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ANOTHER LOOK AT PICKETING IN WASHINGTON
DONALD H. WOLLETT*

Discrepancies creep into our decisions from time to time, and it is frequently necessary that a review be had of our opinions, at which time the cases may be analyzed, approved, or overruled, to the end that the law be made certain, so that individuals and organizations, and members of the bench and bar, may be advised of the holdings of this court. In cases like the one at bar, organized, nonorganized labor, and employers are entitled to definite decisions regarding their rights and liabilities, to the end that they may conduct their affairs as law-abiding citizens, without danger to themselves or their property.—Judge Simpson, speaking for the majority, in Gassam v. Building Service Employees’ International Union, Local 262, 29 Wn. (2d) 488, 492, 188 P. (2d) 97, 99 (1947).

The purpose of this comment is threefold: (1) to reformulate the Washington rules in re peaceful picketing in light of Ostroff v. Laundry and Dye Works Drivers’ Local No. 566; 2 (2) to suggest, using the metaphor employed by Judge Hamley in his dissenting opinion, that the rule of the Ostroff case embarks the court on a voyage into uncharted seas; and (3) to suggest further the wisdom of the court’s returning to port and recharting a course over better marked and more frequently traveled waters.

Antecedents of the Ostroff Case

The legal history of peaceful picketing in the state of Washington has two principal characteristics: (1) the multiplicity of theories applied by the Washington Supreme Court to judge its legality; (2) the ease and frequency with which the court has shifted from one theory to another.

In 1905 the court, apparently applying the then rather widely held doctrine that peaceful picketing is a contradiction in terms, adopted the rule that all picketing is an unjustifiable interference with advantageous relationships between employers, employees, and consumers—ipso facto “coercive” and unlawful. 2 Seventeen years later this rule was apparently abandoned, partly as a result of the decision of the

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United States Supreme Court in *American Steel Foundries v. Tri-City Trades Council,*\(^3\) in favor of the theory that the “persuasive” (lawful) and “coercive” (unlawful) aspects of picketing should be separated.\(^4\)

The rule of thumb that picketing within 100 feet is coercive and without 100 feet is persuasive was a specific implementation of this theory.\(^5\) In 1925 the court, persuaded that the Washington legislature of 1919 had endorsed the earlier doctrine by passing a version of Sections 6 and 20 of the Clayton Act which failed to extend any protection to picketing,\(^6\) apparently reverted to the rule that all picketing is unlawful.\(^7\) But five years later the court attempted to reconcile the two rules by a semantic device. Relying in part on Duane’s Military Dictionary, which defines a picket as “an out-guard posted before an army to give notice of an enemy approaching,” the court held that patrolling with a banner outside 100 feet is not picketing.\(^8\)

In 1933 the Washington legislature passed an anti-injunction statute drawn almost verbatim from the Norris-LaGuardia Act\(^9\) and known as the Labor Disputes Act.\(^10\) This statute was intended to prohibit the issuance of injunctions against the use by trade unions of their traditional economic pressure weapons, including picketing, provided that a labor dispute existed (as defined in the act) and fraud or violence did not. It made an immediate impact. Presented with its first picketing case arising under the statute, the court held that “stranger” picketing (picketing by a union which has no members employed by the picketed employer) does not arise out of a labor dispute and enjoined it on the ground that its objective was unlawful—viz., to force the employer to “ask, urge, or coerce, directly or indirectly, its employees, who are at liberty to do as they please, to join . . . [the] organization.” *Safeway Stores v. Retail Clerks Union, Local No. 148.*\(^11\) The Safeway case, dealing solely with “stranger” picketing, left open the question of the legality of picketing which arose out of a labor dispute.

The court apparently answered this question one year later in

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\(^{3}\) 257 U.S. 184 (1921).
\(^{4}\) *Pacific Coast Coal Co. v. United Mine Workers,* 122 Wash. 423, 210 Pac. 953 (1922).
\(^{5}\) *Adams v. Cooks & Waiters,* 124 Wash. 564, 215 Pac. 19 (1923).
\(^{6}\) *REM. REV. STAT.* § 7611, 12, 13, 14 [P. P. C. § 700-1 *et seq.*].
\(^{7}\) *Danz v. Musicians,* 133 Wash. 186, 233 Pac. 630 (1925).
\(^{8}\) *Sterling Theaters v. Central Labor Council,* 155 Wash. 217, 223, 283 Pac. 1081, 1083 (1930); *Carey,* *Status of the Right to Picket in Washington,* 5 *WASH. L. REV.* 126 (1930).
\(^{10}\) *REM. REV. STAT.* § 7612-1 *et seq.* [P. P. C. § 695-1 *et seq.*].
**PICKETING IN WASHINGTON**

*Blanchard v. Golden Age Brewery.* Confronted with striking and boycotting arising out of a labor dispute because, *inter alia,* it was "proximate"—that is, the union had members employed by the employers, the court invalidated Sections 7, 8, and 9 of the Labor Disputes Act and held that there was no error in the trial court’s issuance of an injunction prohibiting the conduct because its objective—similar to that proscribed in the *Safeway* case—was improper.12 A reasonable inference from this decision would have been that all union self-help, including picketing, was to be judged on the basis of the propriety of its objective, irrespective of whether or not it arose out of a labor dispute as defined in a substantially discarded statute. However, such an inference, while reasonable, would have been far from accurate. The "labor dispute" test not only survived the *Blanchard* case. but it also prospered.

During the next five years the court, basing its decisions on the "stranger" character of the picketing and the impropriety of its objective, enjoined "non-labor dispute" picketing in every case in which the issue was presented.13 These decisions alone created no inconsistency with the *Blanchard* doctrine. However, during the same period the court refused to enjoin "labor dispute" picketing,14 thus supporting the hypothesis that the basic test of legality was the absence or presence of a labor dispute rather than the propriety of objective. For example, the decision in *Kimbel v. Lumber & Sawmill Workers Union No. 2575* permitted "proximate" picketing intended to force employees to join the union and the employer to recognize it—the same objective which the court had thought improper in the *Safeway* case.15 The result was clouded, however, by the fact that the picketing was also intended to obtain higher wages, an objective which the court later described as "reasonable." Moreover, the court did not rely on the Labor Disputes Act.

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12 188 Wash. 386, 63 P. (2d) 97 (1936) (Statutory sections invalidated on the theory that legislation abridging the power of the courts to issue injunctions violates the state constitution, which vests all judicial power in the courts).


14 Edwards v. Teamsters’ Local Union No. 313, 8 Wn. (2d) 492, 113 P. (2d) 28 (1941); Marvel Baking Co. v. Teamsters’ Union Local No. 524, 5 Wn. (2d) 346, 105 P. (2d) 46 (1940) (Distinguishable because the employer had violated his contract with the union); Kimbel v. Lumber & Sawmill Workers’ Union No. 2575, 189 Wash. 416, 65 P. (2d) 1066 (1937).

