

NOTES

FREE SPEECH AND PICKETING FOR "UNLAWFUL OBJECTIVES"

The constitutional status of the right to picket has been a fruitful source of controversy since peaceful picketing was identified with freedom of speech in *Thornhill v. Alabama*.¹ Only two years after Justice Murphy had written the *Thornhill* decision, Justice Frankfurter led a majority of the Supreme Court on a retreat which culminated in the *Ritter's Cafe*² case. The Court wavered at this halfway house until 1943, and then abandoned its leadership by refusing to review any more picketing cases.³ The recent decision in *Giboney v. Empire Storage & Ice Company*⁴ marks the first full statement on picketing from the Supreme Court in six years. In an effort to organize nonunion ice peddlers, an ice truck drivers union obtained agreements from Kansas City ice wholesalers to refrain from selling ice to independent peddlers. Upon the refusal of the Empire Storage & Ice Company to execute such an agreement a picket line was thrown around the company's place of business. Truck drivers working for Empire's customers refused to cross the picket line, thereby cutting off 85% of the company's busi-

¹ 310 U.S. 88 (1940). Note also the companion case, *Carlson v. California*, 310 U.S. 106 (1940).

² *Carpenters & Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722 (1942). The Ritter case has been widely regarded as a qualification of the original *Thornhill* doctrine. See Gregory, *Labor and the Law* 361 (1948); Armstrong, *Where Are We Going with Picketing?*, 36 *Calif. L. Rev.* 1 (1948); Teller, *Picketing and Free Speech*, 56 *Harv. L. Rev.* 180 (1942).

³ Prior to the *Giboney* case the last full picketing case was *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943). Certiorari was subsequently denied in the following picketing cases: *Fred Wolferman, Inc. v. Root*, 356 Mo. 976, 204 S.W. 2d 733 (1947), cert. den. 333 U.S. 837 (1948); *Hotel & Restaurant Employees International Alliance v. Greenwood*, 249 Ala. 265, 30 So. 2d 696 (1947), cert. den. 332 U.S. 847 (1948); *Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers Union*, 238 Wis. 379, 299 N.W. 31 (1941), cert. den. 316 U.S. 668 (1942). In *Denver Milk Producers, Inc. v. International Brotherhood of Teamsters*, 116 Colo. 389, 183 P. 2d 529 (1947), appeal dismissed 334 U.S. 809 (1948), the Supreme Court declined to review the Colorado court's order restraining secondary peaceful picketing. With Justices Black and Murphy dissenting, the Court announced per curiam: "Because of the inadequacy of the record, we decline to decide the constitutional issues involved. The appeal is dismissed without prejudice to the determination in further proceedings of any questions arising under the federal Constitution." *Ibid.*, at 809. In *U.S. v. Petrillo*, 332 U.S. 1 (1947), the Court again declined to pass on the constitutionality of a statute applied to prevent a featherbedding picket. The lower court had declared the statute unconstitutional. 68 F. Supp. 845 (D.C. Ill., 1946). But the Supreme Court considered it "inappropriate to reach the merits of this constitutional question now. As we have pointed out, we have consistently said that we would refrain from passing on the constitutionality of statutes in advance of the necessity to do so." *U.S. v. Petrillo*, 332 U.S. 1, 10 (1947).

⁴ 69 S. Ct. 684 (1949).

ness. Empire obtained an injunction on its complaint that the efforts of union members to restrain Empire from selling to nonunion drivers were in violation of the Missouri anti-trade restraint statute, and that an agreement by Empire to refuse to make such sales would violate the same statute. The state Supreme Court affirmed, agreeing that the picketing was designed to force Empire to become a party to an unlawful transportation combination, and that the injunction to prevent picketing for such an unlawful purpose did not contravene the union's right of free speech. The United States Supreme Court, through Justice Black, unanimously affirmed the state court decision on the ground that the *Thornhill* doctrine did not "exten[d] its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."⁵ *Giboney v. Empire Storage & Ice Company* supplements the *Ritter's Cafe* case and confirms the line of authority well established in the state courts that peaceful picketing for unlawful objects is not protected by the guarantees of the *Thornhill* doctrine. But whether any vestiges of *Thornhill v. Alabama* can in fact be salvaged from the *Giboney* case invites discussion.

