THE STATUS OF RECOGNITIONAL PICKETING IN CALIFORNIA

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As with all social sentiments, there is an ebb and flow that marks their historical growth. The public attitude toward labor is no different. In an era of economic wealth, with the general standards raised and the general good widespread, the pressures of adversity dissolve and the public is better able to review its prior allegiances. Our social mores no longer demand that the public ignore the inequities of the labor movement. The public's reaction is swift and decisive, pointing up the crudities and magnifying them to extend to the farthest reaches of the labor movement.[2] This is not unnatural even if it may be unreasonable.

Perhaps in no way is this reversal of attitude toward the labor movement more crystallized than in the public attitude toward the organization of non-union workers. At one time it was the equivalent of the scarlet "A" for a workingman to remain independent while his fellow workers joined together for the benefit of combined economic strength. The public disapproved of "free-riders" and supported the organization drives, even

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1. With a comparison of the present status of such picketing under the National Labor Relations Board's jurisdiction.

2. e.g. The most obvious example is the passage of the Taft-Hartley Act and the inability of labor to solidify pressure behind any significant amendments to that Act.

when those drives involved elements of coercion which society forbade any other group to practice.[3] Today, it is a different world. The reaction to organization reaches from apathy to violent reaction. Non-union workers work alongside union workers and are possessed of thick skins when the organizer approaches them. The public approves of the employer - and his employees - who maintains the union standard while rejecting the union. Perhaps, it is this phenomena in changing attitudes which helps explain why, in the space of three months, unions have found themselves deprived of an ancient weapon of expansion - picketing for recognition.

Defined.

A strike for recognition by an employer is the attempt by a union to secure status as the bargaining agent for the employees of the picketed employer without having secured a majority of those employees as members.[4] It is an attempt to coerce the employees into accepting the union as their bargaining representative, something a majority of them would not do voluntarily.[5] As with any set of competing interests there is a clash. Here the clash is between (a) the employer who seeks to carry on his business without interference; (b) the employees who desire to retain their freedom to join or not to join a union; (c) the union which seeks to promote unionism and so protect threats to its standards. Just which of these

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3. e.g. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).
4. This is the standard definition. e.g. Smith, Labor Law (2nd ed.) (1953), 359-363.
5. If a majority did adhere to the union, an election under National Labor Relations Board supervision could easily be arranged for the covered employer. 29 U.S.C. §159 (1952).

interests shall prevail is not only a question of relative economic strength, but it is also a question of the community's attitude. If the social feeling sides with the employees and their employer, "right to work" laws and prohibitions on recognitional picketing emanate from the legislature.[6] If the prevailing public mood favors the union, the picketing is called "organizational" and is therefore privileged.

What is "organizational" picketing? When a union seeks to induce and encourage employees of an employer to voluntarily join the union and make it their bargaining agent, it is organizational picketing.[7] By definition, an attempt to coerce the employees to join the union, or an attempt to coerce the employer into recognizing the union, is "recognitional" picketing. Obviously, few unions are naive enough to approach the employer first, or to physically intimidate the employees while picketing the establishment. In other words, whether the facts denote picketing that will be privileged as organizational or struck down as recognitional depends a great deal on the attitude of the court and the social mores that influence the judicial reaction.

Having established the definitions and outlined the problem of differentiating between the two types of non-majority union picketing, it

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6. Meltzer, "Recognition-Organizational Picketing and Right to Work Laws", 9 Lab. L. J. 55 (1958).

7. e.g. Smith, Labor Law, op. cit. Now that a difference has been established, picketing by a union which does not represent a majority of the employees of the picketed establishment will be called "non-majority union picketing". The traditional term "minority picketing" is rejected because it implies that the union may represent some of the workers at the establishment when, in the general situation, the union either has made no effort to organize the employees or has been rejected by them.

remains only to discuss the State's power to enjoin peaceful picketing before surveying the situation as it exists in California and under the aegis of the National Labor Relations Board.

The State's Right To Enjoin Peaceful Picketing.