15 189 Wash. 416, 65 P. (2d) 1066 (1937).
The picture became badly confused in the early 1940's during the heyday of the doctrine that peaceful picketing is a species of free speech entitled to the protection of the First and Fourteenth Amendments. Basing its decision on that doctrine, the court abandoned the "labor dispute" test in *O'Neil v. Building Service Employees' International Union Local No. 6* and held that "stranger" picketing for organizational purposes was nonenjoinable, even though the picketed "employer" was a businessman-worker with no "employees." The rule was affirmed in *S&W Fine Foods, Inc. v. Retail Delivery Drivers' and Salesmen's Union, Local No. 6*, where there were "employees." Further, the court, applying the same theory, in *State ex rel. Lumber & Sawmill Workers v. Superior Court* refused to enjoin "stranger" picketing, despite the fact that the employer was obligated under the National Labor Relations Act to bargain with another union, because the picketing was intended only to induce the employee-members of the certified union to join the picketing union in a multi-employer strike for higher wages.

The free speech doctrine was short-lived. In 1942 the United States Supreme Court had, by a vote of 5 to 4, upheld the power of Texas to restrain "stranger" picketing outside the area of the industry within which the dispute arose when it conscripted neutrals who had no relationship either to the dispute or the industry. *Carpenters' & Joiners' Union of America v. Ritter's Cafe.* Early in 1947 the Washington court was presented with the case of *Swenson v. Seattle Central Labor Council* which involved "stranger" picketing intended to force an employer to bargain with the picketing union when he was obligated under the NLRA to bargain with another union. The *Ritter's Cafe* case was not strictly in point, but it had eroded the free speech doctrine, and it gave the court a basis for restraining the picketing on the grounds that its objective was improper and that it did not arise out of a labor dispute.22

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21 9 Wn. (2d) 507, 115 P. (2d) 662 (1941).

22 11 Wn. (2d) 262, 118 P. (2d) 962 (1941).

23 24 Wn. (2d) 314, 164 P. (2d) 662 (1945).


26 27 Wn. (2d) 193, 177 P. (2d) 873 (1947). Previously, in *Bloedel-Donovan Mills v. International Woodworkers of America, Local No. 46, 4 Wn. (2d) 62, 102 P. (2d) 270 (1940)*, the court had enjoined picketing when the employer had the duty under the National Labor Relations Act to bargain with a union certified by the National Labor Relations Board as the exclusive bargaining representative and the picketing was
Since the court’s decision six years before in *Weyerhaeuser Timber Co. v. Everett District Council of Lumber & Sawmill Workers* had permitted “proximate” picketing (12 employees out of 1,277 belonged to the defendant union) on the theory that it arose out of a labor dispute, even though compliance by the employer with the picketing union’s demands would have violated the NLRA, the *Swenson* case added some support to the theory that the basic test of legality was the absence or presence of a labor dispute rather than the propriety of the objective.

The extent to which the free speech doctrine had been abandoned and the “labor dispute” test re-established became clear later in the same year when the court squarely overruled the *S & W Fine Foods* and *O’Neil* cases, *supra*, and held that “stranger” picketing does not arise out of a labor dispute and is unlawful when one of its objectives is to force the employer to sign a union shop agreement. *Gazzam v. Building Service Employees’ International Union, Local 262*.24

From the *Gazzam* case to December, 1950, the court uniformly adhered to the “labor dispute” test. In *Hanke v. International Brotherhood of Teamsters*25 and *Cline v. Automobile Drivers’ and Demonstrators’ Local Union No. 882*26 “stranger” picketing was enjoined because it did not arise out of a labor dispute and was intended to compel businessmen-workers to agree to a contract regulating their hours of business. But in *Wright v. Teamsters’ Union Local No. 690* the court held that “proximate” picketing arose out of a labor dispute and was lawful even though one of its objectives was to regulate the employer’s hours of business.27 In *Berger v. Sailors Union of the Pacific* the court held that “proximate” picketing arose out of a labor dispute and was lawful even though intended to force the employer to assist in the organization of his employees by, among other things, intended to abrogate a valid closed shop contract between the employer and the certified union. The court referred to the Labor Disputes Act and found no labor dispute on the theory that the picketing unionists could not be recognized as employees of the employer since they belonged to the "out" union and had not been employed at the time the picketing began. Since the court apparently treated the picketing union as a "stranger," the case is on all fours with *Swenson v. Seattle Labor Council, supra*, except for the fact that a formal collective bargaining agreement had been negotiated.

signing a union security agreement—the objective which the court had held improper in the Gazzam case where the picketing was "stranger." This decision, clearly contrary to the Blanchard doctrine, provoked judicial protest. 29

The most reasonable hypothesis upon which to base an explanation of the Washington picketing decisions up to December of 1950 is as follows:

1. "Stranger" picketing does not arise out of a labor dispute; "proximate" picketing does. 30

2. The legality of picketing which does not arise out of a labor dispute depends upon the propriety of its objective. But since objectives are always improper when sought by "stranger" or "non-labor dispute" picketing, the "true" rule in such cases is the pre-1933 doctrine that all picketing close enough to the employer's premises to be effective is illegal. Such picketing is unlawful as a matter of means, not ends. 31

28 29 Wn. (2d) 810, 189 P. (2d) 473 (1948) (Members of the union were held to be "employees" even though they were also limited partners).
29 Judge Simpson dissenting (joined by Judge Steinert) in Berger v. Sailors' Union of the Pacific, 29 Wn. (2d) 810, 813, 189 P. (2d) 473, 475 (1948).
30 Although it seems clear that the Washington court uniformly treats "proximate" picketing as arising out of a labor dispute, there is doubt about when union members cease to be "employees" of the picketed employer so that their union becomes a "stranger." The test should be: Did the picketing union have any members employed at the time that the dispute arose? Otherwise the foresighted employer may insure that the picketing is "stranger" simply by discharging his unionized workers prior to the start of the picketing. The Washington court does not appear to have followed this test in all cases. In Bloedel-Donovan Lumber Mills v. International Woodworkers of America, Local No. 46, 4 Wn. (2d) 62, 102 P. (2d) 270 (1940), it apparently treated the picketing union as a "stranger," although members of it were employed at the time the dispute arose. In Pacific Navigation & Trading, Inc. v. National Organization of Masters, Mates and Pilots of America, Local 90, 33 Wn. (2d) 675, 207 P. (2d) 221 (1949), which follows the Bloedel-Donovan case, the court again treated the picketing union as a "stranger," although some of its members had been employed at the time the dispute arose. In both cases the court apparently regarded as decisive the fact that the union had no members employed at the time that the picketing began. In the latter case, however, the court suggested that a picketing union is a "stranger" if it represents none of the picketed employer's employees. Thus, if the employer is obligated under the NLRA to bargain with one union, a minority union which pickets, is, since it cannot lawfully represent the employees for purposes of collective bargaining with the employer, a "stranger" even though some of its members are employed at the time of the dispute.

This test is consistent with the policy reflected by Section 8 (b) (4) (c) of the Taft-Hartley Act, 61 Stat. 142 (1947), 29 U. S. C. 158 (b) (4) (c) (Supp. 1950). Further, it can be applied to the organizational picketing cases either in the situation where neither union has a majority or in the situation where there is only one union—provided that the court relies on the time that the dispute arose rather than the time when the picketing began.

