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LABOR AND THE SECONDARY BOYCOTT

ROBERT C. BARNARD AND ROBERT W. GRAHAM*

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."—LEWIS CARROLL.

Advisedly has the "boycott"31 been characterized as "a chameleon that is impossible of definition." Only the epithet "secondary boycott"3 has perhaps occasioned more intricate judicial gymnastics. Justice Steinert, writing for the Washington Supreme Court, has recently observed with perspicacity that "the term 'secondary boycott' is of somewhat vague signification and has no precise and exclusive denota-

*The authors wish to express their gratitude for the helpful suggestions and criticisms made by Donald E. Leland of the Seattle bar.


2Kestner, Der Organisationszwang, 344.


4An entertaining example of judicial legerdemain may be found in Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997, 1012 (1908) where it was stated that, although the publication of a boycott (secondary) could not be enjoined, nevertheless the declaration of such would be since "if the boycott were enjoined there would be no occasion for complaint against its publication."
tion. In the field of labor relations, as in other branches of the law, bench and bar have leaned on the comforting pillar of "lump concept" thinking which has more than once done yeoman's service for judicial reasoning and analysis. Truly has there been more than one black-robed Humpty Dumpty whose use of the phrase "secondary boycott" has meant "just what I choose it to mean—neither more nor less."

An elementary familiarity with the dogma of labor law discloses the touchstone of the law of the "secondary boycott"—its illegality. The definitions of "secondary boycott" like those of "boycott" are "nearly as varied as the cases defining the term." See Truax v. Bisbee Local, 19 Ariz. 379, 171 Pac. 121, 124 (1918). A few courts have termed picketing only the "offending" employer a "secondary boycott." Ellis v. Journeymen Barbers, 194 Iowa 1179, 191 N. W. 111, 113 (1922); Bomes v. Providence Local, 51 R. I. 499, 155 Atl. 581, 583 (1931); cf. Kitty Kelly Shoe Corp. v. United Retail Employees, 125 N. J. Eq. 290, 5 A. (2d) 682, 684 (1939). Other courts have refused or found it unnecessary to define the term. Hopkins v. Oxley Stave Co., 83 Fed. 912, 916 (C. C. A. 8th, 1897); Seattle Brewing Co. v. Hansen, 144 Fed. 1011, 1014 (C. C. Cal. 1905); Wilson & Co. v. Birt, 105 F. (2d) 948, 952 (C. C. A. 3d, 1939). In other cases union activities "which in their essence are not distinguishable" from the secondary boycott have been considered. Pacific Typesetting Co. v. Intern'l Typo. Union, 125 Wash. 273, 283, 216 Pac. 358, 362 (1923). See also O'Brien v. Fackenthal, 5 F. (2d) 389, 391 (C. C. A 6th, 1925) (Union activities were "governed by the underlying principle" of the secondary boycott); Scavenger Service Corp. v. Courtney, 85 F. (2d) 825, 833 (C. C. A. 7th, 1936) ("The picketing was well-nigh a boycott . . ."); Moore Forging Co. v. McCarthy, 243 Mass. 554, 137 N. E. 919, 922 (1923) (Union activities were "in substance a boycott . . ."). The term "secondary picketing", obviously an offspring of the "secondary boycott", has recently been coined to describe a familiar type of "secondary boycott". Evening Times v. Amer. Newspaper Guild, 122 N. J. Eq. 545, 195 Atl. 378, 379 (1937); Mitnick v. Furniture Workers, 124 N. J. Eq. 147, 200 Atl. 553, 554 (1938); Alliance Auto Service v. Cohen, 35 D. & C. 375 (Pa. Dist. Ct. 1939).

The definitions of "secondary boycott" like those of "boycott" are "nearly as varied as the cases defining the term." See Truax v. Bisbee Local, 19 Ariz. 379, 171 Pac. 121, 124 (1918). A few courts have termed picketing only the "offending" employer a "secondary boycott." Ellis v. Journeymen Barbers, 194 Iowa 1179, 191 N. W. 111, 113 (1922); Bomes v. Providence Local, 51 R. I. 499, 155 Atl. 581, 583 (1931); cf. Kitty Kelly Shoe Corp. v. United Retail Employees, 125 N. J. Eq. 290, 5 A. (2d) 682, 684 (1939). Other courts have refused or found it unnecessary to define the term. Hopkins v. Oxley Stave Co., 83 Fed. 912, 916 (C. C. A. 8th, 1897); Seattle Brewing Co. v. Hansen, 144 Fed. 1011, 1014 (C. C. Cal. 1905); Wilson & Co. v. Birt, 105 F. (2d) 948, 952 (C. C. A. 3d, 1939). In other cases union activities "which in their essence are not distinguishable" from the secondary boycott have been considered. Pacific Typesetting Co. v. Intern'l Typo. Union, 125 Wash. 273, 283, 216 Pac. 358, 362 (1923). See also O'Brien v. Fackenthal, 5 F. (2d) 389, 391 (C. C. A 6th, 1925) (Union activities were "governed by the underlying principle" of the secondary boycott); Scavenger Service Corp. v. Courtney, 85 F. (2d) 825, 833 (C. C. A. 7th, 1936) ("The picketing was well-nigh a boycott . . ."); Moore Forging Co. v. McCarthy, 243 Mass. 554, 137 N. E. 919, 922 (1923) (Union activities were "in substance a boycott . . ."). The term "secondary picketing", obviously an offspring of the "secondary boycott", has recently been coined to describe a familiar type of "secondary boycott". Evening Times v. Amer. Newspaper Guild, 122 N. J. Eq. 545, 195 Atl. 378, 379 (1937); Mitnick v. Furniture Workers, 124 N. J. Eq. 147, 200 Atl. 553, 554 (1938); Alliance Auto Service v. Cohen, 35 D. & C. 375 (Pa. Dist. Ct. 1939).

"United Union Brewing Co. v. Beck, 200 Wash. 474, 491, 93 P. (2d) 772, 779 (1938)."

"Llewellyn, A Realistic Jurisprudence—The Next Step (1930) 30 Col. L. Rev. 431."


"Typical judicial expressions may be found in Blandford v. Duthie, 147 Md. 368, 128 Atl. 138, 144 (1925) ("In addition the defendants violated the law in enforcing a secondary boycott"); Kitty Kelly Shoe Corp. v. United Retail Employees, 125 N. J. Eq. 250, 5 A. (2d) 682, 684 (1939) ("This is unlawful and constitutes secondary boycott"); Goldfinger v. Feintuch, 276 N. Y. 281, 11 N. E. (2d) 910, 914 (1937) (Lehman, J., concurring, "... peaceful picketing of plaintiff's place of business . . . is lawful. This is not a 'secondary boycott'"); United Union Brewing Co. v. Beck, 200 Wash. 474, 491, 93 P. (2d) 772, 780 (1939) ("... secondary boycott . . . will be restrained by a court of equity")."