In Thornhill v. Alabama, the United States Supreme Court established that a State could not enjoin peaceful picketing without violating the Fourteenth Amendment to the United States Constitution.[8] This case spoke of the constitutional guarantee in such broad language that it became necessary to adopt the doctrine to the exigencies of particular State needs. The Fourteenth Amendment was applied to peaceful picketing because the placards and leaflets represented an attempt to "communicate" to the public. While this was so, it ignored the fact that such communication necessarily involves an element of economic coercion. This is, of course, legitimate coercion - a union is entitled to utilize economic pressure for the attainment of its ends. But, if such coercion is to be permitted it must operate within permissible boundaries.[9]

The realization that picketing involves "something more" than just speech[10] necessitated a change in the Court's philosophy towards peaceful picketing. It was soon established that both illegal objects and improper means were within the scope of regulation by the State. If the object violated the State's law or announced public policy, the State might enjoin

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8. 310 U.S. 88 (1940); Teamsters v. Vogt, 354 U.S. 284 (1957).
9. Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Ice. Co., 336 U.S. 490 (1949).
10. Bakery Drivers v. Wohl, 315 U.S. 497 (1942).

the picketing even though it were otherwise peaceful and lawful,[11] If the means employed by the union were violent or otherwise invoked the exercise of the police power of the State, an injunction could be properly issued.[12]

This is not to say that a State may outlaw all legitimate collective bargaining objectives and then enjoin peaceful picketing as a violation of State law.[13] It does mean, however, that a union must engage in traditional labor union activities if it is to enjoy the privilege of injunctive immunity. If the union leaves the arena of legitimate collective bargaining and enters the marketplace of business transactions, it will be treated as any other citizen of the State.[14]

At present, then, the law appears to be that a union may engage in peaceful picketing without fear of restraint unless:

(a) The picketing contravenes the established public policy of the State. (unlawful purpose doctrine)

(b) The picketing is violent or physically coercive, or in any way permits the State to exercise its inherent police power to maintain order.

(c) The picketing seeks an objective outlawed by the union unfair labor practices of the National Labor Relations Act, and an injunction is requested by the National Labor Relations Board.

This last restraint on peaceful picketing has not yet been discussed. It

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11. Teamsters v. Gazzam, 339 U.S. 532 (1950) (the end sought prohibited by State law).

12. Allen-Bradley, Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Employment Relations Board, 315 U.S. 740 (1941) (mass picketing).

13. International Union of Auto Workers of America, C.I.O. v. O'Brien, 339 U.S. 454 (1950). cf. Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U.S. 722 (1942).

14. Bakery Drivers v. Wagshal, 333 U.S. 437 (1948); Columbia River Packers v. Hinton, 315 U.S. 143 (1942); Commonwealth v. McHugh, 326 Mass. 248, 93 N.E.2d 751 (1950).

is included here only to round out the picture on peaceful picketing and will be analyzed in the proceeding discussion.

The Federal Right To Enjoin Peaceful Picketing.

Generally, no Federal Court may issue an injunction to prevent peaceful picketing, or any picketing, when it is an integral part of a "labor dispute".[15] The provisions of the Norris-Laguardia Anti-Injunction Act are quite specific in their restraints.[16] As a result, the role of the Federal Courts has been virtually non-existent when it involves the injunctive restraint of peaceful picketing. Although a Federal Court is deprived of the power to grant an injunction by the Norris-Laguardia Act, it may enjoin union activity if requested to do so by the National Labor Relations Board in pursuance of an order of the Board.[17] This regulatory function has been almost the exclusive exercise of power by the Federal Courts in the field of labor relations.

The quiescent role of the Federal Courts may be invigorated by a recent Supreme Court decision. In Textile Workers of America v. Lincoln Mills of Alabama,[18] it was held that Section 301(a) of the Taft-Hartley Act permitted the application of "Federal law" to violations of collective bargaining agreements. This important decision gives the Federal Court the right to utilize their injunctive power in the prevention or cessation

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15. Milk Wagon Drivers' Union, Local No. 753, et.al. v. Lake Valley Farm Products, Inc., 311 U.S. 91 (1940).

