico, "'Don't Buy Where You Can't Work': The New Negro Alliance of Washington," *Washington History* 6 (1994): 66–88; and August Meier and Elliott Rudwick, "The Origins of Nonviolent Direct Action in Afro-American Protest: A Note on Historical Discontinuities," in *Along the Color Line*, 307–404.

of jurisdiction to issue injunctions in "labor disputes."[24] The Supreme Court held that civil rights pickets, like labor pickets, were engaged in a labor dispute and that federal courts could not enjoin the protest.[25] This, along with several Supreme Court cases in 1937–42 granting First Amendment protection for labor activism,[26] gave reason for optimism.

Nevertheless, the NAACP was wary, counseling Bay Area activists against picketing at stores that discriminated.[27] Hughes and Richardson dismissed this advice. As their lawyer later said, they considered the national NAACP an "elitist organization" that deemed picketing "beneath [their] dignity."[28] Here, as in other instances that Sophia Lee explored, local NAACP activists rejected the national lawyers' strategic preferences.[29]

Lucky later blamed the Retail Clerks Union Local 1179 for the dearth of black employees and, as employers often did, insisted that hiring blacks would violate their union contract. The Retail Clerks Union was affiliated with the American Federation of Labor (AFL), and like many AFL unions, it was nowhere near the forefront of civil rights activism.[30] However, Local 1179 leaders testified on behalf of Hughes and Richardson that the union would be happy to supply qualified black members or would agree to the store hiring anyone willing to join the union.[31] Although Local 1179 joined other progressive unions in the Oakland general strike in 1946, it did not go as far as protesting Lucky's discrimination by putting it on the union's "Do Not Patronize" list.[32]

Hughes and Richardson began picketing with signs saying "Shoot Jim Crow out of Luckys" (Figure 1) (referring to the shooting of McKennly Jackson) and "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade – Don't Patronize." The next day, Lucky's San Francisco law firm obtained a preliminary injunction against the Progressive Citizens of America and its Richmond affiliate, the NAACP and its Richmond

24. Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115 (2018).

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

26. *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *Schneider v. State of New Jersey*, 308 U.S. 147 (1939); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Carlson v. State of California*, 310 U.S. 106 (1940); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941); and *Bakery & Pastry Drivers Local 802 v. Wohl*, 315 U. S. 769 (1942).

27. Allan Brotsky, interview by Harvey Schwartz, November 2005, transcript, Oral History, Labor Archives and Research Center, San Francisco State University, 32.

28. Robert Treuhaft, interview by Robert G. Larsen, January 1989, Bancroft Library Oral History Project, University of California, Berkeley, 108–112.

29. Lee, *The Workplace Constitution*.

30. Michael Harrington, *The Retail Clerks* (New York: John Wiley & Sons, 1962), 73–77.

31. *Hughes v. Superior Court*, 186 P.2d 756, 758–61 (Cal. App. 1947).

32. *Contra Costa County Labor Journal*, June 13, 1947.

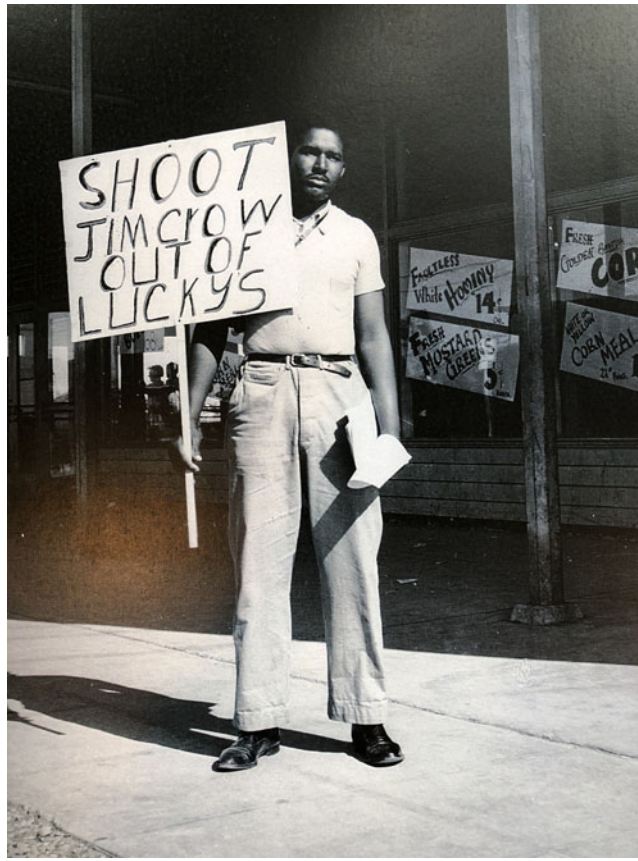

Figure 1. Picketing outside Lucky store in Richmond, California. Image courtesy of Richmond Museum and California Historical Society.

affiliate, and several individuals, including Hughes and Richardson. The court enjoined "any picketing" or "any other means used, or to be used, by defendants in bringing economic pressure to bear upon" the store. The pickets stopped when the injunction was issued.

In revised pleadings, Lucky's lawyers ignored the pickets demanding an end to Jim Crow and focused on the call for verifiable progress in hiring blacks. A week after the first order, Judge Hugh Donovan revised the injunction[33] to prohibit "picketing or taking position in front of any of

33. *Hughes*, 186 P.2d at 758; and "Pickets Are Enjoined from Market Line," *Richmond Record Herald*, May 27, 1947.

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the places of business of Lucky Stores" "for the purpose of compelling" Lucky to engage in "the selective hiring of negro clerks, such hiring to be based on the proportion of white and negro customers who patronize plaintiff's stores." The order also prohibited requesting the firing of employees who used violence against Jackson.[34] Several years later when the case reached the United States Supreme Court, an early draft of Frankfurter's opinion upholding the injunction and the contempt citation said that the trial court had enjoined *only* advocating the affirmative action in hiring of blacks and not the protest of race discrimination.[35] That is inaccurate. At a minimum it prohibited protest of the abuse of Jackson, and Hughes and Richardson apparently read it to prohibit civil rights picketing generally.

Bay Area NAACP Regional Secretary Noah Griffin wrote to Thurgood Marshall in June 1947 enclosing a newspaper clipping about the injunction and asking for support.[36] Marshall replied that the national NAACP was "vitally interested in this problem" and that legal counsel should take "immediate steps to test out" precedent to support the right to picket. Marshall opined, given the *New Negro Alliance* precedent, that this was "one of the easiest types of cases to win."[37]

Having received Marshall's letter, which they read as urging them to make the matter a test case, Hughes and Richardson resumed picketing, in violation of the injunction. They were arrested, charged with contempt, sentenced to 2 days in jail, and fined $20.00 each.

Suppression of Civil Rights Protest as Racial Redemption

Hughes and Richardson found lawyers to take their case who shared their activist commitment. Through the state trial and appeals courts, they were represented by Robert Treuhaft, Robert Condon, and Bertram Edises, who together had a law office in Oakland representing civil rights activists and progressive unions affiliated with the CIO. Later they were joined by Allan Brotsky, a lawyer in another union-civil liberties firm who specialized in

34. Order granting Preliminary Injunction, No. 39861 (June 5, 1947).

35. Felix Frankfurter Papers, *Hughes v. Superior Court* file, University Microfilms. The draft said: "The injunction here was narrowly drawn to prohibit precisely the evil of picketing to bring about proportionate hiring. No issue was raised of picketing merely to protest discrimination against Negroes and the injunction does not forbid it." This was a misstatement of the record.