Contrasted with the overwhelming bulk of statements that a "secondary boycott" is illegal only the following statements by the California courts have been found which verbally recognize that a "secondary boycott" may be legal:

"In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer, and to induce by fair means any and all other persons
term has been the function of a desired result rather than a functional characteristic of any given fact situation or situations. Identical fact situations have been found to be and not to be a "secondary boycott" and their legality has varied with this nominalism. In judicial calculus "secondary boycott" equals illegality. This tautology of measuring illegal relationships in terms of "secondary boycotts" and defining these in turn by reference to legality deserves to be equally as notorious as the philosophical regressions inhering in the merry-go-round of the *renvoi*.

The traditional definition of the "secondary boycott" is contained in Justice Pitney's opinion in *Duplex Printing Press Co. v. Deering*, wherein he states:

"The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as 'secondary boycott'; that is, a combination not merely to refrain from dealing with the complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to do the same, and, in exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employers, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal." *Pierce v. Stablemen's Union*, 156 Cal. 70, 103 Pac. 324, 327 (1909).

"The legality of a secondary boycott, peacefully conducted and without picketing was sustained..." *Ex parte Lyons*, 27 Cal. App. (2d) 293, 81 P. (2d) 190, 194 (1938).

"In... three states (California, Arizona and Montana)... the courts have refused injunctions against the secondary boycott..." *Citizens-News v. Connolly*, 2 L. R. R. Man. 856, 857, 1 C. C. H. Labor Cases 672 (Cal. Super. Ct. 1938).

It is sometimes stated that courts of other jurisdictions have recognized the legality of some "secondary boycotts" but the decisions of these jurisdictions contain no such explicit declarations. *See Citizens-News v. Connolly*, supra, at 857; *United Union Brewing Co. v. Beck*, supra, at 491, 93 F. (2d) at 780.

*See also Weil & Co. v. Doe*, 5 N. Y. S. (2d) 559 (1938).


to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it."

Similarly the Washington Supreme Court reiterates:

"While the term 'secondary boycott' is of somewhat vague signification and has no precise and exclusive denotation, the courts, both Federal and state, are agreed that any combination will be held to be a secondary boycott if its purpose and effect are to coerce customers or patrons, through fear of loss or bodily harm, to withhold or withdraw their business relations from the employer who is under attack."

But neither these nor other judicial expositions of the "secondary boycott" in terms of "coercion" offer much help in attempting to differentiate analytically a "primary" from a "secondary boycott."

Analytically a "primary boycott" would seem to be concerned exclusively with the relationships between two parties, i.e., between the employer (R) and his employees (E). Logically it should make no difference whether the change in relationships between them takes the form of a withdrawal from employment or cessation of business dealings, the first of these alternatives being universally referred to as the "strike" and the second usually being termed the "boycott" or a "primary boycott."

By a parity of analysis it would seem that wherever the alteration of relationships proximately sought involves those between third parties (T) and R, the bounds of the true "primary boycott" have been passed. And, for purposes of logic, it seems immaterial how the disruption of those relationships is sought and of what they consist. The introduction of T into the area of conflict for the purpose of influencing R, results in a "secondary boycott" in an analytical sense. The definition of the "secondary boycott" in terms of "coercion" employed to bring T

\[254\] U. S. 443, 466 (1920).
\[1\] United Union Brewing Co. v. Beck, 200 Wash. 474, 490, 93 P. (2d) 772, 779 (1939).

\[3\] A secondary boycott may be defined as a combination to cause loss to one person by coercing others against their will to withdraw from him beneficial business intercourse . . . " Smythe Neon Sign Co. v. Local Union, — Iowa, — 284 N. W. 126 (1939). Similar expressions may be found in A. F. of L. v. Buck Stove Co., 33 App. D. C. 83, 32 L. R. A. (n.s.) 748, 761 (1909); Meier v. Speer, 96 Ark. 618, 132 S. W. 968 (1910); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324, 327 (1909); Perry Truck Lines v. Intern'l Teamsters, 1 C. C. H. Labor Cases 1292, 1293, 5 L. R. R. 163 (Colo. Dist. Ct. 1939); Beck v. Railway Teamsters, 118 Mich. 70, 103 Pac. 324, 327 (1909); Gray v. Bldg. Trades Council, 91 Minn. 171, 97 N. W. 669, 669 (1903); Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997 (1908); Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 228 (1906).


\[5\] Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324, 327 (1909).
into the arena of combat instead of in terms of its analytical constituents can result only in the determination of the legality of a given state of facts in accordance with whether or not the court is of the opinion that the pressure exerted upon $T$ amounts to "coercion." Truly is this a test which can be and is used with impunity to cloak the opinions and economic predilections of the courts which employ it—a test by which, and only by which, can the various decisions as to what constitutes a "secondary boycott" be reconciled.

Our inquiry will be as to which of these "secondary boycotts" the courts have held legal and which have been "coerced" into illegality, together with some indication of the determinative factors, if any, which have led the courts to a given result.

The problem of the "secondary boycott" is in fact dual, its aspects being (a) the role of the third party against whom pressure is directed, and (b) the nature of the pressure employed. Accordingly, a twofold classification of the cases will be attempted, following which some of the possible trends that may be taken by judicial thought in working out the solution to these problems will be considered. For the purposes of treatment of the decided cases and to clarify our own thinking we propose to employ the term "secondary boycott" in an analytical sense, using it to designate any situation wherein pressure is exerted upon $T$, irrespective of its nature and irrespective of whether or not the courts have labeled it a "secondary boycott."

In line with the analysis suggested above, it is to be observed that in so far as purely peaceful picketing of $R$'s place of business by $E$ seeks to persuade customers ($C$), i.e., third parties ($T$), not to patronize $R$ and other employees ($E'$) not to work for $R$, such picketing contains at least the analytical elements of the "secondary boycott" since $T$ has effectively been brought into the picture. It is, however, recognized that peaceful picketing of $R$ by $E'^1$ has never been designated by the courts as a "secondary boycott"; and recently the United States Supreme Court in *Thornhill v. Alabama* has enshrugged with

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11What each individual member of a labor organization may lawfully do, acting singly, becomes an unlawful conspiracy when done by them collectively. Singly, they may boycott; collectively they cannot. The individual boycott is lawful, because it can accomplish little or nothing. The collective boycott is unlawful, because it might accomplish something." Caldwell, J., dissenting in Hopkins v. Oxley Stave Co., 83 Fed. 913, 931 (C. C. A. 8th, 1897). See also the dissenting opinion of Justice Brandeis in Duplex Printing Press Co. v. Deering, 254 U. S. 443, 485 (1920).

11For a discussion of the Washington cases involving picketing of $R$ by $E$ see Comments (1930) 5 Wash. L. Rev. 126, (1940) 15 Wash. L. Rev. 47.