16. Bakery Drivers v. Wagshal, 333 U.S. 437 (1948).

17. National Labor Relations Act, 47 Stat. 70 (1932), 29 U.S.C. §§101-15 (1952).

18. 353 U.S. 448 (1957). Section 301(a) was held to be "substantive in nature" permitting the Federal Courts a choice of "Federal law" or "State law" that conformed to the purposes of the Federal labor acts.

of collective bargaining agreement violations.[19] To what extent a redefining of the restraint in the Norris-Laguardia Act is necessary, is still unanswered.[20] The Act still binds the Federal Courts, but a discussion as to the probable extent of this restraint is beyond the scope of this paper. It is apparent that there is to be some change in the role of the Federal Courts in the field of labor relations - pointing to an expansion of activities.[21]

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19. There are some 17,000,000 workers covered by collective bargaining agreements and an additional 3,000,000 covered by the "exclusive bargaining agent" provisions of the National Labor Relations Act. Witney, The Collective Bargaining Agreement - Its Regulation And Administration, 1958, P. 14. The importance of this fact is emphasized by another recent United States Supreme Court holding in Guss v. Utah Board, 353 U.S. 1 (1957) stating that no State Labor Board (or State Court) may act on a matter which is within the purview of the National Labor Relations Board's jurisdiction, even if the Board refuses to act. This reaffirmance of the doctrine of Federal pre-emption creates a "no-man's land" of judicial or administration inaction. Presumably, much of this area will be filled by the Lincoln Mills holding. However, employers who are victims of recognitional strikes will not be aided by Lincoln Mills because they are under no collective bargaining agreement. See: Bickel and Wellington, "Legislative Purpose and the Judicial Process: The Lincoln Mills Case," 71 Harv. L. Rev. 1 (1957); Note, "The Discretionary Jurisdiction of the National Labor Relations Board", 71 Harv. L. Rev. 527 (1957).

20. Although some courts will be quick to interpret Lincoln Mills as a repeal of Norris-Laguardia, the process of judicial education via stare decisis will bring them into line. Bull Steamship Co. v. Seafarer's International Union, 33 Lab. Case, ¶71095, holding that a Federal Court may not utilize §301(a) to restrain by injunction a violation of a no-strike provision in a collective bargaining agreement.

21. There will be a natural tendency to turn to the Federal Courts wherever possible now that the State courts are so severely restricted by the Guss decision. For example, it appears that no State now has the right to restrain peaceful picketing which involves parties in inter-state commerce. Garner v. Teamsters, 346 U.S. 485 (1952); Garmon v. San Diego Building Trades Council, 49 A.C. 47 (1958). They may, however, restrain peaceful picketing of parties in intra-state commerce. Teamsters v. Vogt, 354 U.S. 384 (1957).

The California Law As To Recognitional Picketing.

It has long been established in California that a union may seek a legitimate collective bargaining purpose through the means of peaceful picketing.[22] The accepted statement is:

> "...if the object of a union is reasonably related to the legitimate interests of labor, and the means employed are proper, the union cannot be enjoined from using concerted action to enforce its demands."[23]

In California, unions and voluntary collective bargaining have enjoyed a long acceptance,[24] well respected by the Courts. Labor Code §923[25] states the public policy of the State as desirous of promoting "voluntary agreement between employer and employees". Despite this announcement of public policy, the courts of this State had been generous in allowing picketing by a non-majority union.[26]

However, in the most recent declaration of California policy, the Supreme Court of this State awarded damages to an employer whose establishment had been picketed by a union seeking recognition.[27] The

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22. Lisse v. Local Union, 2 C.2d 312, 41 P.2d 314 (1935).
23. Bautista v. Jones, 25 C.2d 746, 749, 155 P.2d, 343, 345 (1944).
24. Tobriner, "The Organizational Picket Line", 3 Stan. L. Rev. 423 (1950).
25. Cal. Labor Code §923 (West, 1955).
26. Cal. Labor Code §920-21, completes the statement of California public policy in relation to union organization. The sections are designed to provide complete freedom of selection or rejection by the employee of union status. C. S. Smith Metropolitan Market v. Lyons, 16 C.2d 389, 106 P.2d 414 (1940); Shafer v. Registered Pharmacists Union, 16 C.2d 379, 106 P.2d 402 (1940); McKay v. Retail Auto S.L. Union, 16 C.2d 311, 106 P.2d 373 (1940).
27. Garmon v. San Diego Building Trades Council, 49 A.C. 47 (1958), awarded damages to a businessman who was picketed by a union demanding recognition although it admitted not representing his employees. No injunction was given in pursuance of United States Supreme Court instructions which, on appeal, had denied to California the right to enjoin this type of picketing in that it fell within the ambit of the National Labor Relations Act and so was within the exclusive jurisdiction of the National Labor Relations Board. Guss v. Utah Labor Board, 353 U.S. 1 (1957) and companion cases.