36. Griffin to Marshall, June 3, 1947, NAACP Correspondence File, *Hughes v. Superior Court*, 1947–50, 2.

37. Marshall to Griffin, June 13, 1947, NAACP Correspondence File, 4–5.

representing progressive activists. For all of them, the case was the kind that inspired them to become lawyers.

Treuhaft, the son of Hungarian immigrants, was the first in his New York public high school to go to Harvard College. After graduating from Harvard Law School, he worked for a union-side law firm and for various wartime federal agencies in New York City and Washington, DC. In 1943, he moved with his soon-to-be wife, Jessica Mitford, to the Bay Area where he practiced with a small firm of progressive labor and civil rights lawyers. Over the years, he represented the East Bay Civil Rights Congress, the Congress on Racial Equality, the Student Nonviolent Coordinating Committee, the Black Panthers, and the Berkeley Free Speech Movement. Condon had been an NLRB attorney from when he graduated from Berkeley Law in 1938 until entering the Army in 1942. He was elected to the California Assembly while working on the *Hughes* case and served in the Assembly for 4 years, followed by 2 years in the United States House of Representatives.[38] Bertram Edises, an Oakland native, graduated from law school at Berkeley. He had a civil rights and criminal defense practice in the East Bay for his entire career, eventually attracting a subpoena to testify before the House Un-American Affairs Committee (HUAC) in 1960. The junior lawyer on Hughes' and Richardson's team, Allan Brotsky, likewise had a long career as a labor and civil rights activist-lawyer and law professor.[39]

As the lawyers sized up Hughes' and Richardson's chances of establishing a right to picket, they faced conflicting precedent.[40] Civil rights and labor protest had gained protection from federal court injunctions in 1938, and labor leafleting, speechifying, and picketing won constitutional protection 1939 and 1940. Although, beginning in 1941, the court began to uphold a few state court injunctions against violent labor picketing, still, in in 1942–43, the court reversed injunctions against peaceful picketing.[41] The court's leading case stated: "Free discussion concerning the conditions in industry and the causes of labor disputes" was "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."[42]

But in the mid- to late-1940s, the court ceased describing picketing as free discussion concerning the conditions in industry, and began to describe it as a tactic in economic or class warfare that could be restricted

38. Treuhaft, Oral History, 94, 108–12.

39. Brotsky, Oral History, 34, 67

40. Ludwig Teller, "Picketing and Free Speech," *Harvard Law Review* 56 (1942): 180–82.

41. *Bakery Drivers v. Wohl*, 315 U.S. 769, 775 (1942); and *Cafeteria Employees. Union Local 302 v. Angelos*, 320 U.S. 293 (1943).

42. *Thornhill*, 310 U.S. at 103.

to protect "community peace" or to avoid inconvenience to business or consumers. In 1947, just months after Hughes and Richardson picketed, Congress adopted the Taft–Hartley Act, which restricted certain union picketing, strikes, and boycotts. The same year, the court upheld huge fines imposed on the United Mine Workers and its leader John L. Lewis for persisting in a strike after the federal government had seized and operated the coal mines (handing the profits over to the mine owners) and had ordered the miners to end their strike.[43]

Still, activists also had reason to be optimistic about prospects for civil rights protest. Taft–Hartley prohibited protest only by labor unions and their agents, and Hughes and Richardson were not that. The court opinions upholding the injunctions emphasized the coercive power of labor unions to command obedience to picket lines by threatening to revoke union membership and thereby bar people from working in union jobs. By comparison, a couple of pickets seeking a customer boycott seemed to be a much better candidate for free speech protection.

Their optimism proved unfounded. In holding Hughes and Richardson in contempt, Judge Donovan accepted almost every argument that Lucky's lawyers made. Reading his opinion from the bench, the judge opened by saying that California should follow a New York case, *A.S. Beck Shoe Corp. v. Johnson*,[44] which had enjoined picketing at a Harlem shoe store urging it to hire black store clerks. (He ignored the fact that the Supreme Court had squarely rejected the *Beck Shoe* decision 10 years before.) Judge Donovan then echoed Lucky's theme that if the protesters "succeeded in their purpose it would then become equally proper for some organization composed of white persons to picket the premises, insisting that all Negro employees be discharged and that white employees be re-employed. If this were permitted there is substantial danger that race riots and race reprisals might result in this and other communities."[45]

In working on the appeal to the California Court of Appeal, Allan Brotsky wrote to Robert Carter, at the NAACP's national office in New York, to explain that his office was writing an amicus brief in the case on behalf of the NAACP's local branch. Brotsky asked for data to support their theory that the pickets were asking for proportional hiring only to ensure that the store would not simply hire a token black and continue discriminating.[46] Brotsky's letter prompted a flurry of attention to the

43. *United States v. United Mine Workers*, 330 U.S. 258 (1947).

44. 274 N.Y.S. 946 (1934).

45. Decision by the Court, filed April 30, 1948, *nunc pro tunc* as of November 20, 1947, Record of *Hughes v. Superior Court*, California Historical Society.

46. NAACP Correspondence File, 7; and Brotsky, Oral History.

case by the NAACP national legal staff. Marian Wynn Perry responded to Brotsky, enclosing the research she had on minority hiring practices. But she wrote a memorandum to other national staff the same day saying she was "very disturbed at the object of the picketing" and could "think of few things more dangerous than tying Negro employment to Negro patronage" or demanding a "quota system of hiring," because it would do little to help blacks outside of areas with large black populations.[47]

Hughes and Richardson had their only win at any stage of the litigation in the California Court of Appeal. Presiding Justice Raymond Peters, a fearless liberal, reasoned that the picketing called for an end to race discrimination in employment, which was in the interest of the picketers and "in accord" with public policy.[48] The court rejected the idea that advocating the hiring of blacks might lead to racial resentment. Discussing a *Harvard Law Review* article asserting that picketing could be limited whenever a court concluded that it produced injurious effects, Justice Peters noted that article defended a right to engage in civil rights picketing in extravagant language, which he quoted: "Insecure, dispossessed, intensely exploited, the American Negro worker clings to the crags of life in the face of overwhelming counter availing forces. Abolition of slavery has not meant emancipation of the Negro." Therefore, Justice Peters stated, still quoting the *Harvard Law Review*, "race, color and creed ought to be accorded the privilege of picketing upon the reasonable assumption that its benefit to the individuals involved is worth more than its cost to society."[49]

Lucky appealed to the California Supreme Court and won, in a short opinion by Justice Benjamin Rey Schauer over long and angry dissents by Justice Jesse Carter and Justice Roger Traynor. There, Lucky successfully introduced—over objection by Hughes and Richardson—new evidence denying that it discriminated against blacks and claiming that the picketing only advocated proportional hiring, not elimination of discrimination.[50] Justice Schauer insisted, "If 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."[51] The dissents of Justice Carter and Traynor echoed the lower court's view that

47. Marian Wynn Perry to Mitchell, NAACP Correspondence File, February 18, 1948, 6.

48. *Hughes*, 186 P.2d at 763, 765.

49. Ibid. at 768 (quoting Ludwig Teller, *The Law Governing Labor Disputes and Collective Bargaining* [New York: Baker, Voorhis & Co., 1940], 427).

