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AN ANALYSIS AND RE-EVALUATION OF PICKETING IN LABOR RELATIONS

MORRIS D. FORKOSCH*

INTRODUCTION

PICKETING is a term with connotations both of good and of evil. Generally, these connotations depend upon one's point of view, the interests, both private and public, involved and affected, the circumstances and conditions under which it occurs, the economic, social and other reasons why it is invoked or provoked, and the judicial and legislative reasons why it is permitted or denounced. As will shortly be seen, the very act of picketing, without more, or, as we shall put it, picketing per se or pure picketing, involves not only an objective viewer's powers of logical analysis but also his emotions, biases, economic and social predilections, and a host of assorted items which enter into and condition his *weltanschauung*. It is the purpose of this article to disentangle these varieties of human experience and to review and analyze, and then to re-evaluate, picketing in its context as a constitutionally protected activity.¹

For example, insofar as the judicial and the legislative approaches to picketing are concerned, apparently there first occurred a pendulum-like swing from outright and absolute denunciation to outright and absolute acceptance. The pendulum, reaching its apogee, began to slither backwards along its arc, albeit with perceptible opposition from the body social, economic and political. Today, and for the foreseeable future, has the pendulum come to rest at a mid-point, if at any point, or is it still in the process of moving, and if so, in which direction? The preced-

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1. The impact of judicial decisions upon picketing is a historic and current fact, as is the present regulation via legislation. To what extent these judicial and legislative forces are themselves influenced, in so acting, by particular and general external forces such as business and labor organizations, the economic and social conditions and requirements of contemporary and future years, and the domestic and international political situations, is incalculable, although influence the judges and the legislators they do.

Past or current theory, concededly, should not so condition as to determine a present national or state approach to a symptom of an underlying ill; neither, however, should ad hoc determinations be made so as to result in chaos or, at the least, in an unsettled and unstable future. Since the American philosophy is fundamentally pragmatic in basic content, then, as a corollary, is it not required that periodic investigations be conducted, analyses made, and approaches re-cast and re-formulated? Such investigations should be factual and detailed but this is beyond the scope of this article. We assume a general knowledge of past facts and contemporary newspaper reported-material and limit ourselves to, and concentrate upon, the analysis and re-evaluation of picketing in situations involving labor relations.

ing is an historical and objective analysis. Subjective re-evaluation is found by adding to the last query three words, namely, "should it move," so that for future policy purposes we inquire, is the pendulum still in the process of moving, and if so, in which direction should it move?

The answer to the "should" of such a movement includes, of course, personal and imponderable factors such as one's ethics, the *mores* of the community, and the determination of what is "best" for the national interest at home and abroad. In this field of the "ought," as distinguished from the "is," definiteness is abjured while experience and logic are sought. A bridge between the two is nevertheless possible in that what most people desire (the ought), however expressed by them as in the electoral process or by their representatives in the legislature or on the judiciary, must be taken as a fact (the is), and this fact therefore does become significant.²

PRELIMINARY LIMITATIONS

Before first entering upon an analysis of picketing a preliminary limitation is a conceptual and factual necessity. Since our concern is primarily, if not exclusively, with picketing, we exclude any extended discussion or analysis of strikes, boycotts, collective bargaining and unfair labor practices. These other matters cannot be completely eliminated for they not only enter the peripheral aspects of our picketing discussion but, at times, dominate and determine the over-all situation. Nevertheless, our concentration is upon a physical method used mostly, but not exclusively, by labor in its dealings with management. The term labor is delimited by concentrating upon organized labor, that is, the trade and labor unions which have grown or emerged in the last quarter-century, and the term picketing is also to be further delimited and analyzed in the paragraphs which follow.

Definition of Picketing

Just what is meant by the term picketing? Is it picketing when groups or organizations of individuals, acting singly or in concert, carrying placards, parade alone or in numbers before the Russian consulate and embassy, and thereby protest against the 1956 Red intervention and slaughter in Hungary? The newspapers so termed it, the radio and television commentators spoke of picketing, and the man in the street understood and acquiesced in the word and its use. Yet this is not picketing as we use the term; and it would not be so termed even if labor organizations engaged in such demonstrations and carried placards and shouted, "Boycott Russian goods."³ The reason for this conclusion

2. See *The Political Philosophy of Arnold Brecht*, 115 (Forkosch ed. 1954).

3. The converse of this proposition may not likewise be so expressed, i.e., a non-labor

is that such demonstrations against the Russian government do not involve either direct self-interest with respect to wages, or labor situations, relations, or disputes in the sense that any master-servant, employer-employee, or other relation stemming therefrom is seen to exist therein or to be affected thereby. It could be argued that labor organizations here are vitally interested in labor abroad because working conditions elsewhere affect costs and thereby permit "unfair" competition with our goods; that such self-interest is advanced by freeing the captive people who can increase their living standards; and that labor is always interested, apart from these considerations, in advancing the cause of humanity and freedom elsewhere. The short answer is that picketing by labor for international or humanitarian purposes is not within our study, especially since the federal and state governments are judicially and legislatively concerned primarily with the picketing involved in labor relations, and treat other types of activity within a context of different considerations.⁴ For example, labor organizations are somewhat circumscribed in their political activities,⁵ greatly circumscribed in their "criminal" activities,⁶ and treated as ordinary business associations in their entrepreneurial activities.⁷ When labor seeks an immediate end which is other than its traditional goal of betterment *via* wages, hours,

organization apparently may picket (at least in the federal jurisdiction) a retailer to have him hire certain workers. In *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), a corporation composed of colored persons, organized for the mutual improvement of its members, and the promotion of civic, educational, benevolent, and charitable enterprises, picketed a newly-opened retail grocery store to obtain hiring of colored personnel. The Alliance had no business dealings, directly or indirectly, with the grocery, did not compete with it in any way, and no employer-employee relation existed in any aspect. It was held to involve a "labor dispute" within the terms of the Norris-LaGuardia Anti-Injunction Act. *Contra*, *Hughes v. Superior Ct.*, 32 Cal. 2d 850, 198 P.2d 885 (1948), *aff'd*, 339 U.S. 460 (1950).

4. See, e.g., *Hague v. CIO*, 307 U.S. 496 (1939). A Jersey City law was declared unconstitutional insofar as it was used to prevent individual citizens of the United States from exercising their rights under the privileges and immunities clause of the 14th amendment "to disseminate information concerning the provisions of the National Labor Relations Act, [and] to assemble peaceably for discussion of the Act, and of opportunities and advantages offered by it. . . ." The dissemination of information included the distribution of circulars, handbills, and placards.

5. Unions are limited in their political contributions or expenditures to not more than \$5,000. 18 U.S.C.A. § 610 (Supp. 1956). But in *United States v. CIO*, 335 U.S. 106 (1948), the publication by a union of a weekly periodical containing a statement by its president urging members to vote for a certain candidate for Congress was held not within the statute's prohibitions.

6. See 18 U.S.C.A. § 1951 (1951); *United States v. Green*, 350 U.S. 415 (1956); *United States v. Nedley*, 153 F. Supp. 887 (W.D. Pa. 1957).

7. See, e.g., Forkosch, *The Legal Status and Suability of Labor Organizations*, 28 *Temp. L.Q.* 1, 28-29 (1954).

and conditions of employment, then it acts within a framework of constitutional and other rights accorded all citizens or persons. Of course an ultimate end may be such betterment through appropriate legislation but, to illustrate, in agitating for a particular candidate the immediate activity is political. Picketing for such other goals is therefore without the scope of this analysis.

What exactly is picketing?⁸ As used in labor relations, the term has denotative and connotative aspects which become significant when cast against statutory terms and constitutional clauses, but to the average individual picketing is usually a physical occurrence. When John Doe walks along a thoroughfare he may see one or more persons⁹ walking up and down, carrying placards or sandwich signs, distributing literature, intoning phrases such as "Pass 'em by," "Don't patronize this non-union shop," or otherwise physically engaged in concerted action. The reasons why these activities are engaged in are not yet of concern to us; the fact of their occurrence is. The union may, separately or simultaneously, utilize radio, television, newspaper, or other media, and may have indoor or outdoor meetings at which speakers exhort solidarity and others distribute literature, but since these are not the picketing activities of which we speak they are excluded.

What is now sought is to describe, in some detail, the actualities of the physical occurrences that we analyze. It is possible, at least in theory, to isolate each detail and to consider it separately or in combination with one or more of the others. Each picketing situation is generally somewhat different from all others, for if we assume one hundred details, that is, 100 per cent, to be our maximum then we can see that not every picketing occurrence will involve, say, eighteen pickets, or distribution of literature, or uttering of slanders, or placarding untruths. Additionally, since we atomize the over-all physical aspect of picketing and examine each separated aspect in isolation, we can assume that constitutional clauses and legal principles may likewise be applied in such a compartmentalized fashion. This method of analysis permits the examination of each item factually and legally, with a separate and minute theoretical conclusion able to be drawn in each instance of permissible or non-permissible conduct. The former can then be synthesized into a total permissible group, or to one or more of them can be added one or more of the non-permissible items with a different conclusion now, perhaps, to be drawn.¹⁰

8. The analysis which follows borrows from Forkosch, *A Treatise on Labor Law* §§ 197-203 (1953).

9. Note that we have not applied to these persons any descriptive adjective which connects them to the employer in a legal relationship.

10. This method of analysis may be compared with that used by the neo-classicists

The Elements of Picketing

One of these physical details requires separate preliminary consideration, namely, the *where* of the picketing. Traditionally it was the immediate or primary employer who was picketed by his own employees at their place of employment, and this we can term "primary picketing." Or else, as later occurred, these primary employees might proceed to an entrepreneur doing business with the primary employer, seek to obtain assistance in the dispute by having the entrepreneur refuse to do business with the primary employer and, failing in such endeavor, now picket this other person and thereby seek to bring pressure upon him to accede in such request. This can be termed "secondary picketing," which also involves a secondary boycott,¹¹ but it should be noted that neither primary nor secondary picketing need be engaged in solely by the primary employees; such picketers may be strangers to the relationship of primary employer-employee, may be hired picketers, may be employees of other employers in the same or a different industry, or may be the union organizers or officials.¹² The *who* is not yet of importance. Furthermore, the place of the picketing may involve solely and only the employer's premises, at which only primary employees are involved; or it may be that another's employees seek to enter the premises to obtain or deliver merchandise or do work there;¹³ or two or more employers are doing work at the same place and only one is picketed but this necessarily affects the others;¹⁴ or the employer's business requires or permits

in economics, for they developed and utilized systems of production and distribution which were static. It could also be analyzed atomistically, or synthesized into different combinations with a theoretical change also charted. Of course a dynamic situation cannot be factually so treated, and later we consider the consequences of such an inability to separate these integrated items; at present, however, we do use this method of analysis. See p. 397 *infra*.

11. The outstanding early boycott case of this nature was *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). A secondary boycott of a slightly different type was also denounced in *Loewe v. Lawlor*, 208 U.S. 274 (1908), where the Danbury haters struck and the AFL, in its publication, listed the firm in its "We Don't Patronize" column, thereby effectuating a consumer's boycott for which they ultimately responded in damages. But for the modern approach to this type of consumer's boycott through the method of circularizing customers miles away from the dispute, see *E. L. Kerns Co. v. Landgraf*, 128 N.J. Eq. 441, 16 A.2d 623 (Ct. Err. & App. 1940).

12. See, e.g., *AFL v. Swing*, 312 U.S. 321 (1940); *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323 (1938) (stranger picketing may still be a "labor dispute" within the anti-injunction statute); *Senn v. Tile Layers Union*, 301 U.S. 468 (1937).

13. See, e.g., *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951), upholding the union's right to seek to influence two employees of a customer of the primary picketed mill not to cross the picket line.

14. See, e.g., *NLRB v. Denver Bldg. Trades Council*, 341 U.S. 675 (1951) holding this to be a violation of the Taft-Hartley Act, 21 U.S.C.A. § 153(b)(4)(A) (1956), in that

his employees to travel elsewhere in their work and so the picketers "rove" with them to this other location and there engage in a "roving" or "ambulatory situs" picketing of the primary employer or his employees, although necessarily picketing at the premises of the other entrepreneur;¹⁵ or other variations may be found.¹⁶

In addition to the *how*, the *where*, and the *who* of picketing, the *why* is of importance. The *how* analyzes the physical details of the picketing, that is, the means or the methods, as also do the *where* and the *who*, but the *why* brings up the question of purpose, reason, or goal, that is, the intent, motive, or end. Whereas the *how*, the *where*, and the *who* are seemingly factual and objective, the *why* is peculiarly subjective and requires value judgments or conclusions based upon inferences drawn from the facts. Is the picketing being conducted primarily and solely to harm the employer; or primarily and solely to benefit the employees, with incidental harm to the employer being secondary; or is there a mixed primary and secondary reason?¹⁷ Regardless, do the picketers seek to organize the employees of the picketed employer, that is, organizational picketing;¹⁸ or economically to coerce the employer into signing a contract;¹⁹ or to inform the public or the employees, or both,

"an" object of the picketing of the primary employer was to force the termination of a contract between a general contractor and his non-union subcontractor.

15. This roving situs doctrine permits such picketing and the NLRB held that it did not conflict with the (secondary) boycott provisions of 29 U.S.C.A. § 158(b)(4)(A) (1956). *Sterling Beverages, Inc.*, 90 N.L.R.B. 401 (1950); *Schultz Refrigerated Services, Inc.*, 87 N.L.R.B. 502 (1949). See *Forkosch, NLRB's New Jurisdictional Rule on Secondary Boycotts*, 2 Lab. L.J. 247 (1951); *Forkosch, Secondary Boycotts Under the Taft-Hartley Law*, 1 id. 1009 (1950).

16. See, e.g., *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722 (1942), where one Ritter owned a restaurant in which the employees were unionized, but engaged a non-union contractor to construct a dwelling about a mile and a half away; the Carpenters Union picketed the restaurant and the employees thereof, delivery truckers, and others refused to cross the picket line, business dropping off 60%. The Supreme Court upheld the power of a state in confining the area of unrestricted industrial warfare. See also *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672 (S.D.N.Y. 1948), holding that 29 U.S.C.A. § 158 (1956) did not condemn picketing of a third-party employer who was doing the primary employer's work, thereby becoming his "ally." This ally doctrine is an exception to the general doctrine and depends upon the facts of the case, rather than the law.

17. See *Forkosch, An Analysis of the "Prima Facie Tort" Cause of Action*, 42 Cornell L.Q. 465 (1957). It should be noted that different state jurisdictions may give different answers to the validity of the picketing, depending upon their approach to the primary-secondary concept.

