is amenable to a closed shop in his own plant, to contract freely in pursuit of his business.[22]

The "unity of interest" theory developed by the New York courts to avoid the consequences of secondary boycotts by allowing the union to follow the non-union product and persuade the public not to purchase it,[23] may have application in the principal case. Although no non-union product was involved and the plant picketed supplied the non-union shop, it might be contended that the plaintiff manufacturer in the principal case is in "unity of interest" with the non-union Paddy Kake company so that the union may strike and picket the manufacturer, stopping the sale of union goods to a non-union shop, thereby causing Paddy Kake to unionize.[24] That the plaintiff had an economic benefit from the sale to the non-union shop is shown by the fact that the shop purchased fifty per cent of the plaintiff's output.

Labor Law—Picketing User of Non-Union Service—Unity of Interest—[New York]. —A company installed a burglar alarm system in a retail haberdashery, retaining title in and agreeing to maintain and service the system. In the course of a dispute over wages and hours between the company and a union representing its employees, the union picketed the haberdashery, carrying in a peaceful and orderly manner signs which read, "Maintenance of Burglar Alarm in this store unfair. . . . ." Upon complaint of the haberdasher, the pickets were prosecuted for disorderly conduct under Section 722 of the Penal Code of New York.[1] Upon appeal from convictions, *held*, there was "unity of interest" between the company and the store, thus making the picketing lawful. Judgments reversed. *People v. Muller*.[2]

The term "unity of interest" gained general currency when it was used to describe the economic relations between the manufacturer and the retailer in *Goldfinger v. Fein-*

[22] It should be noted that the plaintiff in the instant case went bankrupt before the final determination by the Washington Supreme Court. It is not shown what factors were instrumental in causing this insolvency. Brief for Appellant, at 57, Marvel Baking Co. v. Teamsters' Union Local No. 524, 105 P. (2d) 46 (Wash. 1940).

[23] Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. (2d) 910 (1937). See also Aeolian Co. v. Fischer, 29 F. (2d) 679 (C.C.A. 2d 1928); Duplex Printing Press Co. v. Deering 254 U.S. 443, 479 (1920); Thornhill v. Alabama, 310 U.S. 88 (1940); 8 Univ. Chi. L. Rev. 357 (1941).

[24] But cf. Feldman v. Weiner, 173 Misc. 461, 466, 17 N.Y.S. (2d) 730, 734 (S. Ct. 1940) ("the conclusion reached is that defendants' action amounts to a secondary boycott which does not come within the permissible legal exceptions noted in the Goldfinger case. . . . . To hold otherwise would be to hold that a union-shop manufacturer of garments, for example, could be picketed if any one of his many customers, wholesale or retail, did not have a union shop.").

[1] N.Y. Cons. Laws (McKinney, 1938) c. 40, § 722. This statute reads in part as follows: "Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct . . . . 2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others. . . . ."

[2] 174 Misc. 872, 21 N.Y.S. (2d) 1003 (N.Y. City Cts. 1940). The convictions below resulted in suspended sentences because the labor dispute had been settled. Permission to appeal to the Court of Appeals has been granted.

tuch.[3] In that case a union, trying to organize the manufacturer of meat products, picketed the non-union[4] product at the retailer-plaintiff's store. In denying the latter's request for an injunction, the court seemed to follow previous New York decisions which permitted peaceful picketing[5] of the non-union product or service.[6] Although it stated in a dictum that picketing for the purpose of inducing the customers of the retailer to withdraw patronage generally was illegal,[7] the mention in the picketing sign of the place where the non-union product was sold was allowed.[8] The court explained its decision primarily on the grounds that since the retailer benefited in his competition with other retailers through selling the cheaper non-union product, he had a "unity of interest" with the non-union manufacturer and could not complain if the union pickets followed the product to prevent its sale.[9]

This use of "unity of interest" differed from that common at the time the *Goldfinger* case was decided. The term was first used by Mr. Justice Brandeis in his dissent in *Duplex Printing Press Co. v. Deering*.[10] That was not, however, a case of a neutral[11] being picketed by those in dispute with the non-union employer but was, rather, a case

[3] 276 N.Y. 281, 11 N.E. (2d) 910 (1937), noted in 5 Univ. Chi. L. Rev. 518 (1938); 15 N.Y.U. L. Q. Rev. 282 (1938); 23 Corn. L. Q. 473 (1938); 12 St. John's L. Rev. 358 (1938); 86 U. of Pa. L. Rev. 547 (1938).