50. *Hughes*, 32 Cal. 2d 850, 851, 854 & n.1 (1948); Affidavits of Otto Meyer, Albert West, and Benjamin Linsner, Transcript of Record, 45–50.

51. 32 Cal. 2d at 856.

Hughes and Richardson had not picketed to urge Lucky to discriminate against whites, but rather to end discrimination against blacks. Justice Traynor pointed out that "[n]o law prohibits Lucky from discriminating in favor of or against Negroes," therefore "[t]he picketing in this case is directed at persuading Lucky to take action that it may lawfully take on its own initiative."[52] Traynor insisted that the Constitution protected "orderly appeals to the public coupled with a clear and truthful statement of the facts of the dispute."[53] Traynor's distinction became crucial to the United States Supreme Court's protection of civil rights picketing in the 1960s, but it did not carry the day in 1948.

The lawyers for Hughes and Richardson and the NAACP disagreed about whether to seek review in the United States Supreme Court. The NAACP's Loren Miller wrote to Thurgood Marshall that Justice Schauer's opinion was "a particularly bad one,"[54] and Bertram Edises said "it would be fatal error to allow this decision to stand unchallenged."[55] But Cecil Poole, who was the San Francisco NAACP's counsel and later became the first African American judge on the United States Court of Appeals for the Ninth Circuit, thought that *Hughes* was a bad test case. He wrote to Thurgood Marshall that the case involved only "proportional picketing" and "in no way prohibits the general picketing for jobs which is an ultimate weapon employed by many branches." Poole strenuously argued that proportional picketing was "unsound both economically, practically and philosophically" and was contrary to the goals of the NAACP; Poole urged the NAACP to stay out of the case and wait for a better vehicle to defend civil rights picketing.[56] The opposition to proportional hiring was not unusual; at that time Herbert Hill branded it "a sugar-coated form of segregation."[57]

ACLU lawyers waffled, but generally agreed with Poole. Herbert Levy, of the national ACLU, wrote to ACLU lawyer Osmond Fraenkel, arguing that if Hughes prevailed in the Supreme Court, then opponents of discrimination could picket to force employers to continue discrimination.[58] Ernest

52. 32 Cal. 2d at 869.

53. 32 Cal. 2d at 897.

54. Miller to Marshall, November 1948, NAACP Correspondence File.

55. Edises to Marshall, Jan. 22, 1949, NAACP Correspondence File

56. Poole to Marshall, January 10, 1949, NAACP Correspondence File

57. Dennis Deslippe, *Protesting Affirmative Action: The Struggle Over Equality After the Civil Rights Revolution* (Baltimore: Johns Hopkins University Press, 2012), 10.

58. Levy to Fraenkel, March 8, 1949, NAACP Cases: *Hughes v. Superior Court: Racial Quota Pickets*, Box 845, Folder 9, item 88. The ACLU of Northern California was involved from early on in the appeals process in support of Hughes and Richardson. ACLU Files, 1940–1949, MS 3580 (Series 11, Box 27, Folder 561), California Historical Society.

Besig, of the ACLU of Northern California, told Levy that the ACLU should perhaps stay out of the case because the picketers were communists, but then said that, on balance, the ACLU should join the case regardless because of the importance of the principle.[59] C.L. Dellums, the influential Oakland-based leader of the Brotherhood of Sleeping Car Porters, also had reservations; he said his organization was deeply opposed to proportional hiring. He blamed the ill-advised case on the Bay Area NAACP branch which, he said, was "the most completely communist capture branch in all of the NAACP."[60]

In the end, Hughes and Richardson persisted in seeking Supreme Court review. Robert Carter committed the NAACP national office to file an amicus brief emphasizing that the injunction is "a violation of free speech and a limitation upon the rights of organizations such as ours to seek to use lawful pressure means to obtain job opportunities for Negroes."[61] The NAACP, the ACLU, and the CIO's amicus briefs all emphasized free speech rather than whether race-conscious hiring was legal. Shortly before the briefs on the merits were due, Thurgood Marshall fired off a letter to the Richmond NAACP leadership expressing surprise that the case had been pressed. He chastised them for filing the case "without consultation with the National Office and/or the Legal Staff of the National Office," and insisted that the "Association can continue to exist only by cooperation between our branches and the National Office."[62] When it was pointed that Marshall had forgotten that he had urged it as a test case 2 years before, Marshall contented himself with insisting that, in the future, the Richmond branch should communicate more closely with the national office.[63] Juanita Wheeler, the secretary of the NAACP Richmond branch, replied rather defensively, insisting that they had not been involved in the case since 1948, and that the "quotas demand was not an issue when our branch was supporting the case and we have no obligations or committments [sic] in so far as the case is concern."[64]

Lucky's lawyers wrote to Marshall and also to Loren Miller, urging them to file an amicus brief in support of Lucky because of the NAACP's known opposition to racial quotas in hiring. This was mean

59. Besig to Levy, May 27, 1949. NAACP Cases: *Hughes v. Superior Court,* Box 845, Folder 9; ACLU Files, 1940–1949, MS 3580 (Series 11, Box 27, Folder 561), California Historical Society.

60. Dellums to McLaurin, April 5, 1949, Cases: *Hughes v. Superior Court*, Box 845, Folder 9.

61. Carter to Brotsky, August 29, 1949.

62. Marshall to Brown, October 25, 1949.

63. Ming to Marshall, October 28, 1949.

64. Wheeler to Marshall, November 8, 1949.

spirited, given that Lucky had initially named the NAACP as a defendant in the case. At best, it reflected that Lucky's Supreme Court counsel, who were not the same lawyers who had filed the complaint, were unaware that the NAACP was originally a defendant. Given that Lucky still refused to hire more than a few token blacks, the overture to the NAACP could not have been serious.[65]

Mobs and the Law of Direct Action

When Superior Court Judge Donovan held Richardson and Hughes in contempt of court for picketing, he captured what was actually at stake in the case much more accurately than the way the case morphed into a test of affirmative action on appeal. He portrayed picketing as a threat to law and order: "the Court cannot lend its assistance to this movement. It must protect not only this plaintiff but the community as a whole from the dangers which exist in continued activity along these lines."[66]

Hughes and Richardson's vision of a right of protest and their willingness to fight for their right to ask consumers to join them in forcing Lucky to abandon Jim Crow strikes a familiar chord in civil rights and labor history, as does their lawyer's criticism of the NAACP as being too conservative and too focused on litigation.[67] Like the radical labor activists who came before them and the student sit-inners who came after, they saw direct action as being at the core of building a social movement that would change the law and change the world. They sought to ally labor and civil rights organizations through direct action in order to build a class-based, multiracial movement. And the power of such a mass movement—the threat that mob action might actually change society—was precisely what prompted courts and legislatures in the 1940s and 1950s to force labor unions to curtail picketing, boycotts, and strikes. The free speech rights consciousness that they invoked was controversial because it challenged the more conservative conception of rights and law that, by 1947, had come to prevail in the NLRB, Congress, and the courts.

By picketing for the right of blacks to work and shop on terms of equality, Hughes and Richardson were not setting up a test case; they had not lined up lawyers, coordinated with national NAACP strategy, or figured out a plan that would deliver a legal victory in court. They resorted to

65. Frank Richards to Miller, October 27, 1949; Richards to Marshall, October 18, 1949.

66. Decision by the Court, filed April 30, 1948, *nunc pro tunc* as of November 20, 1947, Record of *Hughes v. Superior Court*, California Historical Society.