I

The *Thornhill* case and its companion decision, *Carlson v. California*,⁶ involved blanket statutory proscriptions of all picketing. In holding these state laws invalid, the Court relied upon an earlier dictum of Justice Brandeis⁷ to convert picketing from a tolerated privilege into a full-fledged constitutional right. Speaking for the Court, Justice Murphy announced that "[i]n the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."⁸ Justice Murphy's meaning was clarified the following year, when the Court handed down the decision of *AFL v. Swing*.⁹ A beauty workers' union had attempted to unionize Swing's beauty parlor by peaceful picketing. Swing obtained an injunction on the ground that there was no immediate employer-employee dispute involved. On appeal the Court reaffirmed the *Thornhill* rule and held that, in the absence of legislation, state courts could not restrict a union's right of free speech simply "by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him."¹⁰

⁵ *Ibid.*, at 688.

⁶ 310 U.S. 106 (1940).

⁷ In *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937), the Court decided that pro-picketing legislation did not deprive an employer of due process of law or of equal protection of the laws. But Justice Brandeis uttered an equivocal statement in the course of the decision which has been widely misinterpreted. "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the constitution." *Ibid.*, at 478.

⁸ *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

⁹ 312 U.S. 321 (1941). The same day, in *Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies*, 312 U.S. 287 (1941), the Court established that picketing "in the context of violence" was not protected by the guarantees of the *Thornhill* doctrine.

¹⁰ *AFL v. Swing*, 312 U.S. 321, 326 (1941).

The holding of the *Swing* case was amplified in *Bakery and Pastry Drivers Local v. Wohl*.¹¹ In an effort to compel independent pastry peddlers to employ union relief drivers, a truck drivers union picketed bakeries which were supplying the independents. Since the peddlers were self-employed, the trial court had issued an injunction on the ground that there was no labor dispute. The Court reiterated the rule of the *Swing* case, stating that the absence of a labor dispute as defined by state law did not impair the union's constitutional rights under the Fourteenth Amendment. But while token respect was paid to freedom of speech, the Court also indicated that picketing was subject to restrictions not clearly encompassed within orthodox free speech doctrine.¹² These caveats to the *Wohl* case were elevated to holdings in *Carpenters & Joiners Union of America v. Ritter's Cafe*.¹³ A building contractor was erecting a building for Ritter under a contract which did not require employment of union labor. The defendant union picketed a cafe owned by Ritter to compel the hiring of union workers by the contractor. This picketing was enjoined as violating the state anti-trust law, and the Supreme Court affirmed the injunction five to four. Speaking for the majority, Justice Frankfurter declared that the states could lawfully confine the "sphere of communication" within the "economic context of the real dispute." The Court thus implied that the organized carpenters were constitutionally protected in picketing nonunion building operations, but not enterprises outside the building industry. In preference to a clear-and-present-danger approach, the Court employed a unity-of-interest rationale to distinguish the *Wohl* case from the *Ritter* case.¹⁴ In so rejecting the free speech touchstone of *Thornhill v. Alabama*, the *Ritter* case has been regarded as a major qualification of the basic *Thornhill* doctrine.¹⁵

The Supreme Court's decision this year in the *Giboney* case will undoubtedly add fuel to the controversy engendered by the *Ritter's Cafe* decision. This con-

¹¹ 315 U.S. 769 (1942).

¹² "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell, respondents' mobility and their insulation from the public as middlemen made it practically impossible for petitioners to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue." *Ibid.*, at 775. In a concurring opinion, Justice Douglas commented: "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*." *Ibid.*, at 775.

¹³ 315 U.S. 722 (1942). The *Ritter* and *Wohl* cases were decided the same day.

¹⁴ "The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments, the union members would only be following the subject-matter of their dispute." *Carpenters & Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722, 727 (1942). A similar problem arose in *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740 (1942), where a union picketed the homes of nonstriking employees. However the case was decided on other grounds.

¹⁵ Note 2 *supra*.

troverly will be intensified by the fact that Justice Black's opinion is susceptible to divergent interpretations. Some critics will read the decision as holding that picketing by the union drivers was itself a violation of the anti-trade restraint statute.¹⁶ Others will contend that inducing Empire to violate the Missouri statute was in substance a criminal solicitation.¹⁷ Or it may be urged that the picketing was intrinsically lawful, but was tainted with an "illegal purpose."¹⁸ If the unlawful-object¹⁹ approach underlies the *Giboney* case, the *Thornhill* doctrine would require that the accomplishment of the union's illegal purpose threaten a clear and present danger of substantive evil. Consideration of the probable success of the picketing and the offensiveness of its "object" would be vital factors in the decision. Such consideration, if present in the *Giboney* case, was cast only in veiled language.²⁰ Justice Black's opinion thus leaves undetermined the area of state discretion in defining unlawful objects. If picketing is still to be an exercise of simon-pure free speech, the "objects" would have to be tested by clear-and-present-danger techniques. If picketing is pure economic warfare, the guiding principle would be public policy in defining the allowable area of economic conflict. If picketing is a hybrid activity, some fair method should be developed to differentiate the privileged from the unprivileged. Presuming some identification of the peaceful picket with free speech, how far can picketing be restricted by declaring its purposes illegal?