31 The Washington court has not squarely held that "stranger" picketing is ipso facto illegal and enjoínable. But it has uniformly held that such picketing does not arise out of a labor dispute, and save for the repudiated S & W Fine Foods and O'Neill cases and the bizarre Lumber & Sawmill Workers case where one group of employees was picketing another, has consistently enjoíned it. Thus the Washington court, by talking about objectives in the "stranger" picketing cases, has done indirectly what the United
3. Picketing which does arise out of a labor dispute is lawful, regardless of its objective. The Blanchard case, insofar as it holds that all union self-help is to be judged on the basis of its objective, has no practical importance.

The only decision out of phase with this theory is the Lumber & Sawmill Workers case, supra, which not only judged the legality of "stranger" picketing on the basis of its objective but also held the objective to be proper. Apparently this case, although based upon the discarded free speech doctrine, is still good law. At least it has not been repudiated. However, the case is sui generis. The picketing there was intended solely to induce employer action and has little relevance to the typical picketing case which involves an attempt to force employer action.

Any theory based upon the sweep of sixteen years litigation is vulnerable, particularly when the court has not been consistent in its approach to the problem. There are, of course, many grounds other than the absence or presence of a labor dispute for distinguishing the cases which have permitted picketing from those which have restrained it. Any careful analyst doubted in December, 1950, that

States Supreme Court said in A. F. of L. v. Swing, 312 U.S. 321 (1941), that Illinois could not do directly. If the Swing case has any vitality left (and the matter is not free from doubt), it stands for the proposition that a state cannot constitutionally strike down peaceful picketing solely because it is "stranger" in character. It may be that a narrowly drawn order against signal picketing based entirely on its "stranger" character would stand up against the Swing holding that a state "cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." 312 U.S. 321, 326 (1941). But the matter is doubtful, and the Washington court, either by accident or design, has avoided the issue by pegging its results in part on the impropriety of objectives.

The United States Supreme Court, in affirming the Gazzam, Hanke, and Cline cases, supra, did not directly overrule the Swing case nor did it speak in respect to the constitutionality of state decrees which prohibit picketing of workers by other workers. See A.B.A. Rep. on State Labor Legislation for 1949-50, p. 5. The heart of its position is that a state has the power to enjoin picketing which either is intended to force an employer into violating the policies expressed in a valid legislative enactment or operates against the public interest in the preservation of other values, e.g., the freedom of little businessmen and property owners from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy. There is no longer any reason to think that a state decree enjoining picketing will be struck down as violative of the Fourteenth Amendment provided that the court is prudent enough to base the decree on objective and the policy reflected has a rational basis. See A.B.A. Rep. on State Labor Legislation for 1949-50, pp. 7-8, 10-11.

In the Wright case the employer had an "employee" if (as the court held) an oral lessee of a meat market is really an "employee." In the Hanke and Cline cases the petitioners were businessmen-workers (although Cline had two nonunion employees in another part of his business at the time the picketing began), and the court made much of the importance to a democratic society of encouraging small economic units of self-employed persons. In the Swenson case the majority union had been recognized by the National Labor Relations Board after a consent cross-check but had not been certified. In the Weyerhaeuser case the majority union had received no NLRB recognition—
the court would permit "proximate" picketing in all of the situations where "stranger" picketing had been restrained. Such doubt is no longer speculative. The significance of the Ostroff case is that it upset the long-standing adherence to the "labor dispute" test, enjoined "proximate" picketing for the first time in fifteen years, and reverted to the Blanchard doctrine, supra, by holding that, even though there is a labor dispute, picketing may be enjoined if the court considers one of its objectives to be improper.

One other preliminary point needs to be made. Testing the legality of picketing by examining its objective is an orthodox common law doctrine. But since the common law affords no standards to guide such judgments, courts have frequently been hard-pressed to justify them. The process has been criticized as a form of "dog law." The Washington court, in dealing with organizational picketing, has tested the objectives of such picketing against certain language in Section 2 of the Labor Disputes Act. The point has been made elsewhere, but it was spelled out in greatest detail in the Gazzam case, supra, where the court enjoined "stranger" picketing to force an employer to sign a union shop agreement. Section 2 of the act states, inter alia, that an individual worker "should be free to decline to associate with his fellows" and should be "free from interference, restraint, or coercion of employers of labor...in the designation of...[collective bargaining] representatives." Since, the court said in the Gazzam case, the public policy of the state as set out in Section 2 is to protect from employer coercion an employee's freedom to decline to associate as well as his freedom to associate, it is unlawful for a union, by picketing,
to undertake to force an employer to sign an agreement which requires his employees either to join the union or suffer loss of employment.

The point is relevant here because the court, which had refused to extend the Gazzam doctrine to "proximate" picketing in the Berger case, supra, applied the doctrine to "proximate" picketing in the Ostroff case.

OSTROFF V. LAUNDRY AND DYE WORKS DRIVERS' LOCAL NO. 566

The case arose when the employer, operator of two cleaning and finishing plants and four stores for cleaning and dyeing in Seattle, refused to sign an agreement which, inter alia, would have required his employees, as a condition of continued employment, to join either Local No. 566 of the Laundry and Dye Works Drivers or Local No. 24 of the International Laundry Workers and Dry Cleaners.\(^3^5\)

The former union, one of whose members was employed by the employer at the time of the dispute, responded by establishing a peaceful picket line. The pickets displayed signs stating that "Spic N Span Dry Cleaners refuses to pay union wages—Laundry and Dye Works Drivers' Local 566." The picket line was effective. Union drivers would not cross it to deliver supplies, thus making it necessary for the employer to drive his own trucks. A substantial number of customers also respected the picket line, causing Ostroff's gross weekly receipts to fall from $2,500 to $1,700.

Ostroff countered by calling a meeting to which twenty-three of his twenty-five employees came. (The union member was on strike, and one other employee was on vacation.) These employees, in answer to the employer's request (no showing of coercion), unanimously signed a statement in which they said that they neither desired to join the unions nor desired their employer to sign collective agreements with them.

Ostroff's petition for an injunction was denied by the trial court on the ground that there was a labor dispute within the meaning of the Labor Disputes Act, thus depriving the court of jurisdiction to enjoin. It was this decision which the Washington court overturned by a 5 to 3 vote, holding squarely that "proximate" picketing can be enjoined even though it arises out of a labor dispute.\(^3^6\)

The majority conceded at the outset of its opinion that, despite the fact that the union had only one member employed, the picketing

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\(^3^5\) The Drivers' Local is chartered by the International Brotherhood of Teamsters and is affiliated with the local of the Laundry Workers. Both are A. F. of L. unions.

\(^3^6\) See note 1, supra.
arose out of a labor dispute. Section 13 (a) of the Labor Disputes Act, defining the term, says that it includes a controversy between "one or more employers and one or more employees." But, continued the court, this does not dispose of the matter. An additional test is: Did the picketing step over the line from persuasion to coercion? It did, the argument concluded, because if the union is adamant in its demand for a closed shop, and the employer ultimately signs, the employees will have to do something they don't want to do—namely, either join the unions or find other employment. They will be coerced in the exercise of their right not to associate, as spelled out in Section 2 of the Labor Disputes Act; their freedom of choice will be abridged.

This was obviously, despite the talk of "persuasion" and "coercion," simply an application of the illegal objective theory evolved in the Gazzam case. In essence the court said that the means (picketing) is coercive because the objective (closed shop) forces employees to choose between two undesired alternatives. Picketing is persuasive (lawful) or coercive (unlawful) depending upon its objective. If the objective is unlawful, the picketing is coercive (unlawful). If the objective is lawful, the picketing is persuasive (lawful).