67. Christopher W. Schmidt, "Divided by Law: The Sit Ins and the Role of Courts in the Civil Rights Movement," *Law and History Review* 33 (2015): 113.

protest because the legislature and the people of California refused to enact fair employment legislation; therefore, they sought to appeal to a different kind of justice.

Although the case ended as a failed test case, it began as activism in a moment of radical and multiracial upsurge. Hughes and Richardson were part of the postwar strike wave that galvanized a resurgent working class to throw off the shackles of the wartime government-mandated no-strike pledges. Taking direct action to challenge California's version of Jim Crow, they were part of a movement to create multiracial, multiethnic unions, and challenged the power of the white oligarchy that had profited handsomely during war and sought to roll back the New Deal. Insisting on their right to demand racial justice, Hughes and Richardson sought not to win a test case but to articulate a vision of justice in defiance of the law of the era.[68]

Hughes' and Richardson's lawyers, if not Hughes and Richardson themselves, knew the defense of the legality of sit-down strikes, which, like labor picketing, had been the tactic of activists when the courts and legislatures failed working people. Its best known lawyerly defense was published by Maurice Sugar, a radical labor lawyer who had been counsel for the United Auto Workers until Walter Reuther purged him in a November 1947 anticommunist spree. Sugar spent months in 1936 and 1937 writing briefs and arguing in courts in defense of the sit-down strike.[69] Two days after the Supreme Court upheld the Wagner Act against constitutional challenge in April 1937, Sugar defended the sit-down in a speech to the Cuyahoga County Bar Association, and he published his views in the leftist magazine *New Masses* a few weeks later.[70]

Sugar asserted that the sit-down strike was *ethical* because it was the only way that workers could force their employers to abide by the National Labor Relations Act. But he went farther: the sit-down was *legal*, just like picketing, collective bargaining, and walk-out strikes. Sugar conceded that the sit-down was "an encroachment upon the property rights of the employer," but "[t]he law books abound with adjudications which justify encroachments upon property rights." "If the employer has the absolute right to run his business without *any* interference on the part of labor, he certainly has the right to run it free from interference by labor outside of his plant as well as inside. The same applies to the

68. Reid, "In a Defensive Rage," 1043. Christopher L. Tomlins, *In the Matter of Nat Turner: A Speculative History* (Princeton, NJ: Princeton University Press, 2020).

69. Christopher H. Johnson, *Maurice Sugar: Law, Labor, and the Left in Detroit, 1912–1950* (Detroit: Wayne State Press, 1988), 212–13.

70. Maurice Sugar, "Is the Sit-Down Legal?" *The New Masses*, May 4, 1937, 19; and Johnson, *Maurice Sugar,* 216–17, 296.

right to picket. Picketing certainly is an encroachment upon the property rights of the employer. Indeed, in one sense that is its main purpose." To the contention that direct action was lawless, Sugar retorted: "We are told that the workers have no respect for the courts. Who tells us this? The fifty-three Liberty League lawyers who announced that the Wagner Labor Act was unconstitutional, and deliberately encouraged its violation."[71] To establish the legitimacy of direct action in defiance of law, Sugar invoked Abraham Lincoln, but also Edmund Burke's 1777 criticism of repression of the Irish and the Americans: "People crushed by law have no hopes but from power. If laws are their enemies, they will be enemies to laws; and those who have much to hope and nothing to lose will always be dangerous, more or less."[72]

In the decade between the success of the Detroit and Akron sit-down strikes in 1937 and Hughes and Richardson's protests, the labor–civil rights Left had seen their gains halted or reversed. Courts had outlawed sit-down strikes and intermittent strikes or slow-downs.[73] The Supreme Court allowed states to prohibit secondary activity in 1942, even before Congress outlawed it in the Taft–Hartley Act.[74] And even in 1941, during the brief period in which the court treated labor protest as speech protected by the First Amendment, the court's vision of free speech tolerated no picket line violence of any kind whatsoever.[75] Hughes and Richardson, in retrospect, overestimated their chance of fitting civil rights protest in the increasingly narrow circle the court had drawn around constitutionally protected labor protest. But winning the case in litigation had not been their goal in the first place. Continuing the struggle was.

Nevertheless, seeing the case through the lens of what historians have shown about the court's retreat from broad protection for civil liberties in the 1940s and its reluctance to extend constitutional protection to the civil rights sit-ins of the early 1960s makes their loss seem inevitable.

71. Sugar, "Is the Sit-Down Legal?" 20–21; and Frederick Rudolph, "The American Liberty League, 1934–1950," *American Historical Review* 56 (1950): 19–33.

72. Sugar, "Is the Sit-Down Legal?" 20–21, quoting Edmund Burke, Letter to Charles James Fox, October 8, 1777. https://www.gutenberg.org/files/15702/15702-h/15702-h.htm#CHARLES_JAMES_FOX (accessed January 21, 2021).

73. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Int'l Union, United Auto Workers v. Wisconsin Emp. Rels. Bd.,* 336 U.S. 245 (1949); *Elk Lumber Co.*, 91 N.L.R.B. 333 (1950); James Gray Pope, "Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958," *Law and History Review* 24 (2006): 45–113; Karl E. Klare, "The Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941," *Minnesota Law Review* 62 (1978): 265–340.

74. *Carpenters Union v. Ritter's Café*, 315 U.S. 722 (1942).

75. *Milk Wagon Drivers Union Loc. 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).

On the one hand, it is entirely plausible to see *Hughes* as of a piece with what Laura Weinrib and Jeremy Kessler have explained about *Carolene Products* deference to the political branches and the anxiety about direct action.[76] But before concluding that the court of 1950 would necessarily reject the Hughes and Richardson vision of law in protest, it is worth considering why peaceful civil rights protest that was not prohibited by state statute and involved no violence, no coercion, and no trespass seemed too destabilizing in 1950 but not such a severe threat in 1963.

One reason is the specter that subversive radicalism would necessarily lead to violence: the very specter attacked by the 1941 Smith Act prosecution of militant Teamster drivers in Minneapolis.[77] The court's retreat from civil liberties, and the famous rift between the justices, began in a 1941 case arising from picketing in a late 1930s dispute between Chicago area dairies and milk delivery drivers.[78] Equating direct action with violence allowed the court to sacrifice protection for civil liberties by insisting that it was only deferring to the power of states and municipalities to prevent violence and, therefore, avoiding a revival of substantive due process. Indeed, this is exactly how Justice Frankfurter, writing for the majority, framed the Chicago dairy case.[79] Justice Hugo Black dissented—his first in a civil liberties case—and particularly irritated Frankfurter when he relied on Frankfurter's influential 1930 book that had detailed the problematic use of injunctions in labor disputes. (In a tart reply to Black's gracious note explaining his reliance on the book, Frankfurter said he had "not examined that book for ages."[80]) Black scoured news reports of the milk drivers' strike and created several pages of elaborate charts cataloguing the incidents of violence by date, by the damage to person or property, by whether there was evidence of union involvement, and by the identity

76. Laura Weinrib, "The Right to Work and the Right to Strike," *University of Chicago Legal Forum* 2017 (2018): 531; and Kessler, "The Early Years of First Amendment Lochnerism."