18. See notes 12, 16 *supra*, and note 20 *infra*. See also note 22 *infra*.

19. See, e.g., *Truax v. Corrigan*, 257 U.S. 312 (1921), where this type of coercion was denounced, and the Arizona anti-injunction law overturned; although today economic coercion by such picketing for contract purposes is upheld. See also *Senn v. Tile Layers Union*, 301 U.S. 468 (1937).

of the facts in the situation, that is, informational picketing; or to educate the employees of the benefits to be derived from joining the union, that is, educational picketing;²⁰ or directly to compel a secondary employer to cease doing business with another, that is, secondary picketing, or indirectly to have the secondary employees bring pressure upon their secondary employer to cease doing business with another, that is, secondary picketing;²¹ or to have the picketed person do or refrain from doing any one of a thousand or more items?²²

The *how*, the *where*, and the *why* of picketing, as well as the *who*, require separate consideration. Internally and externally details of each may, by permutations and combinations, result in an almost unlimited variety of factual situations.²³ It is a truism that no two factual situations can ever be identical. Necessity and life, however, require that they be grouped into classes or types and to each such class or type analogical reasoning be applied. The result is that a general principle, with particular exceptions, may now be utilized in deciding cases. How and why these general principles judicially evolved, the imponderables going into their formulation, and the discrete situations upon which they were based, is the subject of our study. So, too, are the private (labor and management) and public (legislative and executive) actions (politicking and legislation), reactions (judicial interpretations), and counter-reactions (judicial reversals, as well as legislation overturning the interpretations) of concern to us, for any re-evaluation of general principles, that is, the "ought," involves the past and the present "is." The analysis of both the "is" and the "ought" further involves the pre-

20. See Forkosch, *Informational, Representational, and Organizational Picketing*, 6 Lab. L.J. 843 (1955); Forkosch, *The Status of Organizational Picketing in the State of New York*, id. at 42. See also note 22 *infra*.

21. Note that in the first of these two types of picketing the primary employees are picketing the secondary employer directly to bring direct pressure upon him, and we have elsewhere termed this a triangular boycott, for a line may be drawn from the primary employer to his employees, from them to the secondary employer, and from him to the primary employer, thereby forming a triangle. In the second type of boycott illustrated, which we have termed a secondary boycott, a rectangle is formed because now the primary employees, via picketing or other means, bring direct influence, or pressure, or coercion upon the secondary employees who, it is hoped, will now transmit this to their own (secondary) employer and so to the primary employer. These triangular and rectangular situations are illustrated and discussed in Forkosch, *Treatise on Labor Law* § 197 (1953). See also, on tertiary boycotts and picketing, note 102 *infra*.

22. We have given labels such as "organizational," "educational," and "informational" to the picketing activities of unions, as well as calling them "primary" and "secondary." Labels do not make or determine the facts, nor do labels have any sacrosanct significance. We use them here solely as convenient shorthand symbols for easy reference. The facts, objective or subjective, or both, determine the law's applicability.

23. See note 10 *supra*.

liminary question whether any conceptual approach exists, and should continue to exist, or if it does not then whether one should be formulated and applied now and in the future. Of course this permits the criticism that we may be forcing men into molds of principles and concepts, but since men already live and act according to "golden" rules espoused in other fields we may at least attempt this conceptual formulation initially. Then we can examine the past and present "is" of picketing, setting forth our re-evaluated "ought" as our conclusion.

THE CONCEPTUAL APPROACH TO PICKETING

If we examine the humanistic and rationalistic concepts formulated early in the English common law, with a parallel found in the cultural renaissance movement,²⁴ we can see that freedom and liberty were simultaneously the lightning bolts and the lightning rods of the centuries.²⁵ Magna Carta, for example, was a reaction against the harsh and circumscribing legal and political order, and its various clauses were generally couched in negatives or limitations, such as, "No freeman shall be taken or imprisoned . . . unless by the lawful judgment of his peers, or by the law of the land."²⁶ The flight of the villeins from the manors, spurred by the Black Death of the fourteenth century, likewise sought to negate the status and submerged social and economic conditions of the lower classes.²⁷ The fifteenth century emergence of the modern state could be accomplished only when the strangle hold of the land economy, that is, the feudal system, was broken by the emerging class of latter-day entrepreneurs.²⁸ Adam Smith's eighteenth century efforts similarly attacked the prevailing mercantilist philosophy which prevented the natural instincts of mankind from blossoming forth in a plethora of production and wealth, and his *laissez-faire* disciples made his principles of liberty

24. See, e.g., Groethuysen, Renaissance, 13 Encyc. Soc. Sci. 278, 279 (1934), setting forth the views of early writers who characterize the period between the 13th and 17th Centuries ". . . as a distinct cultural epoch. . . [A]s an age of liberation from the shackles of mediaevalism and as the beginning of the modern era of individualism." Others disagree, and Professor Groethuysen takes a somewhat middle position.

25. Put differently, we can say that the surging desire for freedom and liberty sundered the restraints and coercions which bore upon man, thus acting as a bolt of lightning; when these excrescences were thus eradicated it was felt that the self-same freedom and liberty could thereafter provide safeguards for the national interest, i.e., act like a lightning-rod and draw off the evils which threatened man and his government.

26. Magna Carta, art. 39. Magna Carta is ". . . in part . . . a free grant of liberties made by the king, in part . . . a treaty between him and his subjects. . . ." Maitland and Montague, A Sketch of English Legal History 78-79 (1915).

27. See Forkosch, Treatise on Labor Law §§ 18-20 (1953).

28. See Coles, The Origins of the Modern State: A Problem in Political Formation, 10 Western Pol. Q. 340 (1957).

and freedom the basis for governmental non-interventionism.²⁹ The American view was no different historically,³⁰ and in both nations coercion which limits one's liberties, or prevents man from his fullest development, or minimizes his freedom of choice, was and is still denounced.³¹

This legalistic denunciation of coercion is not solely for the individual's benefit as it is also, if not primarily, the public interest which is likewise furthered insofar and to the degree that man's mind is free and his activities uncircumscribed.³² The state thus protects the individual against coercion from his fellow-men because it, as a government, is not alone rendered more secure politically but also because it, as a nation, thereby expands culturally, scientifically, and economically and is thus rendered more secure politically and internationally. Self-protection for the state, as well as for the individual, requires that coercion be negated

29. Heckscher, *Mercantilism*, 10 *Encyc. Soc. Sci.* 333-39 (1933).

30. See Forkosch, *Treatise on Labor Law* §§ 21-24 (1953).

31. See, e.g., *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941): "It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. . . ." For a good analysis of the period, see Salomon, *In Praise of the Enlightenment*, 24 *Soc. Research* 202 (1957).

As to the limitations upon one's liberties, reference to *Bailey v. Alabama*, 219 U.S. 219 (1911), is sufficient, even though in that case a constitutional prohibition, i.e., the 13th amendment, was involved.

As for "freedom of choice," it is a rather general term and its inherent vagueness cannot be defined by an arbitrary choice of words but is best illustrated by reference to particulars. Furthermore, "freedom of choice" is not restricted to the law *per se*. In the field of economics Adam Smith's *Wealth of Nations* inveighed against restrictions upon such freedom in choosing businesses, lines of production, purchases, etc., and our own antitrust laws are based upon such concepts. See, e.g., Forkosch, *Antitrust and the Consumer* cc. II, IV (1956). In politics we seek to prevent the voter's choice from being anything but the individual's rational and freely exercised one, and in labor relations this political concept is carried over into the election proceedings to determine the majority choice of a bargaining representative, so that where "the uninhibited desires of the employees" (*Bonita Ribbon Mills*, 87 N.L.R.B. 1115 (1949)) are frustrated, the election will be set aside. For illustrations of such frustrations, see Forkosch, *Treatise on Labor Law* 716-17 (1953). In the law, generally speaking, coercion which saps one's (contractual or other) freedom is denounced. See, e.g., definition and discussion in 14 C.J.S., *Coercion* pp. 1307-09 (1939). For an argument against determinism as a limitation upon freedom, see Berlin, *Historical Inevitability* 33-34 (1954).

32. With certain exceptions, e.g., for the self-protection and benefit of the many, circumscription is required. See, e.g., Mill, *On Liberty* 72-73 (*Everyman's Lib. ed.*, No. 482, 1948); see, however, Stephen, *Liberty, Equality, Fraternity* 3 (1873), inveighing against the generality of such terms and attacking Mills' views on liberty because ". . . the words do not typify, however vaguely, any state of society. . . ."

and, if permitted, be limited and controlled. Freedom is the condition, with limitations thereon the exception, and these latter are not only strictly construed but are themselves limited in time and application.³³ Regardless of the practice or situation in other areas,³⁴ the American judiciary hews to this historical approach which is likewise embedded in our Constitution's Bill of Rights.

This writer's tentative approach to picketing in labor situations is thus based upon the dual concept of initial full liberty for the individual, which thereby benefits the state as well, and the propriety or impropriety of limitations thereon. More importantly, since we immediately acquiesce in the propriety of such limitations, who is to determine the nature, scope, application, and permanence of these institutionalized limitations, and if individuals, are they to be subject to any separate limitation in so enumerating and fixing these limitations? The immediate and obvious answer to this last question is yes, otherwise individuals thereby exercise the powers of, and to that extent become, the government.³⁵

For example, the law concerning voluntary, unincorporated, non-profit associations, such as labor unions, permits them to exercise a great deal of self-control over their internal affairs but, under certain conditions, the state may and does step in to limit such power.³⁶ Similarly, in their dealings with each other, persons may enter into any arrangements they

33. See, e.g., the effort to make the freedoms of religion, speech, press, and assembly as exempt from governmental limitation as is constitutionally possible so to do, but the limitations placed upon them by the "clear and present danger" and other tests, as in the early cases of *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (dissenting opinion); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (dissenting opinion); and *Schenck v. United States*, 249 U.S. 47, 52 (1919).

34. In the field of economic life it is suggested that imperfect or monopolistic competition is the rule, with free or perfect competition the exception (if it ever does exist). See discussion in Forkosch, *Labor and Price Control*, 2 *Lab. L.J.* 567 (1951).

35. "The State, as the final authority and the ultimate embodiment of force, is the means whereby these patterns of authority are set. Its principal purpose is the establishment and support, by force if necessary, of the society's institutional structure. It may provide that many or few decisions shall be reached directly through governmental channels; but all decisions return ultimately to it. By the recognition it gives through law to non-governmental institutions—like slavery, as an extreme example, or unlimited rights of ownership as one less extreme—the state supports these institutions; in effect it makes them a part of itself. The people who draw power from them draw it in the last analysis from the state, since their authority to act will be defended by the instruments of government. In the exercise of power, they become at one degree removed the agents of the state itself. In a sense, even the individual's power to decide some matters for himself rests at the last upon the state, which defends his right against others and against society." Swarthout, *The Postulates of Res Publica*, 10 *Western Pol. Q.* 249, 258-59 (1957).

36. See, e.g., Forkosch, *Internal Affairs of Unions: Government Control or Self-Regulation*, 18 *U. Chi. L. Rev.* 729 (1951); Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 *Ill. L. Rev.* 425, 631 (1949); Note, 57 *Yale L.J.* 1302 (1948).

mutually accept, or bring pressure upon each other so to accept, limited solely by the lawfulness of the arrangements and the legality of the pressure.³⁷ And it is the state which is to determine such lawfulness and legality, as for example, a mutually acceptable contract to pay a bribe to a legislator or a union official is illegal and indictable because the legislature feels it to be against the public interest to permit such contracts to be entered into; or non-violent picketing may be judicially held to be unlawful because it is, in some manner, against a state's public policy.³⁸ In other words, the actions of persons may initially commence free but they are never unrestrained³⁹ because not only others but also society and its welfare so demand it; the formulation of these restraints is a function of government to be applied as required, but always from the point of view that freedom of mind and expression, as well as liberty of action, are to be uppermost. Private coercion of mind or action, when involving a restraint as so analyzed, is itself subject to the governmental limitations imposed upon all such restraints; picketing, as a private activity when and if⁴⁰ it coerces another, is therefore subject to governmental control, although the converse is likewise apparently true, that is,

37. "Of the meaning and force of the word 'lawful,' Anderson, in his Dictionary (p. 610) says: 'Legal' looks more to the letter, and 'lawful' to the spirit, of the law. 'Legal' is more appropriate for conformity to positive rules of law; 'lawful,' for accord with ethical principles. 'Legal' imports, rather, that the forms of law are observed, and the proceeding is correct in method,—that rules prescribed have been obeyed; 'lawful,' that the act is rightful in substance,—that moral quality is secured.'" State ex rel. Van Nice v. Whealey, 5 S.D. 427, 430, 59 N.W. 211, 212 (1894).

We can, for shorthand purposes, suggest that illegal refers to the violation of a command, e.g., the breach of a criminal statute; unlawful refers to the violation of a community code or mores but is not necessarily illegal (if it is, then it is both illegal and unlawful in our sense); and other terms may suggest analogous views. For example, in the amended Wagner Act, 29 U.S.C.A. § 158(b)4(A)-(D) (1956), certain conduct of labor organizations or their agents constitutes "unfair labor practices," while in Taft-Hartley, 29 U.S.C.A. § 187 (1956), this identical conduct is made "unlawful" for the purposes of that section; and in some states like conduct may be made illegal.

38. E.g., the contrary policy views in the federal and state jurisdictions for and against the picketing of a retail store by a negro organization which desired the store to employ more negro clerks. Hughes v. Superior Ct., 339 U.S. 460 (1950) and New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

39. See, e.g., Rousseau's famous opening sentence in the first chapter of his Social Contract 3 (Everyman's Lib. ed., No. 660A, 1950): "Man is born free; and everywhere he is in chains."

40. Note that we have said "when and if," and not "which." There is a meaningful difference in the use of these terms for if we had written, "picketing, as a private activity which coerces another," we would be guilty of assuming and concluding that picketing per se (i.e., pure picketing) necessarily must and does coerce another—and that would be that! Some writers and judges do hold to that opinion but, as is indicated shortly, they err in not analyzing and developing further the legal and social meaning of the term coercion.

if there is no coercion then generally no control is required. Since, however, this governmental control springs from the public weal and is based upon public interest and policy, other factors may enter which dominate a particular situation so as to permit, if not require, that some degree of private coercion nevertheless be permitted.⁴¹

The general rule of governmental opposition to all forms of private coercion may therefore have exceptions occurring which allow a limited form of private coercion when it is in the interest of the state so to permit. A balancing of policies and interests thus emerges, whether legislatively or judicially accomplished, and which may result in a rejection of all restrictions or coercions, a permitting of them all, or a utilizing of some mean between the two extremes.⁴² Which extreme to adopt, or the resting point between, is a function of government, so that the legislature and the judiciary⁴³ may both or separately act when conditions and circumstances warrant or compel. The same conclusion may be reached even if we assume, as do some writers or judges, that picketing per se necessarily involves coercion. But almost every private act involves coercion, for example, Jones tells garageman Smith that he, Jones, would like to open a super-garage down the road but will purchase Smith's if Smith cares to sell; U.S. Steel hikes the price of steel

41. See, e.g., Pound, *Theory of Social Interests*, in *Readings in Jurisprudence*, 238-39 (Hall ed. 1938): "The whole body of the common law is made up of compromises of conflicting individual interests in which we turn to some social interest, frequently under the name of public policy, to determine the limits of a reasonable adjustment."

42. See, e.g., the approach adopted by Mill in his *Utilitarianism* (2d ed. 1864) and also the statement in *American Brake Shoe Co. v. NLRB*, 244 F.2d 489, 492 (7th Cir. 1957): "However, as has been observed by the Board, the rights of the employees to engage in collective bargaining and to strike in furtherance of their economic demands must be balanced against the employer's right to protect his business against loss." See also the language of Justice Frankfurter in *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470, 474-75 (1950): "Here, as in *Hughes v. Superior Court* . . . we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.' . . . The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' . . . A State's judgment on striking such a balance is of course subject to the limitations of the Fourteenth Amendment. Embracing as such a judgment does, however, a State's social and economic policies, which in turn depend on knowledge and appraisal of local social and economic factors, such judgment on these matters comes to this Court bearing a weighty title of respect."