¹⁶ "Thus all of appellants' activities . . . constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony." *Giboney v. Empire Storage & Ice Company*, 69 S. Ct. 684, 688 (1949).

¹⁷ The gravamen of the offense here would be that the picketing "was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to non-union peddlers." *Giboney v. Empire Storage & Ice Company*, 69 S. Ct. 684, 690 (1949). *Fox v. Washington*, 236 U.S. 273 (1915), a solicitation case, was relied upon in this section of the Court's argument. The opinion of the Missouri court, which was adopted by the Supreme Court, emphasized that inducing Empire to violate the anti-trade restraining statute was the gist of the union's illegal conduct.

¹⁸ The Court regarded the picketing merely as an incident of the union's transportation combination, and consequently refused to consider it "in isolation." Similarly, the Court argued that "we can[not] say that the publication here should not have been restrained because of the possibility of separating the picketing conduct into illegal and legal parts." *Giboney v. Empire Storage & Ice Company*, 69 S. Ct. 684, 690 (1949). The inference seems to be that the picketing would have been lawful, if regarded "in isolation."

¹⁹ The illegal-purpose approach to picketing has dictum support from the *Wohl* case. Counsel for the vendors had contended that a subsequent decision of the New York Court of Appeals established the rationale of the injunction as based on the unlawful-object doctrine. This was ignored because it "lack[ed] the deliberateness and formality of certification, and was uttered in a case where the question of the existence of a right to free speech was neither raised nor considered." *Bakery & Pastry Drivers Local v. Wohl*, 315 U.S. 769, 774 (1942).

²⁰ "There was clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy [of the Missouri law] a dead letter insofar as purchases by nonunion men were concerned." *Giboney v. Empire Storage & Ice Company*, 69 S. Ct. 684, 691 (1949).

II

The pre-eminence of the unlawful-object test in the state courts is largely due to the doctrine enunciated in the *Swing* and *Wohl* cases. Judges who had maintained that local anti-injunction acts were the only bars to the restriction of picketing, were informed by the Supreme Court that peaceful picketing was immune from the injunction irrespective of such legislation. Presumably the absence of a state-defined labor dispute did not open the door to injunctive relief unless the picketing could be brought within the scope of the *Ritter's Cafe* decision. The unlawful-object test thus furnished a convenient alternative for those courts which did not approve of the *Thornhill* doctrine. Without openly defying the Supreme Court, these courts could still argue that lawful means could not be used to support unlawful ends.

This revival of the unlawful-object rationale also had its disadvantages. The definition of "object" has always been a source of much confusion to the courts. A great body of distinctions has been built up to differentiate motive, purpose, and intention, as well as to account for "immediate" and "ultimate" objects.²¹ The necessity of extracting "purpose" from a vast continuum of means and ends led to great uncertainty in the picketing cases. The Missouri Supreme Court held that picketing could be enjoined when a lawful and unlawful purpose were "coupled" together,²² while in Oregon a combination of lawful and unlawful purposes was privileged.²³ The California Supreme Court authorized peaceful picketing for unlawful objects which were "means" to lawful ends,²⁴ although in a later case it was conceded that "the public interest may tip the scales one way or another."²⁵ In the majority of cases the courts have chosen without explanation the objective to be tested.²⁶

Even when union purpose has been established, the basic problem of legality must still be met. The decisions reflect standard problems which arise in the judicial definition of the allowable area of economic conflict. In the teeth of the *Thornhill* doctrine, the state courts have been surprisingly uniform in subjecting picketing to the same scrutiny as other devices of union pressure. The manner in

²¹ Rest., Torts § 777 Comment a (1939); 1 Teller, Labor Disputes and Collective Bargaining § 66 (1940).