decision came as a surprize to many and as a shock to many more.[28] In a State whose courts were considered so attuned to the needs of organized labor such a decision was regarded as out of line with the precedent. An analysis of the California cases will indicate that the elements underlying this decision can be found in the prior case law.

Although California had originally held all peaceful picketing unlawful,[29] this attitude changed with the national alteration of attitude toward labor unions in the 1930's.[30] Peaceful picketing was approved of as an effort to obtain a lawful purpose.[31] The original trilogy of cases[32] to apply Labor Code §923 adhered to the philosophy that labor had the right to expand and organize in order to obtain bargaining power commensurate with employer strength. To this end, the non-majority union picket line was approved. The philosophy was exemplified by the Court's language in C. S. Smith Metropolitan Market Co. v. Lyons[33] to the effect that

> "A labor organization may have a substantial interest in the employment relations of an employer, although none of them is employed by him; that the reason for this is that the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes..."

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28. Tobriner, "The Organizational Picketing Line", 3 Stan. L. Rev. 423 (1950). But cf. Plant, "Recognitional Picketing By Minority Unions in California", 9 Stan. L. Rev. 100 (1956).

29. Moore v. Cooks', Writers' and Waitresses' Union, No. 402, 39 Cal.App. 538, 179, Pac. 417 (1919).

30. Lisse v. Local Union, 2 C.2d 312, 106 P.2d 314 (1935).

31. Howard, "The Unlawful Purpose Doctrine in Peaceful Picketing And Its Application in the California Cases", 24 So. Calif. L. Rev. 145 (1951).

32. C. S. Smith Metropolitan Market v. Lyons, 16 C.2d 10, 389, 106 P.2d 414 (1940); Shafer v. Registered Pharmacists Union, 16 C.2d 379, 106 P.2d 402 (1940); McKay v. Retail Auto S.L. Union, 16 C.2d 311, 106 P.2d 373 (1940).

33. 16 C.2d at 106 P.2d at 391 (1940).

Such a philosophy permitted the sanctioning of the picketing of an establishment in which the employees had evidenced a refusal to join the union.[34] It seemed clear that the non-majority union could seek to extend its influence through the picket line's economic pressure.

The post-war years of increasing prosperity and growth gave impetus to California employers to once again take up the banner that coercion of employers to recognize a union is an unlawful object. A series of lower court cases were the scene of attempts to have recognitional picketing declared an unlawful end.[35] The employers relied on the well established doctrine that an unlawful object of a union could be enjoined.[36] They pointed out that even in the cases which had upheld the non-majority union's right to picket, language had appeared which spoke of "legitimate collective bargaining objects" and an "intimate relation to the well-being of labor".[37] Finally, the pendulum was successfully pushed back in Garmon v. San Diego Building Trades Council.[38] The Supreme Court of California held that it was a violation of Labor Code §923 to attempt to coerce an employer into recognizing a union as the bargaining agent when a majority of his employees did not being to that union. The McKay case,[39]

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34. Park and Tilford Import Corp. v. International Brotherhood of Teamsters, 27 C.2d 599 , 165 P.2d 891 (1946).

35. Stow v. Garage and Service Station Employees, 27 LRRM 2057 (Cal. Super. Ct. 1950); Barnes v. Truck Drivers, Warehousemen and Helpers Union, California Superior Court, Contra Costa County, No. 48873 (1950).

