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Counterpart of Federal Law in the Labor Equation: Indiana as Illustrative of State Labor Law

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THE COUNTERPART OF FEDERAL LAW IN THE LABOR EQUATION: INDIANA AS ILLUSTRATIVE OF STATE LABOR LAW

I. FEDERAL AND STATE BACKGROUND

Is labor law exclusively federal in nature? Obviously it is not. Yet, at initial encounter, many believe otherwise. Nor does further investigation necessarily alter this impression. Commensurate with increased exposure one finds proportionate preoccupation with federalism. At that juncture attention is drawn to the supremacy of federal jurisdiction over that of the states. At least from a semantic standpoint, however, understanding has progressed, for "supremacy" necessarily connotes a relative concept which differs substantially from the initial absolute reaction of "exclusiveness." True, the major developments of the past twenty-five years — the Wagner Act (1935) and Taft-Hartley Act (1947), and the application of the doctrines of free speech and preemption to labor law — have all been on the federal level. However, relativity definitively connotes a comparison, and the counterpart of federal law in the labor equation is state law. It is this area of labor

law, both decisional and statutory, which has not only been relegated to a minor role, but virtually forgotten and often ignored.

Unquestionably, federal determinations and enactments have materially affected labor-management relations and will continue to do so. However, the initial benevolences and abuses which came to be known as "labor law" were first fashioned by the state courts and legislatures. Federal embellishment came much later and this new addition neither lost sight of nor destroyed its origins.

At the outset, it is patent that a labor problem of intrastate character must first find its solution in a state forum. Nor does state influence in labor matters stop at state boundaries. Historically, each federal extension of jurisdiction has created new problems and new areas for state litigation. Illustrative are the federal doctrines of free speech and preemption. Thus, when the Supreme Court of the United States applied free speech to picketing and related activity,[1] it was in one sense placing a loose limitation

[1] The applicability of free speech to labor matters was first suggested in 1937 in Senn v. Tile Layers Protective Union, 301 U.S. 468, 478 (1937), in which Justice Brandeis, discussing the status of picketing under the fourteenth amendment, observed that ". . . [M]embers 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 Federal Constitution." Formal enunciation of the doctrine, however, awaited Thornhill v. Alabama, 310 U.S. 88 (1940), and Carlson v. California, 310 U.S. 106 (1940), where state and municipal enactments which prohibited all picketing were held to violate the free speech guarantees of the Constitution. In AFL v. Swing, 312 U.S. 321 (1941), the free speech doctrine reached full maturity when it was held that even stranger picketing, *i.e.*, picketing by non-employees of the employer, was within the purview of this constitutional guarantee and hence could not be enjoined by state courts. Milkwagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), decided the same day as *Swing*, and three cases decided shortly thereafter — Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943); Baker & Pastry Drivers, Local 802 v. Wohl, 315 U.S. 769 (1942); and Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1922) — treated certain exceptions and variations of the basic doctrine, but it remained essentially unchanged until 1949. Then, in relatively short order the Supreme Court decided four cases in which it tempered the free speech doctrine in cases where the picketing was violative of state law or policy: Building Service Employees Int'l Union v. Gazzam, 339 U.S. 532 (1950); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior

upon state courts, but to the extent that the vast majority of free speech questions originate in state courts and few ever reach the Supreme Court, the effect of the doctrine was to provide state tribunals with another issue with which to deal in the first instance. Similarly, shortly after the Court had enunciated its *Garner* doctrine of federal preemption,[2] thus contracting state influence, it found it necessary to carve exceptions[3] to its contraction which had

Court of California, 339 U.S. 460 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949). This new trend was reversed at least in part by the federal preemption doctrine which was first enunciated in 1953 in Garner v. Teamsters Union, 346 U.S. 485 (1953). See note 2 *infra*, for a discussion of federal preemption.