11Cf. Kitty Kelly Shoe Corp. v. United Retail Employees, 125 N. J. Eq. 250, 5 A. (2d) 682 (1939), where it was held that picketing of $R$ by The New Jersey League of Women Shoppers in sympathy with the striking employees constituted a "secondary boycott."

constitutional sanctity E's right peacefully to picket R,20 a right which
the Washington court had finally recognized without qualification in
Yakima v. Gorham21 upon the grounds of legislative policy. Accord-
ingly, we but designate this situation in passing as a type of "sec-
ondary boycotts"22 under the various anti-injunction acts23 has been
The procedural question as to the enjoinability of this or other "sec-
ondary boycotts" under the various anti-injunction acts22 has been
conceived to be beyond the scope of this discussion.23 A considera-
tion of

20The view of the United States Supreme Court in Thornhill v. Alabama,
60 Sup. Ct. 736 (1940), may be compared with earlier statements as to the
legality of picketing. See American Steel Foundries v. Tri-City Council
257 U. S. 184, 205 (1921), where passing through a picket line was called
"running the gauntlet." Cf. Atchison Ry. v. Gee, 139 Fed. 582, 584 (C. C.
Iowa 1905), where it is stated:
"There is and can be no such thing as peaceful picketing, any
more than there can be chaste vulgarity or peaceful mobbing, or
lawful lynching."
21200 Wash. 564, 94 P. (2d) 180 (1939).
22A discussion of the anti-injunction acts may be found in Feinberg,
loc. cit. supra note 3, Hellerstein, loc. cit. supra note 3; Smith, loc. cit.
supra note 3; Etter, Statutory Definitions of "Labor Dispute" (1940) 19
ORE. L. REV. 201; Smith and DeLancey, The State Legislatures and Unionism
(1940) 38 Mich. L. Rev. 987.
23These statutes were designed to prevent the issuance of preliminary
injunctions which frequently decided a labor dispute before the case could
be tried on its merits. FRANKFURTER AND GREENE, op. cit. supra note 1 at
200-201. The uniformity with which injunctive relief has been sought in
the decided cases testifies to the ineffectiveness of monetary damage in
the bargaining struggle and to the fact that "damages in cases of this
kind are very difficult, if not impossible, of correct mathematical calcula-
Dist. Ct. 1939). In but few cases have damages been sought or allowed. See
Scavenger Service Corp. v. Courtney, 85 F. (2d) 825 (C. C. A. 7th, 1936);
Martineau v. Foley, 231 Mass. 220, 120 N. E. 445 (1918); Gatzow v. Buening,
106 Wis. 1, 81 N. W. 1003 (1900). These anti-injunction statutes purport
where the statute explicitly states that "nothing herein shall be construed
to legalize a secondary boycott"—WIS. STAT. (1939) § 103.53—the sub-
stantive law would appear to be unaffected. See Atlantic Ref. Co. v. Cohen,
34 D. & C. (Pa. Dist. Ct. 1938). The continued granting of injunctions in
situations traditionally viewed as "secondary boycotts" warrants the gen-
eralization that "secondary boycotts" are not "labor disputes" within
these statutes. Lake Valley Farm Products, Inc., v. Milk Wagon Drivers' 
Union, 108 F. (2d) 436 (C. C. A. 7th, 1939); Meadowmoor Dairies v. Milk
Wagon Drivers' Union, 371 Ill. 377, 21 N. E. (2d) 305 (1939); Evening Times
v. Amer. Newspaper Guild, 124 N. J. Eq. 71, 199 Atl. 538 (1936); United
Union Brewing Co. v. Beck, 200 Wash. 474, 93 P. (2d) 772 (1939). Contra:
Pau/ly Jail Bldg. Co. v. Intern'l Ass'n, 29 F. Supp. 15 (E. D. Mo. 1939); 
Hydrox Co. v. Doe, 293 N. Y. Supp. 1013 (1937); Davega-City Radio, Inc.
v. Randau, 1 N. Y. S. (2d) 514 (1938); Atlantic Ref. Co. v. Cohen, 34 D. & C.
582 (Pa. Dist. Ct. 1938). However, these statutes appear to have had a
profound effect, even though indirect, upon the substantive law. So clear
a declaration of legislative policy cannot be lightly glossed over. Enjoin-
able conduct must a fortiori be illegal but non-enjoinable conduct is not
of necessity legal. Some courts, however, have indulged in the non
sequitur that non-enjoinable conduct must be legal, and it appears that
such dicta is worming its way into the substantive law. For example, in
U. S. v. Hutcherson, 32 F. Supp. 600, 603, 604 (E. D. Mo. 1940) it is said that
"the purpose of the Norris-LaGuardia Act is to legalize and sanction the
use of peaceful persuasion in 'labor disputes'. . . . The tendency of legis-
the anti-injunction acts posits a further problem which can only be noted in passing—that of the connection between the "secondary boycott" and the "jurisdictional dispute." The Norris-LaGuardia Act by its definition of "labor dispute" eliminates the necessity of the employer-employee relationship in the permissible area of struggle. The Washington court on the other hand, has delineated the "lawful labor dispute" in terms of the employer-employee relationship, and has determined that an outside union cannot peacefully picket nor exert other pressure on R when none of its members are employees of R, irrespective of whether the union seeks to displace non-union employees or members of a rival labor organization.

In this connection the *Thornhill* case may prove pregnant with possibilities. Is the "labor dispute," which E has a constitutional right to publicize, to be delineated by the statutory decisions as to what constitutes a "labor dispute" under the Norris-LaGuardia Act? Or may the *Thornhill* case be limited to its facts, holding that there is a constitutional privilege "effectively to inform the public of the facts" only when the proximate relationship of employer-employee exists?

Our concern, however, is with the extent to which labor may exert pressure against third parties. It is conceivable in the "jurisdictional dispute" to view the union bringing pressure upon R as E and the rival union or non-union group as T, the third party, under which view the situation would fall within the analytical concept of a "secondary boycott." Such analysis, however, finds no judicial acceptance and the relationships with third parties which the precepts of the "sec-
ondary boycott” have protected from “coercion” have been other than employment relationships. The same protection is afforded T irrespective of whether pressure is being brought by employees of R or an outside union. In short it appears that the cases make no distinctions as to limits of permissible pressure against T in those situations involving a “jurisdictional dispute,” and the scope of labor’s activity is delimited in terms of the same factors which govern the traditional “secondary boycott.” To this end E will be used to designate union labor irrespective of whether or not the employer-employee relationship exists, and cases involving the jurisdictional dispute will be referred to only in so far as they involve pressure against third parties.

CLASSIFICATION OF CASES

As indicated above, unquestioned recognition has now been accorded the legality of the peaceful picketing of R by E, albeit an objective is admittedly to influence T. In order to obviate a burdensome and probably useless citation of the all too numerous cases in this type situation of the analytical “secondary boycott,” the cases involving union activity in geographical proximity to the employer’s place of business have arbitrarily been eliminated from treatment. The thread of consistency sought to be followed has been the inquiry as to whether or not the activities of E have centered solely “in the vicinity of the place of business of an employer.”

Any attempted classification of the cases along the lines of the purpose for which pressure is being exerted by E proves fruitless. Whether or not the objective be higher wages, shorter hours, better working conditions, a closed shop, or other aims, the nature and extent of the activity which E may direct against T remains unaltered. There

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21See, for example, United Union Brewing Co. v. Beck, 200 Wash. 474, 493, 93 P. (2d) 772, 781 (1939).