No matter how you cut this argument it makes objective the test of legality. It is unfortunate that the court talked so much in terms of coercion when it was really talking about objective, for the language tends to confuse the orthodox analysis of picketing. The typical approach is to test the legality of picketing by looking first at what occurred on the picket line (means) and second at the objective sought by the union. There are a number of cases enjoining picketing because of coercive techniques used on the picket line, and it is correct to say that when pickets obtain refusals to patronize or to work by coercive rather than persuasive methods, the picketing—or at least its coercive aspects—will be enjoined. Picketing may be enjoined because of the

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38 The proposed agreement would have required all drivers, driver helpers, and solicitors to join Local No. 566, would have prohibited the acceptance of laundry or dry cleaning from nonmember drivers and nonunion shops, and would have prohibited the pickup and delivery of work by nonmembers. The agreement would also have required that all cleaning, renovating, dyeing, and processing be done by members of Local No. 24.

39 Perhaps the classic case distinguishing between the coercive and persuasive aspects of picketing is American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184 (1921).

The Washington court, in dealing with picketing that arises out of a labor dispute, has also prevented intimidation but permitted "missionary" work. For example, in Weyerhaeuser Timber Co. v. Everett District Council of Lumber & Sawmill Workers, 11 Wn. (2d) 503, 119 P. (2d) 643 (1941), the court permitted the peaceful aspects of the picketing but limited the number of pickets and enjoined molesting or obstructing.
means employed or the objective sought, and it is helpful to reserve the term "coercion" as a test for the legality of the former. The use of the term in the Ostroff case suggests that the pickets obtained respect of their line by violence, threats of violence, or threats of economic reprisal. No such evidence appeared in the record.

A clue to the possible direction in which the Washington court is traveling was disclosed by the final paragraph of the majority opinion, which in effect invited the union to drop the closed shop clause from the requested agreement and petition for dissolution of the injunction. Such a petition would, the court indicated, be granted. It is apparent, therefore, that the decision neither protects the employer from the economic loss caused by picketing nor directly restrains picketing as such. It is, rather, a restriction of the power of a minority union to bargain for a closed shop. The Ostroff case condemns the closed shop objective, not the picketing. It is not clear how deeply the court's feeling against the closed shop runs. Perhaps it intends to impose the Taft-Hartley Act rules and illegalize the execution and enforcement of such agreements regardless of the circumstances under which they are reached. Perhaps it intends to adopt the Massachusetts common law rule which, while it permits a closed shop agreement to exist and be enforced, proscribes the use of picketing by a union to induce an employer to enter into such an agreement. Perhaps it intends to follow the Massachusetts rule only when the picketing union represents a minority of the employees. These are questions opened for future consideration and resolution.

The rule of the Ostroff case can accurately be formulated as follows: Picketing arises out of a labor dispute when the picketing union has one member employed by the picketed employer at the time the dispute arises, but the picketing is nonetheless enjoinable if one of its objectives is to force the employer to sign an agreement which makes union membership a condition of employment. Since the court had reached a contrary result in the Berger case, supra, on a similar set of facts, it was constrained to distinguish the two cases. This was accomplished by pointing out that here the employees manifested their desire to remain non-union whereas in the Berger case they did not.

43 This is a questionable distinction, since in the Berger case 13 of the employees joined the employer as parties plaintiff. Query: How manifest does a manifestation of desire not to join the union have to be?
Thus, to the rule should be added: "... if the employees have manifested their desire to remain non-union."

The willingness of the court in the Ostroff case to permit the picketing if the "coercive" objective is dropped emphasizes again the decisive importance of whether or not the picketing is "stranger." In the Gazsam case "stranger" picketing to obtain a union shop was enjoined. In the Ostroff case "proximate" picketing to obtain a closed shop was enjoined, but only insofar as it had a "coercive" objective. Apparently the rule is that one "coercive" objective makes "stranger" picketing enjoinderable, whereas one "coercive" objective makes "proximate" picketing enjoinderable only insofar as it is in pursuit of that objective. To put this another way, it seems that when the Washington court is faced with "proximate" picketing it restrains the "coercive" objectives but permits the "persuasive" ones, e.g., advising the public that the employer is not unionized, with the hope that the employees will join, but when it is faced with "stranger" picketing it restrains all objectives. This analysis adds support to the thesis that "stranger" picketing is ipso facto unlawful in Washington as an illegal means to achieve ends, lawful or unlawful, whereas "proximate" picketing is a lawful means permissible so long as it is in pursuit of lawful ends; and it focuses critical attention on the criteria the court uses in organizational picketing cases to determine whether or not the ends sought are lawful.

**THE POLICY OF FREEDOM OF CHOICE**

Since the Safeway case, supra, the court has, by decision, implemented the policy of protecting employee freedom of choice—the same policy which is spelled out and developed by the National Labor Relations Act as amended in 1947 by the Taft-Hartley Law.44

If unions are what they profess to be, namely, voluntary organizations whereby workers obtain an effective voice in setting the conditions of their economic life, there is no doubt that the freedom of individual employees to choose which collective bargaining representa-

44 61 STAT. 136 (1947), 29 U. S. C. § 141 et seq. (Supp. 1950). Freedom of choice is the policy of Section 7, 61 STAT. 140 (1947) 29 U. S. C. § 157 (Supp. 1950), which guarantees employees the right to form, join, or assist labor organizations and to bargain collectively through representatives of their own choosing and "the right to refrain from any or all of such activities," except insofar as such right is abridged by a legally authorized (by election) union shop agreement. (Italics by the author.) These rights are protected by Section 8 (a) (1), 61 STAT. 141 (1947), 29 U. S. C. § 158 (a) (1) (Supp. 1950), against employer interference, restraint, and coercion and by Section 8 (b) (1), 61 STAT. 141 (1947), 29 U. S. C. § 158 (b) (1) (Supp. 1950), against union restraint or coercion.
tive, if any, they shall have should be protected by law. Given the realities of modern economic life and their effect on the individual bargaining power of workers, the freedom to choose between bargaining representatives (unions) is of more significance, generally at least, than the freedom to choose between collective bargaining and individual bargaining. Nonetheless, there can be no doubt that particular groups of employees, especially when they are beyond the reach of the National Labor Relations Act and cannot therefore express their wishes on the matter at an NLRB-directed election, should—as a desideratum—not be left powerless to resist the efforts of a strong organization to capture their membership, if not their loyalty, by forcing the cooperation of their employer. Indeed, in a society that stands almost alone in its emphasis on individual freedom, there is something repugnant about the notion that employees should be unionized by powerful economic groups without reference to their individual wishes on the matter, even though it may be “good for them” or “in the public interest.” If unions are the collective voice of the individual worker in negotiating the rules of his economic life and implementing what is spoken of as “industrial democracy,” it is clear that the freedom to reject unionization is entitled to some protection against employer and union (group) pressures. A captive unionist is not usually a good unionist, and it is not without significance that the unions that have most frequently “organized” the workers by “organizing” the employer are those which are characterized by a powerful, dominant leadership which is relatively free from effective control by the membership.