[2] Garner v. Teamsters Union, AFL, 346 U.S. 485 (1953). While the *Garner* case is regarded as having formally enunciated the doctrine of federal preemption, rumblings of the doctrine were heard several years earlier. In 1945, the Supreme Court in Hill v. Florida, 325 U.S. 538 (1945), struck down a Florida statute requiring union business agents to be licensed subject to certain residency requirements and requiring unions to file annual reports relative to their activities. The basis of the decision was that the Florida statute was "repugnant" to the National Labor Relations Act, in that it would frustrate the collective bargaining process authorized by the federal act. In 1947, the Supreme Court held that the NLRB had supreme and exclusive jurisdiction over the certification of a bargaining unit of foremen engaged in interstate commerce and that action by the New York Labor Relations Board relative to such employees was therefore invalid. Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947).

These two decisions set the stage for the *Garner* case, which carried the principle of preemption to picketing and related labor activity. Little was added by such other pre-*Garner* decisions as LaCrosse Tel. Corp. v. WERB, 336 U.S. 18 (1949) (Wisconsin board had no authority to certify bargaining unit even though the NLRB had not acted); Algoma Plywood & Veneer Co. v. WERB, 336 U.S. 301 (1949) (states may enforce more restrictive union security policies than those established by the Taft-Hartley Act, since section 14 (b) of the Taft-Hartley Act permits the states to do so, 61 STAT. 451 (1947), 29 U.S.C. § 164 (b) (1952)); Plankington Packing Co. v. WERB, 338 U.S. 953 (1950) (Wisconsin Board has no jurisdiction over an unfair labor practice allegedly committed by interstate employer because within the exclusive jurisdiction of the national board); International Union, UAW v. O'Brien, 339 U.S. 454 (1950) (Michigan statute requiring strike notices and a membership referendum invalid as repugnant to Taft-Hartley Act and policies); Amalgamated Ass'n. of Street Elec. Ry. and Motor Coach Employees v. WERB, 340 U.S. 383 (1951) (attempt to impose compulsory arbitration in public utilities labor disputes).

[3] *See* United Automobile Workers v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956) (state court retained traditional power to control physical violence); United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954) (state court had jurisdiction of common law damage action even though conduct violated a federal act as well).

the relative effect of expanding state jurisdiction. But then — and quite currently — in *Garmon v. San Diego Bldg. Trades Council*,[4] *Guss v. Utah Labor Relations Bd.*,[5] and *Fairlawn Meats, Inc. v. Amalgamated Meat Cutters, AFL*,[6] the Supreme Court ruled that the federal government had preempted the labor field in interstate matters even though a jurisdictional vacuum may be created by reason of the refusal or failure of the NLRB to act.[7] Instantaneously a partisan cry for congressional action arose and a bill was introduced into the United States Senate which would, in effect, cede jurisdiction to the states where the NLRB had declined to assert jurisdiction.[8] Whether or not this suggested bill has merit, one thing is certain: Congress will feel constrained to agree or disagree with the Supreme Court and eventually Congress will reduce its belief to writing in the form of legislation.

At the outset of this writing, the view was expressed that state law had been relegated to a minor role. Perhaps at this point, this statement should be reiterated, but it is becoming increasingly obvious that the role, although perhaps small, is indeed focal. Yet with all of the developing clamor, very few of the noisemakers are cognizant, except perhaps superficially, of the tools which the states

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4 45 Cal. 2d 657, 291 P.2d 1 (1955), *rev'd*, 353 U.S. 26 (1957).

5 5 Utah 2d 68, 296 P.2d 733, *rev'd*, 353 U.S. 1 (1957).

6 99 Ohio App. 517, 135 N.E.2d 689, *appeal dismissed*, 164 Ohio St. 285, 130 N.E.2d 237 (1955), *rev'd*, 353 U.S. 20 (1957).