23From the majority opinion in Thornhill v. Alabama, 60 Sup. Ct. 736, 743 (1940).

24My Maryland Lodge v. Adt, 100 Md. 238, 59 Atl. 721 (1905).


26Marx & Haas Co. v. Watson, 168 Mo. 133, 67 S. W. 391 (1902).

It is perhaps inevitable that in dealing with the kaleidoscopic manifestations of the "secondary boycott," the number of whose forms has been limited only by the ingenuity of its creators, that the courts have succeeded only in bringing confusion out of chaos. Recognizing the futility of attempting to analyze or reconcile the cases upon the nominalism there found, it is believed that a helpful dissection of the "secondary boycott" can best be made in the factual terms of two important variables—first, the status of $T$, i.e., the position of the third party against whom pressure is directed; and second, the form which that pressure takes, cognizance being taken of the fact that any given case may involve combinations of both variables. The ineptitude with which legal research lends itself to the methods of the laboratory technician and the fact that a composite situation as seen by the trial judge is frequently more persuasive than his bare and sketchy recitation of facts must be borne in mind. Keenly aware of these limitations, we turn to the decided cases.

In by far the greater number of cases embracing a "secondary boycott" the place of $T$ has been occupied by customers of $R$. In other cases $T$ has been a supplier either of materials or services. In a few situations pressure has been directed at persons more remotely connected with $R$, as for example customers or suppliers not of $R$ but of $R$'s customers or suppliers, situations which have been characterized as "tertiary boycotts."


See cases cited infra notes 46, 52, 56, 62, 63, 64 and 69.
See cases cited infra notes 47, 53, 57, 62, 63, 64 and 69.
See cases cited infra notes 48, 54, 58, 62, 63, 64 and 69.

*Note (1923) 23 Col. L. Rsv. 578.
The determinative factor in all these situations and the multitude of variations therefrom appears not to be who fills the shoes of T. "Coercion" of any third party is illegal. Similarly it seems immaterial whether E exerting the pressure consists of members of the same local or international organization or whether E embraces members of divergent labor groups. The determinant is whether or not the nature and extent of the pressure utilized by E against T amounts to "coercion."

**Actual force.** The employment of actual force or violence against T is, of course, recognized as illegal; similarly threatening or intimidating T is coercive, although a finding of "threats and intimidations" may be a verbal catch-all which covers a multitude of sins.

**Strikes.** Turning to a consideration of the economic weapons employed by E we find that strikes or threats of strike against T constitute "secondary boycotts" in the eyes of the courts irrespective of whether T is a customer of R's goods or services, or whether he is a

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"Picketing third parties has been held illegal irrespective of whether the picketing was done by members of the same local, Evening Times v. Amer. Newspaper Guild, 122 N. J. Eq. 545, 195 Atl. 378 (1937), 124 N. J. Eq. 71, 199 Atl. 596 (1938), or by other labor groups. See Kitty Kelly Shoe Corp. v. United Retail Employees, 125 N. J. Eq. 250, 5 A. (2d) 682 (1939). Similarly threats of refusal to handle "unfair goods" have been condemned whether the threats came from members of the same international, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U. S. 37 (1927), or from associations of different internationals. Alfred W. Booth & Bro. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226 (1906). Likewise have threats of strikes against third parties been deemed unlawful regardless of their issuance by members of the same international, Pac. Type Co. v. Intern'l Typo. Union, 125 Wash. 273, 216 Pac. 358 (1923), or members of other organizations. Decorative Stone Co. v. Bldg. Trades Council, 23 F. (2d) 426 (C. C. A. 2d, 1928), cert. denied, 277 U. S. 394 (1928).


supplier of $R^{47}$ or some other third party. It may be interesting to note that where labor is on strike against a supplier of $R$ the Washington Supreme Court has failed to designate this type situation as a "secondary boycott," being content to observe that "there are in the books many cases involving the question of 'secondary boycott' which in their essence are not distinguishable from the principle here involved." It is generally held, however, that union men may refuse to work with non-union men on the same low subcontractor-employer is concerned.


Refusal to handle. In those situations where employees of T have refused to handle goods manufactured or processed by R or supplies destined for R, the traditional dogma of the "secondary boycott" has been written. Whether T is R's customer or his supplier seems to be a distinction without a judicial difference. Likewise if T is a step removed, being the customer or supplier of R's customer or supplier, the same result follows—illegality.

"Duplex Printing Press Co. v. Deering, 254 U. S. 443, 447 (1920); Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n, 274 U. S. 37 (1927);
Since the "secondary boycott" invalidated by the United States Supreme Court have involved violations of the Sherman Act it may be questioned whether that court has passed on the status of a "secondary boycott" per se. See also Lowe v. Lawlor, 208 U. S. 274 (1907), 225 U. S. 522 (1915); Gompers v. Buck's Stove Co., 221 U. S. 418 (1911). Cf. the following statement from Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, supra at 50:

"Whether either kind of boycott was lawful or unlawful at common law was held to be immaterial, and the distinction between a primary and a secondary boycott was only important to be considered upon the question of the proper construction of the Clayton Act."

Picketing. It is in the treatment of those cases involving labor's most utilized weapon—the picket—that the analytical treatment of the "secondary boycott" has sunk to its lowest ebb. Again the vast majority of jurisdictions prohibit any "secondary picketing" of T regardless of whether T is a customer, supplier, or is related to R in some miscellaneous or more remote connection. A few courts have


In the following cases the court refused to issue an injunction under the applicable anti-injunction act: Wilson & Co. v. Birl, 105 F. (2d) 848 (C. C. A. 3d, 1939); Pauly Jail Bldg. Co. v. Intern'l Ass'n, 29 F. Supp. 15 (E. D. Mo. 1939); Hydrox Co. v. Doe, 293 N. Y. Supp. 1013 (1937); Davega-City Radio, Inc., v. Randau, 1 N. Y. S. (2d) 514 (1938); Devon Co. v. Levinson, 5 L. R. R. 496, 1 Prentice Hall Labor Service, fI 22,162 (N. Y. Sup. Ct. 1940); Senn v. Tile Layers Union, 222 Wis. 383, 268 N. W. 270 (1936), aff'd on other grounds, 301 U. S. 468 (1936). See also cases cited note 93 infra.


accorded labor the permission to exert economic pressure in the form of picketing but have felt constrained to verbal consistency and have found no "secondary boycott."

Unfair Lists. With reference to "unfair lists," the courts have prohibited placing T's name on such lists and the early decided cases prevented E from notifying T that R is on an unfair list.

Solicitation. In general where E has employed only "peaceful persuasion" against customers or other third parties the courts have not


The position has been taken by some commentators that picketing can only be viewed as a means of publicizing a labor dispute. See Hellerstein, op. cit. supra note 3, at 350. A more realistic view, however, would seem to recognize that a picket line may well be the means of economic or psychological pressure as well as a source of information.