77. Donna T. Haverty-Stacke, *Trotskyists on Trial: Free Speech and Political Persecution Since the Age of FDR* (New York: New York University Press, 2015); Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (New York: Hill & Wang, 1982); Michael R. Belknap, *Cold War Political Justice: The Smith Act, the Communist Party, and American Civil Liberties* (Westport, CT: Greenwood Press, 1977); and Catherine L. Fisk, "A Progressive Labor Vision of the First Amendment: Past as Prologue," *Columbia Law Review* 118 (2018): 2057–94.

78. *Meadowmoor Dairies,* 312 U.S. 287. H. N. Hirsch, *The Enigma of Felix Frankfurter* (New York: Basic Books, 1981), identifies *Meadowmoor* as the case that began the split between Frankfurter and Black.

79. *Meadowmoor Dairies,* 312 U.S. at 299.

80. F[elix] F[rankfurter] to H[ugo] L[.] B[lack], February 6, 1941, *Hughes v. Superior Court* file, Black Papers, Library of Congress.

and punishment of the perpetrator.[81] It was on the basis of this careful scrutiny of the record that Black dissented from the majority's suggestion that the injunction targeted violence rather than picketing, and he worked hard to draw a line between the permissible and the dangerous in picketing.

Black was particularly troubled that the opinion's loose language would undermine all free speech protection for labor protest. Where Frankfurter's draft opinion said the violence was "enmeshed" in "contemporaneously violent picketing," Black scrawled questions on the draft about the meaning of these terms and whether they were supported by the evidence. Black wrote "no," "not so," or "not true" in the margins next to a few misstatements of the record about whether the injunction targeted violence or speech. Black's marginal notes on the draft disputed that the court's precedents allowed injunctions against speech in the "context" of violence: a term that Black also flagged as problematic. Where Frankfurter wrote that the Constitution protects only speech that "appeals to reason" and is not "an instrument of force," Black wrote that the picketing in that case *was* an appeal to reason. Importantly for how the law would later develop, when Frankfurter wrote that the states could enjoin picketing where associated violence had a "coercive effect" and also could enjoin picketing to prevent "future coercion," Black wrote question marks in the margin and scare quotes around the loose terms. And where Frankfurter wrote in the final sentence of the draft opinion that it was important for the court not to read "our own notions into the Constitution," Black simply wrote "freedom of speech."

Frank Murphy wrote a note to Black after he circulated the dissent, explaining that he agreed with much in Black's "powerful and eloquent" dissent, but suggested "let's take our time about this important case."[82] Murphy had been governor of Michigan during the sit-down strikes of 1937–38, and had written the opinions for the court in a pair of 1940 cases holding that labor picketing is speech protected by the First Amendment.[83] Both Frankfurter and Black thought that Murphy's vote would be influential, informed as it was by his experience in trying to accommodate labor activism to employer intransigence. In the end, Black lost Murphy but attracted the votes of Justices William O. Douglas and Stanley Reed, and the dairy case began the court's major retrenchment regarding protection for labor activism.

81. *Hughes v. Superior Court* file, Black Papers.

82. Murphy to Black, n.d., Black Papers; Henry Ellenbogen of Pittsburgh Court of Common Pleas to H[ugo] L[.] B[lack], August 1, 1941, Black Papers.

83. *Thornhill*, 310 U.S. 88; *Carlson*, 310 U.S. 106.

Fear of the power of the group (as opposed to the right of the individual) also explains some of the successes that the court's civil libertarians had in winning majorities in some cases. While Black was unsuccessfully challenging Frankfurter over picketing in the dairy case, he won the majority away from Frankfurter in another major civil liberties case involving Harry Bridges, president of the radical, multiracial International Longshore and Warehouse Union (ILWU), who had been held in contempt for publishing comments in the *Los Angeles Times* in violation of a gag order imposed by the judge presiding over the government's ongoing efforts to deport Bridges.[84] The Bridges case generated huge media attention and a great deal of ill-will between Frankfurter and Black over civil liberties and labor issues.[85] Perhaps Black received a majority in the Bridges case because it concerned the rights of an individual, not the power of the mob.

The next year, the same 5–4 split among the justices over labor and civil liberties was cemented when Frankfurter received a majority to hold that states could ban labor picketing that had a so-called "secondary" object.[86] Black objected that "the immediate purpose of the injunction was to frustrate the union's objective of conveying information to that part of the public which came near the respondent's place of business."[87] Even if the injury caused harm to the business, Black insisted, "I can see no reason why members of the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales in favor of the side they think is right."[88] For Black, the crucial distinction was whether the state court exercised "its permissible powers to regulate the use of its streets or the conduct of those rightfully upon them" or, instead, "barred the petitioners from using the streets to convey information to the public because of the particular type of information they wished to convey." What was unacceptable, according to the Black, was to enjoin free expression because "the public's response to such information would result in injury to a particular person's business."[89]

Republicans gained a majority in Congress in 1946 in part because of reaction to the postwar strike wave. They aimed the Taft–Hartley Act of mid-1947 squarely at the labor protest that had shown the power of the mob in the 2 years before. Black and his allies lost their nerve in protecting civil liberties in labor protest cases. To stick with the position that labor

84. *Bridges v. California*, 314 U.S. 252 (1941).
85. James F. Simon, *The Antagonists* (New York: Simon & Schuster, 1989), 121–28.
86. *Ritter's Café,* 315 U.S. 722.
87. Ibid. at 729.
88. Ibid. at 730.
89. Ibid. at 731.

protest is speech protected by the First Amendment would require invalidation of the many anti-picketing provisions of the Taft–Hartley Act. Given the Republican electoral victory that produced Taft–Hartley, and the congressional override of Truman's veto, Frankfurter was strengthened in his argument that voting to strike it down would be resurrecting Lochnerism under the guise of civil liberties. Outside the court, civil rights unionism was struggling in the South. The government had won several high-profile criminal prosecutions of communists and labor radicals under the anti-sedition Smith Act. The CIO was purging the more radical, activist, and racially inclusive unions. All of this made 1948–50 an inauspicious time for radical labor–civil rights activists to present a case in court.

* * *

When Hughes and Richardson's case reached the United States Supreme Court in the October 1949 term, the prospects for civil rights and labor direct action seemed dimmer than they had when Hughes and Richardson had begun their direct action in the spring of 1947. The Supreme Court had lost—to temporary incapacity, death, or a change of heart—three of the civil libertarians who would have been most likely to vote for them. Justice Douglas did not participate. He spent from October 1949 to early 1950 recuperating from a near-fatal equestrian accident.[90] The death of Frank Murphy in the summer of 1949 deprived the court of the perspective of one who, as governor, had refrained from evicting the sit-down strikers from automobile plants in 1937, who had written the 1940 opinion for the court holding that the First Amendment protected peaceful picketing at a factory gate,[91] and who as attorney general had created the Civil Liberties Unit of the Department of Justice to handle important cases of blacks denied the right to vote or working in peonage systems.[92]

For a decade after joining the court, Hugo Black had adhered to the view that picketing was speech protected by the First Amendment. But in April 1949, Black changed his position and wrote the court's opinion upholding a ban on picketing by ice delivery drivers, and made clear that he no longer regarded peaceful labor picketing as constitutionally protected speech.[93] He labored over many drafts of his opinion in the ice peddlers' case to justify his retreat from civil liberties, and to reconcile free speech rights with

90. Bruce Allen Murphy, *Wild Bill: The Life and Legend of William O. Douglas* (New York: Random House, 2003), 271.

91. *Thornhill*, 310 U.S. 88.