7 In the main this failure or refusal to act is due to the Board's self imposed limitations. In theory its jurisdiction is as broad as the commerce power of the Constitution. The Board has declined, however, to accept all cases affecting commerce. Prior to 1950 it exercised or refused to exercise jurisdiction on a case to case basis. Then, in 1950, it established a "jurisdictional yardstick," requiring the participants to prove a minimum annual dollar volume of interstate commerce before their case would be heard. These requirements were made more stringent in 1954. See Samoff, *Handy Guide to the July, 1954 NLRB Jurisdictional Standards*, 7 LAB. L. J. 667 (1956); Symposium, *NLRB Jurisdictional Standards and State Jurisdiction*, 50 NW. U. L. REV. 190 (1955).

8 Senator Watkins of Utah introduced S. 1723. Similarly, an association of state labor relations agencies was formed and held its first meeting at Madison, Wisconsin, April 23-24, 1957.

have utilized, the various results which have been reached, and the articulation of the problems which have been demonstrated on the state level. The issue is not the old question of whether the states have reserved to themselves all that has not been delegated to the federal government or whether the federal government is completely supreme in the field. Rather, the query revolves around what procedures and substantive law can best bring about equity, impartiality, and stability in labor relations. Thus, in order to make an appropriate determination of whether the states are to have more or less authority in the field of labor relations, one must know what steps the states have taken through legislation and judicial decisions to produce equity, impartiality, and stability. Common beliefs regarding state law must be discarded and a long overdue analysis undertaken.

Where does this investigation begin? While it would be desirable, space limitations do not permit a detailed analysis of the decisional and statutory law of each state. On the other hand, a general and superficial treatment would be of little value. Unfortunately, a single common denominator is absent, but for illustrative purposes a state which has treated many of the aspects of labor relations can be selected. This state should be neither a model of enlightenment nor of confusion. If possible, this state should not only illustrate legislative and common law development but also should reflect something of a composite reaction to federal growth as well as economic and social motivations.

The choice of a state which meets these requirements and hence could serve as an illustrative exercise requires an initial inquiry into state law in general. Several categories are readily eliminated. At the outset, a few states become atypical because the common law of the courts has been superseded by legislation administered by state

agencies.[9] Conversely, a limited number of jurisdictions possess little substantive legislation and derive their doctrines almost exclusively from the common law.[10]

The remaining states fall into two basic categories: the southern and some agricultural states have adopted "right to work" legislation.[11] "The development in most other state states commenced with the common law and has undergone a transition with the passage of anti-injunction legislation similar or identical to the federal Norris-LaGuardia Act.[12]

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9 The following states and territories have enacted labor relations acts: Colorado, Connecticut, Hawaii, Kansas, Massachusetts, Michigan, Minnesota, New York, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Utah, and Wisconsin. They are all quite similar to the Wagner and Taft-Hartley Acts in the sense that they deal with certain unfair labor practices, and, in the main, make provision for election of bargaining representatives under the auspices of an administrative agency.

10 California (considerable body of isolated enactments), Delaware, Kentucky, Missouri, New Hampshire, Ohio, Vermont, and West Virginia.

11 Section 14 (b) of the Taft-Hartley Act, 61 STAT. 151 (1947), 29 U.S.C. § 164 (b) (1952), enables a state to enact union security legislation which is more restrictive than the Taft-Hartley union shop provisions. Section 14 (b) provides:

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Accordingly, a number of states have enacted "right to work" laws which prohibit union shop agreements. Such laws have been enacted in Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Iowa, Louisiana (limited to agricultural workers), Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia. In two states there have been recent developments in this area. Thus, during 1956 the Louisiana right to work act was repealed (but repassed relative to agricultural workers) while in Washington a proposed right to work law was defeated by referendum by a 2 to 1 margin as recently as November, 1956. Also, in 1957, Indiana passed a right to work act and the Kansas legislature called for a referendum.