See discussion infra pp. 155-157. See also cases cited supra notes 56, 57 and 58.


See cases cited infra note 69.
intervened.\(^6\) Where, however, the "peaceful persuasion" of T is personali-
zed,\(^7\) the difference between such "persuasion" and a threat of strike or refusal to handle is possibly "that between tweedledum and tweedledee."\(^8\) This consideration may perhaps be the invisible golden thread of reconciliation running through the chaotic maze of cases wherein the courts have apparently at will enjoined or refused to en-
join the dissemination of letters and circulars\(^9\) or other modes of

\(^{6}\)See Duplex Printing Press Co. v. Deering, 254 U. S. 433, 468 (1921), and cases cited infra note 69.

ment Workers, 12 Ohio Op. 228 (Ohio Co. Ct. 1939); Where, however, circulars or letters contain false or fraudulent ma-
terial, their publication is generally restrained.


\(^{9}\)The dissemination of peaceful informative circulars or letters is gen-
erally upheld. Truax v. Bisbee Local, 19 Ariz. 379, 171 Pac. 121 (1918); J. F. Parkinson Co. v. Bldg. Trades Council, 154 Cal. 581, 98 Pac. 1027 (1908); Lindsay & Co. v. Mont. Fed. of Labor, 37 Mont. 264, 96 Pac. 127 (1908); Iverson v. Dlin, 44 Mont. 270, 119 Pac. 719 (1911); Empire Theater Co. v. Cloke, 53 Mont. 183, 163 Pac. 107 (1917); Finsheimer v. United Gar-

Where, however, circulars or letters contain false or fraudulent ma-
soliciting support for labor's cause.\(^7\)

An additional problem, which can be but mentioned, is the extent to which the courts have been influenced by the existence of contractual relationships that may be affected by the pressure being exerted by E. The early decisions branded as illegal any activity by E which resulted in forced alteration of R's contractual relations with his employees,\(^1\) customers,\(^2\) or other third parties.\(^3\) More recent decisions,\(^4\) and in particular the New York cases,\(^5\) have indicated that so long as E is pursuing legitimate ends and is utilizing "illegal" pressure, the fact that contractual relationships may be altered is immaterial.\(^6\) The sanctity of the contract finds scant judicial exposition in current labor decisions.

A more modern phase of this problem, and one which has as yet occasioned but sparse judicial recognition, is the effect to be given a contract between E or its affiliated labor organization and T which stipulates for certain results which E could not bring about by resort to economic pressure.\(^7\) For example, if E or the central labor organization with which E is affiliated has a contract with T that T will not handle "unfair" goods,\(^8\) what effect will this contract be given in a

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Advertising by the unions is generally upheld. Lisse v. Local Union, 2 Cal. (2d) 312, 41 P. (2d) 314 (1935); Philip Henrici Co. v. Alexander, 198 Ill. App. 568 (1916); Lietzman v. Radio Station WCSS, 262 Ill. App. 203 (1935); Rogers v. Evarts, 17 N. Y. Supp. 264 (1891); State v. Van Pelt, 136 N. C. 633, 49 S. E. 177 (1904); Longshore Printing Co. v. Howell, 26 Ore. 527, 38 Pac. 547 (1894); Contra: Campbell v. Motion Picture Operators, 151 Minn. 220, 186 N. W. 781 (1922).


Such a contract, containing provisions similar to those found in many modern union contracts, was involved in Swift & Co. v. Amalgamated Meat
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jurisdiction which forbids E to picket or otherwise “coerce” T into refusing to handle such goods? Is there now a dispute between E and T, a legitimate purpose for pressure on T? Has this contract established such a “primary” relationship between E and T that picketing of T is no longer a “secondary boycott”? Or will the threat of a picket line on T if he fails to live up to his contract lead the courts to treat the situation the same as one involving no such contract? The decided cases lend little support for prognostication, but it may not be amiss to suggest that such a contract will probably not, in the eyes of the courts, legalize a “secondary boycott” which would otherwise be felled by the judicial ax.79

By way of summary it may be concluded that the law as derived from the decided cases by and large prevents the direction of any pressure against T, irrespective of T’s relationship with R, the decisions of New York being the notable exception.80 Where, however, the activity of E consists entirely in the peaceful dissemination of information and “peaceful persuasion” of T, the courts have generally failed to find a “secondary boycott.” From here the cases fade off into the shadowy penumbra of illegal “coercion.”

When peaceful dissemination of information and requests (or the peaceful picketing of T in a few jurisdictions) ripens into “coercion” can perhaps better be answered by reference to the unwritten law than to the books.81 In truth the “peaceful” picket or innocuous “unfair” list may be the “talismanic symbol”82 of a concerted policy of “refusal to handle” on the part of organized labor. And yet the cloaking of judicial reasoning in such intangibles as “coercion” may perhaps be more understandable than the jurisprudential realist would concede. Whether or not T has in truth been “coerced” may depend not only upon the reported facts but also upon such factors as “the social and economic ideas of judges,”83 the size and strength of the union, its

Cutters, No. 318647 King County Super. Ct., judgment of dismissal entered April 23, 1940. Meat Cutters Local No. 81, an affiliated local with Packing House Workers’ Local No. 186 to which the employees of Swift & Co. (R) belonged, had negotiated contracts with various butcher shops (T), customers of Swift & Co., which provided that “Employers shall, upon request of the Union, discontinue purchasing supplies from concerns that have been declared unfair by the State Federation of Butchers and the Central Labor Council . . . .”


See discussion infra, page 155 et seq.


From the dissenting opinion of Brandeis, J., in Duplex Printing Press
reputation in the past for “goon squad” tactics, the extent and effectiveness of the union’s affiliation with other labor groups, whether or not the union requests were broadcast generally by circulars or were effectively directed toward T individually with an inarticulate “or else”—all of which factors may unconsciously and subtly be reflected in a judge’s finding of “coercion.”

Perhaps this intangible judicial license of decision is but the accouterment of those imponderables which find expression not upon the printed page, but which may permeate the atmosphere of the court room or community.

**Unity of Interest**

Throughout the cases, the courts have sought to prevent “coercive” union pressure against third parties who are “strangers” to the industrial dispute. “Strangers,” the courts argue, should not suffer loss because of a dispute between two other parties. However, in modern economic life, founded upon specialization and interdependence, the apparent simplicity of determining who is a “stranger” is illusory. A single dispute affects a whole community, albeit slightly, and the action of each individual has some influence, however remote, on the outcome of the dispute. Very recently Justice Murphy declared:

> "The health of the present generation and of those as yet unborn may depend upon these matters, and the practices of the single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. At merest glance the State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of real local or private concern."

Hellerstein tersely summarized the idea of social unity in absolute terms in the statement “Neutrality is impossible.”

Courts have become increasingly aware of the “facts” of modern life and, although decisions are not decided by reference to principles of social unity having the aesthetic symmetry of absolutes, it is in those cases involving pressure upon third parties, suppliers or customers of R, that the New York courts have evolved the concept “unity of interest” as a criterion for delimiting the sphere of permissible union activities.