43. Sometimes the executive enters either directly and under a claimed executive power, as in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), or indirectly as the delegatee of a legislative power, as in *United States v. United Mine Workers*, 330 U.S. 258 (1947), or under the general powers committed to the federal government, as in *In re Debs*, 158 U.S. 564 (1895).

and its competitors "follow the leader." It is therefore not the *fact* of coercion but the *degree* (or kind) of coercion exercised which is judicially and legislatively declared to be anti-social. For example, if Jones simultaneously holds a pistol to Smith's head, that is illegal, for now this kind and degree of coercion is legislatively banned. But why has not the original type and degree of coercion been declared forbidden? As one English court put it, "competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law."⁴⁴ Or, put differently, the state has a stake in the continued and increased progress of business, with all that this implies, and experience has disclosed that some amount of harm or damage must be permitted, without legal injury flowing therefrom, otherwise the economy and the state stagnate.

This over-all rule of general governmental opposition to all forms of private coercion, but with governmentally-formulated or approved exceptions, gives the over-all conceptual approach of which we spoke earlier, and it is this writer's thesis that the "is" and the "ought" of picketing unfold when such views are made the basis for analysis and re-evaluation. We must, however, narrow our analysis of coercion to but two forms, physical and economic. For example, coercion may be found present where an individual is physically beaten or threatened with physical violence or otherwise physically harmed so as to have him comply with the wishes of the attacker; in such a situation the mind of man is not free.⁴⁵ Or, as utilized in a sit-down strike, the physical occupation of an employer's factory prevents him and his agents from working the machines, thereby bringing pressure upon the employer to accede to the union's demands. However, this illustration really involves the economic as well as the physical, for it is the economic consequences resulting from an employer's inability to produce that compel him to capitulate. A slow-down is cut of the same cloth, and so is the case where *X*'s employees not only picket *X* so as economically to coerce him directly, but also approach *Y*, who does business with *X*, and threaten to picket *Y* unless he discontinues his dealings with *X* so as to have *X* thereby further economically coerced to agree to his employees' demands.

44. *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q.B.D. 598, 620 (1889), aff'd, [1892] A.C. 25.

45. Brain-washing is an extreme illustration of this generation's most refined method of coercion, even though physical beatings are eliminated, so that we do not classify this form of mental torture with physical coercion. Another form of (fear) coercion we do not examine is that in which a Russian or Chinese national or citizen of the United States is informed that unless he aids these nations his relatives overseas will be "dealt with."

In this latter situation there is no physical violence or threat thereof, but the peaceful picketing may result in an employer's loss of business and even ultimate bankruptcy, so that coercion of an economic nature is here involved. It is these two kinds of coercion, *via* picketing, which are here examined. We therefore first turn to the past and the present of picketing, that is, the "is," and then conclude with the "ought" of re-evaluation.

PICKETING ANALYZED IN THEORY AND CLASSIFIED IN PRACTICE—
MEANS AND ENDS DISTINGUISHED

Picketing in the past, regardless of its *how* or *why*, evolved from outright legal condemnation under the common-law doctrine that a criminal conspiracy was involved, to a sort of grudging consent that it would be permitted.⁴⁶ Picketing was, and still is, conceived as coercive, as pressuring one individual by another, and therefore as a form of private warfare, albeit of an economic nature. In the early revolt against mental, moral, and religious restrictions practiced by medieval kings and churches, the centuries which exalted reason found it simple to denounce all forms of private pressure. The modern view, of course, is that private pressure of an economic sort is permissible when limited, so that "picketing *per se* is [not] to be condemned as an illegal act,"⁴⁷ although at first some courts, even in this century, felt otherwise.⁴⁸

Note that we are speaking of picketing in and of itself, of the mere fact of its occurrence, regardless of the *how* or the *why*. In other words, the mere presence of an individual who may be termed a picket, perhaps because of a placard he carries which sets forth an absolutely true fact, is still denounced or feared. The picketer need not speak, and yet his placard and his presence speak for him. This very act of picketing, said

46. On criminal conspiracy, see Forkosch, *Treatise on Labor Law* c. VIII (1953); on the lack of success concept, see concurring opinion of Justice Douglas (joined by Justices Black and Murphy) in *Bakery Drivers, AFL v. Wohl*, 315 U.S. 769, 775 (1942) (concurring opinion): "If the opinion in this case means that a state can prohibit picketing when it is effective but may not prohibit it when it is ineffective, then I think we have made a basic departure from *Thornhill v. Alabama*. . . ."

47. Chief Judge Cardozo in *Nann v. Raimist*, 255 N.Y. 307, 316, 174 N.E. 690, 693-94 (1931); see also Chief Justice Taft's famous opinion in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184 (1921), which definitely legalized "missionary" picketing.

48. E.g., *Atchison, T. & S.F. Ry. v. Gee*, 13 Fed., 582, 584 (C.C.S.D. Iowa 1905), where the court opined that there could be "no such thing as peaceful picketing, any more than there could be chaste vulgarity, or peaceful mobbing, or lawful lynching." See also *State ex rel. Lumber Workers v. Superior Ct.*, 24 Wash. 2d 314, 348, 164 P.2d 662, 679 (1945) (dissenting opinion): "Picketing is not cast in the mold of freedom; it is economic warfare." *Contra*, *Foster v. Retail Clerks' Protective Ass'n*, 39 Misc. 48, 78 N.Y. Supp. 860 (Sup. Ct. 1902).

one state court, ". . . is conceived in battle; its real purpose is to conquer. It would compel acquiescence, not induce it by mere persuasion. Unquestionably its tendency is always militant . . ."49 On this hypothesis even theoretical "pure picketing," as we shortly analyze it, must be denounced, regardless of identification with constitutional protections, for it is coercive and bad. This, however, is not the law nor should it be, for all human conduct necessarily has repercussions upon others, whether such conduct be active or passive. As phrased by Justice Douglas:

"We recognized that picketing might have a coercive effect: 'It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society.'

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."⁵⁰

To the extent that Justice Douglas feels that "the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated," he is being practical and realistic, but he does not conclude that, therefore, all picketing must be stopped. He does say that "those aspects of picketing make it the subject of restrictive legislation," but his conclusion is too broad. First: the "action of one kind or another" which is induced by the very presence of a picket line is preceded by the term "may," which is a term of possibility, not probability. Of course a picket line *may* induce various kinds of action, for example, voting for one candidate instead of another; or obtaining support for a church; or inducing violence upon those who cross the line. We speculate with "may," but live by "should," that is, the probabilities in a given situation. Our entire system of science is based upon probability, not possibility, and even the law speaks of the reasonable man, that is, one who should and will act in a given situation in a manner we have charted because of the years of experience gained in examining these situations. Thus, whether

49. *Keith Theatre, Inc. v. Vachon*, 134 Me. 392, 413, 187 Atl. 692, 702 (1936).

50. *Bakery Drivers Local v. Wohl*, 315 U.S. 769, 776-77 (1942) (concurring opinion), citing *Thornhill v. Alabama*, 310 U.S. 88 (1940). Justice Douglas' position in effect holds that free speech considerations require strict examination of legislative or (state) judicial limitations upon picketing, and in *Teamsters Union, AFL v. Vogt, Inc.*, 354 U.S. 284 (1957) (dissenting opinion), he pointed out that the Supreme Court was now almost rubber-stamping state characterization of picketing in particular as good or bad; he desired a closer review of the facts and the inferences drawn therefrom.

or not a picketer "may" induce action is not really before us; what is involved is whether or not it is probable that his presence will induce to action of a kind we abhor and condemn. This brings up the second aspect making for a too broad conclusion by the Justice: the "action of one kind or another" which is so induced must be divided into action which is not condemned and that which is condemned; or, as we shall put it, into good or bad action. The former, while by our definition not a pure (that is, constitutionally protected) item in the picketing situation, nevertheless by legislative or judicial definition should not be and is not denounced; thus merely because "action of one kind or another" is induced does not automatically mean that the "one kind," as well as the "another," is to be regulated.

Picketing *per se*, however, is a fictional and conceptual term which we may use only for shorthand purposes at this point in our analysis. It necessarily denotes a restricted, narrow type of picketing and hereafter is so considered and treated. Not being condemned as an illegal act does not necessarily mean that it is therefore a lawful method in labor-management relations, for the possibility intrudes that picketing *per se* may only be tolerated, since it is not illegal, rather than being wholeheartedly upheld as lawful and legal. As we shall see, the toleration approach, rather than the wholeheartedly lawful approach, was and is the attitude evinced by the courts and the legislatures, for pressure, that is, some degree of economic coercion, is somehow either wrapped up within its covers or else hovers nearby. This narrow type of theoretical picketing as a method we may term "pure," that is, neither the legislatures nor the courts today condemn it in and of itself. Its basic elements, or definition, may be illustrated negatively, rather than affirmatively, so that past decisions uphold it when, for example, such pure picketing is not accompanied by factual coercion or violence, does not involve any illegalities, is not to result in an illegal act, does not seek to accomplish an unlawful end, is not against a state's public policy, does not seek actively or subjectively to coerce, or does not result in any coercion whatsoever.⁵¹ In other words, pure picketing may involve a fact situation in which one or more individuals, uttering no slanders, imprecations, or untruths, carrying a reasonably-sized placard or sign and per-

51. It should be emphasized that we have included in this analysis of pure picketing, or picketing *per se*, the element of non-coercion factually and legally. It may be argued that this is unrelated to life and therefore an erroneous assumption. True, let us now assume. But in theory, as now discussed, our assumptions must be accepted, although later we apply them to the facts of experience. As will be seen and has already been stated, no "pure" social conduct exists in life but a series of (governmentally imposed or accepted) compromises is the fact of day-to-day existence. See, e.g., Pound, *supra* note 41. Thus our pure picketing may be totally unrealistic, but it is a conceptual tool with which to analyze the facts.

haps handing out throw-aways which likewise contain no untruths, walk not too slowly or rapidly to and fro in front of the employer's place of business, without blocking traffic, causing any congestion, or otherwise creating a disturbance, for a purpose or end which is not coercive, does not coerce, and does not seek primarily to injure anyone, is not to compel anyone to break any laws or obligations, and is to obtain benefits for the picketers or their principals, factually or legally, directly or indirectly.⁵²

This narrow type of picketing per se, that is, pure picketing, is not alone theoretically tolerated by the legislatures and the courts but, additionally, it is entitled to the protection of the Federal Constitution. The reasoning behind this is simple. The picketing we have just analyzed and discussed includes speaking, or distributing literature, or publicizing the facts, or otherwise involves the concepts found in the First Amendment's proscriptions upon federal, and through the Fourteenth Amendment's substantive Due Process Clause upon state, actions which limit or prevent this type of individual freedom. To the extent that such individual activities are protected by the free speech and other clauses⁵³ of the Constitution, no federal or state limitations can ordinarily be placed thereon.⁵⁴ Of course such rights or freedoms are not absolutes, so that some type of limitation or even outright prohibition is permitted at some time and under certain conditions, but unless otherwise so conditioned,

52. Note that while we are emphasizing only a method qua pure picketing, we have here included aspects of the end or purpose of such picketing.

53. In *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 529 (1949), Justice Black rejected the union's contention that the state right-to-work laws "abridge the freedom of speech and the opportunities of unions and their members 'peaceably to assemble and petition the Government for a redress of their grievances.'" Regardless of these and other clauses, we concentrate upon the constitutional right of free speech in its identification with certain aspects of picketing.

54. This free speech-picketing identification is analyzed and footnoted in detail in Forkosch, *Treatise on Labor Law* § 198 (1953), where its beginnings are traced from the Brandeis dictum in *Senn v. Tile Layers Union*, 301 U.S. 463, 478 (1937), to the Murphy adoption in *Thornhill v. Alabama*, 310 U.S. 88 (1940), albeit subsequent courts, as the discussion shows, overlooked the qualifications placed by these two Justices upon any outright and absolute identification. In *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) the Supreme Court showed how these original qualifications would be followed to interdict union actions coming within their scope, and this is the law today.

The recent case of *Teamsters Union, AFL v. Vogt, Inc.*, 354 U.S. 284, 294 (1957), is the latest pronouncement upon the subject. There the Supreme Court upheld Wisconsin's inferred findings that the picketing was for an unlawful purpose, i.e., under a statute which forbade picketing for the purpose of coercing, intimidating and inducing an employer to interfere with his employees in their right to join or not to join a union. Justice Frankfurter, for the majority, held that ". . . the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes," while Justice Douglas, for a dissenting minority of three, characterized the majority as "coming full circle" since the *Thornhill* decision. *Ibid.*

pure picketing, as we have analyzed it, is constitutionally protected against federal and state encroachments and limitations.

Pure picketing is, of course, a convenient label for purposes of theoretical analysis and synthesis. We use it primarily to denote union conduct which is not alone legal and lawful but which is constitutionally protected. While these pure details of union conduct may be isolated in theory and discussed in a vacuum they cannot, however, "be treated in isolation" practically or legally, for all of the union's activities "constituted a single and integrated course of conduct" which may include items other than speech, items which can be made the subject of restrictive legislation or judicial condemnation.⁵⁵ These items "other than speech," or "pluses," as we shortly term them, cannot be used "to take advantage of speech or press to violate valid laws designed to protect important interests of society,"⁵⁶ but this is not to say that all "pluses" are "bad" ones. Thus, as pointed out in the following paragraph, the "pluses" may be "good" or "bad," with different consequences flowing from each total fact situation. The sum of the elements which enter into and make up the particular totality of permissible picketing, that is, the basic pure picketing, plus other conduct or ends, may and indeed do vary from jurisdiction to jurisdiction. For example, the federal and state jurisdictions may disagree as to the legality of picketing to compel a retail store to hire negro clerks,⁵⁷ or state jurisdictions may disagree among themselves as to the adoption of the "unity of interest" doctrine.⁵⁸ In any event, and regardless of state or federal policy, when only those elements which make up pure picketing are found in a theoretical fact situation, it is the constitutional guarantee of free speech which rejects any governmental interference with the individual's right so to act. It is only when something new is added factually, or we may say when a "plus" appears among the basic factual elements making up pure constitutionally protected picketing, that the constitutional protection must now be considered with respect to a new total fact situation which goes beyond the pure picketing which is umbrella-ed by free speech. Because of and as a direct result of the "plus" it is possible, but not necessarily probable, that such constitutional protection may, not must, be either modified or

55. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498, 501 (1949).

56. *Id.* at 501.

57. Upholding the picketing for this end is *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), a federal jurisdiction case involving the District of Columbia; while denouncing it is the California case sustained by the Supreme Court in *Hughes v. Superior Ct.*, 339 U.S. 460 (1950).

58. For analysis of the doctrine, see Forkosch, *Treatise on Labor Law* § 201 (1953). Only a minority of the states accept the leadership of New York which promulgated this doctrine, but it is an indication of the diversity of legal approaches found in the forty-eight states.

withdrawn completely, that is, some or all of the "plus" aspects of the total picketing may be curtailed, leaving the pure picketing and the good "pluses" alone or even, as we shall see, the entirety of the picketing, including the basic pure elements as well as the good "pluses," may be conceivably denounced and prevented.