[4] The term "non-union" is applied to those persons whose business activity produces the goods or supplies the services which the union is picketing. Thus it subsumes the situations in which the employer: (1) operates as an open shop; (2) operates under a closed shop agreement with a rival union; or (3) is in a dispute with the picketing union over wages, hours, or working conditions.

[5] Exchange Bakery & Restaurant, Inc. v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927), motion for reargument denied, 245 N.Y. 651, 157 N.E. 895 (1927).

[6] Manhattan Steam Bakery, Inc. v. Schindler, 250 App. Div. 467, 294 N.Y. Supp. 783 (1937); Blumenthal v. Weikman, 154 Misc. 684, 277 N.Y. Supp. 895 (S. Ct. 1935), aff'd without opinion, 244 App. Div. 721, 279 N.Y. Supp. 966 (1935); Blumenthal v. Feintuch, 153 Misc. 40, 273 N.Y. Supp. 660 (S. Ct. 1934); Engelmeyer v. Simon, 148 Misc. 621, 265 N.Y. Supp. 636 (S. Ct. 1933); Spanier Window Cleaning Co., Inc. v. Awerkin, 225 App. Div. 735, 232 N.Y. Supp. 886 (1928); Public Baking Co., Inc. v. Stern, 127 Misc. 229, 215 N.Y. Supp. 537 (S. Ct. 1926), aff'd without opinion, 216 App. Div. 831, 215 N.Y. Supp. 908 (1926). But see George F. Stuhmer & Co. v. Korman, 241 App. Div. 702, 269 N.Y. Supp. 788 (1934), aff'd without opinion, 265 N.Y. 481, 193 N.E. 281 (1934).

[7] Goldfinger v. Feintuch, 276 N.Y. 281, 286, 11 N.E. (2d) 910, 912 (1937).

[8] See Spanier Window Cleaning Co., Inc. v. Awerkin, 225 App. Div. 735, 232 N.Y. Supp. 886 (1928); Feinberg, Analysis of the New York Law of Secondary Boycott, 6 Brooklyn L. Rev. 209, 212–216 (1936). But see Allied Window & House Cleaning Co. v. Palmerie, 229 App. Div. 854, 243 N.Y. Supp. 848 (1930).

[9] Goldfinger v. Feintuch, 276 N.Y. 281, 286, 11 N.E. (2d) 910, 913 (1937). See 5 Univ. Chi. L. Rev. 518, 520 (1938); Peterson, The Right to Picket in Light of Anti-Injunction Statutes and the New Emphasis on the Guarantee of Freedom of Speech, 28 Calif. L. Rev. 354, 363 (1940); Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L. J. 341, 351 (1938); 15 N.Y.U. L. Q. Rev. 282, 284 (1938); 23 Corn. L. Q. 473, 474 (1938); 12 St. John's L. Rev. 358, 359 (1938).

[10] 254 U.S. 443, 482 (1921).

[11] The term "neutral" designates the third party whose place of business is picketed whether he be an employer or not. This term is used even though he may be in "unity of interest" with the non-union employer.

where employees of the neutral had refused to work on machines from the plant in question, because of the labor policy of the non-union employer toward his own workmen. The phrase, "unity of interest," was used by Brandeis to denote the common economic interest among both sets of workmen, all members of the same union, in organizing the Duplex plant. Prior to the *Duplex* case the New York courts had applied the term "common interest" to such relationships between the employees of the customer and the employees of the non-union employer. The earliest use of the phrase "common interest," however, occurred in *Nat'l Protective Ass'n v. Cumming*[12] to designate the mutual interest among members of the same union. There each member of the defendant steam-fitters' union was found to have a personal interest in his own safety and welfare while employed in pursuing his trade. Thus the members of the union, which set a high standard of skill for admission, had such "common interest" that the union could strike to force employers to hire only its own members. This doctrine was again applied to the relationship existing in *Bossert v. Dhuy*.[13] That case held that members of the carpenters' union working on building projects had a "common interest" with other members of the same union who were employed in wood-trim mills. As a consequence, they might refuse to work upon the products of a non-union mill which their union was attempting to organize. The courts limited this form of union behavior to the attainment of the legitimate ends of labor activity—improved wages, hours, and working conditions, as well as unionization.[14] But forcing a specific employer out of business, apart from any of these objectives, is not legitimate union activity.[15] A further limitation upon the doctrine was indicated in *Auburn Draying Co. v. Wardell*.[16] The court held that all the members of different craft unions composing the Central Labor Union, the trade council of the city of Auburn, did not have the "common interest" justifying a consumers' boycott against patrons of the plaintiff, non-union trucking company. To what extent members of unions in different crafts can have such "common interest" is not certain; but the Court of Appeals did indicate that the "interest" in this situation was too attenuated. Subsequent lower court cases, however, have held that the "common interest" principle is not confined to the situation of the *Bossert* case.[17]