*Thorndill v. Alabama, 60 Sup. Ct. 736, 744 (1940).

*Hellerstein, op. cit. supra note 3 at 354. Hellerstein has ably analyzed the sociological implications of the doctrine of unity of interest which he espouses.
Courts are forced to determine how far into the economic life of the community the union may carry its struggle. "There must in all reason be a limit somewhere."

The doctrine of "unity of interest" does not have a long and respected judicial ancestry. A good statement of the general principle may be found in Justice Brandeis' dissenting opinion in the *Duplex* case:

"A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the working-men did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties. But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself."

The broad language used by Justice Murphy in *Thornhill v. Alabama* raises the question whether the Supreme Court of the United States has inferentially adopted the "unity of interest" precept. One California superior court has relied on the doctrine in dealing with a "secondary boycott."

But it is only the New York courts which have examined the doctrine in any detail. As enunciated in the leading case, *Goldfinger v. Feintuch*, the principle is a logical development of the New York rule that *E* may picket *T* so long as the pickets bear banners which refer only to *R* or his products and contain no reference to *T*. After

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9From the opinion in Evening Times v. Amer. Newspaper Guild, 124 N. J. Eq. 71, 199 Atl. 598, 604 (1938).


9Supra p. 154.


observing that it is illegal to picket "one who is not himself a party to an industrial dispute," the court held that a retailer (C) of Ukor, a non-union sausage, has a "unity of interest" with the non-union manufacturer (R) with whom the union has a dispute, which justifies the union's picketing the retailer's (C's) place of business, provided the banners carried by the pickets refer to the manufacturer (R) only as "unfair" and contain no reference to the retailer (C). The "unity of interest" principle was phrased in the following language:

"Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale, and this may result in the unfair reduction of the wages of union members. Concededly, the defendant union would be entitled to picket peacefully the place of the manufacturer. Where the manufacturer disposes of the products through a retailer in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of presenting its plea to the attention of the public."

It must not be assumed that Goldfinger v. Feintuch represents an unqualified adoption of the sociological precept that "Neutrality is impossible." The court felt constrained to take a more practical and, it can not be gainsaid, more realistic attitude in determining the limits of permissible union activity. Finch, J., carefully pointed out that the broad statement of principle was confined to the facts in the case. The lower courts in New York have made more elaborate attempts to prune the principle by restrictive interpretation. In Feldman v. Weiner, the court announced that:

"The courts, since the Goldfinger v. Feintuch case, have sought to limit the application of that case to its facts; they have refrained from broadening the meaning of 'unity of interest' beyond the scope therein."

The lower courts, in restricting the operative effect of the "unity of interest" principle, have attempted to establish the following rules of limitation: The "ultimate consumer," according to one court, is not in "unity of interest" with a third party (T) who is his supplier (S). It has also been held that the meatpackers' union can not

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9Id. at 913.
9Hellerstein, loc. cit. supra note 86.
917 N. Y. S. (2d) 730, 733 (1940).
picket a union meatpacking establishment (S) because it supplies a small part of its product to a non-union remanufacturing plant (R) with whom the union has a dispute, the court stating that the rule in Goldfinger v. Feintuch is limited to fact situations involving products manufactured by non-union labor.99 Thus up to the present, it is only when a retailer of a non-union product100 or a product serviced by non-union labor101 is involved that the New York courts have found “unity of interest.”

It has been pointed out above that an examination of the problem “secondary boycott” has two aspects: First, which third parties may be subjected to pressure; and second, what kind of pressure may be exerted against them.102 By the test of “unity of interest” the courts may determine against whom pressure may be exerted; but the test does not determine the nature and extent of that pressure. Since “unity of interest” is not “identity of interest”, it does not follow that T may be subjected to the same pressure as R. Up to the present, the courts adhering to the “unity of interest” idea have permitted only peaceful picketing of T,103 with the further qualification in New York that banners must refer to R or the non-union product only and not to T.104 The few cases have not considered the kind of pressure to which T may be subjected, but it is anticipated that the principles which govern the balancing of the injury which T suffers against the desirability of furthering union interests will be determinative in deciding what “coercive” measures E may take against T. Courts might well consider the relative strength of the union, the employer and T, the intimacy of the relationship between R and T, the public injuries resulting from a widespread rather than localized dispute, along with the multitude of imponderables which are inevitably concomitants of an involved factual situation.105

Logically, the “unity of interest” cases impel a more comprehensive analysis of the two phases of the problem of the “secondary boycott.” In the great majority of “secondary boycott” situations T is subjected to pressure not only by the aggrieved union, but by other locals of

Doe, 5 N. Y. S. (2d) 559 (1933); Canepa v. Doe, 277 N. Y. 52, 12 N. E. (2d) 790 (1938); People v. Bellows, 281 N. Y. 67, 42 N. E. (2d) 238 (1939); Sol Katzman v. Kirkman, 18 N. Y. S. (2d) 903 (1940).

100Feldman v. Weiner, 17 N. Y. S. (2d) 730 (1940).

103See discussion supra, p. 141.
104See cases cited supra notes 91, 100, 101.
105See note 93 supra.
106See discussion supra, p. 140.
the same international, or by fellow unions. Consequently it would seem that here the courts must face two additional questions: First, which unions \((E')\) are sufficiently identified in interest with the aggrieved union \((E)\) to justify their participation in the labor dispute in any way; and second, what types of pressure may be exerted by \(E'\) against \(T\), assuming that \(T\) is in unity of interest with \(R\) under the criteria discussed above.

With regard to the first question, the cases are practically silent. Although "unity of interest" among unions is not based upon a tangible economic relationship similar to that between \(R\) and \(T\), where \(T\) is \(R\)'s customer or supplier, nevertheless it must be conceded that all unions have some interest in the cause of unionism. In any industry "the practices of the single factory may have economic repercussions upon a whole region and affect widespread systems of marketing." Yet, no individual dispute justifies a general attack by all unions upon \(T\). No single employer is such an intimate part of the whole community that unions "not united by a common interest, but only by sympathy," may take part in the dispute. When attempting to discover the bounds of "unity of interest" among unions, the court would properly be assisted by considering such factors as whether the industries in which they coexist are closely knit, whether the functions which the respective unions perform are similar, and whether the labor of both unions is necessary to complete a finished product.

Although no decisions adopting the rationale of "unity of interest" have involved the second question posed above, i.e., what pressure may \(E'\) exert on \(T\), it would seem that the character of the activity

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106 See note 43 supra.
107 Thornhill v. Alabama, 60 Sup. Ct. 736, 744 (1940).
108 In Auburn Draying Company v. Wardell, 227 N. Y. 1, 124 N. E. 97, 100 (1919), a case explicable of the theory that the unions were bringing pressure upon all third persons dealing with the offending employer, the court intimated the limit of "unity of interest" among union organizations when it declared that the dispute "arose because the defendant, constituting the entire population of the city . . . carried on . . . a comprehensive exclusion of the plaintiffs from the business of the community, in order to compel it to unionize its business."
110 Courts will also find some assistance from the presence or absence of councils made up of affiliated unions: e.g., the Building Trades Council or the Metal Trades Council. In such cases some unity of interest between the crafts is apparent. Realistically, it would seem that the same analysis should apply to a fact situation involving industrial unions such as the C. I. O. organizations.