²² Fred Wolferman, Inc. v. Root, 356 Mo. 976, 204 S.W. 2d 733 (1947), cert. den. 333 U.S. 837 (1948).

²³ Peters v. Central Labor Council, 179 Ore. 1, 169 P. 2d 870 (1946).

²⁴ Park & Tilford Import Corp. v. International Brotherhood of Teamsters, 27 Cal. 2d 599, 165 P. 2d 891 (1946). Compare Burlington Transportation Co. v. Hathaway, 234 Ia. 135, 12 N.W. 2d 167 (1943).

²⁵ Northwestern Pac. Ry. Co. v. Lumber & Sawmill Workers Union, 31 Cal. 2d 441, 189 P. 2d 277 (1948).

²⁶ The American Law Institute has submitted a definition of "object" which avoids the typical difficulties: "An 'object' of concerted action by workers against an employer is an act required in good faith by them of the employer as the condition of their voluntary ceasing their concerted action against him." Rest., Torts § 777 (1939).

which the closed-shop picket has been handled discloses varied approaches to picketing regulation. The typical situation arises when a minority or outside union pickets an open-shop or a nonunion employer to compel him to sign a closed-shop contract. Some courts, notably those of Massachusetts,²⁷ have simply declared the closed shop an unlawful object, and have enjoined the picketing without further comment.²⁸ Other courts have obtained the same result by defining "labor dispute" narrowly enough to preclude the application of local anti-injunction acts, thus ignoring the Supreme Court's mandate in the *Swing* case.²⁹ More ingenious courts have argued that minority unions may not picket to compel breach of the employers' statutory duty to contract only with the majority representative.³⁰ Courts upholding the closed-shop picket have generally done so because the object was deemed lawful rather than on free speech grounds.³¹

A related purpose served by picketing is the protest of contracts or certification awarded a rival union. Some courts have proceeded on the theory that the absence of a labor dispute opens the door to injunctive relief.³² Certification of a rival union is thus held to terminate the minority's privilege of applying further pressure, supposedly because the minority is not a competent party to a "labor dispute." Where the *Thornhill* doctrine is taken more seriously, courts have relied on unlawful-object principles. Thus it is held an illegal purpose to frustrate the statutory mechanism of majority rule by defying the rival union's certification.³³ On the other hand, where picketing is permitted, the distinction is drawn be-

²⁷ *David Bros. Fisheries v. Pimental*, 78 N.E. 2d 93 (Mass., 1948); *Colonial Press v. Ellis*, 321 Mass. 495, 74 N.E. 2d 1 (1947); *Fashioncraft v. Halperin*, 313 Mass. 385, 48 N.E. 2d 1 (1943).

²⁸ In *Consumers Sand & Gravel Co. v. Kalamazoo Bldg. Council*, 321 Mich. 361, 32 N.W. 2d 531 (1948), a closed-shop picket was held unlawful under a "right to work" statute.

²⁹ *Gazzam v. Building Service Union*, 29 Wash. 2d 488, 188 P. 2d 97 (1947); *Markham & Callow v. International Woodworkers of America*, 170 Ore. 517, 135 P. 2d 727 (1943); *Shively v. Garage Employees Local Union*, 6 Wash. 2d 560, 108 P. 2d 354 (1940). In *AFL v. Bain*, 165 Ore. 183, 106 P. 2d 544 (1940), a statute prohibiting picketing in the absence of a "bona fide labor dispute" was held unconstitutional.

³⁰ *Fred Wolferman, Inc. v. Root*, 356 Mo. 976, 204 S.W. 2d 733 (1947), cert. den. 333 U.S. 837 (1948); *R. H. White Co. v. Murphy*, 310 Mass. 510, 38 N.E. 2d 685 (1942).

³¹ *Iacominis Restaurant v. Hotel & Restaurant Employees Local*, 16 C.C.H. Lab. Cas. ¶65080 (Ohio Ct. Com. Pls., 1948); *Park & Tilford Import Corp. v. International Brotherhood of Teamsters*, 27 Cal. 2d 599, 165 P. 2d 891 (1946); *Twitchell-Champlin Co. v. Conary*, 11 C.C.H. Lab. Cas. ¶63483 (Super. Ct. Me., 1946); *East Lake Drug Co. v. Drug Clerks Union*, 298 N.W. 722 (Minn., 1941).