[12] 170 N.Y. 315, 63 N.E. 369 (1902).

[13] 221 N.Y. 342, 117 N.E. 582 (1917); see Wohl v. Local 802, 14 N.Y.S. (2d) 198 (S. Ct. 1939), aff'd without opinion, 259 App. Div. 868, 19 N.Y.S. (2d) 811 (1940); Cohn & Roth Electric Co. v. Local No. 1, 92 Conn. 161, 101 Atl. 659 (1917); George J. Grant Construction Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N.W. 520 (1917); Burnham v. Dowd, 217 Mass. 351, 104 N.E. 841 (1914); Gill Engraving Co. v. Doerr, 214 Fed. 111 (D.C. N.Y. 1914); Pierce v. Local No. 8760, 156 Cal. 70, 103 Pac. 324 (1909); State v. Van Pelt, 136 N.C. 633, 49 S.E. 177 (1904).

[14] Frankfurter and Greene, The Labor Injunction 24–27, 29, 30 (1930).

[15] George F. Stuhmer & Co. v. Korman, 214 App. Div. 702, 269 N.Y. Supp. 788 (1934), aff'd without opinion, 265 N.Y. 481, 193 N.E. 281 (1934); Grandview Dairy, Inc. v. O'Leary, 158 Misc. 791, 285 N.Y. Supp. 841 (S. Ct. 1936).

[16] 227 N.Y. 1, 124 N.E. 97 (1919); see Feinberg, op. cit. supra note 8, at 211.

[17] Reardon v. Caton, 189 App. Div. 501, 178 N.Y. Supp. 713 (1919); Weitzberg v. Dubinsky, 173 Misc. 350, 18 N.Y.S. (2d) 97 (S. Ct. 1940), aff'd without opinion, 21 N.Y.S. (2d) 512 (App. Div. 1940); see Aeolian Co. v. Fischer, 27 F.(2d) 560 (D.C. N.Y. 1928), 29 F.(2d) 679, 681 (C.C.A. 2d 1928), 35 F. (2d) 34 (D.C. N.Y. 1929), rev'd 40 F.(2d) 189 (C.C.A. 2d 1930). On the effect of recent legislation, see Feinberg, op. cit. supra note 8, at 221.

In the *Goldfinger* case the court recognized that the "unity of interest" between the non-union employer and the neutral who hired no employees was different from the "common interest" that may exist between the employees of the non-union employer and the employees of the neutral. The "unity of interest" designates relationship on the enterpriser level, whereas the "common interest" refers to a relationship on the employee level. Judge Finch, however, describes the two "interests" as "analogous."[18] The interrelation between them is indicated by his statement that if the retailer "had employed any help, legally they could strike or refuse to work for him so long as he sold" the product of non-union labor. This remark was presumably based on the supposition of a common union affiliation for wholesale and retail meat workers. He further suggested that these workers would then have the right to publicize the reasons for their dispute; and similarly in the *Goldfinger* situation, the pickets could "in a proper manner and in a peaceful way, ask the public to refrain from purchasing products made by non-union labor and state where the same are sold."[19] To perfect the analogy by illustration, if the retailer had employees who might strike under the rule of *Bossert v. Dhuy*, the employees of the non-union employer would have the right to picket the retailer, and this right would not be extinguished by the fact that the retailer had no employees.