But while there is wide agreement to the general proposition that individual employee freedom of choice should be protected, there is equally wide disagreement as to what kind of protection against what kind of pressure it should be given under varying circumstances. The Washington court, in evolving what may be labeled the Gazzam-Ostroff doctrine, has committed itself to the broad principle that freedom of choice shall be protected against the pressures of picketing to compel employer assistance in organization, regardless of whether or not it arises out of a labor dispute, provided that the employees concerned desire to remain unorganized.

45 Despite the equating in Section 7 of the NLRA of the right not to engage in union activity with the right to engage, the basic policy of the statute is to favor the establishment of collective bargaining. See Section 1, particularly paragraphs 2 and 3.
Legal Basis of the Policy in Washington

The theory that Section 2 of the Labor Disputes Act sets out as the law of the state a rule of protecting the individual worker's right to reject unionization free from employer coercion and union picketing suggests that the court has no choice but to implement this policy as particular cases come before it, no matter how complex the problems presented happen to be. The fact is, however, that the court does have a choice, for the Labor Disputes Act in nowise compels the court to the results it reached in the Gazzam and Ostroff cases.

In the first place, the statute does not purport to make any conduct lawful or unlawful. It withdraws a remedy and makes procedural adjustments. It does not legalize or illegalize conduct. In essence it deprives courts of jurisdiction to issue injunctions against certain conduct engaged in by certain persons and arising out of a labor dispute. The Norris-LaGuardia Act, of which the Washington statute is an analogue, and an almost verbatim reproduction, is intended to have, and has had, no effect on federal substantive law at all (except for the weird decision in United States v. Hutcheson). The Labor Disputes Act is couched in the same language as the federal statute, and there is no reason to believe that it is intended to lay down state substantive law.

The point can be emphasized by pointing out the marked distinction between enjoining picketing intended to compel an employer to do an act which will subject him to criminal or civil liability, as the Washington court did in the Swenson case, supra, and as the United States Supreme Court said Missouri had the power to do in Giboney v. Empire Storage and Ice Co., and enjoining picketing intended to compel an employer to do an act which transgresses a policy but does not subject the transgressor to liability, as the Washington court did in the Gazzam and Ostroff cases. The court in the Ostroff case cited the Swenson case as stating the applicable rule. But the Swenson case is not apposite to the Ostroff case unless the Washington court is now prepared to say that signing a closed shop agreement subjects an employer to liability, a result very far removed indeed from the purpose of the Labor Disputes Act.

This is not to suggest that the Washington court has exceeded its constitutional power under the Fourteenth Amendment. It seems clear

47 312 U.S. 219 (1941).
that it has not. The point is made to emphasize that Section 2 of the Labor Disputes Act does not make substantive law and that the court has moved far beyond the rule it enunciated four years ago in the Swenson case.

In the second place, as pointed out supra, the Labor Disputes Act is essentially a jurisdictional statute designed to restrict, and in some situations terminate, judicial intervention by injunction in labor disputes. In picketing cases the question of law presented is whether or not the act is applicable so as to preclude the issuance of an injunction, not whether or not its language requires the issuance of an injunction. The basic test for determining whether or not the jurisdictional structures of the statute come into play in a particular case is the absence or presence of a labor dispute. In the Gazzam case the court held that there was no labor dispute, which meant that the restrictions of the statute did not apply, and proceeded to find the picketing unlawful by reference to the general language of Section 2. This is anomalous enough. But in the Ostroff case the court held that there was a labor dispute, which meant—presumably—that the jurisdictional limitations of the statute did apply, and then proceeded to enjoin the picketing anyhow, basing its result on the same anti-injunction act.

The key to this bizarre judicial behavior is found in the Blanchard case, supra, which invalidated Sections 7, 8, and 9 of the Labor Disputes Act on the theory that legislation abridging the power of the

49 However, the court may run into another constitutional snag if it applies the Gazzam-Ostroff doctrine to an industry which "affects interstate commerce" and therefore falls within the ambit of the Taft-Hartley Act. Sections 8 (b) (4) (B), 61 STAT. 142 (1947), 29 U. S. C. § 158 (b) (4) (B) (Supp. 1950), and 8 (b) (4) (C), 61 STAT. 142 (1947), 29 U. S. C. § 158 (b) (4) (C) (Supp. 1950), of that statute impose two restrictions upon strikes, picketing, and other concerted activities aimed at securing recognition of the union as the bargaining representative. Professor Cox has concluded that Congress has pre-empted the entire field and that state regulation of such activity is now improper. This conclusion may also be supported on the theory that the failure of Congress to deal with primary picketing for recognition indicates, in light of the debates, that Congress intended, not to leave freedom to regulate such conduct to the states, but to leave such concerted activity free from any regulation. The argument has particular force in respect to the Gazzam-Ostroff doctrine since it is so clearly an implementation of the rights guaranteed to employees by Section 7 of the Taft-Hartley Act, 61 STAT. 140 (1947), 29 U. S. C. § 157 (Supp. 1950). Cox and Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211, 237, 225-6 (1950). See Amalgamated Ass'n, Etc. v. Wisconsin Employ. Rel. Bd., 71 S. Ct. 359 (1951).

However, the Ostroff case appears to be more a regulation of the closed shop than of picketing, and there is convincing evidence that Congress did not intend to curtail the power of states to restrict the execution and enforcement of union security agreements. Section 14 (b) of Taft-Hartley, 61 STAT. 151 (1947), 29 U. S. C. § 164 (b) (Supp. 1950), says that nothing in the law "shall be construed as authorizing the execution or application of arguments requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."
courts to issue injunctions violates the state constitution, which invests all judicial power in the courts. Section 4, the heart of the statute, which specifies the types of union conduct, including picketing, totally immunized from injunctions when arising out of a labor dispute, is a fortiori invalid on this theory. Section 2 exists primarily for the purpose of affording a background of language against which these sections can be construed. Section 13, which defines the term "labor dispute," is intended to provide a frame of reference for Section 4 and loses its significance without that section. Neither section is intended, standing alone, to have operative importance. It is clear, therefore, that when the court relies on Section 13 for the meaning of the term "labor dispute" and Section 2 for the policy of freedom of choice, and uses either or both to justify enjoining picketing, it is engaging in the curious process of lifting the inoperative sections of an invalid legislative enactment out of context, breeding them with common law doctrines, and treating the hybrid offspring as a set of "equitable" rules. This looks like judicial legislation, as patently so as Justice Frankfurter's tying together of the Clayton, Norris-LaGuardia, and Sherman Acts in the Hutcheson case, supra.

These are harsh words, and their accuracy is weakened by the fact that the court has decided some of the picketing cases without relying on the Labor Disputes Act. In 1938 the statute had enough virility to cause the invalidation of a city ordinance. But on other occasions it has had no appreciable impact on the court's thinking. Perhaps, then, the Labor Disputes Act is not a parent of the doctrine governing organizational picketing but only a midwife whose testimony as to the pedigree of the product is quoted when its quality is in doubt. Indeed, the court has said that the statute is only a guide to "equity and good conscience."

There is no doubt that the Washington law relating to picketing, and more particularly the Gazzam-Ostroff doctrine protecting employee freedom of choice, is exclusively a creation of the court.