92. Sidney Fine, *Frank Murphy: The Detroit Years* (Ann Arbor: University of Michigan Press, 1975); and J. Woodford Howard, *Mr. Justice Murphy: A Political Biography* (Princeton, NJ: Princeton University Press, 1968).

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

his New Deal desire to allow government to regulate economic actors, including unions. Had Black taken a narrower position in the ice peddlers' case, and limited it to picketing situations in which the union had the power to coerce union members to observe a picket line or lose their union membership, he might have been in a position to treat civil rights picketing as speech even if labor picketing was not. But Black had written broadly, and having so recently abandoned his long-held position, he was disinclined to find civil rights picketing to be constitutionally protected.

Moreover, fear of the mob as opposed to tolerance for individuals manifested in Black's votes in 1949 and 1950. A month before the court handed down *Hughes* and the cases upholding Taft–Hartley, Black dissented when the court denied review of the Hollywood Ten's convictions for contempt of Congress for invoking the First Amendment as a shield against compelled testimony about their political views.[94] Black also dissented from the court's decision in *American Communications Association v. Douds,* handed down the same day as *Hughes,* rejecting a First Amendment challenge to the Taft–Hartley anticommunist affidavit.[95] Targeting individuals for their political beliefs presented a different case for Black than targeting activists for collective exertions of power. It was the power of group action, not the beliefs of an individual, which he believed posed a threat.

The newly confirmed Tom Clark, who replaced Frank Murphy, had been a liberal on civil rights issues when he worked in the Truman Administration Justice Department before joining the bench. The court had civil rights cases on its docket; it handed down *Sweatt v. Painter* in June of 1950, only a month after *Hughes*, holding that Texas violated equal protection by excluding blacks from the University of Texas Law School when the black public law school was so vastly inferior.[96] With more civil rights cases on the horizon, it must have occurred to him and the other justices to think about how civil rights protest would play a role if the Norris–LaGuardia Act did not protect picketing from state court injunctions. Clark approached *Hughes* with energy, and wrote several drafts of what he labeled at first a dissent and later a concurring opinion. He never circulated them, and ultimately joined the court's opinion. In later drafts, when Clark had shifted from dissenting to concurring, he continued to fault the opinions in *Hughes* and the two labor picketing cases for failing

94. *Lawson v. United States*, 339 U.S. 934 (1950); and *Trumbo v. United States*, 339 U.S. 934 (1950).

95. *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950).

96. Ibid.

to clearly articulate how to determine when some state policy justified a restriction on picketing. But without a strong civil libertarian to take the lead, Clark's and his law clerk's ideas went nowhere.

So Frankfurter, who by this point was receiving many of the assignments to write opinions for the court in labor picketing cases and had been voting to uphold restrictions on picketing since 1941, had no difficulty obtaining a majority. In the voluminous literature seeking to explain, justify, critique, or complicate the narrative of Frankfurter's switch from a labor civil libertarian to a staunch opponent of constitutional protection for labor activism, *Hughes* is overlooked. In the framing of the debates among Frankfurter and other members of the court as being about letting Congress and the states resolve the balance of power between labor and management, or deference to legislative regulation of economic relations, scholars make no mention of *Hughes* and its emphasis on political protest about civil rights.[97] Perhaps this is because Frankfurter treated the case as closely analogous to labor picketing cases.[98] Noah Feldman claims that Frankfurter's 1951 majority opinion upholding the convictions of the American Communist Party leadership in *Dennis v. United States* "marked the moment that he could no longer be fairly described as a liberal."[99] I think that moment came earlier, and the transformation certainly was complete by 1950 in *Hughes*.

Frankfurter's justification for upholding the injunction and contempt convictions had two major points. First, he discerned in California law a policy against a "quota system" for hiring.[100] This supposed policy, ironically, was based on the California Supreme Court opinions secured by the campaign against race discrimination of which Hughes and Richardson were a part.[101] What Frankfurter did not mention was that race discrimination by employers was still legal in California (and would remain so until 1959).[102] Moreover, even if race discrimination were illegal, it is far from

97. Clyde E. Jacobs, *Justice Frankfurter and Civil Liberties* (New York: Da Capo Press, 1974); Hirsch, *The Enigma of Felix Frankfurter*; Noah Feldman, *Scorpions the Battles and Triumphs of FDR's Great Supreme Court Justices* (New York: Twelve, 2010); Melvin Urofsky, *Felix Frankfurter: Judicial Restraint and Civil Liberties* (Boston: Twayne, 1991); Philip B. Kurland, *Mr. Justice Frankfurter and the Constitution* (Chicago: University of Chicago Press, 1971); and Jeffrey Hockett, *New Deal Justice: The Constitutional Jurisprudence of Hugo L. Black, Felix Frankfurter, and Robert H. Jackson* (Lanham, MD: Rowman & Littlefield, 1996).

98. *Hughes*, 339 U.S. 460.

99. Feldman, *Scorpions*, 348.

100. *Hughes*, 339 U.S. at 463.

101. *James v. Marinship Corp.*, 25 Cal. 2d 721 (1944); and *Williams v. International Brotherhood of Boilermakers,* 27 Cal. 2d 586 (1946).

102. Brilliant, *The Color of America*, 119.

clear that affirmative action in hiring as a voluntary remedy for the employer's own ongoing discrimination would have been treated as illegal discrimination. Hughes and Richardson had insisted all along that their picketing was to urge verifiable progress toward eliminating discrimination against blacks. Nevertheless, Frankfurter fancifully asserted, California distinguished "between picketing to promote discrimination, as here, and picketing against it."[103]

This aspect of Frankfurter's opinion was what most concerned Clark. The California Supreme Court cases on which the majority relied certainly were not a judicially created fair employment law. Absent a remedy for a person denied employment on the basis of race, Clark wrote in one of his drafts, "I cannot believe that the First Amendment is to be so diluted that vague generalizations, unsupported by legislative or even judicial remedies available to an injured party or the State, will support prohibition of free speech."[104]

The second point of Frankfurter's opinion was that picketing is not speech because it "exert[s] influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."[105] Frankfurter did not explain what those loyalties and responses were in the context of civil rights picketing. In an earlier draft, Frankurter had said that prospective customers might heed the picketers' exhortations because of "a feeling of embarrassment" at crossing a picket line and, when customers were union members, they would be required to respect a union picket line, under penalty of loss of union membership.[106] This was a point that Lucky had advanced early in the litigation but that Justice Traynor refuted. The union had nothing to do with picketing Lucky; it allowed its members to cross the picket line, and it had not placed the store on its Do Not Patronize list. Frankfurter probably deleted the reference to the loss of union membership because there was no evidence in the record that a consumer appeal conducted by a civil rights group would trigger union discipline of shoppers who crossed the picket line. Frankfurter nevertheless insisted that picketing is not speech, but is instead conduct that states may regulate in pursuit of a reasonable policy.

Frankfurter's opinion, echoing Lucky's litigation strategy, turned the racial and economic justice goals against the movement by making

103. *Hughes*, 339 U.S. at 466.

104. Memorandum of Justice Clark, dissenting, dated January 1950, Clark Papers, Box A3, Folder 1, Tarlton Library, University of Texas, Austin.

105. *Hughes*, 339 U.S. at 465.