12 47 STAT. 70 (1932), 29 U.S.C. § 101 (1952). The following states and territories have statutes prohibiting the granting of injunctions: Arizona, Connecticut, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Utah, Washington, Wisconsin, and Wyoming. Many of these statutes, like that of Indiana, are patterned after, or copied from, the Norris-LaGuardia Act. Others, such as those of Illinois and Montana, are much less complete, setting forth little more than a statement of policy.

The state statutes of this latter category have acknowledged the right of individuals to organize, bargain collectively, and engage in activities directed toward furthering their common aims. The acts thus have had the effect of recognizing labor relations as part of our industrial society and have attempted to equalize bargaining positions of labor and management. To this extent, the test of impartiality may well be satisfied by these latter states. At least an effort to perform equity and attain stability in labor relations is discernible in them.

Thus, the search has narrowed. Indiana is representative of both these latter categories, and thus stands out as the appropriate subject for examination. Its anti-injunction statute is identical to the Norris-LaGuardia Act. Some decisions of the state are models of advanced articulation while others are examples of kaleidoscopic confusion. Obviously, both extremes are helpful for illustration and analysis. Moreover, Indiana has the additional attribute of being the only state of the last-mentioned group which possesses an early common law history anticipating the problems, rights, and duties inherent in contemporary labor relations. Finally, and perhaps ironically, despite its statutory and common law background, Indiana has passed a right to work act.[13] In this respect it occupies two extremes. Its enactment is the *latest* in this field and it is the *first* northern industrial state to take such a step. Thus, the state can lay claim to an advanced common law history, an enlightened statutory background, and a clouded "right to work" future. Indiana may perhaps not only be the most appropriate state for examination, but it may also be the most interesting, because one cannot analyze the Indiana decisions without inquiring into the wisdom of, or necessity for, "right to work" legislation.

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13 This act was passed March 2, 1957.

II. Whatever One Man May Do, All Men May Do

On October 31, 1905, Justice Hadley of the Indiana Supreme Court announced in *Karges Furniture Co. v. Amalgamated Woodworkers,*[14] that: "Whatever one man may do, all men may do, and what all may do singly they may do in concert, if the sole purpose of the combination is to advance the proper interests of the members, and it is conducted in a lawful manner."[15]

The *Karges* case involved a strike with attendant picketing. The contention was made that this activity constituted a conspiracy and, in any event, was illegal. Justice Hadley held otherwise, stating that all combinations are not conspiracies. He noted that under the American form of government all citizens should have a free and equal chance in life so that each may pursue the path of his choice, seeking his own betterment as long as the rights of some other citizen are not infringed.

The court then discussed competition and the "life of trade," noting that a merchant may lawfully undersell and attempt to win the customers of his rival even with the knowledge that the latter's business would be ruined thereby. He further observed that when a person loses his property by the acts of his neighbor, as a result of such activity, it is *damnum absque injuria.* Thus, it was found that a strike and picketing were legal even though they would be necessarily attended with injury and damage to the employer's business.

An analysis of the *Karges* case indicates that Justice Hadley enunciated the following basic ground rules — the common law labor law of Indiana: (1) the law granted workmen the right to *strike* and to use those means and agencies, not inconsistent with the rights of others, that

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[14] 165 Ind. 421, 75 N.E. 877 (1905).

[15] *Id.* at 880.

are necessary to make the strike *effective;*
(2) making a strike effective would include argument, persuasion, and such favors and accommodations as the strikers have within their control because the law will not deprive diligently applied energy of its just reward;
(3) picketing, which was merely a tool to make the strike effective and, which therefore was legal, could not only take place in the vicinity of factories, but the names and places of residence of non-union employees could be obtained for the purpose of peaceful visitation;
(4) the exercise of one's rights may cause harm to another, but if these rights are being legally exercised, the one harmed has no redress.