The generally accepted interpretation of the *Goldfinger* case, that the union is permitted to picket a non-union product or service at the place of business of any neutral who receives economic benefit because of the labor policy of the non-union employer, seems to have been restricted by subsequent decisions. These have held that there must be a labor dispute within the definition of Section 876(a) of the Civil Practice Act.[20] In the case of *Feldman v. Weiner*,[21] the court held that the plaintiff's packing plant could not be picketed by a union in its attempt to organize the employees of a company which purchased waste products from the plaintiff. This case fits the interpretation of the *Goldfinger* case suggested above because the waste-product price received by the plaintiff probably would not be affected by the labor policy of the pur-

[18] Goldfinger v. Feintuch, 276 N.Y. 281, 286, 11 N.E. (2d) 910, 913 (1937).

[19] Ibid., at 287 and 288.

[20] N.Y. Civ. Prac. Ann. (Gilbert-Bliss, Supp. 1940) § 876-a. Subsection 10(c) of this statute reads as follows: "The term 'labor dispute' includes any controversy concerning terms or condition of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee." Cases interpreting this section follow: Stolper v. Straughn, 3 C.C.H. Lab. Law Serv. ¶ 60,105 (1940) (defendant must be a labor union); Weil & Co., Inc. v. Doe, 168 Misc. 211, 5 N.Y.S. (2d) 559 (S. Ct. 1938) (plaintiff may not be one who is a final consumer after a single transaction); Thompson v. Boekhout, 273 N.Y. 390, 7 N.E. (2d) 674 (1937) (plaintiff may not be proprietor of a "family" establishment). Compare with the above New York statute the Clayton Anti-Trust Act, § 20, 38 Stat. 738 (1914), 29 U.S.C.A. § 52 (1927) and the Norris-LaGuardia Act, § 13(c), 47 Stat. 73 (1932), 29 U.S.C.A. § 113(c) (Supp. 1940). See Local No. 753 v. Lake Valley Farm Products, Inc., 61 S. Ct. 122 (1940). The New York statute is like the Norris-LaGuardia Act, Strauss v. Steiner, 173 Misc. 521, 18 N.Y.S. (2d) 395 (S. Ct. 1940).

[21] 173 Misc. 461, 17 N.Y.S. (2d) 730 (S. Ct. 1940); cf. Back v. Kaufman, 3 C.C.H. Lab. Law Serv. ¶ 18,692 (1940). See 8 Univ. Chi. L. Rev. 353 (1941).

chaser of the waste products. The plaintiff would, therefore, seem to acquire no economic advantage from the purchaser's non-union conditions. In *Canepa v. "John Doe"*[22] and *People v. Bellows*,[23] on the other hand, the court held that the stores which had purchased neon signs manufactured by non-union plants were not in "unity of interest" with the manufacturers of the signs and could not be picketed. These cases do not fit the economic-benefit interpretation of "unity of interest" because buyers of non-union neon signs would benefit by the lower overhead expense in their competition with enterprisers installing union-made signs. That this doctrine of "unity of interest" can apply only to the neutral who is himself an enterpriser seeking profit from the resale of the non-union product seems to be a limitation based upon requirements of expediency. Unless the "unity of interest" doctrine is so limited, the numerous individual consumers of a non-union product or service would be subject to picketing. Perhaps these neon sign cases are explainable as consistent with the dictum in the *Goldfinger* case that picketing the retailer to induce a general boycott of him, rather than merely of the non-union product, is illegal.[24] Picketing the purchaser of a neon sign can be nothing but an attempt to cause his customers to refrain from patronizing him generally since there is no non-union product for sale.[25] But in some of the cases where the neutral was using a non-union window cleaning service, the picketing was not enjoined.[26] If such cases are consistent with the neon sign cases, a possible explanation is that in the window-washing cases the picketing must have been directed at a discontinuance of the non-union service and not at the boycotting of the general business of the neutral. The instant case fits in with these window-cleaning cases, rather than the sign cases. The court in the principal case, however, sought to distinguish the sign cases on the somewhat tenuous difference between an outright purchase and a leasing arrangement.[27]

The restricted use of the term "common interest" in the earlier New York cases to describe the mutual economic interest among groups of closely related workers affords precedent by analogy for some of the cases purporting to adopt the meaning of "unity

[22] 277 N.Y. 52, 12 N.E. (2d) 790 (1938); Silverglate v. Kirkman, 171 Misc. 1051, 12 N.Y.S. (2d) 505 (S. Ct. 1939); Weil & Co., Inc. v. Doe, 168 Misc. 211, 5 N.Y.S. (2d) 559 (S. Ct. 1938); People ex rel. Briesblatt v. Borden, 22 N.Y.S. (2d) 690 (S. Ct. 1940).