Furthermore, there are no branch divisions in an industrial union, and a dispute with one section necessarily occasions a dispute with the whole union, as, for example, the tie-up of the Port of San Francisco followed a dispute with one small section of the I. L. A., the dock stewards. The nominal unity of interest within one industrial union is readily apparent, but the bare fact that the union is organized as an industrial as distinguished from a craft union should not be the determinant.
which $E'$ will be permitted to direct against $T$ will vary with the intimacy of the relationship between $E$ and $E'$. The same factors which may be persuasive in delimiting the pressure which $E$ may exert against $T$ are relevant to the inquiry regarding the type of pressure $E'$ may exert against $T$.

Every "secondary boycott" involving sympathetic union activity ($E$ and $E'$) logically requires two applications of the principles of "unity of interest" preliminary to any inquiry as to the pressure to be permitted: First, the "unity of interest" between $R$ and $T$ must be determined, and second, the "unity of interest" between $E$ and $E'$ must be ascertained. The decided cases, however, give little promise of the adoption of this approach.

Throughout this discussion we have made reference to the dual factors involved in determining the legality of any "secondary boycott"; namely, "unity of interest" and nature of pressure employed. However, it is believed that these questions are not separate and distinct—rather, is each a variable of the other. "Unity of interest" is not an absolute and can only be considered in relation to the pressure against $T$ which is being considered.

Thus, as the degree of "unity of interest" increases from "no interest" at one end of the scale to "identity of interest" at the other end of the scale, the amount of pressure which should be deemed lawful will also vary from the "no pressure", which the law admonishes when there is no real connection between $R$ and $T$, to the "same pressure which $E$ may directly employ against $R$" where there is an "identity of interest" between $R$ and $T$.

Inevitably in practice are merged these two problems which in logic must be kept distinct. This merger hardly justifies, however, the scuttling of judicial analysis in favor of the quagmire of "coercion" or "secondary boycott."

An examination of the "unity of interest" cases does not lend itself to neat blanket conclusions. It may be suggested that the concept was evolved as a recognition of the fact that $E$'s struggle against a modern large-scale economic unit is ineffectual if $E$ is confined to picketing the premises of $R$. The effective focal point for bringing pressure upon $T$ is in many cases no longer a point near $R$'s doorstep. On the other

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110 Of course, when there is no "unity of interest" whatsoever, as for example where $R$ and $T$ are only members of the same economic community, $E$ will notwithstanding be permitted to "affect" $T$ by activity which falls within the scope of $E$'s constitutional prerogative of free speech, thus constituting "no pressure" in the eyes of the law.

hand, it is necessary to offset against these facts the injury to \( T \) and other persons removed from the immediate area of conflict. "Unity of interest" is the result of balancing these conflicting interests.

Perhaps it is inopportune, because of the undeveloped stage of this phase of the law of labor relations, to suggest the factors which may or should guide the courts in balancing the exigencies of union strategy in its "economic war of attrition" against the injury to \( T \) which results when \( T \) is subjected to picketing or other peaceful methods of "coercion." It is believed, however, that the following factors may properly receive judicial consideration. If the relationship between \( T \) and \( R \) is so remote that pressure against \( T \) can have but a very indirect effect upon \( R \), the balance will probably be in favor of protecting \( T \) from injury. If \( T \)'s relations with \( R \) are intermittent or casual, the effect on \( R \) will probably be treated as remote. Conversely, if \( T \) maintains a direct current relationship with \( R \) as a regular customer, the interrelationship between \( T \) and \( R \) justifying the union's pressure upon \( T \) is readily apparent. In the judicial analysis of the type of pressure exerted by \( E \), it should be relevant to inquire whether or not there are other equally effective and readily available means of obtaining the results sought. If pressure against \( R \), or a party in more direct relations with \( R \), is as effective as pressure against \( T \), the court may conversely refuse to permit \( E \) to exert pressure against \( T \). Ineffectiveness of \( E \)'s pressure against \( R \) may justify pressure against \( T \). Another factor to be considered is whether or not \( E \) is arbitrarily singling out \( T \) as the object of pressure, while not subjecting other persons similarly situated to the same treatment.113 These factors, along with others, including "the social and economic ideas of judges"114 concerning the law of labor relations, will perhaps be determinants defining the extent of permissible union activity in a modern industrial struggle between \( E \) and \( R \). The concept "unity of interest" is as workable as the well established legal fiction of the "reasonable man."

THORNHILL v. ALABAMA

The reaffirmation of the constitutional right of free speech in a sweeping declaration by Supreme Court of the United States in Thornhill v. Alabama115 has opened "vistas of new uncertainties"116 in the law of the "secondary boycott". The court, in holding that peaceful picketing of \( R \) by \( E \) for a legitimate union objective is mere exercise of the constitutional right of free speech, has given the lie to ordinances and decisions declaring such activity illegal. However, because the free

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114Note 83 supra.
11560 Sup. Ct. 736 (1940).
116From the dissenting opinion of Hughes, C. J., in Apex Hosiery Co. v. Leader, 60 Sup. Ct. 982, 1003 (1940).
speech rationale of the decision is phrased in abstract terms, the case has raised problems potentially more interesting than the actual question disposed of, problems whose analysis necessitates an exercise of prophetic insight. By deciding that \( E \) has the constitutional right peacefully to picket \( R \), the court gave constitutional sanction to an activity that other courts had, with virtual unanimity, agreed was lawful. But does the \textit{Thornhill} case purport to give \( E \) the right, as an exercise of his constitutional right of free speech, peacefully to picket third parties? Justice Murphy declared:

"Free discussion [by picketing] concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem."\textsuperscript{117}

A loose interpretation of the broad principles of freedom of speech and press announced in the \textit{Thornhill} case might lead one to conclude that a union has an unlimited right to picket peacefully as, indeed, one California case, \textit{Ex parte Lyons,}\textsuperscript{118} subsequently repudiated,\textsuperscript{119} held. Sustaining the right to picket peacefully on a free speech rationale is not new,\textsuperscript{120} and it is believed that the \textit{Thornhill} case does not stand for the broad proposition that \( E \) may place a picket line around \( T \), whose sole connection with the labor dispute between \( R \) and \( E \) lies in the fact that he belongs to the same economic community.\textsuperscript{121} Any interpretation of the abstract statements must be considered in view of the facts in the \textit{Thornhill} case; the dispute was "publicized in the vicinity of the place of business of the employer."\textsuperscript{122}

\textsuperscript{117}Thornhill v. Alabama, 60 Sup. Ct. 736, 744 (1940).
\textsuperscript{118}See also the following statement in Carlson v. California, 60 Sup. Ct. 746, 749 (1940):

"The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."