In connection with the last point the court gave the following example:

> To illustrate: A. resides in a populous, residential part of the city. B. has established a saloon in the same square. Keeping a saloon there is lawful business. Many of the neighbors patronize the saloon, and the business prospers. A. disapproves of the business in that place, and withholds his patronage. He has the absolute right to withhold it. The neighbors have the absolute right to bestow theirs. B. has no absolute right to the patronage of either, and without patronage will fail in business. Here it is plain that A. has the absolute right to stand on the street corner and note all his neighbors who enter and leave the saloon, hail them on the street, or visit them at their respective homes, and by argument and persuasion (they being willing to listen) endeavor to induce them to cease their patronage. A.'s object is to make B.'s business unprofitable and losing, and thus compel him to move away, and improve the place and attractiveness of A.'s neighborhood. Now if A. converts all of his neighbors to his course of conduct by argument, reason, entreaty, and other fair and proper means, and thereby effects the suppression of the saloon and financial ruin of B., it is *damnum absque injuria.* A. has done nothing but what the law protects him in doing.[16] (Emphasis added.)

Finally, the court treated the issue of violence. The facts

[16] *Id.* at 881.

in the case reflected that while there was no violence on the picket line as such, the strike was not wholly unattended by such action. Fourteen of the named defendants,[17] members of the union, assaulted employees, and threatened them with violence if they did not quit work in plaintiff's factory. The factory was so situated that many persons going to and from work at other plants would pass the factory. Crowds would form in the alley and about the streets of plaintiff's premises and sometimes plaintiff's workmen would be accosted as they entered or left the factory. They were called scabs and other opprobrious names. The strikers formed a small part of these crowds. While the fourteen individuals who had engaged in "violence" were enjoined, the court refused to enjoin the union or any of its other members from its concerted activity.

Hence, the *Karges* case, in 1905, was the first pronouncement[18] in Indiana of substantive labor law regarding the

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17 It should be noted that the *Karges* case also held that unions could not sue or be sued in their own names, stating that in order "to enforce a right either for or against them . . . the names of all the individual members must be set forth. . . ." *Karges* did not consider an 1881 enactment, IND. ANN. STAT. § 2-220 (Burns 1946), which provides that ". . . when the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole." Two recent cases have discussed the statute and have ruled that unions may sue or be sued in representative or class actions without joining each member: Janalene, Inc. v. Burnett, 220 Ind. 253, 41 N.E.2d 942 (1942) (action by one union member on behalf of all other members against employer for injunction and other relief relative to breach of contract); Nelson v. Haley, 232 Ind. 314, 111 N.E.2d 812 (1953) (action for assault and battery against certain persons "as representatives of Laundry Workers International Union" held to be suit against members and property denominated). On the other hand, it seems that actions solely in the name of a union, as contrasted to representative or class actions, are still not proper in Indiana. Thus, in Faultless Caster Corp. v. United Elec., Radio & Machine Workers, CIO, 119 Ind. App. 330, 86 N.E.2d 703 (1949), it was held upon the authority of *Karges* that an action in the name of a union as an entity for an injunction against discharges in violation of a collective bargaining agreement would not lie, it being noted, however, that *Karges* was modified to the extent that it barred representative actions.

18 While Clemitt v. Watson, 14 Ind. App. 38, 42 N.E. 367 (1895), decided

right to make a strike effective by means such as picketing. The court, in effect, found picketing to be merely one facet of argument or persuasion — thus anticipating the free speech cases which were to come more than three decades later. The case involved violence, but the court enjoined only those guilty of violence. The statements of the court concerning "argument" with non-union persons condoned organizational picketing, and it is to be noted that the "neighbor" in the court's tavern example, was not connected with the tavern and hence was engaged in stranger "argument", *i.e.*, picketing.[19]

Karges represents the law of Indiana today, with or without the anti-injunction statue of the state, passed some