A few situations may thus be theoretically envisaged: (1) pure picketing alone; (2) pure picketing plus good elements; (3) pure picketing plus bad elements; (4) pure picketing plus good and bad elements, that is, a combination of situations (2) and (3); (5) pure picketing plus "continuing bad" elements which are separable from all the others; (6) pure picketing plus "continuing bad" elements which are not separable from all the others; (7) a combination of (6) with one or more of the preceding situations.⁵⁹ It may be urged that any situation except (1) is a mixed one and therefore "impure" by definition, but the use of "good" in situation (2) shows that this is not necessarily so. Alternatively, it may be argued, situations (3) through (7) cannot be "pure," so that are we not pre-judging the legality of the picketing situation to be examined by terming certain of the elements "bad"? This contention merits analysis. The answer is that in our examination of past and present decisions it is not we who are characterizing the elements as good or bad but the courts; our task is to sort them in accordance with the judicial categories into which they fall, the labels having been affixed by the judges. As we shall see, the labels so affixed have never been constant, some jurisdictions have disagreed, and some have reversed themselves several times. Nevertheless, our break-down into good and bad "pluses" which are tagged onto our basic pure picketing situation enables us to examine and understand the decisions.

PURE PICKETING AS THEORY AND ITS CONSTITUTIONAL IDENTIFICATION —MEANS AND ENDS DISTINGUISHED AND IDENTIFIED

We start with picketing per se, or theoretical pure picketing as we have termed it, which is not alone lawful and legal but is also entitled to the protection of the Federal Constitution under the free speech concepts found in the First and the substantive Fourteenth Due Process Clauses. Of what does such pure picketing consist? That is, what are its very few elements in our assumed 100 per cent factual situation? Obviously pure picketing embraces the physical speech of a picketer whereby, without

59. We might also set forth situations in which no elements of pure picketing are found, i.e., picketing which consists: (8) solely of good elements; (9) solely of bad elements; (10) solely of continuing bad elements (in law there would be no difference with the preceding subdivision); (11) a combination solely of good and bad elements; and (12) a combination solely of good and continuing bad elements. We do not analyze these situations as the discussion permits conclusions thereon to be drawn by the reader.

unnecessarily shouting too loudly or uttering slanders or vituperations, he states facts.⁶⁰ The free speech cases which involve situations other than the employer-employee relationship here analyzed permit not alone the statement of facts but also the appeal to reason and the exhortation to permissible action.⁶¹ It is at this narrow point in our fact situation that we must exercise care in placing the actual words or speech within or without the pure picketing concept. The reason is that some courts distinguish "between peaceable persuasion by speech and peaceable picketing."⁶² Apparently the contention is that because the fact of picketing, that is, persuasion *via* an economically coercive method, cannot square with the political and allegedly non-coercive method of free speech and persuasion *via* an appeal to reason, then the two may be treated differently in law. This argument is not alone specious but ignores pertinent decisions, basic concepts, and analogous facts.

The broad area of free speech holdings discloses that picketing decisions in labor-management situations are such a decided minority of the cases that, for example, the sole collection of legal materials upon "Political and Civil Rights in the United States" devotes only ten pages of over eleven hundred to but one law review comment upon the subject of "Picketing and Free Speech."⁶³ This is not a meaningful statistic, however, for it was not until 1940 that a tentative identification of picketing with free speech occurred in the Supreme Court decisions,⁶⁴ and not until 1949 that the Court was forced to restate the conceptual bases for, and the consequences flowing from, such holding.⁶⁵ Political, religious, educational, and other types of situations and cases, however, as distinguished from labor picketing items in this area, began to crop

60. *Music Hall Theatre v. Moving Picture Mach. Operators*, 249 Ky. 639, 642-43, 61 S.W.2d 283, 285 (1933) where the court stated concerning "peaceful picketing": "Labor has the recognized legal right to acquaint the public with the facts which it regards as unfair, to give notoriety to its cause, and to use persuasive inducements to bring its own policies to triumph. Such picketing or publicity is not per se unlawful. It is only when the evil, tortious factors . . . are brought into play that it becomes illegal. Nor will peaceable picketing be permitted to become a nuisance. The bounds of legitimacy may be crossed in many and diverse ways."

61. See, e.g., cases cited in notes 3, 4, 13, 31, 46, 54, and 60 *supra*.

62. E.g., *Keith Theatre, Inc. v. Vachon*, 134 Me. 392, 413, 187 Atl. 692, 702 (1936): "[T]he latter is said not to have in it force or violence, threats, intimidation or coercion, yet in all picketing, there is an element not appearing in fair argument and a reasonable appeal for justice."

63. *Emerson & Haber, Political and Civil Rights in the United States* 695-702 (1952). Of the nine chapters three are devoted to "Freedom of Speech" in three different aspects, the third such chapter being further subdivided, with the first subdivision thereof having its fourth and last analysis treating of picketing.

64. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

65. Beginning with *Giboney v. Empire Storage Co.*, 336 U.S. 490 (1949).

up with the passage of the Alien and Sedition Acts in 1798⁶⁶ and continue into this day. Even now questions of governmental aid to religious education, releasing children from public schools to take private religious instruction, saluting the American flag in schools,⁶⁷ and the like are brought to the judiciary for determination, and of political cases there are a plethora. The general approach in all these cases is to support the freedom of mind, of conscience, of religion, and of the individual's right to choose, with minor and necessary departures under grave stresses.⁶⁸ Thus in denouncing a state law which required school children to salute the flag, even though it was contrary to their religious beliefs, the late Justice Jackson wrote:

"National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard."⁶⁹

This denunciation of governmental compulsion in the First Amendment area is now, by some courts, and through a sort of reverse analogy, made the basis for the denunciation of private compulsion in the economic area. Just as the mind and the conscience of man are to be kept free of coercion so, they argue, are the market place and the price mechanism required to be free to act and settle as they may.⁷⁰ There is, however, one fundamental difference between mind and market, namely, that the former may require a judicial treatment in terms of absolutes, whereas the latter can never be or become such.⁷¹ The mind apparently knows no boundaries but the market is limited, or is not free, or is otherwise qualified. Thus confusion occurs when analogy is mis-

66. Act of July 14, 1798, c. 91, 1 Stat. 596; Act of June 25, 1798, c. 75, 1 Stat. 580; *United States v. Haswell*, 26 Fed. Cas. 218, No. 15, 324 (C.C. Vt. 1800); *United States v. Cooper*, 25 id. 631, No. 14865 (C.C. Pa. 1800); *United States v. Callender*, id. 239, No. 14709 (C.C. Va. 1800); *Lyon's Case*, 15 id. 1183, No. 8646 (C.C. Vt. 1798).

67. Respectively, *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306 (1952); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

68. See, e.g., the Japanese Relocation Cases, which in retrospect outrage one's sense of fairness and decency but were upheld under the guise of the "critical days of March, 1942," as stated in *Ex parte Endo*, 323 U.S. 283 (1944); see also *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

69. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, at 640, 641 (1943).

70. I.e., the "natural" forces of the market require a freely functioning economy, and the philosophy of the Sherman Antitrust Act supports this view, although such an economy is theory, not fact. On these aspects, see Forkosch, *Antitrust and the Consumer* (1956); Forkosch, *Labor and Price Control*, 2 Lab. L.J. 567 (1951).

71. We have already seen, in notes 25-34 *supra*, that competition in the market-place is subject to man-made rules of law. But business law is not the same throughout the world, as is the natural law, and so elsewhere competition may be an "evil" according to the views of one or more groups in control.

used, for the factual and theoretical differences between the free speech-mind and the free speech-picketing identifications require, if not merely permit, differences in treatment.⁷²

We must therefore conclude that, to the extent that picketing involves action which affects man, picketing may conceivably result in good or in harm; to the extent that picketing contains an element of an appeal to the reason (the mind), picketing can result only in good. The Age of Reason, the Century of Enlightenment, and the Renaissance all argue that to deny that reason, properly fed and used,⁷³ can eventually result only in good is to confess that reason not only may err temporarily and particularly, as indeed it must because we are fallible humans, but that reason cannot be relied upon to function as man's continuing guide to the stars. This exaltation, if not deification, of reason is found, to a great extent, in the common law of our forebears, as well as in our laws of today. Appeals to the reason *via* facts are therefore not merely judicially or statutorily tolerated but, under our fundamental concepts, are entitled to the protection of our Constitution. Picketing, to the extent that it is such an appeal to the reason *via* facts, is constitutionally protected; when it goes beyond it is to be denied such protection; and, conceivably, not only may the latter be forbidden but when it is so gross that it necessarily drags the former down with it, then all may be restricted or forbidden. Or, as we have already put it, pure picketing is constitutionally protected but when "pluses" are tagged onto it then the "pluses" may result in various consequences, all generally classified above in assumed situations (1) through (7).

72. Chief Justice Hughes, in sustaining the 1935 Wagner Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) stated: "Thus, in its present application, the statute [§ 7 of the Wagner Act, 49 Stat. 452, 29 U.S.C.A. § 157 (1956)] goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

"That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. . . ."

73. It may be objected that this argument assumes that reason is "properly" fed and used, but who is to do the feeding? Therefore, is not reason subject to brain-washing, stimulation, etc.? And is it not controllable and controlled, generally, rather than exceptionally, e.g., advertising, slogans for war or peace, appeals to emotion.

Regardless of all of the above, the thought expressed in the first paragraph of this subdivision bears repetition and further analysis. We distinguished between free speech in the political field, where ideas and man's actions in governing himself have over the centuries required absolutes to be evolved, and free speech in the economic field, which is a newcomer in ideological concepts. In the field of politics the mind is assailed by conflicting views and reason is left free to examine, choose, and then act; in the field of economics, however, it is claimed that when pickets seek to present views there is necessarily so interwoven with such presentation the coercive effect of a diminution in business that the picketed employer or party cannot be free to examine, choose, and then act as his reason suggests. It is urged that the mere act of picketing conduces to coercion regardless of the desire of the union or the picketers.

Assuming this last claim to be true, that picketing per se is coercive, still it does not follow that it is to be outlawed. The fields of politics and economics may be analogized, but they may not be identified in all aspects. Whereas the slightest acid of coercion turns the political litmus from blue to red, in the field of economics we daily see a variety of forms of coercion occurring.

"[I]t has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. In such a case he is not held to act 'unlawfully and without justifiable cause' The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged"74

In other words, some sort of converse parallelism dictates the connection between politics and economics, in the sense that we discuss it here. Completely free competition may result in a form of fascism; completely controlled "competition" may result in a form of communism. Under either of the above consequences there can be no freedom of thought, no use by man of his rational mind and the presence of choice. But these latter are necessary conditions for social and political man to grow and find himself in the scheme of things entire. A mean is therefore required between the completely free and the completely controlled economic competition, and this is found in some degree in our form of monopolistic competition or imperfect competition. How far should competition be free, or controlled, or imperfect? This is answered by each generation for its own purposes, but it is submitted that through the warp and the woof of the pattern emerging in this century there

74. Justice Holmes, in *Vegeahn v. Guntner*, 167 Mass. 92, 105-06, 44 N.E. 1077, 1080 (1896) (dissenting opinion).

is seen the goal of a freely functioning political man. This man cannot be coerced in the slightest, although he is led and influenced by teachings, suggestions, and examples. The economic man, however, cannot escape coercions in his daily life, and the only question is the type of coercion permitted, its degree, and the consequences attended thereon.

Political man's mind is discussed in terms of absolute freedom,^{74a} whereas economic man's mind is discussed in terms of relative freedom. The law deals in and with relatives, for what is "reasonable" in one context may be unreasonable in another. *Res judicata* and *stare decisis* are not identical, although they may be discussed in the same breath, and the like is true of coercion as we analyze it. Even if the mere act of picketing does result in some form and degree of coercion, the real question is whether or not society finds it worth more in the long run to permit this slight amount of coercion than to ban it altogether. This is a question of policy, and in a democracy we find it expressed in various ways, such as in a constitution, in judicial decisions, or in the will of the electorate or its representatives. Thus policy, not logic, controls the doctrine of picketing per se, whether it is to be banned or permitted and not whether it is or is not coercive. Since policy intrudes here it is understandable that one generation's answer may not be that of another's, or that even in one decade different conclusions may be accepted in different jurisdictions. And since policy, under our form of government, is for the individual states to set, the federal courts will not enter this field so long as the states have power to act.⁷⁵

Thus pure picketing is embraced within constitutional protections for reasons of policy as well as politics, that is, free speech identification,

74a. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940): "Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." While Justice Roberts here speaks of "freedom to believe," and we are discussing freedom of speech, the two are still to be discussed in the same breath, for belief without speech is meaningless.

In *Yates v. United States*, 354 U.S. 298, 343-44 (1957), the opinion of Justice Black, joined by Justice Douglas, concurred and dissented with the opinion of the Court: "Doubtlessly, dictators have to stamp out causes and beliefs which they deem subversive to their evil regimes. But governmental suppression of causes and beliefs seems to me to be the very antithesis of what our Constitution stands for. The choice expressed in the First Amendment in favor of [absolute?] free expression was made against a turbulent background. . . . Unless there is complete freedom for expression of all ideas, whether we like them or not, concerning the way government should be run and who shall run it, I doubt if any views in the long run can be secured against the censor."

75. *Hughes v. Superior Ct.*, 339 U.S. 460 (1950).

and this constitutional safe-guarding of pure picketing is no momentary bending of the judicial knee to forces which require mollification. Unless our assumptions and reasoning are wrong it is because our institutions so require the identification that the judiciary can do naught but support the principle. In theory, therefore, pure picketing can be isolated and treated as we have, with the necessary conclusions drawn as suggested and implied.

This does not mean, although some may so infer, that pure picketing is always good no matter *where* or *why*. Pure picketing is the *how* which we have heretofore discussed, but even a method may be mis-used or distorted. Thus it is only the means which, isolated from all else, are brought within our present ken, and it is therefore only the means of which we speak when "pure picketing" is used. This "pure" means is not only "pure" as a method but when the purpose, that is, the *why*, is to present facts and to reason with one's mind, then a conjunction of pure means and pure end results. From this point of view, therefore, the constitutionally protected type of picketing must either be solely this pure means and pure end just analyzed or, at the very least, these elements must be present in any other type of picketing before constitutional protections may be sought for it. The former, we reiterate, is seldom, if ever, found in fact; it is the latter of which we must take notice, and again the "pluses" are the be-all of our inquiry, that is, the theoretically pure has added to it elements which may or may not detract from the constitutional protection to be accorded.

We are therefore compelled to analyze mixed, rather than pure, picketing, although we utilize completely and solely pure picketing, which is so constitutionally protected, as our starting point. This pure picketing may have added to it "pluses" which are only good, which are mixed good and bad, etc., as we now proceed to examine in our next subdivisions.

MIXED PICKETING AS PRACTICE—THE DETERMINATION OF THE "PLUSES"—WHERE ONLY GOOD "PLUSES" ARE FOUND

It is obvious, from the formulation of this subdivision's heading, that constitutional protection must be accorded that type of picketing where the pure is mixed only with a good. If this were not so then, as a matter of logic and common sense, all actual picketing would be outside constitutional protection and, unless otherwise upheld, enjoined. We are therefore here not primarily interested in the formulation of an equation such as, pure plus good equals good, but, rather, in finding out if possible who determines whether a "plus" is good or bad, under what circumstances and why is such a determination to be made, and what factors enter into and influence this determination. In other words, the crux of the problem is found in this small and subjective area which

is also emotion-ridden, influenced by economic, social, and other predilections, and which cannot be cast in a static mold. What follows is therefore one man's views, and is not only subject to change with time and knowledge but to criticism and rejection by those who adhere to different views. Withal, these personal opinions follow.