106. Felix Frankfurter Papers, *Hughes v. Superior Court* file.

Hughes' and Richardson's protest about race-conscious hiring rather than about the race discrimination and racial violence that actually motivated it. Frankfurter made the case about racial tolerance rather than discrimination. The media coverage of the Supreme Court's decision picked up this theme, and portrayed the case in racially redemptive terms. When the court handed down its opinion, the *San Francisco Chronicle* and the *New York Times* each ran the same short Associated Press (AP) story quoting the passage in the majority opinion insisting that it was necessary to ban the picketing in order to prevent an upsurge of racial and ethnic strife by Hungarians, Poles, Germans, Portuguese, and Mexicans.[107]

In the scant media attention to the case, the losing side emphasized that the court's holding was very narrow. The communist *People's Daily World*, for example, said: "Observers point out that the right to picket for jobs was not involved in this case—only the question of the proportionate demand."[108]

A decade later, when the court conferred constitutional protection for the civil rights protest that began with the lunch counter sit-ins of 1960, Black portrayed *Hughes* as a case in which California was simply regulating the use of the sidewalks. He explained in a draft concurring and dissenting opinion in the court's first sit-in case that the court "never has" and "never should" hold that the First Amendment confers a right on "people to communicate ideas by patrolling, marching, and 'picketing' on streets and highways."[109] Justice William Brennan marked this language in the margin of the draft opinion, presumably because it was an inaccurate statement of the law, and Black omitted it from the published opinion. But in the draft and in the published opinion, Black did cite *Hughes* and the ice peddlers case for the proposition that "Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment."[110] Because the Southern cities confronted with the sit-ins were trying to suppress ideas, the court protected the protesters.

Hughes surfaced again when the NAACP turned its fight to Mississippi in 1964.[111] Local NAACP chapters picketed to enforce a boycott against white-owned stores that refused to hire black employees. The NAACP lawyers recognized that *Hughes* was a problem but offered two theories to

107. "Lucky Stores Win Ruling on Negro Clerks," *San Francisco Chronicle*, May 9, 1950, 2; and "Picket Bans Win in Supreme Court," *New York Times*, May 9, 1950, 19.

108. "Court Picket Ruling Held 2-Edged Sword," *People's Daily World*, May 14, 1950.

109. Brennan Papers, Box I: 118, Folder 5, Draft opinion from Black circulated to Court on December 3, 1964, Library of Congress.

110. *Hughes*, 379 U.S. at 578.

111. Memorandum on Mississippi Selective Buying Campaign, 4–5, Mississippi Pressures Boycott 'Made in Mississippi' 1964–65, NAACP General Office File.

distinguish it. First, the *Hughes* court had determined that the object of the picketing was unlawful. Second, the picketing was the problem because picketing is not "pure" free speech, whereas the boycott itself was something else.[112] The legality of the Mississippi boycott was eventually upheld by the Supreme Court in 1982 in an opinion that signaled a clear retreat from *Hughes*.[113]

Judges would later rely upon *Hughes* for the proposition that race discrimination in employment violates California public policy apart from statutory fair employment practices legislation and a state constitutional amendment. It has also been read to prohibit race conscious affirmative action in hiring.[114]

For labor, however, the legacy of *Hughes* was quite different. It was one of a dozen Supreme Court decisions in the 1940s and 1950s upholding injunctions against, and damages judgments for, picketing as a form of protest. Labor lawyers were forced to caution the unions they represented about the dangers of picketing. For example, Alfred Goldberg, counsel for the Wisconsin State Federation of Labor, said in a speech to the annual convention of the Wisconsin state federation shortly after the court handed down *Hughes*: "State legislatures are now free to prevent peaceful picketing by declaring that the object of the picketing is in violation of a state law or an announced public policy."[115] This dire warning was picked up by the national labor press. It turned up back in Contra Costa County, where *Hughes* arose, in the *Contra Costa County Labor Journal*. Decades later, in the same term in 1982 when the court granted First Amendment protection to the NAACP's civil rights boycott of Mississippi, the court rejected First Amendment protection for a political boycott launched by longshoremen.[116]

As became clear in the 1960s, civil libertarians on the court could have treated civil rights picketing in *Hughes* differently than picketing by a labor

112. Memorandum on Mississippi Selective Buying Campaign, 10. NAACP General Office File.

113. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982).

114. *San Diego Gas & Elec. Co. v. San Diego Congress of Racial Equality,* 241 Cal. App. 2d 405 (1966) (Coughlin, J., concurring); 43 Op. Cal. Atty's Gen. 200, 203–04 (1964); David Benjamin Oppenheimer and Margaret M. Baumgartner, "Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?" *University of San Francisco Law Review* 23 (1989): 191.

115. "Labor Lawyer Fears Injunction Rule," *Contra Costa Labor Journal*, September 22, 1950.

116. *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982); and James Gray Pope, "The First Amendment, the Thirteenth Amendment, and the Right to Organize in the Twenty-First Century," *Rutgers Law Review* 51 (1999): 941, 950.

organization. Civil rights groups lacked organized labor's power to coerce through threats to revoke union membership. And it was hard for business to characterize civil rights protest as having the anticompetitive goals and methods that they had used to tar labor protest. But to have protected the civil rights activism of John Hughes and Louis Richardson would require seeing them as lone individuals, not as the manifestation of a powerful movement. This is the significance of the embrace of radical labor-racial panic by Lucky and by Frankfurter. The radical and racially inclusive labor activism of *Hughes,* Operation Dixie, and the successful push of the ILWU to organize all of Hawai'i in one big multiracial union in 1947 made it difficult to see civil rights activism as fundamentally weaker than or different from labor activism.

Experiences of the Labor and Civil Rights Movements with Lawyers and Direct Action

The legal history of the civil rights movement portrays a complex relationship between movement activists and lawyers. Scholars describe both vertical relationships between activists and courts, mediated by lawyers, and horizontal networked relationships among various lawyers and activists in which courts or law played a very small role.[117] The labor movement, too, had this experience, although it has had less scrutiny of the vertical and horizontal relationships between and among courts, lawyers, and labor movement actors. *Hughes* illustrates a moment when the horizontal networks among labor and civil rights activists and lawyers overlapped, as both the activists and their lawyers formed common cause. It was also an instance in which the vertical relationships between labor unions and their lawyers and the courts were extended to the civil rights movement, and not in a good way, for the cause of civil rights activism.

The aftermath of *Hughes* differed in both the horizontal and vertical relationships of civil rights organizations as compared with labor organizations. Of course, it is important not to overstate the differences. There were many horizontal connections across the two movements. Civil rights and labor historians have documented the significance of direct action in the interlocking struggles by black workers and labor rights and civil rights.[118]

117. Risa Goluboff, "Lawyers, Law, and the New Civil Rights History," *Harvard Law Review* 126 (2013): 2312, 2319; and Christopher W. Schmidt, "Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement," *Law and History Rev*iew 33(2015): 93–150.