[23] 281 N.Y. 67, 22 N.E. (2d) 238 (1939). This case extended the test of "unity of interest" to criminal prosecutions under Section 722 of the Penal Code, note 1 supra. The court held that "picketing, which has been declared unlawful by this court, does constitute disorderly conduct" (at 77). The court cited with approval People v. Jenkins, 138 Misc. 498, 246 N.Y. Supp. 444 (S. Ct. 1930), aff'd without opinion, 255 N.Y. 637, 175 N.E. 348 (1931), which indicated that evidence sufficient to cause an injunction to issue is also sufficient to indicate that a public disorder might be occasioned. This rule has been criticized in 30 J. of Criminal L. & Criminology 953 (1940).

[24] See text accompanying note 7 supra; Smith, Coercion of Third Parties in Labor Disputes—The Secondary Boycott, 1 La. L. Rev. 277, 287 n. 22 (1939).

[25] Speculations on just what action the picketing attempts to achieve will lead to the conclusion that probably the union desires to be paid the difference between the price of the non-union sign and that of a similar union-made product. It would be impractical to attempt to force the neutral to remove the non-union sign.

[26] Spanier Window Cleaning Co., Inc. v. Awerkin, 225 App. Div. 735, 232 N.Y. Supp. 886 (1928); see Feinberg, op. cit. supra note 8.

[27] People v. Muller, 174 Misc. 872, 874, 21 N.Y.S. (2d) 1003, 1005 (S. Ct. 1940).

of interest" as used in the *Goldfinger* decision. Thus in the *Feldman* case, the neutral plaintiff was picketed by members of the teamsters' union although he hired union butchers and did not hire non-union teamsters or any non-union workmen remotely connected with teamsters, his "vice" being merely to sell scrap to one who did. Hence, by analogy to the *Auburn* case, his workmen would not have sufficient interest in the teamsters' welfare to support them by striking. Similarly in the cases involving the sale of neon signs, it is doubtful that there would be a sufficient "common interest" between union electrical workers employed for a short time only to install the individual unit and the retail salespersons employed permanently by the stores picketed to justify a strike by the latter to help the former. The instant case, like the window-washing cases, might be differentiated from the cases just discussed upon the ground that a continuing relation involving the non-union service men results from the contract of maintenance.

One problem under the *Goldfinger* case which has not been treated by the New York cases is the implications of the recent United States Supreme Court decisions[28] which have protected peaceful picketing in a labor dispute under a constitutional guaranty. Although Mr. Justice Murphy used general language in *Thornhill v. Alabama*,[29] which might suggest that picketing in a situation like the instant case is an exercise of freedom of speech, other language of his opinion and approving citations[30] to opinions of Mr. Justice Brandeis indicate that the "limits of permissible contest upon the industrial combatants" are set by the state.[31] In New York the test of "unity of interest" between the non-union employer and the picketed neutral as stated in the *Goldfinger* case and as subsequently developed seems to be the limiting factor set by state law.

Procedure—Federal Rules of Civil Procedure—Blood Test to Prove Paternity—Substance or Procedure—[Federal].—The plaintiff brought an action for separate maintenance against her husband, alleging him to be the father of her unborn child. The husband counterclaimed for divorce denying paternity and charging the plaintiff with adultery. Pending this suit, the child was born. The district court, on the defendant's motion, ordered that the plaintiff and the child be subjected to a blood-grouping test, applying Rule 35(a) of the Federal Rules of Civil Procedure, which provides that "In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination. . . ." The plaintiff contended that a blood-grouping test would invade her substantive rights,[1] and hence could not be authorized under the Federal

[28] Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940), petition for rehearing denied, 310 U.S. 657 (1940); Hague v. C.I.O., 307 U.S. 496 (1939), petition for rehearing denied 307 U.S. 661 (1939); Schneider v. California, 308 U.S. 147 (1939); Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).

[29] 310 U.S. 88 (1940).

[30] See quotation with approval, ibid., at 103, from the majority opinion in Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937), and citation, ibid., at 104, to the dissent in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1920).

[31] Thornhill v. Alabama, 310 U.S. 88, 103, 104 (1940); see Barnard and Graham, Labor and the Secondary Boycott, 15 Wash. L. Rev. 138, 163 (1940).

[1] The substantive right argued was apparently the right to be "let alone."