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50 In Yakima v. Gorham, 200 Wash. 564, 94 P.(2d) 180 (1939), the court invalidated a city ordinance which prohibited picketing by a person unless he had been employed by the picketed employer for at least three months and within the previous 60 days on the ground that it conflicted with the legislative declaration of public policy in the Labor Disputes Act.

51 In twenty-two picketing cases decided since 1935 the court cited and apparently relied on the Act fourteen times and either ignored or did not base its decision on the Act eight times. See Jaffe, Status of Picketing in Washington, 15 WASH. L. REV. 47 (1940).
Freedom of Choice Unlimited?

Freedom of choice is a two-way street. Section 2 of the Labor Disputes Act protects the privilege to associate and to designate collective bargaining representatives free from the “interference, restraint, and coercion of employers.” Obviously the right to engage in union activity is accorded fully as much status as the right to refuse to engage. The problem is to identify the line between private interferences with this dual-edged privilege which will be tolerated and those which will be prohibited.

Prior to the Ostroff case the court had pricked out a line based upon the absence or presence of a labor dispute. The court had laid down the rule in the Gazzam case that freedom of choice will be protected from the picketing pressures mobilized by a union which is a “stranger” to the relationship between the particular employer and his employees. It had gone the other way in the Berger case, supra, because the picketing union had members employed by the particular employer. In broad terms, the rule was that “outside” union interferences with employee freedom of choice will not be tolerated while “inside” union interferences will be.

However, in the Ostroff case the court conceded that the defendant union had sufficient interest in the conditions of employment in Ostroff’s business to characterize the picketing as arising out of a labor dispute, and its decision therefore extended the privilege of individual employees not to engage in union activity to include protection from “inside” union pressures. This extension raises a multitude of questions.

What additional “inside” union pressures are unlawful abridgments of employee freedom of choice? Is “proximate” picketing for the union shop, as well as the closed shop, unlawful? Does a union at some point acquire sufficient interest in employment conditions in the establishment so that even picketing for a closed shop becomes lawful? Suppose the picketing union has five members employed instead of one, or 51 per cent of the work force instead of 4 per cent. Does the degree of legal protection accorded the freedom not to engage in union activity vary directly with the extent of employee hostility or apathy? Suppose only 45 per cent of the workers manifest a reluctance to join instead of 92 per cent. Suppose they do not manifest it in writing but only by joining as parties plaintiff (as in the Berger case, supra).

Is the extension of the Ostroff case limited to freedom from coercive
“inside” union pressures or does it include freedom from coercive “inside” employer pressures? On the principle of freedom of choice, it should embrace both. Is it, then, unlawful for an employer to sign a closed shop agreement under the circumstances of the Ostroff case? How about the legality of an employer’s refusing to hire a man because he does not belong to a union, or insisting that he go to the union hiring hall for clearance and possible referral, or discharging him because he has been expelled from the union?

The court quotes with approval the statement that the Labor Disputes Act guarantees the right to join or not to join a union free from coercion of employers; and it says that the statute “does prohibit such coercion by an employer whether acting voluntarily or through coercive action on the part of other employees.” Does this mean that it is unlawful for an employer to sign and enforce a closed or union shop agreement voluntarily? Does it mean that it is unlawful for an employer voluntarily to discharge, or threaten to discharge, an employee for engaging in union activity? Suppose the employer threatens to fire the employees who do not sign a statement indicating their reluctance to join the union. Does this fact alter the rule of the Ostroff case or perhaps subject the employer to liability for restraint and coercion of his employees in the exercise of their right to engage in union activity?

So long as a court confines itself to enjoining “outside” employer or union pressures, it can avoid most of these vexatious questions on the orthodox common law theory that the pressuring employer or the picketing and “stranger” union lacks sufficient interest in the labor conditions in the establishment to justify the intentional infliction of harm on its proprietor. The “labor dispute” test is simply a modern statutory formulation of this theory. But once a court enjoins the pressures of an “inside” union which has sufficient interest to concede that it is involved in a labor dispute, it is in trouble. It has abandoned the test which fixes the point outside which restraints of freedom of choice will be enjoined and has shrouded the whole matter with the cloak of confusion and unpredictability.

The Washington court implied, of course, that the rule of the Ostroff case applies only when the picketing works against the manifest desires of the majority of the employees directly involved. There is no gainsaying the fact that the point has some appeal.

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52 137 Wash. Dec. 559, at 568, 225 P. (2d) 419, at 424. (Italics by the author.)
If the majority of employees in a particular group do not want the closed shop—or, indeed, any form of unionization—it is certainly reasonable to say that the law should afford protection against the efforts of superior economic forces to impose it. This is the principle of majority rule, which is a precept as firmly fixed in modern labor policy as it is in American political life. Very likely the court had this principle in mind when it looked at the Ostroff case in which twenty-three of the twenty-five employees expressed opposition to unionization.

Unfortunately, however, the matter is not quite so simple. From the standpoint of the larger group—that is, the employees of all of Ostroff's competitors—the Ostroff decision does not represent an implementation of the principle of majority rule. Substandard (non-union) wages and conditions of employment, insofar as they cause a total cost differential and permit a price differential, place unionized employers at a competitive disadvantage vis-à-vis nonunionized employers and pose a continuing threat to union standards everywhere in the industry. Whenever the vast majority of the employees in the competitive area of the industry are members of a union—as they were in the Ostroff case, they are the beneficiaries of union standards and union bargaining power, have a direct interest in the maintenance of those standards and that power, and have therefore an interest in the removal of conditions which threaten them. From the standpoint of these employees, the decision in the Ostroff case is an affirmation of the right of a small minority of the employees in the competitive area of the industry to maintain their opposition to unionization in defiance of the will of the majority, at the cost of majority bargaining power, and—perhaps—at the expense of union standards of which all the employees are the beneficiaries. The decision, from this point of view, protects the freedom of a few employees to refrain from collective bargaining at the expense of the freedom of the majority to maintain collective power.

Perhaps the court intended to say in the Ostroff case that, for purposes of the exception engrafted onto the "labor dispute" test, the law protects, on the principle of majority rule, the freedom of choice of the employees in the particular "employer," rather than the "competitive," grouping. If this is so, then the court, in addition to creating for itself the problem in particular cases of determining what the

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59 Ninety per cent of the cleaners and dyers in the Seattle area have agreements with the two unions.
"uncoerced" wishes of the employees are, has placed itself in an anomalous position. The "labor dispute" test is intended to determine whether or not the organized employees in an industry have sufficient economic interest in the conditions of employment in a particular establishment in that industry to justify the exertion of economic pressure against it. When the court ruled in the Ostroff case that the picketing arose out of a labor dispute it necessarily conceded that the majority of the employees in the competitive area had an interest in the employment conditions in Ostroff's business. Thus it recognized the significance and the relevance of the "competitive" grouping. Logically, therefore, what the court was saying in the Ostroff case is that the law protects the right of individual members of the "competitive" unit to be free from picketing pressures intended to force employer assistance in organization, regardless of the will of the majority. If this conclusion is correct, the court has laid down a kind of civil rights rule to protect minority groups in industries characterized by collective bargaining. The rule is, in broad terms, that individual employees are not to be forced into support of the organization by union security agreements between employers and the group majority, e.g., closed shop contracts.