118. Eric Arnesen, *Brotherhoods of Color: Black Railroad Workers and the Struggle for Equality* (Cambridge, MA: Harvard University Press, 2001); Nelson, *Divided We Stand*;

Nevertheless, the aftermath of *Hughes* differed in the larger story of the vertical relationship between law and movement actors in the two movements. *Hughes* was an anomaly for the civil rights movement. Without minimizing the terrible cost paid by the tens of thousands who were jailed, lynched, or otherwise tormented by state and private violence, eventually civil rights activists and their organizations won constitutional protection for some movement activism. Law became, to some extent, a tool for progressive change, and civil rights lawyers pursued it. The historiography of how social movements have engaged with law has prioritized the civil rights and other movements that used law to advance formal equality for historically marginalized groups, and have focused on how and why social movements succeed or fail in generating social change via law.[119]

When the courts treated Richardson's and Hughes' civil rights protest under the framework they used for labor protest, civil rights movement activism shared the experience of unions with law: as a tool of social control capable of suppressing activism. Lawyers for the civil rights movement, including Truehaft, Edises, Condon, and Brotsky, defended individuals such as Hughes and Richardson, but they also *advanced* an agenda of claiming rights.[120]

For the labor movement, however, *Hughes* was not an anomaly. It was over-ruled for civil rights groups but not for labor. Direct action remains illegal in many situations, and unions face crushing damages liability for engaging in direct action.[121] Injunctions such as that in *Hughes* remained

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Thomas J. Sugrue, *Sweet Land of Liberty: The Forgotten Struggle for Civil Rights in the North* (New York: Random House, 2008); and Robert Korstad and Nelson Lichtenstein, "Opportunities Found and Lost: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (1988): 786–811.

119. Exceptions include Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994); Kim Voss, "The Collapse of a Social Movement: The Interplay of Mobilizing Structures, Framing, and Political Opportunities in the Knights of Labor," in *Comparative Perspectives on Social Movements*, ed. Doug McAdam, John D. McCarthy, and Mayer Zald (Cambridge: Cambridge University Press, 1996), 227–60. On labor lawyers: William E. Forbath, "Class Struggle, Group Rights, and Socialist Pluralism on the Lower East Side—Radical Lawyering and Constitutional Imagination in the Early Twentieth Century," *University of Texas Law Public Research Paper No. 712*, http://dx.doi.org/10.2139/ssrn.3485241 (accessed January 21, 2021); Robert W. Gordon, "The American Legal Profession, 1870–2000," in *Cambridge History of Law in America*, vol. 3, ed. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 107; and Jerold Auerbach, *Unequal Justice* (London: Oxford University Press, 1976).

120. Risa Goluboff, *The Lost Promise of Civil Rights* (Cambridge, MA: Harvard University Press, 2010).

121. Catherine L. Fisk and Diana S. Reddy, "Protection by Law, Repression by Law: Bringing Labor Back Into Law and Social Movement Studies," *Emory Law Journal* 70

a decisive aspect of how movement actors related to lawyers and law.[122] Law controls not only individual activists but entire organizations. Restrictions on labor picketing and boycotts, along with agency determinations of who could bargain with whom, deprived workers of the ability to form common cause with each other and with consumers and the public.[123] The eagerness of the NLRB and courts in the 1940s to bring the rule of law to labor relations channeled labor activity into bargaining dominated by union leadership at the expense of rank and file activism and engagement.[124] After *Hughes* and other significant losses, labor lawyers were often compelled to help their organizational clients comply with onerous law and to defend the organizations when their activism transgressed specified legal boundaries. Some of these lawyers were an important and neglected part of the apparatus by which courts and the NLRB restrained labor activism and imposed a pluralist vision that treated labor and management as interest groups whose bargains would be enforced; yet denied many substantive rights to labor, while leaving corporate power untouched.[125]

The American labor movement stands accused of being overly suspicious of state power and law, and too confident about what it could accomplish solely through negotiation and collective action.[126] Perhaps labor's

(2020): 63–152; and Richard A. Brisbin, Jr., *A Strike Like No Other: Law and Resistance during the Pittston Coal Strike of 1989–1990* (Baltimore: Johns Hopkins University Press, 2002).

122. William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991); and Victoria Hattam, *Labor Visions and State Power* (Princeton, NJ: Princeton University Press, 1993).

123. Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (New York: Cambridge University Press, 1985); Daniel R. Ernst, "Common Laborers? Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915–1943," *Law and History Review* 11 (1993): 59–100; and Dianne Avery, "Images of Violence in Labor Jurisprudence: The Regulation of Picketing and Boycotts, 1894–1921," *Buffalo Law Review* 37 (1989): 1–118.

124. James Gray Pope, "How American Workers Lost the Right to Strike, and Other Tales," *Michigan Law Review* 103 (2004): 518; Nelson Lichtenstein, *Labor's War at Home: The CIO in World War II* (Philadelphia: Temple University Press, 2010); Karl Klare, "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941," *Minnesota Law Review* 62 (1978): 265-339; David Rabban, "Has the NLRA Hurt Labor?" *University of Chicago Law Review* 54 (1987): 407–31; and James B. Atleson, "The Legal Community and the Transformation of Disputes: The Settlement of Injunction Actions," *Law and Society Review* 23 (1989): 41–74.

125. Katherine Van Wezel Stone, "The Post-war Paradigm in American Labor Law," *Yale Law Journal* 90 (1981): 1513; and Schiller, *Forging Rivals*.

126. Mark Barenberg, "Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation," *Harvard Law Review* 106 (1993): 1379–496.

intermittent failure to appreciate the conditions under which public law can be a resource, and how civil rights and civil liberties can advance the cause of American workers, may itself be constitutive of American exceptionalism. This aspect of the vertical relationship between movement actors and the law and lawyers distinguished the labor movement from the civil rights movement, which rarely has been criticized for being too skeptical of the power of law.

Legal repression of civil rights protest had undeniable effects: the anticommunism of the NAACP, the repression of the Black Panthers, the delay and weakening of civil rights laws, and the ruin or redirection of lives and career. At least peaceful civil rights protest eventually won constitutional protection, even if police brutality against Black Lives Matter protesters in 2020 suggests otherwise. Labor protest never gained even the formalistic protection of the First Amendment. Labor lawyers have been struggling to enable the work of organizing and asserting countervailing power against corporate might while also counseling clients to be cautious, lest the union face bankruptcy for engaging in strikes, picketing, or boycotts in violation of law.

Conclusion

As the legal history literatures on civil rights and labor seek to understand how class was eclipsed by the discussions of inequality focused on race and other identities, it is worth returning to those moments when law made it a little harder or a little easier to find common cause. *Hughes* was one such moment. Since the early 1940s, labor unions have lost almost every case they have argued in the Supreme Court asserting free speech rights for picketing or protest. Whether the separate constitutional free speech categories for labor and civil rights picketing and boycotts made a difference in the long struggle of workers to wrest greater power and more respect is unclear. But it certainly changed the role of lawyers for movement organizations. As many social movement lawyers and activists debated whether litigation, legislation, or direct action was more likely to produce progressive change in the law, labor lawyers debated how to protect the financial solvency of labor unions from secondary boycott and other injunctions and damages claims that were filed as soon as labor protest posed a threat to corporate power. Both civil rights and labor lawyers may have the same affection for the power of mass movement activism, but they have had different experiences since 1960 with the risks.

When the free speech rights of labor unions diverged from those of other social movement organizations, it may also have created barriers to close

alliances. There were important exceptions: Memphis sanitation workers in 1968, the California farmworkers in the 1960s and 1970s, and janitors in the 1990s. But the different legal risks provided a reason for activists in many poor people's movements to eschew being labor unions or even allying closely with them. Law gives them reason to trace their heritage to the boycotts and sit-ins of Mississippi and Greensboro in the 1960s rather than to Detroit in the 1930s. Today's labor and civil rights activists protest together and speak the same social justice language. They follow the example of John Hughes and Louis Richardson, but not the case that bears their name.