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ten years prior to *Karges*, does not appear to involve a labor union, it casts considerable light on early Indiana labor policy. There, a discharged workman proceeded against fellow workmen who, though not engaged in picketing, had ceased work in order to cause the plaintiff to be discharged. The court held that there was no duty on the part of the other workmen "by contract or otherwise" to continue working for their employer, and hence no actionable wrong had been committed. Although the reason for the strike is unclear, the court in effect approved a strike for a closed shop, stating "It would be an anomalous doctrine to hold that, after his fellows have concluded that he was not a safe or *even a desirable companion*, they must continue to work with him, under the penalty of paying damages," and concluding that workmen might "without malice or any evil motive, peaceably and quietly quit work . . . rather than remain at work with one who is *for any reason* unsatisfactory to them." *Clemitt v. Watson, supra* at 368. (Emphasis added.) In reaching its decision, the court discussed conspiracy in Indiana and, in general, observed that while many jurisdictions were still clinging to criminal conspiracy doctrines, conspiracy was not in itself actionable in Indiana.

[19] It should be noted that the "neighbor" was also conducting a boycott. It is evident that the court was not at all troubled by this fact. Compare the following quotation from a contemporary treatise which indicates the tenor of the times:

> "Undoubtedly every person has the right to select those upon they wish to bestow favors or their patronage. But men who will wantonly conspire to boycott inanimate objects, simply because men of their own trade and calling who did not belong to their associations built them, are *monsters* who place themselves outside the pale of the law and *should be exterminated from the face of the earth.* They place themselves on a level of the anarchist, whose religion and creed is the destruction of all existing systems of property, society, government and religion." COGLEY, THE LAW OF STRIKES, LOCKOUTS, AND LABOR ORGANIZATIONS 253 (1894). (Emphasis added.)

28 years later. Nor does a right to work statute affect the implications of the *Karges* decision. It is equally important from a national standpoint because, by way of contrast, it was decided in an era when the federal and most state courts were enjoining all picketing.[20] For example, in *Vegelahn v. Guntner,*[21] in 1896, Massachusetts enjoined all picketing, however peaceful. By this time refusals to work had come to be accepted as legal in those states where common law or statutes[22] had not declared labor unions illegal conspiracies per se. The paramount issue was whether the union could use various tools, such as picketing, to make its strike effective. Some courts actively attacked picketing, saying as one federal court did: "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."[23] Others found peaceful picketing legal, but this finding of legality was articulated with tongue in cheek and generally was not decisive of the out-

[20] See 3 & 4 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 59 (1910).

[21] 167 Mass. 92, 44 N.E. 1077 (1896). Justice Holmes and Chief Justice Fields dissented in separate opinions. Holmes, taking what he termed "the less popular view of the law," objected to the majority's holding that two pickets were an objectionable number and to the breadth of the decree which forbade the defendants from interfering with the plaintiff's business "by any scheme . . . organized for the purpose of . . . preventing any person or persons who now are or may hereafter be . . . desirous of entering the [plaintiff's employment] from entering it." *Id.* at 1080. He concluded, as per *Karges,* that (1) there is no basic distinction or difference between individual action and concerted action causing otherwise lawful activity to be unlawful, and (2) using an example similar to that of the tavern keeper used in *Karges,* that the mere fact that injury will result to one does not make another's lawful activities unlawful, particularly if such damage results from activities beneficial to the active party. Chief Justice Fields concluded that malice is not a proper test of whether an injunction should issue but that intimidation and force might be enjoined.

[22] See, *e.g.,* IND. REV. STAT. § 2126 (1881), *repealed,* Ind. Sess. Laws 1889, c. 181, § 1.