Under our federal and state constitutions the policy-making organs are generally the legislature, the executive, and the judiciary, although in practice we have added the administrative so as to round out a quadripartite form of government. It is not necessary to prove that policy is set by one or more of these organs of government, and it is not required that we analyze the disagreements which often exist among them as to what is to be such a policy and its effectuation. Regardless of what these disagreements may be, it is their resolution which is of moment for, for example, how do we know who is to plunge us into war,⁷⁶ or who is to fix the internal rates for utilities and upon what bases?⁷⁷ Except for the circumscribed areas wherein definite and clear-cut constitutional delegations of policy-making power are found, the evolution and culmination of the doctrine of judicial supremacy generally, albeit not always, finds the Supreme Court as the ultimate factual determiner of a "good" or "bad" policy. This is not to say that ordinarily the Court engages actively in formulating such a policy, although in effect it needs must influence those who do. Rather, the Court leaves it up to the others, federal and state, to initiate a desired policy and eventually, when a case is brought before it, gives its approval or disapproval.⁷⁸ Not all policy matters come before the Supreme Court

76. See, in general, Forkosch, *Treaties and Executive Agreements*, 32 *Chi.-Kent L. Rev.* 201 (1954), and, in particular, U.S. Const. art. I, § 8, cl. 2. See also Hamilton's views in his *Works*, as quoted in S. Doc. No. 170, 82d Cong., 2d Sess. 281-82 (1953).

77. See, in general, Forkosch, *Administrative Law* §§ 338-43 (1956).

78. A general, sketchy, and illustrative analysis of such initiated policies, and the Court's reviewing powers, might be as follows: in the federal jurisdiction there is a statute which involves picketing, namely, the Norris-LaGuardia Anti-Injunction Act of 1932, 29 U.S.C.A. § 101 (1956) as well as the Labor-Management Relations [Taft-Hartley] Act of 1947, 29 U.S.C.A. § 141 (1956). The latter, in § 158(c) of the amended Wagner Act, superficially declares or grants the right to free speech, but it has been interpreted as a grant in that it is limited to unfair labor practices, and not representation proceedings. See, e.g., *Metropolitan Life Ins. Co.*, 90 N.L.R.B. 935 (1950); Forkosch, *Treatise on Labor Law* § 258 (1953). In the federal jurisdiction the Supreme Court is the ultimate interpreter of the meaning of these federal laws, their applicability, effectuation, and their federal constitutionality. In most state jurisdictions there are baby anti-injunction statutes, and in some states there are labor relations acts. These state laws are interpreted, applied, and utilized solely by the state courts, and the Supreme Court has no "look-see" as to these items, being required to accept the state court's interpretation. As so interpreted and/or applied, however, the Supreme Court now has the ultimate responsibility of examining for violations of federal constitutional provisions, or conflicts

for, besides those narrow areas which are reserved exclusively for the co-ordinate organs of government, other limiting questions may arise, such as, is this a policy which only the state, and not the federal government can determine⁷⁹ or, regardless, should the Supreme Court undertake review?⁸⁰ Questions of power and expediency thus overlap, with the former taking second place to the latter, since whether or not power is present is also generally a judicial question. As a consequence it is *ad hoc* decisions which necessarily result, and the Supreme Court has indicated its views on this particular subject many times in the past.

Does all this mean that one body of nine men, appointed for life, have it within their power to determine, influence, or limit the policy which this nation or the states shall adopt? The answer is yes and no; yes, in the sense that they do influence and limit the policies of the several governments through the exercise of their power to declare unconstitutional those declarations or actions which transcend the limits which the Constitution, as they interpret it, fixes; no, in the sense that the ultimate determination of governmental policies is in the hands of the electorate *via* constitutional amendments, or in the hands of the legislature *via* its power over the Court's appellate jurisdiction, or in the hands of the executive *via* his power of appointment, or in the hands of one or more of these three *via* the pressures which can be exerted against the members of the Court, such as, the 1937-1938 New Deal pressures which caused a shift in the Justices' voting, if not in their views, while at the present moment the criticism of the Court anent its decisions on federal-state preemption and educational segregation is reaching a political and legislative crescendo.⁸¹

The Supreme Court does not therefore control, although it does influence, the policy of the nation and of the states. Whether or not a particular legislative or executive policy is "good" or "bad" may thus be judicially inquired into, but where the judges may so initially propose

with applicable federal statutes. In the purely federal sphere the Supreme Court may or may not enter the policy field, albeit indirectly; in the purely state sphere, where no federal constitutional or statutory limitations apply, the Supreme Court (in theory) cannot enter the state's policy field; and if, in this latter situation, a federal constitutional or statutory limitation does apply, the Supreme Court still (in theory) is not to enter the policy field but is only to examine constitutionality or supremacy on a yes or no basis.

79. See, e.g., discussion by Forkosch, *Jurisdiction [of the Federal Labor Board] and Its Impact on State Powers*, 16 Ohio St. L.J. 301 (1955). See also Forkosch, *Treatise on Labor Law* §§ 204-06 (1953).

80. See, e.g., partial dissent by Justice Brandeis in *Ashwander v. TVA*, 297 U.S. 283, 341 (1936). See also Fluno, *How Deep Is the Supreme Court in Politics?*, 10 West Pol. Q. 459 (1957).

81. See, in general, Latham, "Fear Strikes Out," *The New Leader*, Aug. 19, 1957, pp. 14-15.

they do not ultimately dispose, that is, their judicial disposition is not the political and judicial end for, if Congress so desires, it may legislate otherwise.⁸² The modern judicial tendency, if not trend, is for the Supreme Court to deal with the civil and political rights of individuals, to become more of a lawyers' court, and to withdraw greatly from the field of policy, although at times it does act like the proverbial bull. Nevertheless, and assuming no constitutional amendment or restrictive legislation, the Supreme Court will always retain some power to enter the field of policy, whether economic, social, political, or otherwise, and to the degree that its views cannot be overlooked.⁸³

The resolution of our formulated question, whether constitutional protections are to be accorded pure picketing when only a good "plus" is added, is thus not a minor achievement on the scale of a simple mathematical equation. When is union conduct "good" and when is it "bad"? The Supreme Court, as do all judges, does enter this field of characterization and we have attempted to explore certain aspects of its judicial powers and limitations, albeit superficially and briefly. The tentative conclusion we reached made lawyers not only amateur psychologists and life-time students but, because of the shifts which occurred physically in the composition of the Court through retirement and death, and mentally due to reversals and changes in views, made lawyers second-guessers, that is, definite prognostications were improbable. As we saw at the outset of this article, coercion was denounced generally and usually but, absent this factor, pure picketing could well be related to a constitutionally protected right. Only when a "plus" was added might a question arise. And whether this "plus" was a good or a bad one, and how to recognize and stamp it as such, are the questions before us now. Our conclusion is that no legal method exists whereby in advance of a decision there can be a definite characterization, nor can the definite attitudes of the Justices be charted.

However, even Pandora's box contained Hope, and this pessimistic attitude is tempered by the realization that tendencies and trends may be viewed as possible clues to, if not determiners of, the decisions. For example, the wide-open decade of the 20's and 30's resulted in certain employer "vices" which the 1932 Norris-La Guardia⁸⁴ and 1935 Wagner

82. See, e.g., the alleged consequences of *Jencks v. United States*, 254 U.S. 657 (1957).

83. This seemingly means, of course, that individual judges must be studied, their backgrounds unearthed, the influences affecting them analyzed, and that lawyers may be forced to become amateur psychologists and psychiatrists. And since the nine Justices at Washington are merely illustrative of what the practitioner must do on the federal and state local level, a lifetime project looms.

84. "The Norris-LaGuardia Act [29 U.S.C.A. § 101 (1956)], passed in 1932, is the culmination of a bitter political, social and economic controversy extending over half a

Labor Relations⁸⁵ Acts attempted to overcome, and the judiciary gave them sympathetic interpretations; similarly, the 1947 Taft-Hartley Act, and the numerous state enactments including the right-to-work laws, reacted against unions and their conduct, with judicial views following these legislative criteria.⁸⁶ In both of these over-all twin-decade approaches the judiciary was unquestionably influenced, just as the legislature undeniably was, by the facts presented to them. Today, in 1957, the revelations of the Senate's Select Committee on Improper Activities in the Labor or Management Field apparently presage a tightening of not alone laws but of views in this area. Against this, however, is the "hope" of which we spoke that the Supreme Court will stand fast as the guardian of political free speech where this is found to be actually present.

MIXED PICKETING AS PRACTICE—WHERE ONLY
BAD "PLUSES" ARE FOUND

In the preceding subdivision the analysis really was of the over-all judicial method and approach to the characterizing of a "plus" as "good," and the same concepts may be used for the "bad" characterization.⁸⁷ Now we assume that either the legislature or the judiciary has, or both have, tagged a good or a bad label onto a "plus." As we saw previously, pure picketing with a good "plus" is constitutionally protected, that is, the pure is constitutionally protected and this now reaches out and apparently likewise protects the good "plus."⁸⁸ But where the pure is mixed with a bad then a question of policy enters; how bad is the bad, and can we ever permit it to be umbrella-ed by the pure? In other words, we start with the proposition that where the legislature has denounced certain union conduct (the means) or objectives (the end), and this denunciation (the statute) is within that body's power (that is, is itself

century." *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91, 102 (1940).

85. 29 U.S.C.A. § 157 (1956). See note 72 supra.

86. E.g., the 1940 Thornhill decision in this picketing-free speech field evoked protests which, stilled somewhat during the war years, resulted in a re-casting of language, if not approach, in the 1949 Giboney case. To what extent the post-war (1946-1949) restrictive federal and state legislation contributed to the Giboney judicial views is impossible of ascertainment.

87. We must confess, at the outset, a like inability to foretell in particular when a "plus" will be held to be bad.

88. The reason we say "now" reaches out, etc., is because the good of today may be the bad of tomorrow; if a pure-plus-good combination is constitutionally protected, it might be argued that it is always to be protected, i.e., the combination can never be otherwise characterized. But this is not our approach, for we have seen that the characterization of a plus depends upon many and changing factors.

constitutional), then the individual's personal rights needs must be subordinated to the public's general needs as expressed by its representatives. And, additionally, on the assumption that no such legislative declaration has been made or upheld, then the courts may promulgate a public policy which judicially denounces such union conduct or objectives, with like consequences for the individual's constitutional rights.

Put differently, the constitutional protections found in the First Amendment are not absolutes, so that when a responsible body weighs these rights against those of the public or of another person or body and finds them wanting in primacy, then free speech protections, to illustrate, may be circumscribed. But since constitutional rights are involved and must always be protected whenever possible, the mere fact that a bad "plus" is tacked onto a free speech right does not automatically result in a loss of one's free speech. For example, if a union pickets a retailer and to the pure picketing we add a bad "plus," such as a placard containing an untruth, the mere addition of the libel does not ipso facto prevent any and all picketing from being carried on.

The general approach, as seen above, is to protect free speech whenever and wherever possible, so that if we can eliminate the bad and leave only the pure or, as we shall put it in the next subdivision, eliminate the bad and leave only the pure plus the good, which is the usual factual situation, then this is to be done. In other words, a "bullet" injunction should issue, striking narrowly at and preventing the continuation of the illicit but leaving the licit to be carried on. This judicial "accommodation" is reasonable and rational, balances the equities on both sides, and permits constitutionally protected rights to be preserved.⁸⁹

There is, however, one major flaw in this analysis, namely, that heretofore we assumed no pure picketing could or did exist in practice and we could analyze only mixed picketing in fact.⁹⁰ If this be so, and we now remove all bad "pluses" *via* a bullet injunction, then only pure picketing is left, but in theory and not in fact. Thus, logically, where pure picketing is mixed solely with bad "pluses" it would appear as if all picketing goes by the board when the bad "pluses" are prohibited. Logic, however, does not here jibe with experience, for what is always found to be involved in a picketing situation are the mixed good and bad "pluses" discussed in the next subdivision.

89. This is the approach found in federal and state anti-injunction statutes.

90. See p. 415 *supra*.

MIXED PICKETING AS PRACTICE—WHERE GOOD AND
BAD PLUSES ARE FOUND

This is the practical situation found daily in labor-management relations, that is, where theoretical pure picketing, protected as a constitutional right because of its identification with free speech, now has added to it factual aspects some of which are good and some of which are bad. The answer is apparent, namely, eliminate the bad through a bullet injunction and permit the pure-good combination to continue. Again, as in the preceding subdivision, this is reasonable and rational and just makes sense. And that is exactly what the courts will and do do.

We are more concerned, however, with another aspect of this over-all analysis. We have already mentioned that pure picketing is really a conjunction of pure means and pure end,⁹¹ and so a distinction is required to be made between these two terms. The means, as we said, are generally the *how* of picketing, and the end is the *why*. It would be simple now to say that policy formulation concerning the subjective end or *why* is never static, crops up in different jurisdictions on different bases with different results, and that all organs of government enter this field to fix or question its policy, whereas the objective *how* or means deals with the physical deeds of persons, which deeds have generally been already characterized in our penal and regulatory laws as bad and need only be enforced, not questioned⁹² (excluding the question of constitutionality). The difficulty with this is that the Supreme Court sometimes does enter the field of the *how* as, for example, in holding that "an incident in the geographically restricted area near the mill" was primary, not secondary picketing, since no "concerted" action had occurred.⁹³

91. *Ibid.*

92. See, e.g., the language in *International Union, UAW, AFL v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 253 (1949): "While the Federal [Labor] Board is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states."

Compare this, however, with the hint in *NLRB v. International Rice Milling Co.*, 341 U.S. 665, 672 (1951): "In the instant case the violence on the picket line is not material. The complaint was not based upon that violence, as such. To reach it the complaint more properly would have relied upon § 8(b)(1)(A) or would have addressed itself to local authorities. The substitution of violent coercion in place of peaceful persuasion would not in itself bring the complained-of conduct into conflict with § 8(b)(4). It is the object of union encouragement that is proscribed by that section, rather than the means adopted to make it felt." See also Forkosch, *Jurisdiction and Its Impact on State Powers*, 16 *Ohio St. L.J.* 301, 328-30 (1955).

93. *NLRB v. International Rice Milling Co.*, *supra* note 92 at 671. Note that the where of the picketing is emphasized by the Court, but the where and the how are here not differentiated. In this case the unanimous Court also took the position that the why

Nevertheless the general statement, subject to exceptions, is undoubtedly correct, namely, that the Supreme Court usually confines itself to the end rather than the means of picketing,⁹⁴ leaving the latter to local authorities.⁹⁵

Furthermore, the means are not only objective and somewhat ascertainable of direct and immediate proof, for example, a picketer may strike a person or carry a libelous or untrue sign, but centuries have given us in addition to the judicial, a political and moralistic approach to the actions of individuals.⁹⁶ It is only when new objective tactics are utilized, such as a sit-down strike, that policy must be made as to the means. For example, the judicial policy concerning sit-down strikes is to condemn them as illegal;⁹⁷ the administrative policy concerning slow-downs likewise denounces these methods;⁹⁸ the legislative policy with respect to featherbedding is statutorily expressed by making it criminal or an unfair labor practice;⁹⁹ the executive policy when the mails are stopped or vital

was of no importance, if of any consequence, because the actual means employed fell short of the condemned activity, i.e., the activity was individual and usual, not "concerted." "In this case, therefore, we need not determine the specific objects toward which a union's encouragement of concerted conduct must be directed in order to amount to an unfair labor practice under subsection (A) or (B) of § 8(b)(4). . . ." *Id.* at 671. The reasoning apparently is that a federal statute makes it an unfair labor practice (and also unlawful in 29 U.S.C.A. § 187 (1956)) to seek an objective by certain proscribed means. Since only these enumerated means are denounced, others can be employed, for the same objectives, without any statutory objection. It is not the why as such which is the basis of the legal condemnation but only the why plus one or more of the enumerated means. A conjunction of one or more of the enumerated whys plus one or more of the enumerated means must therefore occur before a statutory violation can be found. The why being eliminated, only the how remained for analysis.