\textsuperscript{119}27 Cal. App. (2d) 293, 81 P. (2d) 190 (1938).
\textsuperscript{120}Citizen-News v. Connolly, 1 C. C. H. Labor Cases 672, 2 L. R. R. Mas. 856 (Cal. Super. Ct. 1938). Although the Lyons case was decided by an intermediate appellate court it has not been subsequently relied upon.

\textsuperscript{121}See Senn v. Tile Layers' Union, 301 U. S. 468, 478 (1937); Truax v. Bisbee Local, 19 Ariz. 379, 171 Pac. 121, 125 (1918); \textit{Ex parte Lyons, 27 Cal. App. (2d) 293, 81 P. (2d) 190, 193 (1938)}; Marx & Haas Co. v. Watson, 215 Mo. 421, 67 S. W. 391, 393 (1902); Kirmse v. Adler, 311 Pa. 78, 166 Atl. 566 (1933).

\textsuperscript{122}See Perry Truck Lines v. Intern'l Teamsters, 1 Labor Cases 1292, 5 L. R. R. 163 (Colo. Dist. Ct. 1939) (Plaintiff and \( R \) utilized same truck loading facilities); State v. Jacobs, 7 Ohio N. P. 261 (1889) (Plaintiff's store patronized by "scabs").

\textsuperscript{123}60 Sup. Ct. 736, 743 (1940). See also Evening Times v. Amer. Newspaper Guild, 124 N. J. Eq. 71, 199 Atl. 598, 605 (1938), wherein it is stated:

"We are of the opinion that the lawful place for defendant's
In view of the language used by Justice Murphy, another possible limitation on the abstract right of free speech is possible. It has been suggested above\textsuperscript{123} that some of the language used in the decision indicates an inferential adoption of the "unity of interest" concept as a touchstone to determine the legality of the union action. In the rather unlikely event that Justice Murphy had such an intention, the federal courts, faced with the necessity of establishing the limits of the concept, will thereby define the boundaries of the broadly declared right to picket.

The modern law is in a state of flux; the \textit{Thornhill} case pointed to the problems but did not settle the issues. Some assistance in interpretation may be provided by two other recent decisions, which, when read with the \textit{Thornhill} case, suggest the judicial limits of the abstract statement of the right of free speech enunciated by Justice Murphy. In \textit{Meadowmoor Dairies v. Milk Wagon Drivers Union},\textsuperscript{124} the milk wagon drivers union, in an effort to prevent the dairy from distributing its milk products through independent "vendors" who purchased the milk and distributed it in their own trucks to retail outlets, picketed the retail establishments.\textsuperscript{125} The court disposed of the union's contention,

"that they may not be restrained or enjoined in any case from carrying placards bearing thereon printed words conveying information to the public, because such would violate the guarantee of free speech"\textsuperscript{126} by pointing out that,

"The privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an exercise of unlawful activities."\textsuperscript{127}

Holding that no labor dispute was involved under the Illinois Anti-Injunction Act, the court issued an injunction on the theory that the defendant's acts became "what have been called 'verbal acts', and as such subject to an injunction as the use of any other force whereby property is unlawfully damaged."\textsuperscript{128}

In the subsequent case, \textit{Lake Valley Farm Products v. Milk Wagon Drivers Union},\textsuperscript{129} an action brought under the Sherman Act on a fact

\textsuperscript{123}See discussion, p. 155 supra.
\textsuperscript{124}371 Ill. 377, 21 N. E. (2d) 308 (1939), cert. granted, 60 S. C. 1092 (1940).
\textsuperscript{125}It may be observed that the violence employed by the union had previously been enjoined by the lower court.
\textsuperscript{126}Meadowmoor Dairies v. Milk Wagon Drivers, 371 Ill. 377, 21 N. E. (2d) 308, 316 (1939).
\textsuperscript{129}106 F. (2d) 436 (1940), cert. granted, 60 Sup. Ct. 723 (1940).
situation arising out of the same labor dispute involved in the *Meadowmoor* case, the Circuit Court of Appeals for the Seventh Circuit, after pointing out that a "secondary boycott" was an "unlawful activity", stated:

"It is contended by appellees, however, that the prevention of peaceful picketing of the cut rate stores [retail establishments] would be a violation of the constitutional right of free speech . . . although such acts might be considered as a secondary boycott. We do not understand this to be the law." Holding that the fact situation did not constitute a "labor dispute" within the Norris-LaGuardia Act, the court reversed the decree dismissing the action and remanded the cause to the district court.

The Supreme Court originally denied certiorari in the *Meadowmoor* case, a case presenting the problem of picketing T as an exercise of the constitutional right of free speech, but apparently has had some misgivings and recently vacated its prior order and granted certiorari. CERTiorari has also been granted in the *Lake Valley* case, a case involving problems of jurisdiction under the Sherman Act as well as problems of free speech.

Tentatively it seems proper to inquire, as a result of these cases as decided, reserving final judgment until the Supreme Court has disposed of the *Meadowmoor* and *Lake Valley* cases, whether the present authorities do not stand for the following propositions: E has a constitutional right peacefully to picket R for legitimate union objectives. Apparently E has no constitutional right to picket T. To determine the right to damages, the legality of E's picketing T will be governed by the applicable state law under the rule in *Erie v. Tompkins* except in cases where the union's activity is illegal under the Sherman Act or other Federal statutes. The enjoinability of such conduct must be determined by a reference to the appropriate anti-injunction statute.

**CONCLUSION**

Our inquiry into the factors which have seemed to influence the courts, and our examination of their attempts to define the limits within which labor may carry on its struggle against an employer by affecting third parties, justifies, perhaps, but one conclusion: The courts have attempted to regulate the economic struggle in the public interest as they have conceived it. Perhaps a judicially expounded theory of "unity of interest" will supplant the previously inarticulate conceptions of "public interest."

113 Id. at 442.
114 Id. at 443.
115 Cert. denied, 60 Sup. Ct. 128 (1940); cert. granted, 60 Sup. Ct. 1092 (1940).
116 Cert. granted, 60 Sup. Ct. 723 (1940).
117 304 U. S. 64 (1938).
"Moreover, may it not be judicial to add that, as the questions trench so closely on the political, they may finally be solved only by the political departments of the government."  

1Jetton-Dekle Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590, 592 (1907). The question may perhaps here be posed as to whether or not the public interest may demand a settlement of the dispute between R and E by such political devices as compulsory arbitration instead of trial by combat in the form of the strike, lockout, boycott and blacklist—whose social cost has long been recognized. But it is probably not the voice of the skeptic which would venture that labor will not voluntarily supplant its tested economic weapons with untried political devices; and until labor is assured that political pressure will be as effective as its present economic power such a change will remain in the realm of possibilities rather than probabilities. See Erskine, The Legality of "Peaceful Coercion" in Labor Disputes (1937) 85 U. of Pa. L. Rev. 456; Smith and De Lancey, The State Legislature and Unionism (1940) 38 Mich. L. Rev. 987, 1023 et seq.