[23] Atchison, T. & S. F. Ry. v. Gee, 139 Fed. 582, 584 (C.C.S.D. Iowa 1905). See also Otis Steel Co. v. Local 218, Iron Molders' Union, 110 Fed. 698 (C.C.N.D. Ohio 1901); Jones v. E. Van Winkle Gin & Machine Works, 131 Ga. 336, 62 S.E. 236 (1908); Christensen v. Kellogg Switchboard & Supply Co., 110 Ill. App. 61 (1903), *aff'd* 216 Ill. 354, 75 N.E. 108 (1905), which compared picketing with welfare.

come of the case. If the picketing was extremely peaceful, the courts would philosophize on mental intimidation and coercion[24] or purpose,[25] thus drawing fine lines as to the limits of picketing; if violence occurred, it was relatively easy to state that peaceful picketing was legal, but the circumstances in the case at bar required legal condemnation — not only of the violence but of all picketing.[26]

This was the era which surrounded the *Karges* case.[27] Yet *Karges*, in a period of intense confusion and prejudice, anticipated the federal[28] and its own state anti-injunction legislation.[29] Moreover, while other states were actively seeking legal doctrines to curtail the employees' growing

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24 See, *e.g.*, Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500 (C.C.D. Nev. 1908); Allis Chalmers Co. v. Iron Molders' Union, 150 Fed. 155 (C.C.E.D. Wis. 1906), *modified*, 166 Fed. 45 (7th Cir. 1908); O'Neil v. Behanna, 182 Pa. 236, 37 Atl. 843 (1897).

25 See, *e.g.*, DeMinico v. Craig, 207 Mass. 593, 94 N.E. 317 (1911) (purpose to compel discharge of foreman); W. P. Davis Mach. Co. v. Robinson, 41 Misc. 329, 84 N.Y. Supp. 837 (Sup. Ct. 1903) (purpose to interfere with and injure employer's business). *But see* W. & A. Fletcher Co. v. International Ass'n of Machinists, 55 Atl. 1077 (N.J. Eq. 1903) (purpose to cause workmen not to take employment with employer).

26 See, *e.g.*, Allis Chalmers Co. v. Reliable Lodge, 111 Fed. 264 (C.C.N.D. Ill. 1901).

27 Yet to come, were further setbacks for labor in the Supreme Court cases of United States v. Adair, 208 U.S. 161 (1908) (holding unconstitutional that part of the 1898 Erdman Act which made it criminal for officers of an interstate carrier to discharge an employee because of membership in a labor organization); Loewe v. Lawlor, 208 U.S. 274 (1908) (sustaining, under the Sherman Act, an action for damages resulting from a boycott by a union); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911) (reversing a contempt citation of union leaders but on technical grounds); and Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917) (in substance giving legal effect to "yellow dog" contracts). The Clayton Act, 38 STAT. 730 (1914), was still to be passed, and this much heralded Magna Carta was yet to be destroyed in Duplex Co. v. Deering, 254 U.S. 443 (1921). Further restrictions by the Supreme Court in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 (1921); Truax v. Corrigan, 257 U.S. 312 (1921); the Coronado cases, 259 U.S. 344 (1924) and 268 U.S. 295 (1925); and the Bedford Stone case, 274 U.S. 37 (1927), were from one to two decades away from becoming history.

28 Railway Labor Act, 44 STAT. 577 (1926), as amended, 45 U.S.C. §§ 151-188 (1952); Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C. §§ 101-115 (1952); National Labor Relations Act (Wagner Act), 49 STAT. 449 (1935), amended in 1947 by Labor Management Relations Act (Taft-Hartley), 61 STAT. 136, as amended, 29 U.S.C. §§ 141-188 (1952).

29 IND. ANN. STAT. §§ 40-501—40-513 (Burns 1952).

desire to organize and bargain, the Indiana Supreme Court not only accepted the then contemporary industrial metamorphosis, but enunciated its common law principles which are equally applicable today. The contrast between the holding of the Indiana court and that of other forums is marked. The reason for this divergence is not as obvious, however; no suggested answer is susceptible of precise analysis, for at best the motivation lies not in measurable standards but in subjective beliefs formed by heredity, environment, exposure, and social consciousness, the sum total of which may be termed an "outlook on life."[30]