36. James v. Marinship Corp., 25 C.2d 721, 155 P.2d 334 (1944); City of Los Angeles v. Los Angeles Building and Construction Trades Council, 94 Cal. App.2d 36, 210 P.2d 304 (1949); Northwestern Pacific R. R. v. Lumber and Sawmill Workers Union, 31 C.2d 441, 189 P.2d 277 (1948).

37. Plant, "Recognitional Picketing By Minority Unions in California", 9 Stan. L. Rev. 100, (1956).

38. 49 A.C. 47 (1958).

39. 16 C.2d 311, 106 P.2d 373 (1940).

the leading holding of the Court on the right of a non-majority union to picket for recognition, was distinguished as a jurisdictional strike situation now prohibited by the California Jurisdiction Strike Act of 1947,[40] and so no longer binding on the Court.[41] The Court cited the long line of Supreme Court cases referring to the right of a State to enjoin peaceful picketing for an unlawful purpose and concluded that the union's activity violated the law and public policy of this State.[42]

In the Garmon case, the union demanded recognition from the employer directly, even though none of his employees were members of the union. This was a clear case of recognitional picketing. In the future, California unions will be less likely to make such an overt attempt to gain recognition. They will seek to hide beneath the cloak of "organizational" drives. Whether this mantle will be protective cannot be predicted. Certainly the Court will have greater difficulty avoiding the language of the earlier cases in such a situation, but a Court which is responding to changed times and attitudes has little difficulty fitting the facts into a preconceived mold.

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40. Cal. Labor Code §§1115-1120, inclusive.

41. Declared constitutional in Seven-Up Bottling Co. v. Grocery Workers Union, 40 C.2d 368, 254 P.2d 544 (1953).

42. Teamsters v. Vogt, 354 U.S. 284 (1957); Pappas v. Stacey, 151 Me. 36, 116 A.2d 497 (1957); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950); Local Union No. 10, United Assoc. J.P. and S. v. Graham, 345 U.S. 192 (1952).

The National Labor Relations Board's Rulings As To Recognitional Picketing.

The Board is no less immune to the pressures of changing times. Its reaction is even more directly attuned to the "political" environment than is that of a State court.[43] The change in dominant interests in the Administration, as well as the valid need to equate the interests of labor and management more impartially are strong influences on the Board's course of action. Again, it is the attitude of a "judicial" arbiter toward non-majority union picketing which serves as a prime example of the shift in attitude.

The Board's governing legislation, The National Labor Relations Act, speaks specifically of recognitional picketing in only one provision. In §8(b)(4)(C) a union is restrained from "striking, or inducing or encouraging employees to strike" when there is already a certified union on the premises. If the union is merely recognized, never having availed itself of the Board's processes, this section does not apply. As a matter of fact, the "proviso" to §8(b)(4) specifically states that an employee may cross a legitimate picket line without fear of employer retaliation.[44]

The policy of the Board had been not to enjoin picketing which did not violate any union unfair labor practice.[45] Recognitional picketing became a violation with the decision in Teamsters v. Curtis.[46] In Curtis

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43. For an extended discussion of two areas in which the Board has varied its approach regularly, and without predictability, See: Wood, "Employer Free Speech and Representation Elections", 9 Lab. L. J. 9 (1958); Scolnik, "Hot Cargo Clauses", 9 Lab. L. J. 71 (1958).

44. In Doud v. International Longshoremen's Assoc., Independent, 224 F.2d 455 (1955), a situation was involved where the AFL sought to eliminate the Independent Longshore Union by picketing for the recognition of a union it had specially set up to compete with the Independent. The action was perfectly proper under §8(b)(4)(C) in that the Independent, while recognized, was not certified.

45. e.g. NLRB v. Laundry, Linen Supply and Dry Cleaning Drivers, 31 Labor Cases 93, 014 (1957) (consumer boycott).