94. See, e.g., discussion in *Forkosch*, *supra* note 92, at 335. In *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951), the Supreme Court had to enter the how and where aspects since a federal statute was involved and the pre-emption question required a federal interpretation.

95. This conclusion does not mean that the Supreme Court will never analyze, discuss, and base its decision upon the picketing means employed for, as we shall see in the following two subdivisions, these become most important at times.

96. Obviously a question of fact may enter, to be resolved as such, but here we assume the fact and discuss it as proved.

97. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

98. See 29 U.S.C.A. § 142(2) (1956), wherein "strike" is defined so as to include a concerted slow-down or other concerted interruption of production by employees. Generally, see also *C.G. Conn. Ltd. v. NLRB*, 108 F.2d 390 (7th Cir. 1939).

99. The Supreme Court has emasculated § 8(b)(6) (29 U.S.C.A. § 158(b)(6) (1956)) in *NLRB v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953), and in *American Newspaper Publishers Ass'n v. NLRB*, 345 U.S. 100 (1953), but this is not to say that Congress has not otherwise entered this field and set policy. See, e.g., the *Lea Anti-Petrillo Act*, 47 U.S.C.A. § 506 (Supp. 1956), and the *Hobbs Anti-Racketeering Act*, 18 U.S.C.A. § 1951 (1951).

war production is delayed is to prevent the stoppage and to seize the plants.¹⁰⁰ In all these illustrative situations policy had to be made as to the means, regardless of the end involved. Even though the sit-downers wanted ends which the law recognized and in other situations encouraged and enforced, the means there used were rejected, and this was likewise true for the other illustrations.¹⁰¹ Over the two decades of labor's greatest advances, beginning with the New Deal of 1932 to about the Korean "incident," the tactics of unions in organizing and in bargaining have developed from the simple primary strike to the complicated tertiary boycotts and hot cargo clauses of today.¹⁰² Although we cannot say that time and experience have jelled unions' initiative and ingenuity so that all means are today legislatively or judicially classified as good or as bad, still it is the rare factual situation which brings up a method which, directly or analogically, has not been or cannot be categorized. Policy fixing in this area is not difficult to understand and foretell,¹⁰³ and no attempted identification with free speech will save

100. Respectively, *In re Debs*, 158 U.S. 564 (1895), and *United States v. United Mine Workers*, 330 U.S. 258 (1947), although in this latter case it must not be overlooked that Congress had generally authorized such a seizure. Executive policy determination was nevertheless required in particular instances. See also discussion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

101. See also, a denunciation of mutiny, as in *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942).

102. A tertiary boycott may be illustrated as follows: Union X seeks increased wages from Employer 1 who rejects them; X goes to 2, who does business with 1, and persuades or coerces 2 to cease doing business with 1 unless and until 1 capitulates to X; this is the ordinary secondary boycott, where pressure is placed upon 2 directly or indirectly, e.g., through the medium of proselytizing his employees to refuse to work until 2 does what X requests (all this is condemned in Taft-Hartley § 8(b)(4)(A), (29 U.S.C.A. § 153 (b)(4)(A) (1956)). Suppose, however, that the teamsters refuse to deliver merchandise to 2, and their employer 3 so notifies 2 that he, 3, will be unable to pick up from or deliver to 2, then it is 3's employees who pressure 3 to pressure 2 to pressure 1. See, e.g., the early situation as found in cases discussed in Smith, *Labor Law* 411-26 (1953). Of course the situation as above envisaged is limited, with respect to the number of employers so involved, only by one's imagination. The hot cargo clauses have been upheld by the Second Circuit in *Milk Drivers Union, AFL-CIO v. NLRB*, 245 F.2d 817 (2d Cir. 1957), but have not yet been before the Supreme Court. See also similar NLRB policy in *General Drivers*, 115 N.L.R.B. 800, 801 (1956); General Counsel's Administrative Decision Case No. F-141, Lab. Rel. Rep. (40 L.R.R.M. 1361) (1957). A hot cargo clause is found in a collective bargaining contract and permits the employees to refuse to handle merchandise or material from a concern involved in a labor dispute. For an excellent discussion of the clause, and an analysis of the judicial and administrative views thereon, see *Douds v. Milk Drivers Union, AFL-CIO*, 154 F. Supp. 222 (S.D.N.Y. 1957).

103. E.g., raiding and mishandling of pension funds is really not a means as we use the term; it is downright illegal or unethical. Legislation to overcome loopholes can be drafted and enacted quickly, so that policy here is legislatively fixed. Or, when so fixed and interpretation is required, precedents and logic cooperate to untangle the facts and

that part of picketing which is wrapped up with a sit-down strike, or with other denounced conduct. Just as free speech does not permit one to shout fire in a theatre, so does it not license unions to "shout" sit-down, *via* placards.¹⁰⁴

It is in the goal or end of union tactics, that is, the *why* of union conduct, that subjective evaluation and policy fixing must keep abreast of the times. Here is the place where the greatest difficulty is found in not only understanding why the *why* of union efforts is to be upheld or denounced, but also why that policy approach may be rejected elsewhere or even changed within a period of months or years. For example, federal labor policy is to permit picketing where the end is to compel a retail store to hire negro clerks, although the Supreme Court will nevertheless uphold state labor policy which denounces a like goal.¹⁰⁵ The *why* of union picketing may thus be denounced or upheld and, if the former, then regardless of the means employed, the picketing will be stopped. The constitutional free-speech identification with picketing does not support any picketing for a properly rejected end which is illegal, violative of public policy, or against the mores of a community. We must here carefully differentiate between the conclusion reached in the preceding paragraph and that just given in the preceding sentence. Insofar as means are concerned we concluded that "no attempted identification with free speech will save that part of picketing which is wrapped up with" a denounced method. Now, insofar as the end is concerned, we concluded that such "free-speech identification with picketing does not support any picketing for a properly rejected end" In the former it was "that part" of picketing which was prevented, whereas in the latter there was no support for "any" picketing. In other words, a bad *how*, such as violence on the picket line, ordinarily results in a bullet injunction, striking only against the evil tactic and, because of the free speech identification, leaving all else alone, whereas a bad *why* ordinarily results in a blanket or buckshot injunction, preventing all picketing regardless of the good or bad method of it.

The formulation of such a *why* is, as we have seen, fraught with considerations not only of policy but also of constitutional rights, for all picketing is denounced when the badness of a *why* is announced judicially

the law, as in Dallas General Drivers, 118 N.L.R.B. No. 165 (1957), where the NLRB upheld a union's distribution of handbills at retail stores, asking consumers not to buy the struck wholesaler's products, but denounced the picketing of employee and service entrances to the stores with signs carrying the same working.

104. See, e.g., statement by Judge Goldsborough in *United States v. United Mine Workers*, 77 F. Supp. 563, 566 (D.D.C. 1948), that the ". . . use of a code in order for a union to avoid responsibility is a new thing. . . . [But] as long as a union is functioning as a union it must be held responsible for the mass action of its members."

105. See note 57 *supra*.

or legislatively. What are some of these *whys*? The federal legislature has given us several ends which are denounced, as in the criminal laws,¹⁰⁶ the general labor-management laws,¹⁰⁷ and the particular statute involving collective bargaining.¹⁰⁸ The state legislatures have also given us several denounced ends, such as breach of contract,¹⁰⁹ and conduct which violates the state's anti-monopoly act.¹¹⁰ The judiciary, federal and state, enter this area where the legislature has not acted and policy, in this regard, is thus fixed by the courts.¹¹¹ This is the area of greatest

106. See references in Forkosch, *Treatise on Labor Law* §§ 67-72 (1953). For state legislation, see *id.* §§ 82-88.

107. *E.g.*, Taft-Hartley § 302 (29 U.S.C.A. § 186 (1956)) dealing with pension and trust funds, bribes, etc.

108. The amended Wagner Act of 1935, § 8(b)(4), (29 U.S.C.A. § 158(b)(4) (1956)), found in full in Taft-Hartley § 101 (29 U.S.C.A. §§ 151-167 (1956)). In addition to these subdivisions there is also, for example, § 8(b)(1)(A), which makes it an unfair labor practice for a labor organization or its agents to restrain or coerce employees in their § 7 rights, which expressly include the right "to bargain collectively through representatives of their own choosing." Does minority picketing, *i.e.*, picketing by a union representing only a minority of the employees of the employer, constitute a violation of § 8(b)(1)(A)? In *Curtis Brothers, Inc., Lab. Rel. Rep.* (41 L.R.R.M. 1025) (Oct. 30, 1957), the Board, by a majority of three, with one member concurring and one dissenting, found that the issues of fact in that case were determinative. There the minority union picketed initially for exclusive recognition, then apparently changed such conduct to picketing "only to win adherents and not to be recognized by the Company." The Board found that this was a superficial change, and that factually the picketing continued to be for recognition purposes. Then, continued the Board, since this brought pressure upon the employer, and "necessarily an economic one," ". . . the employees who choose to continue working, while the union is applying this economic hurt to the employer, cannot escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like damage to his employees. That the pressure thus exerted upon the employees—depriving them of the opportunity to work and to be paid—is a form of coercion cannot be gainsaid. . . . The diminution of their financial security is not the less damaging because it is achieved indirectly by a preceding curtailment of the employer's interests." *Id.* at 1027.

109. As in *N.Y. Civ. Prac. Act* § 876-a (1)(a); *Euclid Candy Co. v. Summa*, 174 Misc. 19, 19 N.Y.S.2d 382 (Sup. Ct.), *aff'd mem.*, 259 App. Div. 1031, 21 N.Y.S.2d 614 (2d Dep't 1940).

110. See *Hughes v. Superior Ct.*, 339 U.S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). Also included here is picketing to compel the hiring of unnecessary help, *Opera on Tour, Inc. v. Weber*, 285 N.Y. 348, 34 N.E.2d 349, *cert. denied*, 314 U.S. 615 (1941).

111. See note 110, *supra*, and for the self-employed individual who is protected against union organization, see discussion in *Settembrini v. Greenberg*, 200 Misc. 832, 833, 107 N.Y.S.2d 297, 299 (Sup. Ct. 1951), giving references to cases and to the reasoning behind them. In *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926), Justice Brandeis stated that ". . . a strike may be illegal because of its purpose, however orderly the manner in which it is conducted," and held that "to collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose." He

flux, as statutes, unless overthrown, become adorned with judicial interpretations which somewhat fix their *whys*; the judiciary, however, is not so limited to the field of statutory gloss for, in the absence of a statute, the judiciary may "make" law, that is, declare what the common-law or policy approach is. Before the anti-injunction and labor relations statutes were enacted in the federal and some state jurisdictions, and today in those states which have no labor relations statutes, it was and is the judiciary which, perforce, had to make judicial determinations and thereby set and fix state policy with respect to these matters.¹¹² And even today's laws, regardless of the labor-management area they cover, require some degree of judicial adumbration before application.

The objective means are ordinarily more capable of statutory control than is the subjective end, and so this involves the judiciary more often in the latter than in the former. Whereas coercion and compulsion may be condemned generally by the legislature, whether found in the means or the end, or even where none appears but the legislature nevertheless condemns certain general or even specific actions or consequences because of their social and other consequences, it is, nevertheless, the judiciary which is the common-law fount of an evolving jurisprudence. The basic reason here is found in the particular decisions handed down on an *ad hoc* basis, rather than the generalizing necessarily indulged in by the legislature. The centuries-old background of actual experiences and limited approaches may therefore be called upon to provide a particular basis for the judiciary's narrow decisions in today's actual problems, albeit reversals, distinctions, and like qualifications permit the judges to

also felt that "to enforce payment by a strike is clearly coercion. The legislature may make such action punishable criminally, as extortion or otherwise."

112. For an analysis of the approaches in several state jurisdictions, see Forkosch, *Treatise on Labor Law* 454, fn.86 (1953). See also *J. Radley Metzger Co. v. Fay*, 4 A.D.2d 436, 439-40, 166 N.Y.S.2d 87, 91 (1st Dep't 1957) stating: "There can no longer be any doubt about the power of a state court to enjoin picketing under circumstances where its Legislature or courts have adopted a public policy directed against picketing for unlawful objectives. The decision in *International Brotherhood v. Vogt* . . . makes this indisputably clear." In the Metzger case Local 485 claimed that it had, as members, the employees of plaintiff who, by their corrupt bargaining agent, Local 229, had entered into an alleged "sweetheart contract" with plaintiff. Local 485 picketed, its placards reading "On strike for clean unionism." A temporary injunction was upheld because, on the affidavits, a valid contract was shown, so that plaintiff employer was caught between two rival unions. "Perched between Scylla and Charybdis, the employer, if it accedes to the demands of the pickets and summarily repudiates the contract with Local 229, will be met with picketing ordered by that Local; while if it continues to abide by the agreement, until some court or board relieves it of the obligation, it must suffer the consequences of the picketing. . . ." *Id.* at 439, 166 N.Y.S.2d at 90. It may be of interest to note that the picketing, even though eventually so temporarily enjoined, forced the employer to liquidate its business.

be forward-looking in their opinions. The everyday *why* of picketing is thus more susceptible of a judicial than of a legislative imprint, insofar as its here-and-now acceptance or rejection is to be determined, and it is usually the courts which thus hold a particular *why* to be good or bad in the context of the particular facts before it. Life is lived in the detailed particulars of an actual controversy, not in the ivory seclusion of a statute, for the facts must not only first be determined but, even when found, must be interpreted and brought within the confines of a law itself to be interpreted.¹¹³

MIXED PICKETING AS PRACTICE—WHERE CONTINUING BUT SEPARABLE BAD “PLUSES” OF A VIOLENT TYPE ARE FOUND

Here we assume the factual situation just discussed in the preceding subdivision but now definitely limit our analysis to the *how* of picketing, and assume that these bad “pluses” are continuing ones. As a matter of fact we have necessarily had to make this latter assumption in all of the preceding subdivisions, for if these bad “pluses” were past occurrences, or temporary or sporadic, then the courts would not be concerned with equity injunctions but only with law damages. Where the bad “pluses” are continuing an equity court may step in, but now we ask, to do what? The answer depends upon the fact that pure picketing with a continuing bad (*how*) “plus” attached may or may not be separable therefrom, with two different legal approaches fashioned by the courts. Here we analyze the separable bad (*how*) “plus,” and in the following subdivision we discuss the inseparable situation.

A continuing but separable bad (*how*) “plus” does not ordinarily permit the total picketing situation to be denounced and prevented without taking into account the constitutional free speech identification. A state’s policy may be that in such an assumed factual situation the bad *how* is ordinarily to be excised and the good remain, such as the general approach found in the anti-injunction laws, so that no constitutional question need factually arise; nevertheless, the constitutional requirement is that regardless of a state’s policy, the constitutional protection must be considered by the court before the picketing is enjoined.¹¹⁴

113. “Such a decree [enjoining the picketing there involved], arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute, with an overhanging and undefined threat to free utterance.” *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292 (1941). On the right of governmental employers to strike and picket see *Jackson v. McLeod*, 199 Miss. 676, 24 So. 2d 319 (1946).