³² *North East Texas Motor Lines v. Dickson*, 16 C.C.H. Lab. Cas. ¶65054 (Tex. S. Ct., 1949); *Gulf Oil Corporation v. Smallman*, 270 App. Div. 129, 58 N.Y.S. 2d 495 (1945); *Florsheim Shoe Store Co. v. Retail Shoe Salesman's Local*, 288 N.Y. 188, 42 N.E. 2d 480 (1942); *Bloedel Donovan Lumber Mills v. International Woodworkers of America*, 4 Wash. 2d 62, 102 P. 2d 270 (1940).

³³ *Swenson v. Seattle Central Labor Council*, 27 Wash. 2d 193, 177 P. 2d 873 (1947); *Serval Slide Fasteners v. Molfetta*, 188 N.Y. Misc. 787, 70 N.Y.S. 2d 411 (1947). The same principle has been employed to restrict the right to strike. See *Majority Rule and the Right To Strike*, 16 Univ. Chi. L. Rev. 307 (1949).

tween persuasion of the employer to deal with the minority union, and recruiting employees for organizational purposes. The *Swing* case is thus appropriately invoked, and picketing is deemed an exercise of the right of free speech.³⁴ The recruiting picket has generally been well received by the courts on the ground that spreading the benefits of collective bargaining is a legitimate labor objective.³⁵ Objectives tainted with color discrimination have been declared unlawful on each of the occasions upon which the issue has arisen.³⁶ Finally, there is a large class of cases enjoining picketing for objects which have been declared illegal by statute. State anti-trust legislation has been invoked to enjoin picketing designed to enforce secondary boycotts,³⁷ and similar results have been obtained under the Taft-Hartley Act.³⁸

³⁴ *State v. Superior Court*, 24 Wash. 2d 314, 164 P. 2d 662 (1945); *Blossom Dairy Co. v. International Brotherhood of Teamsters*, 125 W.Va. 165, 23 S.E. 2d 645 (1942); *Culinary Workers Local v. Busy Bee Cafe*, 57 Ariz. 514, 115 P. 2d 246 (1941). During the war, however, one court enjoined a minority union picket of an employer who had entered into a union-shop agreement with a rival union, on the ground that "[o]ne of the substantive evils which Congress has a right to prevent and for the prevention of which the power of the nation is now being asserted, is the breakdown of productive processes in the time of national emergency." *Markham & Callow v. International Woodworkers of America*, 170 Ore. 517, 135 P. 2d 727 (1943).

³⁵ *Standard Grocer Co. v. Local No. 406, AFL*, 321 Mich. 276, 32 N.W. 2d 519 (1948); *Hennigh v. International Brotherhood of Teamsters*, 11 C.C.H. Lab. Cas. ¶63094 (D.C. Colo., 1946); *Denver Local Union v. Buckingham Transportation Co.*, 108 Colo. 419, 118 P. 2d 1038 (1941). However in *Denver Milk Producers, Inc. v. International Brotherhood of Teamsters*, 116 Colo. 389, 183 P. 2d 529 (1947), appeal dismissed 334 U.S. 809 (1948), such picketing was enjoinable because the absence of an employer-employee relationship precluded the existence of a labor dispute. Compare *Silkworth v. Local 575, AFL*, 309 Mich. 746, 16 N.W. 2d 145 (1944). The Texas Supreme Court recently held that a statute limiting picketing to controversies between an employer and the majority representative of his employees was unconstitutional. *International Union of Operating Engineers v. Cox*, 16 C.C.H. Lab. Cas. ¶65053 (Tex. S. Ct., 1949).

³⁶ *Hughes v. Superior Court*, 15 C.C.H. Lab. Cas. ¶64824 (Calif., 1948), cert. granted 69 S. Ct. 930 (1949); *James v. Maranship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329 (1944).

³⁷ *Turner v. Zanes*, 206 S.W. 2d 144 (Tex. Civ. App., 1947); cf. *Giboney v. Empire Storage & Ice Company*, 69 S. Ct. 684 (1949); *Harper v. Brennan*, 311 Mich. 489, 18 N.W. 2d 905 (1945).