46. 119 NLRB 33 (1957).

a union had been certified as the bargaining agent, but a petition had been filed with the Board questioning the union's status as majority representative. Rather than face a decertification election, the union admitted it was no longer the majority representative, and the next day set up a picket line with the ostensible purpose of "inducing" the employees to reselect the union as their bargaining representative. The Board determined that this picketing reduced the employer's business, thereby endangering the jobs of the employees. This "secondary coercion" of the employees constituted a violation of §8(b)(1)(A).[47] The picketing was enjoined as an attempt to "restrain or coerce employees in the exercise of their §7 rights". The decision is unique for two reasons. First, it is the first time that recognitional picketing has been declared unlawful under the Act.[48] Second, it is the first time that §8(b)(1)(A) has been given so broad an interpretation.[49] To discuss the history of §8(b)(1)(A) is to indicate why the Board has refrained from a Curtis type decision for so long.

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47. Such a philosophy had been expressed previously in only one decision, and the decision was not by the Board. Capitol Service, Inc. v. NLRB, 204 F.2d 848 (9th Cir. 1953). The language of §8(b)(1)(A) reads "No labor organization shall coerce or restrain any employee in the exercise of their Section 7 rights."

48. In a companion decision, the Board held that the publication of a firm on a non-majority union "We do not patronize" list was also a violation of s8(b)(1)(A) for the same reasons enunciated in Curtis. International Brotherhood of Machinists, AFL-CIO v. Alloy Mfg. Co., 119 NLRB No. 38, Lab. Rel. Rep. (41 L.R.R.M. 1058) (1957). This appears to be an obvious infringement upon §8(c) of the Act guaranteeing to labor and the employer the right to free speech. There were no threats or acts of violence accompanying the publication to take the union's acts outside the scope of privileged activity.

49. Except for the Capitol Service case, op. cit.

Until the Curtis case, the Board had found violations of the section only in such cases as exertion of physical force against employees,[50] threats of force[51] or economic reprisal,[52] or non-peaceful picketing which prevented ingress to work.[53] Whether or not peaceful picketing itself is coercive was not the question. A certain amount of coercion was privileged to a labor union, it was the violent coercion that was restrained.[54] The section was continually applied in this narrow context.[55] In Curtis, the Board ignored this line of cases and cited instead the long line of Supreme Court cases upholding the right of the State to enjoin peaceful picketing.[56]

Despite the long history of a narrow application of this section, the legislative history contains some evidence which supports the propriety of the Curtis decision.[57] Senator Taft, in discussing this section, cited

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50. e.g. Painter's District Council No. 6, Brotherhood of Painters, AFL, and The Higbee Co., 97 NLRB 654 (1951); United Construction Workers, District 50, United Mine Workers, and Kanawha Coal Operators' Assoc., 94 NLRB 1731 (1951).

51. e.g. Local 169, Industrial Division International Brotherhood of Teamsters, AFL, and Ann Bodrog, 111 NLRB 460 (1955); Randolph Corp. and Charles Chandler, 89 NLRB 1490 (1950).

52. e.g. Peerless Tool and Engineering Co. and Marlin Taylor, 111 NLRB 853 (1955); Pinkerton's Detective Agency, Inc. and Thomas W. Stenhouse, 90 NLRB 205 (1950).

53. e.g. Local 1150, United Electrical Workers, CIO, and Cory Corp., 84 NLRB 972 (1949); International Longshoremen's Union, CIO, and Sunset Line and Twine Co., 79 NLRB 1487 (1948).

54. There has been a great deal of discussion as to whether or not peaceful picketing alone is "coercion". Cf. Jones, "Picketing and Coercion: A Jurisprudence of Epithets", 39 Va. L. Rev. 1023 (1953) with Gregory, "Picketing and Coercion: A Defense", 39 Va. L. Rev. 1053 (1953); and 39 Va. L. Rev. 1067 (1953). See also: Petro, The Labor Policy of the Free Society, (1957).

55. NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

56. As cited in Footnote 42.

57. For an excellent discussion of the Curtis case see Note, "Effect of §8(b)(1)(A) of the Taft-Hartley Act on Peaceful Picketing and Related Activities of Minority Unions", 42 Minn. L. Rev. 459 (1958).

the case of Hall Freight Lines[58] and said:

> "The main threat was 'unless you join our union, we will close down this plant, and you will not have a job'. That was the threat, and that is coercion - something they had no right to do." (emphasis added)[59]

As with most legislative history, both sides could find some support.[59] The important question is not whether the Board was justified, but what course will it take now?