114. See, e.g., *Bakery Drivers v. Wohl*, 315 U.S. 769, 773-74 (1941), where the state court was concerned only with the question whether or not a “labor dispute,” under the state’s anti-injunction act, existed. It found no such dispute did exist and “. . . seemed to be of the impression that therefore no constitutional rights were involved. . . . Of

Whenever the good is factually separable, therefore, a constitutional free-speech question must arise, although the court need not necessarily discuss it formally, before the picketing is prevented. Note that a factual separability question precedes the legal constitutionality question, and while the state courts have great power in their rules of evidence and trial procedure, the free speech guaranty cannot "be defeated by unsubstantial findings of fact screening reality. That is why this [Supreme] Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made."¹¹⁶

A permissible bullet injunction or prevention of free speech by a federal or state court is thus based upon several factors. One of these factors is the factual separability of the bad (*how*) "pluses" from the rest of the items making up the total picketing situation; another factor requires, where this separability does exist, that free speech concepts be considered by the enjoining court. Generally, in this factual separability-constitutional free speech approach, it is the *how*, or bad means, which is factually involved, for the *why* or end of picketing is not ordinarily able to be separated from its picketing method; consequently, the general rule would be that a bad end will be so tied in with the picketing that the latter must be denounced when the former is found, although as with every general rule exceptions may be found.¹¹⁶ Throughout the cases discussing this and the next subdivision runs the judicial emphasis upon the exceedingly important and decisive findings of fact, that it is the actual situation presented in the court which is to be considered and

course that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive." In his concurring opinion Justice Douglas, joined by Justices Black and Murphy, felt that "a State is not free to define 'labor dispute' so narrowly as to accomplish indirectly [i.e., enjoining the picketing] what it may not accomplish directly." *Id.* at 777.

115. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941). In *City of Golden v. Ford*, 33 CCH Lab. Cas. ¶ 70908 (Colo. July 30, 1957), a city ordinance was denounced where its purpose, as a whole, was not to protect the public safety and peace, but was really to control and limit picketing in labor disputes. "Legislative bodies cannot be permitted, under the guise of the police power, to take away fundamental rights of the people." (Note that it is the rights of the people not labor unions alone, which are being protected.)

116. See, e.g., the prohibitions contained in the Norris-LaGuardia Anti-Injunction Act, 29 U.S.C.A. § 101 (1956) which, in § 104 begins: "No court of the United States shall have jurisdiction" to enjoin any one or more of the listed union acts or conduct when a "labor dispute" is involved. Of course where no such labor dispute is involved, then these limitations on court jurisdiction do not apply but, when they do so apply, then regardless of the factual situation, it would appear as if no injunction could issue. However, a question of constitutionality of the statute might then be raised, as was suggested in *Busch Jewelry Co. v. United Retail Employees Union*, 281 N.Y. 150, 22 N.E.2d 320 (1939), quoted in note 121 *infra*.

not a statutory theory, and that when the coercive thrust of these bad "pluses" is able to be removed so that man's rational mind is free to consider and choose, then access to his mind *via* picketing is not to be denied the union.

MIXED PICKETING AS PRACTICE—WHERE CONTINUING BUT INSEPARABLE
BAD "PLUSSES" OF A VIOLENT TYPE ARE FOUND

The final sentence in the preceding subdivision provides us with a jumping-off place here. There we concluded that when the coercive effect of bad "pluses" can be substantially removed then, because of the free speech identification with picketing, only a bullet injunction may issue, directed only against the illicit means. Now, however, we assume that the factual contrary prevails, for our continuing bad "pluses" are so necessarily linked with pure picketing that they are continually inseparable. This does not mean that ". . . the right of free speech [can] . . . be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." Nor does it mean that a factual linking must be confined to the proved current acts alone, and that inferences of continuing future coercion cannot be drawn from past occurrences.¹¹⁷

The legal consequences visited upon otherwise pure and good picketing, because of this inseparable linking up with the continuing bad "pluses," are dependent upon facts which must be present or found as follows: (1) actual bad "pluses" of a violent type must be proved by admissible testimony; (2) rationally drawn and reasonable fact inferences based upon these proved facts may be likewise utilized; (3) these actual or inferred facts must be so connected and linked with the pure and good aspects of the picketing, and so permeate the entirety of the union's conduct, that it is factually impossible to separate them; (4) the bad "plus," so geared as we have set forth to the *how* of the picketing and which involves violence or any fact which leads to the generation of fear or coercion, must so blend with the good and the pure of the picketing that this latter cannot be permitted without the former "going along" with it; (5) there must be a factually continuing bad "plus" of violence, inseparably linked with the good as just set forth, although a

117. *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 267, 293 (1941). "The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the Supreme Court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct." *Id.* at 294-95.

finding is permissible that in a setting of proved violence "the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful";¹¹⁸ (6) there must be one or more findings of fact concerning the preceding requirements, for without them an appellate court has no factual guide to the enjoining court's reasons for limiting or nullifying the free speech requirement, and the trial or enjoining court may thereby be able to utilize emotion rather than judgment as the base upon which to enjoin;¹¹⁹ (7) apparently it is better judicial policy not to enjoin immediately but to give the union an opportunity to "reform" its conduct, perhaps between the stay in the show cause order and the hearing on the motion or even thereafter, before issuing a permanent or semi-permanent buckshot injunction;¹²⁰ (8) in the granting of such an injunction the anti-injunction statutes are not an obstacle or a bar;¹²¹ (9) and neither do the labor relations statutes protect employees who so engage in violence and illegalities, for they may be not only enjoined but also discharged.¹²²

118. *Id.* at 294. This finding is, of course, subjective in that different judges may draw different inferences from the same facts. Where a constitutional claim is made, however, the Supreme Court is the final arbiter on these inferences.

119. *May's Furs & Ready-to-Wear, Inc. v. Bauer*, 282 N.Y. 331, 344, 26 N.E.2d 279, 285 (1940): "In the *Busch* case a majority of this court read the record as disclosing a situation completely permeated by violence and as affording no ray of hope that the defendant would engage in other than violent picketing. The rule of that case presents an exception which is verbal rather than real, for since defendant would have engaged only in violent picketing, the unqualified prohibition of picketing operated only on the one kind of picketing present in that situation, viz., violent picketing. In the case at bar there is no finding to that effect, and so far as the record bears upon this issue, it appears that defendant has reformed its conduct in a more peaceful direction since the institution of this suit. The injunction, therefore, should not have restrained any but violent and unlawful methods on the part of defendant."

The sole dissenter in the *Busch Jewelry Co. v. United Retail Employees Union*, 281 N.Y. 150, 22 N.E.2d 320 (1939), was Judge Lehman. The basis for his disagreement was that "there is no finding and perhaps no basis for a finding that an injunction against continuance of the wrongful acts which accompanied the violence would be disobeyed or that peaceful picketing is 'out of the question.'" *Id.* at 160-61, 22 N.E.2d at 324.

120. *May's Furs & Ready-to-Wear, Inc. v. Bauer*, *supra* note 119. See also *Busch Jewelry Co. v. United Retail Employees Union*, *supra* note 119; *Nann v. Raimist*, 255 N.Y. 307, 174 N.E. 690 (1931).

121. *Busch Jewelry Co. v. United Retail Employees Union*, 281 N.Y. at 156, 22 N.E.2d at 322: "The effect of that statute is to prevent courts from enjoining peaceful picketing. It was never intended to deprive the Supreme Court [of New York] of jurisdiction to enjoin dangerous, illegal acts which constituted disorderly conduct and breach of the peace. If such was its intent and effect it is to that extent unconstitutional and void as an attempt to abridge the jurisdiction of the Supreme Court, guaranteed by article VI, section 1, of the State Constitution. . . ."

122. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 257-58 (1939): "We repeat that the fundamental policy of the Act is to safeguard the rights of self-organiza-

Assuming that an injunction is issued banning the totality of the picketing situation, the question of time crops up. Should or can such an injunction be for an indefinite period, or is there a limit imposed by statute or judicial policy? The federal and state anti-injunction acts are limited to, and involve, situations in which a "labor dispute" is found, and it is only when such a labor dispute requires the statute to be applied that the time factor statutorily enters. In other words, if the court holds that no labor dispute is involved, then the anti-injunction act will not apply, but assuming that it does, and if any of its provisions limit the time within which the injunction may run, then this requirement must be followed.¹²³ Where no labor dispute is found to exist and none of the acts can be utilized, the judiciary will determine its ban upon the facts and findings, but the general approach is to enjoin for a period of time with permission granted either side to apply to reduce or extend this time. Obviously all free speech considerations are determined prior to the issuing of the injunction, but in a total ban such considerations may also affect the permanence of the stay. For example, if the facts disclose that a total injunction is required, the court may still grant the union an opportunity to apply for a relaxation after a minimum period of, say, four weeks, and this because free speech should not be stifled. Again, however, the facts, and the inferences therefrom, control.

CONCLUSIONS AND RE-EVALUATION OF PICKETING

Our analysis, to this point, has disclosed that what is really involved in this article is not an examination and a re-evaluation, but a clarification, of picketing. Man's mind is to be free to understand and decide, but the emotion-charged concept of picketing made those who decided cases and policy in the past incapable of being so mentally free. When we understand the nuances involved in picketing, and the necessary classifications attempted heretofore, we can see that Justice Brandeis was correct in his 1937 hint that picketing and free speech were not incompatible bed-fellows.¹²⁴ When too broad a platform was erected upon

tion and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. . . ."

123. In labor disputes within the federal jurisdiction the Norris-LaGuardia Anti-Injunction Statute, 29 U.S.C.A. § 101 (1956), applies, but it contains no definite time limitations. Under § 4, certain union conduct cannot be enjoined, but this is not involved at present. The state acts are not all identical, but the applicable statute in New York, N.Y. Civ. Prac. Act § 876-a, shows that only six-month injunctions may issue, with a second like period granted if required.

124. *Senn v. Tile Layers Union*, 301 U.S. 468, 478 (1937): "Members of a union

such a narrow base then of necessity something had to give, and in 1949 it was the over-all identification of free speech with the totality of the picketing situation which collapsed of its own weight.¹²⁵ The baby of free speech-picketing identification, however, is not to be thrown out with the bath of objectionable consequences which flowed from the 1940 *Thornhill* decision,¹²⁶ and it has been our purpose not only to disclose that the judiciary has not so done, but also to provide a firm conceptual foundation for the limited identification which Justice Brandeis suggested. In and to the extent that picketing is and can be identified with free speech, the conjunction is nevertheless narrow and easily capable of being shaken loose by certain types of obnoxious union conduct or goals. These possibilities have likewise been discussed but, withal, there still remained the identification concept as the nexus from which corollaries and inferences stemmed.

The political view of picketing requires that to the extent that labor-management relations are involved with industrial democracy the union must be permitted to present its views. This may be designated as informational or educational picketing when directed at employees to convince them of the soundness of the union's position, to have the employees vote for the union, or otherwise to influence the minds of the employees.¹²⁷ Of course a fact question may immediately arise, for if the employer or the picketed person claims that such picketing is merely a cloak to mask a hidden intent to coerce then the picketing must be partially or totally forbidden. A claim, however, is legally insubstantial; a fact must be found, with findings drawn from and based upon evidence or conceded facts. Thus, politically, the free speech-picketing identification is the general rule unless either the picketing facts themselves, or the proof which the picketed person presents, or both, disclose that in a particular situation the picketing contains bad "pluses" which either themselves are to be enjoined or, as heretofore shown, drag down even the pure and the good union conduct in a total blackout of all picketing.

The economic view of picketing permits some form and degree of economic coercion to be engaged in by entrepreneurs against entrepreneurs and, to the extent that wage earners seek a larger share of the profits of industrial production and distribution, they, too, for these

might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution."

125. See, e.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

126. See note 46 *supra*.

127. See, e.g., the NLRB's views as to the campaigning it will permit in representation elections, based upon the concept that such an election is patterned upon a political one. *Bonita Ribbon Mills*, 87 N.L.R.B. 1115 (1949), reiterating views expressed previously in *General Shoe Corp.*, 77 N.L.R.B. 123 (1948).

limited purposes, may be classed as entrepreneurs.¹²⁸ Just as the primary employer may compete with an entrepreneurial rival by cutting prices, or insist the workers accept a cut in wages, or require a union to organize his competitor, so too may the organized workers compete with their own employer, or the employer of the unorganized, to obtain higher prices for their efforts. Economic coercion of a sort is necessarily found in and is inherent in every entrepreneurial decision and activity, so that if coercion qua coercion were to be outlawed all business would have to be eventually socialized, that is, the government cannot act illegally against itself. Just as the Sherman Antitrust Act of 1890 sought to put "reasonable"¹²⁹ restraints upon the coercive tactics practiced by the entrepreneurs of that day, and just as the subsequent antitrust amendments continued so to attempt, so do all of these enactments confess that economic coercion is permitted *via* rules and limitations. Unions do not engage in conduct which is unknown at both the common law and in the modern statutes when they picket and thereby coerce economically; they have merely adopted and adapted a method used for centuries by their employers. The real question is what limits are to be placed upon this method of economic coercion, and here we revert to the previous analyses of the good and the bad "pluses" and the consequences flowing from them.

This political and economic analysis of picketing may be conceded, and informational and educational picketing may admittedly be subsumed under limited free speech concepts geared to either or both of these aspects, and yet a rather important type of picketing still remains to be discussed, namely, organizational picketing. Informational and educational picketing have this in common with organizational picketing, that all may be directed at the employees of the primary employer, although informational picketing may also be directed at the employees of other employers, the consuming public, or to the world in general. Generally, informational picketing seeks only to present facts and information to individuals, permitting them to do as they please once they have obtained the facts; educational picketing goes slightly farther and seeks to do something more, to influence the recipients of the facts or, simply, educate employees to the advantages of unionism *via* the facts and through appeals; organizational picketing, however, assumes either or both of the above situations has occurred, or else is indifferent to their presence, and seeks actively to have the employees organize into or join a union. It can be seen that we progress from the inactive, to the

128. See Forkosch, *Antitrust and the Consumer* c. I (1956).

129. See, on the judicial amendment of the Act by the incorporation of the "reasonable" concept, Forkosch, *Reason and Reasonableness in the Supreme Court's Interpretations of the Sherman Act*, 21 *Brooklyn L. Rev.* 208 (1955).

slightly active, to the wholly active aspects of union conduct and desire, although different goals may be involved, for example, informational picketing may be used to inform consumers and others of conditions, or to inform employees of certain facts existing elsewhere; educational picketing may be used to educate the employees to the advantages of unionism, and this union in particular, or it can be used to educate them concerning their labor rights in general, or to educate them as to conditions in the industry; organizational picketing, of course, is primarily, if not solely, directed at organizing the employees.