³⁸ Section 8(b)(4)(A) provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal . . . to perform any services, where an object thereof is . . . forcing or requiring any employer . . . to cease doing business with any other person." 61 Stat. 136-61 (1947), 29 U.S.C.A. § 151 et seq. (1947). The courts have not hesitated to apply this section to picketing. *United Brotherhood of Carpenters & Joiners v. Sperry*, 15 C.C.H. Lab. Cas. ¶64814 (C.A. 10th, 1948); *Printing Union v. LeBaron*, 23 L.R.R.M. 2145 (C.A. 9th, 1948); *LeBus v. Pacific Coast Marine Firemen Assoc.*, 15 C.C.H. Lab. Cas. ¶64794 (D.C. La., 1948). Compare *Douds v. Metropolitan Federation of Architects*, 75 F. Supp. 672 (N.Y., 1948). Section 8(c) provides that "[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." But the legislative history of this section indicates that it was designed primarily to safeguard employer free speech. Conference Report, H.R. 510, 80th Cong. 1st Sess. (1947). See H.R. 245, 80th Cong. 1st Sess. (1947). "In brief outline, the bill accomplishes the following: . . . (13) It outlaws picketing of a place of business where the proprietor is not involved in a labor dispute with his employees."

The overwhelming affirmation of the unlawful-object test in the state courts has now the blessings of a Supreme Court which unanimously affirmed the *Giboney* case. In the face of this green light from the Supreme Court, how far will they now extend the unlawful-object test? Previous application of the illegal purpose technique has divided the state courts into three camps: 1) those which have not questioned state power to define unlawful objects,³⁹ 2) those adopting a balance-of-equities approach to measure the asserted illegality against "the requirement of competition and some measure of equality in the economic struggle between the seller and the producer of services,"⁴⁰ and 3) those few courts which have tested the prohibited objects for "substantive evils" which would justify restriction of free speech.⁴¹

Perhaps the significant factor which explains the continued vitality of the unlawful-object test in the picketing cases, is the strength it draws from the orthodox common law of verbal regulation. The law of criminal solicitations has long recognized that speech for illegal purposes is punishable,⁴² although the use of the injunction raises the special problem of previous restraint.⁴³ The critical problem lies in locating the area of state discretion in creating unlawful objects. Six basic illegal ends have hitherto been significant: 1) inducing breach of contract,⁴⁴ 2) inducing the employer to commit an unfair labor practice or to violate other statutory duties,⁴⁵ 3) inducing violation of anti-trust acts,⁴⁶ 4) induc-

³⁹ The Massachusetts cases are the outstanding examples. Note 27 *supra*.

⁴⁰ *Northwestern Pac. Ry. Co. v. Lumber & Sawmill Workers Union*, 31 Cal. 2d 441, 189 P. 2d 277 (1948); *Shively v. Garage Employees Local Union*, 6 Wash. 2d 560, 108 P. 2d 354 (1940); cf. *Saveall v. Demers*, 322 Mass. 70, 76 N.E. 2d 12 (1947).

⁴¹ *State v. Superior Court*, 24 Wash. 2d 314, 333, 164 P. 2d 662, 672 (1945). "Peaceful picketing is a manifestation of the exercise of freedom of speech and it can be restrained only upon those grounds and conditions which warrant restraint in any other case involving freedom of speech." See also *Ex Parte Waltrip*, 207 S.W. 2d 872 (Tex. Crim. App., 1948); *Markham & Callow v. International Woodworkers of America*, 170 Ore. 517, 135 P. 2d 727 (1943).

⁴² See *Verbal Acts and Ideas—the Common Sense of Free Speech*, 16 Univ. Chi. L. Rev. 328 (1949); *Curran, Solicitation: A Substantive Crime*, 17 Minn. L. Rev. 499 (1933); *Fox v. Washington*, 236 U.S. 273 (1915). But see *Winters v. New York*, 333 U.S. 507 (1948).

⁴³ *Near v. Minnesota*, 283 U.S. 697 (1931). However, in *Carpenters & Joiners Union of America v. Ritter's Cafe*, 315 U.S. 722 (1942), the issue was not even raised. Moreover the Court has made it clear that libellous picketing is enjoinable, although allowance must be made for "conventional give-and-take in our economic and political controversies. . . ." *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943).

⁴⁴ *International Association of Machinists v. Downtown Employees*, 13 C.C.H. Lab. Cas. ¶64053 (Tex. Civ. App., 1947); *Chattanooga Blowpipe & Roofing Co. v. Sheet Metal Workers Local*, 12 C.C.H. Lab. Cas. ¶63706 (Tenn., 1947); *Gulf Oil Corp. v. International Brotherhood of Teamsters*, 185 N.Y. Misc. 409, 57 N.Y.S. 2d 24 (1945).