How far the court will push this rule—if, indeed, this is the rule it intends—cannot be foretold. Probably it will distinguish the situation where a union security agreement is being sought as part of an organizational campaign, the situation where it is being sought for the first time but as part of bargaining demands in the renegotiation of an old contract, the situation where continuation of an existing union security contract is being sought, and the situation where the group is seeking enforcement of an existing union security contract against a prospective employee who doesn't want to join the union or an old employee who wants to get out. Perhaps protection of employee freedom of choice will vary according to whether or not the union has a majority in the plant but a minority in the industry (or vice-versa), or a majority in both areas (or in neither). Doubtless the court will draw distinctions between closed shop, union shop, maintenance of membership, and preferential hiring agreements.

It may well be that the Washington court laid down a completely sound policy under the particular and peculiar circumstances of the Ostroff case. But the Ostroff case presented only one narrow aspect of a much larger problem—viz., the circumstances under which individual employee freedom to reject or support collective bargaining is to be
protected against the economic power of the organized group, with or without the cooperation of employers. The court, by basing its decision on the ground of freedom of choice, set in motion implications which run far beyond the facts of the Ostroff case and committed itself to a broad principle from which it will almost certainly find it necessary to retreat.

Freedom of choice is a sound enough policy. But the problem of what kinds of protection against what kinds of pressures it is to be given under varying circumstances is complex and vexatious. The problem has far too many facets to be dealt with adequately or wisely on a completely ad hoc basis. The Washington court, by pushing the doctrine, is in effect judicially enacting part of the National Labor Relations Act into Washington law. It is important to note that the legislative body which is responsible for that statute has, after thorough examination of the problem, protected freedom of choice in some instances and subordinated it to conflicting interests in others. If freedom of choice is our policy, it needs to be spelled out by the legislature after careful and thorough consideration of all of its aspects. Doubtless, as in the case of all freedoms, there are public limitations which should be imposed and private abridgments which should be permitted. This is a dangerous area for a court to work in, even though the equities of a particular case may make such a policy attractive.

There are two further questions which need to be asked. Section 2 of the Labor Disputes Act protects employee freedom against employer pressures, and the cases in which injunctions have been granted have been those in which the picketing was intended to force the employees into supporting the union by forcing the employer into cooperation—by, for example, signing a closed shop agreement. The Lumber & Sawmill Workers case, supra, in which the court permitted "stranger" picketing intended to produce employee action directly—that is, without the support of the employer, presumably is still good law. What will the court do with a picketing case in which the union is not asking the employer to do anything but is only asking his employees to join? Picketing to force employee action directly is, to the extent that it is respected by workers and consumers, fully as harmful to an employer as any other kind of effective picketing. Will such an

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64 See note 44, supra.

65 Any lawyer who has had experience with the National Labor Relations Act knows that while the individual employee's freedom of choice is protected in some instances, it is sharply curtailed in others. The specific statutory sections and decisions documenting the point are too numerous to catalogue here.
employer have a legal or equitable remedy? If not, will he be required
to maintain a position of neutrality—that is, will he be open to legal
action if he succumbs to the pressure which is only indirect as to him
and makes a deal with the union, despite the manifest wishes of his
non-union employees?

Leaving aside the question of the extent to which the court will push
the freedom of choice doctrine, what new objectives will fall within
the ambit of illegality when the court is dealing with “proximate”
picketing? Will such picketing be enjoined insofar as it is intended to
regulate the employer’s hours of business, to force him to violate the
National Labor Relations Act, or to force him to pay value for work
which is not to be performed? And what tests will be used to determine
the legality of a particular objective?

These issues can, and will be, resolved if and when they arise. The
court can always come up with a result. The problem is what frame
of reference it can use so that the decisions will represent a reasonably
symmetrical body of doctrine. Certainty is not the end of the law, but
it has its virtues.

THE "LABOR DISPUTE" TEST AND OTHER LIMITATIONS

Much of the court’s difficulty with the picketing cases stems from
its definition of the term “labor dispute.” The court has been forced
by the early misconstruction of Section 13 of the Labor Disputes Act56
to the arbitrary and mechanical rule that a labor dispute exists when
the picketing union has one member employed and does not exist when
the union has no members employed. There is nothing to commend
this rule but its simplicity. There is a large and persuasive body of
authority and literature to the effect that Section 13 of the parent
statute, the Norris-LaGuardia Act, does not compel such a result and,
indeed, precludes it.57

Section 13 (c) states: “The term ‘labor dispute’ includes any contro-
versy concerning terms or conditions of employment, or concerning
the association or representation of persons in negotiating, fixing, main-
taining, changing, or seeking to arrange terms or conditions of employ-

56 Safeway Stores v. Retail Clerks Union, Local No. 148, 184 Wash. 322, 51 P.(2d)
372 (1935).
57 Lauf v. Shinner, 303 U.S. 323 (1938); New Negro Alliance v. Sanitary Grocery
(C. C. A. 3rd 1939). For a clear and brief, albeit accurate, exposition of the point, see
Gregory, LABOR AND THE LAW, pp. 167-169, 189-191. See also Gregory and Katz, LABOR
LAW: CASES, MATERIALS AND COMMENTS, pp. 260-265, 271-274; Jaffe, STATUS OF PICK-
PICKETING IN WASHINGTON

ment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.” Reading this language against the background of Duplex Printing Co. v. Deering, which held that Section 20 of the Clayton Act legalizes only self-help arising out of disputes between an employer and his past, present, or prospective employees, e.g., “proximate” picketing, it is clear that Congress intended in passing the Norris-LaGuardia Act to broaden the permissible area of conflict to embrace self-help (including picketing) by a union organized in the industry in which the employer competes, even though it has no members employed by him, i.e., its picketing is “stranger.” The federal courts have so held. The Norris-LaGuardia Act does not, of course, apply to Washington courts. But the language of that statute and the Labor Disputes Act is identical, and there is no reason to believe that the Washington legislature intended a different result. Indeed, in light of the rigorous way that the Washington court had dealt with picketing prior to 1933, there is considerable reason to believe that it intended the same result. However, as the court pointed out in Adams v. Building Service Employees International Union and Shively v. Garage Employees Local Union No. 44, the legislature was apprised of the construction put on the term “labor dispute” in 1935 by the Safeway case, supra, and its failure to speak at subsequent sessions was a tacit endorsement of that construction. Nonetheless, the court was not unanimous in its view of the matter.