Informational and educational picketing seemingly do contain elements of political free speech, and insofar and to the extent that such elements can be preserved the identification concept protects these aspects of the picketing. It is not impossible to visualize pickets with placards or throw-a-ways which contain statements such as, "There is no strike here," "We are not picketing the employer," "Local X has no grievance or labor dispute with the employer." Such disclaimer of a labor dispute by a union is not difficult to require, judicially, and the only question really remaining is whether, regardless of the disclaimer, there nevertheless remains some degree of economic coercion which itself must be prevented. Two short answers are possible to this question. First, a question of fact is involved, and since a general answer cannot be given we must await the trial of each case before the details can be spread before us. It is generally understood that the union will cry no economic coercion, and the employer will insist that there is economic coercion, so that claims as such may be disregarded. For example, in one case the employer sought an injunction against organizational picketing, contending he was being economically damaged and thereby coerced into influencing his employees to join the picketing union, but the two day trial disclosed that no falling-off in patronage had occurred and that the claim of financial injury was specious.¹³⁰ Whatever economic coercion exists is therefore the subject of proof, not claim, and this brings us to the second of our two short answers. The existence of coercion does not necessarily require a cessation of picketing. We have already seen that the political and economic aspects of picketing must be distinguished,

130. The case is *Wood v. O'Grady*, 307 N.Y. 532, 122 N.E.2d 386 (1954), analyzed and discussed in Forkosch, *The Status of Organizational Picketing in the State of New York*, 6 Lab. L.J. 42 (1955). See, however, *Plattsburgh Ready-Mix Concrete Co. v. Wright*, — Misc. 2d —, 164 N.Y.S.2d 934 (Sup. Ct. 1957), where the union contended its picketing was organizational but the court found it to be for the purpose of compelling the plaintiff-employer to hire union members and to recognize it as the bargaining representative even though plaintiff's employees did not so desire it. *Wood v. O'Grady* has had repercussions in New York, as instanced by the efforts of entrepreneurial groups to legislate an anti-picketing ban where organizational picketing is used coercively. See N.Y. Times, March 22, 1957, p. 1, col. 4.

and what is now involved is the latter. But there is always coercion present in economic affairs, and the basic problem is not its presence or absence but, admitting its presence, is it the kind and degree of coercion which must be stopped, regardless of all other considerations? Or, as we have analyzed it, does the maxim *damnum absque injuria* apply? Our conclusions, given above in the analyses under the several subdivisions, need not be repeated here, but one caveat should be explicated.

There is a distinction which can be drawn between coercion in fact and coercion in law. Put differently, we can distinguish between coercion which is proved as a fact or through factual inferences of a reasonable and rational nature which flow without distortion from the proved facts, and coercion which the judge will hold to be present because, although the proved facts do not directly or rationally so disclose or permit the inference to be drawn, he so "feels," or "generally accepted opinion so holds," or he sees "no basis for distinguishing" between the two. This latter form of coercion is, in effect, a policy determination by the judiciary which may be of a narrow type and restricted vertically to the facts, or generalized and made applicable horizontally to all situations. When narrowly and exceptionally applied the public interest is not really involved, but when a general rule of conduct is formulated then, practically, judicial legislation is involved. Depending upon the times and the situation, this "law" may be denounced, accepted, or, if possible, legislatively declared, reversed, or modified. In any event, as between coercion in fact and coercion in law the clear-cut former has always been denounced by virtue of our common law history and mores, whereas the latter is necessarily vague and subject to forces which are economic, political, psychological, and downright personal. Coercion in law thus becomes a tool which, impossible of refutation, may be misused and misapplied. Since the judges or the quasi-judicial labor boards have it within their power to reject or to find such coercive presence flowing as a matter of law from the mere fact of picketing, regardless of its *whys* or *wherefores*, it is not beyond the realm of possibility that uncritical adjudicators will so hold; which means that the Supreme Court ultimately will be required to set policy one way or another unless, of course, it is a valid statute which is otherwise now being adumbrated.

What is really the bone of contention today is not informational or educational picketing but organizational picketing, that is, when the union seeks to organize the unorganized employees.¹³¹ Here the employer

131. There are various other types or classifications of picketing which might be analyzed, e.g., "recognition picketing," which occurs when the picketing is for the object of compelling the employer to recognize the union. See, e.g., note 103 supra. This type of picketing may or may not be permissible, e.g., the union is a minority one and there-

is seemingly caught between two forces, union and governmental. The union desires that the employees join, willy-nilly, but the government has statutorily given these employees complete freedom of choice. If the union coerces them directly though violence or indirectly by implied threats of future consequences the police power steps in; if the employer coerces them he commits an unfair labor practice. The union may nevertheless seek to act upon the employer to bring his powers of persuasion to bear upon his employees, especially if they prove reluctant to the union's blandishments, and thereby ease the organizing burdens. Assuming the employer refuses so to do, how can the union pressure the employer to pressure the employees? Eschewing violence and direct action of a similar nature, the economic consequences of a picket line may suffice.¹³² In this sense, therefore, picketing becomes a means of coercing an employer to coerce the employees to join the picketing union, and in this method for this tentative and ultimate end the picketing should be enjoined. But here we have assumed the coercive aspects to exist; what if these are completely absent? We are then left with picketing which is directed toward influencing the minds of the employees by good and fair means, so that informational and educational aspects are really involved. If economic damage to the employer flows therefrom it must be endured as a risk of doing business is, as when a competitor reduces prices and causes the employer losses in sales and profits. First, however, the facts of the picketing must be developed, that is, what kind of picketing is it, for what purposes, and how is it being conducted.¹³³ And when these facts are found then the questions arise whether, assuming any coercion is present, is it so small and insignificant that the *de minimis* concept may apply, or if not, then is it the kind and degree of coercion which society feels should nevertheless be permitted because the long term consequences are better for the public interest? Policy, of course, is now being set, whether by the legislature or by the judiciary.

We have just stated, in the previous paragraph, that "the economic consequences of a picket line may suffice" to pressure an employer to pressure the employees. Pressure, or coercion as such, is not automatically to be equated with illegalities or unlawful acts; as we have seen,

fore has no statutory claim to represent all of the employees. See notes 133, 135, *infra*. Whether such picketing is termed recognition, organizational, or otherwise is or involves a process of judicial rationalization, i.e., when the judges desire to enjoin the conduct they term it recognitional picketing, whereas it is termed otherwise when they desire to permit it. Vladeck, *Organization and Recognition Picketing*, 8th Ann. Conf. on Labor 207 (1955); see also Benetar, *Organizational and Recognition Picketing*, *id.* at 199.

132. See, e.g., note 108 *supra*, and the views of the Federal Labor Board in this respect.

133. In the *Curtis Brothers* case, Lab. Rel. Rep. (41 L.R.R.M. 1025) (Oct. 30, 1957), the Board specifically found as a fact that the union's purpose was coercive, and that the employees were likewise so affected.

economic pressures and coercions may be upheld and permitted when society's best interests so require. It is therefore required that distinctions be drawn between permitted and denounced coercive acts, and this is a function of a state's policy-making bodies, subject to the Federal Constitution's over-riding requirements.¹³⁴ More importantly, the factual issue becomes predominant in determinations whether the pressure is directed against the employer alone, the employees alone, or against both; and, as above mentioned, whether the coercive thrust against the employer spills over onto the employees' heads and thereby pressures them. In this last aspect there is also included a violation of Taft-Hartley section 8(b)(1)(A), so that common-law concepts may here be additionally strengthened by statutory commands. The Federal Labor Board has apparently just held that picketing of an employer by a minority union which results in an "economic hurt" to him must, as a matter of law, be held to damage the employees and therefore coercive and violative of their rights under the cited section.¹³⁵

134. See, e.g., *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470, 474-75 (1950), quoted in note 42 supra.

135. *Curtis Brothers Inc., Lab. Rel. Rep.* (41 L.R.R.M. 1025) (Oct. 30, 1957). This case is probably one of the most important pronouncements of the Board in this free speech-picketing area in recent years. As such it will have repercussions far beyond its factual borders. As of this writing it would appear, superficially, that another Thornhill-Giboney cycle may eventuate unless the Curtis opinion is analyzed carefully and confined to its facts.

In that case the Board did not say, nor did it hold, that as a matter of law any picketing of an employer by a minority union necessarily involved coercion of employees and was therefore violative of § 8(b)(1)(A) of the Taft-Hartley Act. The Board there found as a matter of fact that the union's entire conduct was permeated by a coercive thrust at and against the employer and likewise factually involved, inferentially, the employees. E.g., the Board stated that ". . . minority picketing, even for organizational purposes, exerts a coercive force upon the employees who prefer to work. Such a case, therefore, may well require a balancing of the right to organize against the right to be free of restraint in the selection of a bargaining representative. That situation is not presented in this case and we do not pass upon it . . ." until it does arise. *Id.* at 1028.

Thus the instant Curtis situation did involve inferred factual coercion of the employees and so was violative of the statute. The Board specifically held that "on this record, we conclude once again that the Union was at all times . . . seeking to win recognition by the Company." Minority picketing thereby harmed the employer and spilled over onto the employees, as we have noted, and thus a statutory violation occurred. *Id.* at 1025.

As to other types of picketing, however, no conclusion could be drawn, and none was attempted. As we have seen, the facts determine everything; assuming no factual coercion attempted, desired, or sought, then organizational picketing, insofar as the political aspects of free speech are involved, is to be upheld; insofar as the economic aspects involve economic coercion, public policy necessarily enters and a balancing of interests permits some degree of coercion, i.e., damage or financial harm to the employer. From this point of view the admitted harm (coercion) does not thereby spill over onto the employees, as was the thought in the Curtis Brothers case.

The factual question is not of great importance for us; rather, it is the inference drawn by the Board concerning factual coercion upon the employees by virtue of the damage done to the employer by minority picketing. Whether this inference is a permissible one depends upon its rationality, as is discussed in *Western & A.R.R. v. Henderson*, 279 U.S. 639 (1929), and like cases; to this writer such an inference based upon the Curtis facts seems entirely reasonable and rational and, where facts exist analogous to that case, should again be applied. But this is a far cry from a like inference being applied to a different factual basis, namely, where the picketing does involve political aspects, as we have analyzed them, and coercion as such is absent. A finding that employees have been coerced would now be unreasonable and not conducive to sound judicial thinking. Of course we speak of a violation of the statutory prohibitions upon unions; absent this section, factual coercion must be somewhere present, and this does not require that employees as such be coerced where employers can show coercion upon them.

It must not be overlooked, and emphasis should be given to the fact, that in the Curtis Brothers case there was an absence of direct evidentiary facts upon which to base a factual conclusion that the new picketing was actually designed for coercive or "blackmail" purposes. The Board was thus compelled to utilize its expert knowledge and to rationalize or draw a reasonable inference from the totality of the factual situation. In other words, if no prior proceedings were able to be utilized, could the Board infer, solely from the alleged organizational picketing, that its purpose or its net effect was coercive? A factual inference of factual coercive purpose cannot ordinarily be so drawn (see, e.g., analysis of substantial evidence rule and the findings therefrom in *Forkosch*, Administrative Law c. XIV (1956)), but the question of its effect is different. Thus in the Curtis Brothers case the Board held, and properly so because of the factual situation, that while the picketing did not directly coerce the employees it did do so indirectly via the economic harm foisted upon the employer, this now spilling over onto the employees. There is analogous authority for this approach.

For example, in *NLRB v. Better Monkey Grip Co.*, 243 F.2d 836, 837 (5th Cir. 1957), cert. denied, — U.S. — (Oct. 28, 1957), the discharge of a supervisor for giving testimony adverse to his employer was held a violation of Taft-Hartley § 8(a)(1) because the Board was warranted in concluding that there was interference and coercion of the non-supervisory employees, citing *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (5th Cir. 1954), and referring to *Pedersen v. NLRB*, 234 F.2d 417 (2d Cir. 1956). In the Talladega case two supervisors were discharged because of "their failure to prevent the Union from becoming the bargaining representative of" the employees. "In these circumstances . . . the discharges plainly demonstrated to rank and file employees . . . [and] the net effect of this conduct was to cause non-supervisory employees reasonably to fear that the Respondent would take similar action against them if they continued to support the Union." *Supra* at 214, n.4, giving quotations from Trial Examiner's and Board's conclusions.

Separate and apart from the factual bases found in the Curtis Brothers case we must ask what the Labor Board's decision would have been if merely minority organizational picketing had been the fact, i.e., no background of factual coercion. If there is factual coercion, direct or inferred, then obviously a question of statutory violation may arise, distinct from that of a common-law violation. Thus in *Alloy Mfg. Co.*, Lab. Rel. Rep. (41 L.R.R.M. —) (Nov. 7, 1957), the Board felt that the "same underlying considerations" which denounced "minority picketing for exclusive recognition" in the Curtis case now required it to conclude that "picketing by a minority union for purposes of obtaining a union shop agreement" violates § 8(b)(1)(A) in that it is also picketing for an illegal objective, i.e., an end condemned by the cited section. In addition, the Board

Regardless of the basis upon which picketing may or is to be identified with free speech another factor intrudes, namely, without picketing what else is left for organized labor except the strike or the legislative process? If these are the only practicable alternatives, then are we not asking for economic instability and the very thing which the labor statutes are designed to overcome, obstructions to the free flow of commerce? And, eventually, may not the government be required to seize all productive and distributive facilities if and when these are so economically immunized as to be a drag upon the nation?¹³⁶ For labor will not beg and keep begging for legislation and simultaneously withhold the strike weapon if such legislation is denied. Pragmatically, the lesser of

now also held that: "As the restraint and coercion brought to play upon the employees is an economic one through curtailment or extinction of their employer's business, it is not really material whether the pressure is applied through the act of picketing, and thereby hurting the business, or by other equally direct and effective techniques. Thus, appeals to consumers and 'we do not patronize' lists contain the same threats to the employees' livelihood as does picketing. Like picketing, they are concededly aimed at hurting the employer economically by blacklisting him in the estimation of those persons among whom he earns his living, and whose dealings support his business operations. And, as in the case of picketing, to the extent that the employer suffers the economic loss that the Union seeks to inflict, the employees' earnings are threatened with diminution, and their very jobs endangered. We see no basis for distinguishing appeals made orally to consumers or away from an employer's premises from the self same appeals addressed to consumers by way of a picket line. The intended and necessary effect of each type of appeal is the same—to threaten the employer's business and necessarily the employees' job security."

Thus a statutory violation occurs when a consumer boycott is sought by a minority union which desires a union shop, but this is because of the interpretation and reasoning of the Board based upon the cited law. In the absence of such a denounced end, e.g., recognition or a union shop, and if the minority union pickets solely and purely for organizational purposes, then obviously some economic harm may, and generally will, bear upon the employer. This, as a matter of law, both common and statute, is no reason to enjoin the picketing. Now, however, can the Board infer, factually, a spilling over of the employer's harm onto the employees? The Board, in the second paragraph of this note, has refused to answer this question as of this writing. The Curtis reasoning, if accepted here, permits this inference but, it is submitted, this reasoning is strained, unreasonable, and irrational under our assumed facts. In our interdependent economy damage spreads until the de minimis rule must be invoked, but does a legal "injury" necessarily result because of such damage? And even if it does, is it to be borne as a necessary price we pay for our form of economy and democracy? From a policy point of view, the answer must permit the picketing, even though a statute be involved, and if the Board so interprets the statute as to denounce this form of picketing then the statute, in this respect, should be held unconstitutional. Obviously, from this approach, the state common law and the federal judges will uphold such organizational picketing as a manifestation of free speech as heretofore discussed.

136. E.g., seizure makes the workers governmental employees who cannot strike against their new employer (see note 113 supra) as in *United States v. United Mine Workers*, 330 U.S. 258 (1947).

the evils is the halo-ing of picketing if and when it is kept within reasonable limits. The setting of these limits, as already seen, are functions of the federal and state governments, and policy considerations generally enter into and determine their type and their character. Usually a balancing of consequences will be the basis upon which legislation will be fixed and the judiciary likewise so acts when the legislature has not spoken. The objection that because numerous subjective elements enter into the picketing situation then no general rule can be fashioned, and so no free speech identification should be made, is not sufficiently cogent to warrant treatment at this late stage. Everything heretofore said discloses that the judiciary must first obtain the facts, which it has been doing for centuries, and then upon these found facts make its decisions. It is this policy with which we have been concerned, and our fundamental conclusion is that free speech must be identified in some respects with picketing.