⁴⁵ *Fred Wolfman, Inc. v. Root*, 356 Mo. 976, 204 S.W. 2d 733 (1947), cert. den. 333 U.S. 837 (1948); *Serval Slide Fasteners v. Molfetta*, 188 N.Y. Misc. 787, 70 N.Y.S. 2d 411 (1947); *Swenson v. Seattle Central Labor Council*, 27 Wash. 2d 193, 177 P. 2d 873 (1947); *Turner v. Zanes*, 206 S.W. 2d 144 (Tex. Civ. App., 1947); *Burlington Transportation Co. v. Hathaway*, 234 Iowa 135, 12 N.W. 2d 167 (1943).

⁴⁶ Note 37 *supra*.

ing discriminatory hiring practices,⁴⁷ 5) inducing a closed-shop contract,⁴⁸ and 6) inducing a secondary boycott.⁴⁹ Clearly the courts are operating on the outer fringes of the solicitation rationale. And can it be said that the accomplishment of these "objects" constitutes a clear and present danger of substantive evil?

III

The major controversy over the right to picket centers around the categories of liberty of utterance and economic warfare. Whether unlawful objects must be tested by clear-and-present-danger techniques⁵⁰ or by legislative and judicial preference, depends largely upon which concept most successfully assimilates picketing speech. The effectiveness of picketing is based upon its appeal to class solidarity rather than upon the justice of its ends. It functions as a signal for the alignment of social forces hostile to the picketee, on grounds which are independent of any particular labor controversy. Hence, while not properly "persuasion," it is nevertheless a form of communication designed to enlist the cooperation of persons sympathetic to the interests of organized labor. But because there is no conceptual peg between the tweedledum of economic pressure and the tweedledee of "pure speech," picketing has been left to vacillate in the undefined area between the competing categories. Justice Douglas, concurring in the *Wohl* case, was able to reconcile this middle ground with the *Thornhill* decision by distinguishing the speech from the nonspeech aspects of picketing. "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 ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation. But since 'dissemination of information concerning the facts of a labor dispute' is constitutionally protected, a State may not define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly."⁵¹

The use of speech to further economic ends has been a sore spot to the Supreme Court upon more than one occasion. The employer free speech cases reflect one aspect of the ambivalent attitude toward economic speech. Although an

⁴⁷ Note 36 supra.

⁴⁸ Notes 27-31 supra.

⁴⁹ *United Brotherhood of Carpenters & Joiners v. Sperry*, 15 C.C.H. Lab. Cas. ¶64814 (C.A. 10th, 1948); *Printing Union v. LeBaron*, 23 L.R.R.M. 2145 (C.A. 9th, 1948); *LeBus v. Pacific Coast Marine Firemen Assoc.*, 15 C.C.H. Lab. Cas. ¶64794 (D.C. La., 1948); *Wisconsin Employment Relations Board v. Milk & Ice Cream Drivers Union*, 238 Wis. 379, 299 N.W. 31 (1941), cert. den. 316 U.S. 668 (1942).

⁵⁰ The Supreme Court's stand on the clear-and-present-danger test was clearly stated in *Bridges v. California*, 314 U.S. 252, 263 (1941). "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Compare *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

⁵¹ *Bakery & Pastry Drivers Local v. Wohl*, 315 U.S. 769, 776 (1942). See Jaffe, *In Defense of the Supreme Court's Picketing Doctrine*, 41 Mich. L. Rev. 1037 (1943).

employer is free to take sides on controversial issues, his activities are "forever suspect" because of the possibilities of coercion which the context of his remarks may disclose.⁵² Commercial advertising is another form of economic communication that has been placed outside the sphere of free speech guarantees.⁵³ Nevertheless, the Supreme Court has struck down restrictions on the "sale" of Jehovah's Witness literature, even where the seller has made his living thereby.⁵⁴ Presumably this is based on the ground that the content of the literature is not of a commercial nature. But in *Thomas v. Collins*⁵⁵ the Court swung back to the middle of the road. Justice Rutledge there announced: "The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge . . . that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities,' or that the individual who leads it in exercising these rights receives compensation for doing so."⁵⁶

The reluctance of the courts to extend constitutional protection to commercial speech probably derives from the distinction between speech in the public interest and speech in the private interest. Since economic communication is identified with private gain, it has not generally been held entitled to constitutional protection. The *Thornhill* doctrine blurred this distinction by identifying the private interest of labor with the public interest at large. Picketing was equated with discussion concerning the conditions in industry and the causes of labor disputes, and this discussion the court deemed "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society."⁵⁷ In the light of this principle picketing has been permitted wider latitude than any other form of economic communication, even in the face of its obvious nonverbal characteristics.