59 254 U. S. 443 (1921).
61 See note 57 supra. For further support of the broad construction of “labor dispute,” see Section 13 (a) which states that a case grows out of a labor dispute when it involves persons who have a direct or indirect interest in the same industry, if the dispute involves any conflicting or competing interests in a “labor dispute”—as defined by Section 13 (c)—of “persons participating or interested” in a labor dispute and relief is sought against him or it and he or it is engaged in the same industry in which the dispute occurs and has a direct or indirect interest therein. (Italics by the author.)
62 There is little doubt that a federal court looking at a Gazzam case or an Ostroff case would hold that the picketing arose out of a labor dispute.
63 197 Wash. 242, 34 P. (2d) 1021 (1938).
64 6 Wn. (2d) 560, 108 P. (2d) 354 (1940).
65 See Judge Blake, dissenting in Fornili v. Auto Mechanics’ Union Local No. 297, 200 Wash. 283, 288, 93 P. (2d) 422, 424 (1939), and in Shively v. Garage Employees’ Local Union No. 44, 6 Wn. (2d) 560, 576, 108 P. (2d) 354, 361 (1940) (Judge Blake argued for the adoption of the federal construction of the term “labor dispute”). Curiously enough, in Marvel Baking Co. v. Teamsters’ Union Local No. 524, 5 Wn. (2d) 346, 105 P. (2d) 46 (1940) the court referred to Section 13 (c) and cited Lauf v. Shin- ner, 303 U. S. 323 (1938) and New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552, 304 U. S. 542 (1938), both holding that Section 13 (c) embraces “stranger” picketing. However, the decisions were not apposite, since the Marvel case involved “proximate” picketing.
There is nothing rational about saying that picketing does not arise out of a labor dispute when the union has no members employed and does arise out of a labor dispute when it happens to have one. Such a rule encourages subterfuge, and one can expect employers and unions to work various kinds of "gimmicks" in an effort to beat the rule. It is perhaps the irrationality of the criterion for determining when a labor dispute exists that led the majority of the court in the Ostroff case to abandon it as the test of legality. But the trouble with abandoning the test is that there is no satisfactory rule suggested to take its place.

There is much to be said for complete burial of that partially interred statute, the Labor Disputes Act (including, of course, Section 13), and the adoption of the common law rule that the intentional infliction of harm on another is actionable unless justified. More precisely put, the rule is: The intentional infliction of harm on another makes a *prima facie* tort; the *prima facie* case is overcome if the defendant shows that the harm was justified by the advancement of economic self-interest. There are two tests which can be invoked under this rule. The first relates to the legitimacy of the union's objective; the second, to the interest the union has vis-à-vis the employer.

As to the former, the test is: Does the economic pressure exerted by the organized group have as its objective the strengthening of the workers' bargaining power, *e.g.*, the closed shop, or the obtaining of immediate benefits to the workers in their present jobs, *e.g.*, wages, hours, health benefits, the right of collective bargaining, or adjustment of other terms and conditions of employment? An affirmative answer establishes the legitimacy of the objective.

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65 As Judge Simpson seems to argue in his dissent (joined by Judge Steinert) in *Berger v. Sailors Union of the Pacific*, 29 Wn.(2d) 810, 813, 189 P.(2d) 473, 475 (1948).


"... the policy of allowing free competition justifies the intentional inflicting of temporary damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade.... I have seen the suggestion made that the conflict between employers and employed was not competition.... If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.'" Holmes dissenting in *Vegelahn v. Gunter*, 167 Mass. 92, 44 N. E. 1077, 1081 (1896).
As to the latter, the test is: Is the economic pressure exerted against an employer who is part of the industry in which the pressuring group is organized so that his continuance as a nonunion employer threatens group standards everywhere in the competitive area and gives the organized workers an interest in the terms and conditions of employment in his plant? An affirmative answer establishes that the union is exerting pressure within the permissible area of economic conflict. This latter test is the common law formulation of the "labor dispute" test of the Norris-LaGuardia Act as applied by the federal courts.

The proposed rule obviously permits wide latitude to employer and union economic combat. It is based fundamentally on the notion that the conflict between management and labor is a form of competition and that "free competition is worth more to society than it costs." It is not suggested, however, that either the rule or the policy it reflects is the optimum. Obviously the doctrine conflicts with some of the affirmative policies of the labor relations acts. Moreover, it fails utterly to meet the problem of the economic struggle between an employer and a union in a strategically located economic activity where tolerance of economic warfare (competition) costs more than it is worth, e.g., a work stoppage in a public utility. It is only suggested that the theory is consistent with the hands-off or laissez-faire attitudes of the common law, that it affords a workable frame of reference against which to resolve cases in a reasonably consistent way, and that it is sound doctrine in the absence of clearly spelled out and formulated legislative policies to the contrary. One of the basic theses of this comment is that labor-management conflict is an area for legislative, not judge-made, law.

The suggested doctrine in nowise affects the power of the courts to enjoin the coercive aspects of picketing. If the picketing deters reasonable men from working or patronizing because of fear of physical injury to person or property, the express or implied threats producing that fear can, and should be, enjoined. In cases where the coercive and persuasive aspects of picketing are so intermingled that "peaceful" picketing can be only a contradiction in terms, all picketing should be enjoined.

Further, while secondary picketing (not at the situs of the dispute) is beyond the scope of this comment, it should be pointed out that the doctrine serves to resolve such questions. There is not much excuse

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for secondary picketing unless the picketed employer either has a unity of economic interest with the employer with whom the union has its direct argument, or has joined the latter employer as an economically vis-à-vis the union by, for example, accepting “struck” work. Moreover, the rule applies to all economic weapons commonly employed by unions, including the strike, the secondary strike, and the consumer boycott.

The Washington court has never used the suggested analysis in deciding the legality of picketing either by employing the common law theory or by giving a broad construction to the term “labor dispute,” although one Washington judge talked the language of the former thirty-four years ago. For the Washington court to take this step after many years of traveling different paths would be cataclysmic. Yet the alternatives are also unhappy.

The choices available to the court seem clear. It can (with or without reference to the Labor Disputes Act, preferably the latter), continue to use a mechanical formula for determining when a labor dispute exists—except when intended to produce employee action directly, and (following the Ostroff case) separate the “persuasive” and “coercive” aspects of “proximate” picketing on the basis of what it conceives to be proper and improper objectives in particular cases, permitting the former and enjoining the latter. This course of action will run the court into all sorts of vexatious problems and will necessitate the ad hoc determination, on a piecemeal basis, of important policy questions—questions for which the common law has few answers. Equity will be dispensed in its purest form at the expense of certainty and predictability. The court can treat the Ostroff case as sui generis and

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69 “A tradesman, singly or in combination with others, may lawfully advertise his goods, undersell, solicit, and win the customers of his rival, knowing that he is thereby ruining the latter’s business. This is competition, and is what the law commends as ‘the life of trade.’ In such case one loses his property by the acts of his neighbors, but it is damnnum abaque injuria. But the contest must be a fair and honest one. If the same tradesman, singly or with others, advertises his goods, undersells, solicits, and wins away the customers of his rival by false representations, intimidation or artifice, not to better himself, but to injure his rival, he has committed an actionable wrong.... Whatever one man may do, all men may do, and what all may do singly they may do in concert, if the sole purpose of the combination is to advance the proper interests of the members, and it is conducted in a lawful manner.” Judge Holcomb, quoting from Karges Furniture Co. v. Amalgamated Woodworkers’ Local Union No. 131, 165 Ind. 421, 75 N. E. 877, in his dissenting opinion in St. Germain v. Bakery & Confectionary Workers’ Union No. 9, 97 Wash. 282, 300, 166 Pac. 665, 669 (1917).
return to the mechanical use of the "labor dispute" test, thus sacrific-
ing rationality for simplicity and consistency. Or it can discard or
redefine the "labor dispute" test and start afresh, thus doing consider-
able violence to the doctrine of *stare decisis*.