The Board decision attempted to differentiate between recognitional and organizational picketing.[60] The Board said:

> "Equally inapposite to the case at bar is minority picketing for organizational purposes. In words, at least, such conduct falls within the statutory 'right to self-organization' set out in Section 7 of the Act. More important, organizational picketing is not tainted, on its face, with the unlawful direct purpose of forcing the commission of an unfair labor practice by the employer and the summary imposition of an unwanted union upon its employees..."

The majority went on to say that organizational picketing also involved coercion on the employer and his employees, and a balancing of interests might be necessary in a particular case, but they would not pass on this question. Under normal circumstances, it might be said that a sophisticated union can avoid the impact of this decision by carefully directing its placards and leaflets to the public and avoiding the picketing of employee entrances. In this manner, they might set up the protection of a consumer boycott - privileged under the Act.[61] Unfortunately, the Board dismissed this loophole by pointing out that the existence of communication to the

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58. Hall Freight Lines and Local 705, International Brotherhood of Teamsters, AFL, 65 NLRB 397 (1946).
59. 93 Cong. Rec. 4023 (1947).
60. Teamsters v. Curtis, 119 NLRB (1957).
61. NLRB v. Laundry, Linen Supply and Dry Cleaning Drivers, 31 Labor Cases 93, 014 (1957).

consumer was what provided the economic pressure which constrained the employer's business and endangered the employees' jobs! With this route closed, there remains only one other potential differentiation between types of non-majority union picketing.

The Board was greatly disturbed by the fact that if the union had been successful in the Curtis case, the employer would have committed a violation of §(8)(A)(1) by recognizing a union to which his employees did not belong, thereby coercing his employees in the exercise of their §7 rights. The previous quotation from the decision indicates that the Board thought that organizational picketing would not induce this violation. Whether a union may use this as an escape from the Curtis holding still depends largely on the Board, for this suggested difference means that the Board must review the subjective intent of the union - absent any obvious coercive acts - in order to determine whether the union seeks to "induce" the employees to join or "compel" the employer to recognize. If there has been a change in attitude toward non-majority union picketing, labor should look for scant relief in the Board's analysis of union intent.

The Future of Non-Majority Union Picketing: What It Should Be And What It May Be.

It could well be argued that non-majority union picketing is inherently so dangerous as to require a wide breadth of control.[62] If both forms of non-majority picketing are judged by their effect on the businessman and his employees there is no perceptible difference. This coercion could

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62. See: Petro, The Labor Policy of the Free Society (1957); Pound, "Legal Immunities and Labor Unions", in Labor Unions and Public Policy (1958).

reasonably be declared undesirable and §8(b)(1)(A) extended to restrict it.[63] Combining the present attitude of the Board with the prevailing national mood makes this blanket prohibition against non-majority picketing seem quite likely.

There is, however, an intellectually and realistically honest difference between recognitional and organizational picketing. It is well established that labor unions may engage in economic coercion where other "pressure groups" may not. As long as the union seeks a proper collective bargaining objective, it may utilize, in a privileged manner, certain forums of peaceful economic coercion to attain those legitimate ends. Although the public mood has changed, it is still generally recognized that union's have a vested interest in preventing the undercutting of their standards.[64] These standards can be undermined not only by "free-riders" within an establishment, but by competitive businesses within an industry which refuse to follow the union standard. Their lower standards permit lower prices, jeopardizing the economic position of the unionized employer and his employees.[65]

It has been argued that to accept the "maintenance of standards" argument is to deny the freedom of action guaranteed to employees in

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63. Certainly the United States Supreme Court has agreed that a State may forbid non-majority union picketing. Teamster v. Vogt, 354 U.S. 284 (1957).

64. Meltzer, "Recognition-Organizational Picketing and The Right To Work Laws", 9 Lab. L. J. 55 (1958).

65. Although there has been a great deal of controversy as to just how effective a role labor unions play in the fixing of wages, it is not denied that the existence of a labor union in an industry tends to rigidify the wage structure and so prevent any pronounced decline in periods of economic slack. Garbarino, "A Theory of Inter-Industry Wage Structure Variations", Quarterly Journal of Economics, (May, 1950); Maher, "Union - Non-Union Wage Differentials", American Economic Review (June, 1956), 336; Cf. Ross and Goldner, "Influences on Inter-Industry Wage Structure", Quarterly Journal of Economics (May, 1950), 254.