The root of the differentiation of picketing speech from other utterances inspired by prospects of economic gain must lie in the policies which define the

⁵² *NLRB v. Ford Motor Co.*, 114 F. 2d 905 (C.C.A. 6th, 1940), cert. den. 312 U.S. 689 (1941). Compare *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941); *Schweitzer v. NLRB*, 144 F. 2d 520 (App. D.C., 1944).

⁵³ *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). See Wolff, *Unfair Competition by Truthful Disparagement*, 47 *Yale L.J.* 1304 (1938). In *Lewis Publishing Co. v. Morgan*, 229 U.S. 288 (1913), the Supreme Court upheld a post-office regulation denying 2d-class mailing privileges to publications "designed primarily for advertising purposes." Cf. *Hannegan v. Esquire*, 327 U.S. 146 (1946).

⁵⁴ *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Similarly, the distribution of handbills advertising religious literature could not be prohibited by city ordinance. *Jamison v. Texas*, 318 U.S. 413 (1943).

⁵⁵ 323 U.S. 516 (1945). In a five to four decision, the Court held unconstitutional a Texas statute requiring union organizers to get permission from the Secretary of State prior to soliciting union memberships. The Court conceded that this was economic activity.

⁵⁶ *Ibid.*, at 531.

⁵⁷ *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

lawful area of self-help in labor disputes.⁵⁸ The question remains whether any such policy justifies pegging the right on the level of a constitutional privilege. If picketing is sufficiently important, pro-picketing legislation would seem the more desirable alternative. If the requisite political power is lacking, is it the office of the judiciary to remedy the deficiency? Surely the vigorous role assumed by the legislatures in the regulation of industrial conflict militates strongly against judicial intervention.

Should the rise of the unlawful-object test be welcomed as a qualification of an unsound doctrine? If unlawful objects are subject to clear-and-present-danger techniques, a substantial part of the *Thornhill* doctrine may yet be salvaged from the *Giboney* case. But the extensive pre-*Giboney* use of the unlawful-object test indicates that such restraint will not be exercised. Continued lip-service to the *Thornhill* doctrine seems an unpardonable subterfuge if the creation of unlawful objects is governed only by judicial and legislative whimsy. The Supreme Court has argued that the *Giboney* case does not qualify *Thornhill v. Alabama*. A generous interpretation of the decision may support this contention. The critical test will come when the Court decides whether a state may outlaw the closed-shop picket or recruiting picket by employing the illegal purpose device. If such objects do not threaten a clear and present danger of substantive evil, the Supreme Court will have to elect between affirmation or repudiation of the *Thornhill* doctrine.⁵⁹ The real problem must then be faced. Are the courts or the legislatures the proper organs of labor policy?

CHURCH AND SPIEGEL IN PERSPECTIVE

I

In two recent companion cases dealing with the federal estate tax, *Com'r v. Estate of Church*¹ and *Estate of Spiegel v. Com'r*,² the members of the Supreme Court wrote six opinions reflecting the provocative treatment of the subject they belabor. The opinions—two majority, three dissenting, and one dissenting in part—reached the impressive length of 55,000 words. These opinions were

⁵⁸ See Riesman, *Civil Liberties in a Period of Transition*, 3 Pub. Policy 80 (1942); Meiklejohn, *Free Speech and Its Relation to Self Government* 63 (1948); Holmes, J., in *Vegeahn v. Gunter*, 167 Mass. 92, 106, 44 N.E. 1077, 1080 (1896): "The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof."

⁵⁹ The Supreme Court has already granted certiorari to review a case in which picketing to induce an employer to adopt a discriminatory hiring policy was enjoined. *Hughes v. Superior Court*, 15 C.C.H. Lab. Cas. ¶64824 (Calif., 1948), cert. granted 69 S. Ct. 930 (1949). The impending *Hughes* case will be the acid test for the *Thornhill* doctrine. The Court's recent denial of certiorari in the less critical case of *Pa. L.R.B. v. Chester and Delaware Counties Bartenders Local*, 361 Pa. 246 (1949), cert. den. 69 S. Ct. 812 (1949), may indicate that the *Hughes* case was chosen specifically for this purpose.

¹ 335 U.S. 632 (1949).

² 335 U.S. 701 (1949).