Section 7 of the National Labor Relations Act.[66] This argument is singularly valid, but is as extreme in application as is the preservation of unrestrained recognitional picketing. There must be some balance between employee freedom of action and the protection of proper union objectives.

Proposed Course Of The Law.

If a sincere attempt to protect employee rights is combined with a desire to maintain organized labor as a wholesome and necessary economic lever in our society, a distinction must be made between pure recognitional picketing and pure organizational picketing. Since these two are theoretically Siamese twins, certain arbitrary criteria must be set up and applied.

On the Federal level, §8(b)(4)(C) should be amended to provide that no non-majority union may picket an establishment without first

(1) Notifying the Regional Director of the National Labor Relations Board of an intention to picket for the purpose of organization. There must be affirmative evidence that the union has not approached -

(a) the employer seeking recognition;

(b) any other employer seeking assistance of an economic nature in their attempts to gain bargaining status with the picketed employer.[67]

(c) any union or union members seeking an agreement not to service or in any way perform functions, in the course of their employments, for the picketed employer.

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66. Meltzer, "Recognition-Organizational Picketing And The Right To Work Laws", 9 Lab. L. J. 55 (1958).

67. This is not covered by §8(b)(4)(A) of the National Labor Relations Act which restricts only efforts to induce or coerce employees of the employer.

(2) A Board election to determine the bargaining representative (if any) must be held within six (6) weeks of the initiation of the attempt to "induce" the employees to join the union.

(3) Any union which loses an attempt to gain bargaining status in such an election may not engage in any attempt to organize the employees of that establishment for no less than two (2) years.

There is inherent in this scheme two safeguards. First, no union will undertake an organizational attempt if it has serious doubts as to its success. The penalty for losing an election is severe. Second, there is the traditional guarantee that no more than a minority of the employees will be "coerced" into accepting the union as their representative since a majority is essential for representation. There is one subliminal inadequacy in this proposal. In operation, it may succeed in being as effective a bar to non-majority picketing as would be an extended Curtis decision. Only actual application could test this possibility.

On the State level no sweeping suggestion can be made. Each State will be conditioned by its mores and prejudices. Those States which are traditionally less hospitable to unionization will extend their distaste for recognitional picketing to organizational picketing.[68] The problem is not too acute, however, in view of the pronounced tendency of the United States Supreme Court to divest the States of their regulatory power over labor relations.[69] What power that does remain will always be subject to the restraints of the Fourteenth Amendment.

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68. Witness the Kansas Supreme Court in Newell v. Chauffeurs, Teamsters and Helpers, Local Union 795, 181 Kan. 898, 317 P.2d 817 (1957); rev.'d: Chauffeurs, Teamsters and Helpers, Local Union 795 v. Newell, (Nov. 9, 1957), Commerce Clearing House, U.S. Supreme Court Reporter, Docket 847.

69. Guss v. Utah Labor Board, 353 U.S. 1 (1957).

Conclusion.

This paper was begun on a note which indicated that what appears to be a legal problem is actually a problem in social relationships. Anything that is concerned with the interplay of economic forces and the role that society takes to this interaction must consider the prevailing bias of the time. For over twenty years the prevailing, though not uniform, national bias served as a protecting womb within which labor could perform the act of gestation. Now that the process is largely complete and their remains the greater and more difficult task of maturation, the innovations in attitude of the California Supreme Court and the National Labor Relations Board towards non-majority union picketing represents society's demand that labor accept the responsibilities of adulthood.[70]

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70. For an interesting discussion of the need to deprive unions of their special legal immunities see: Roscoe Pound, "Legal Immunities of Labor Unions", in Labor Unions and Public Policy (1958). Cf. Forkoch, "An Analysis and Re-evaluation of Picketing in Labor Relations", 27 Ford. Law Rev. 391 (Autumn, 1957).

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