The description and appraisal of a particular outlook at a particular time will vary, but notwithstanding such variance, a specific "outlook" prevailed in Indiana in the period circumscribing the *Karges* case and this apparently also was shared by the Indiana legislature. Elsewhere, there were still conspiracy statutes which declared that a concerted refusal to work was a crime.[31] Moreover, where a few courts were inclined to recognize the rights of workmen and visualize their problems, the legislatures generally were not, and the converse was equally true.[32] In Indiana, however, by an 1879 statute, laborers were given the status of preferred creditors.[33] In 1885 it was declared

30 In analyzing the motivations of judges and the attendant impact upon decisional law, Justice Cardozo made the following observation:

> "There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting."

CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12-13 (1921).

31 See 2 COMMONS, HISTORY OF LABOUR IN THE UNITED STATES 191 (1921); MARTIN, MODERN LAW OF LABOR UNIONS 267-80 (1910).

32 See, *e.g.*, statutes and cases cited in FRANKFURTER AND GREENE, THE LABOR INJUNCTION, 146 n. 52 (1930).

33 IND. ANN. STAT. § 40-111 (Burns 1952).

illegal to import aliens to perform labor services of any kind.[34] In 1889 it was made unlawful for an employee to waive or for an employer to coerce an employee to waive payment for services in money,[35] or to purchase at a particular place or at a particular price.[36] Black-listing was outlawed in 1889,[37] and the eight-hour day was effectuated in the same year,[38] with a proviso that it was permissible to work more than eight hours provided the employees received "extra compensation."[39] By 1899 it was made a crime for an employer to attach a fine against an employee's wages or to change his wages without notice.[40] In 1901 a minimum wage of twenty cents per hour was established,[41] and a statute leveled against importing police for use in strike breaking was passed in 1905.[42]

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34 IND. ANN. STAT. § 40-2001 (Burns 1952). This act, operating like a high tariff, was designed to protect and enhance wage levels and employment.

35 IND. ANN. STAT. § 40-117 (Burns 1952).

36 IND. ANN. STAT. §§ 40-118—40-121 (Burns 1952). These enactments were designed to attack the all too common practice of employers forcing employees to buy at company stores at prices established by the employer. This was often coupled with the building of a company town where employees were forced by circumstances or otherwise to purchase housing, food, clothing and, in fact, everything from the employer at unreasonable prices.

37 IND. ANN. STAT. § 40-302 (Burns 1952). This section was held invalid as to voluntary quitters because they were not encompassed in the title of the act. Wabash R.R. v. Young, 162 Ind. 102, 69 N.E. 1003 (1904). See also IND. ANN. STAT. § 40-301 (Burns 1952).

38 IND. ANN. STAT. § 40-401—40-404 (Burns 1952). It should be noted that Ind. Laws 1901, c. 122, which fixed a minimum wage for unskilled laborers on public works was declared unconstitutional in Street v. Varney Elec. Supply Co., 160 Ind. 338, 66 N.E. 895 (1903). There has been considerable Indiana litigation in this area.

39 See also IND. ANN. STAT. § 28-521 (Burns 1948) (child labor); IND. ANN. STAT. § 40-1112—40-1114 (Burns 1952) (releases by injured employee); and IND. ANN. STAT. §§ 40-1101—40-1111 (Burns 1952) (an early employer's liability law).

40 IND. ANN. STAT. § 40-116 (Burns 1952). See also IND. ANN. STAT. § 40-202—40-203 (Burns 1952) (prohibitions against assigning wages); IND. ANN. STAT. §§ 40-901, 40-903—40-904 (Burns 1952) (employment of children and women regulated); IND. ANN. STAT. § 40-1014 (Burns 1952) (prohibiting discrimination by employers against "any person" or "class of labor").

41 Ind. Sess. Laws 1901, c. 122, § 1. See also IND. ANN. STAT. § 40-204 (Burns 1952) (limitation on employer repayment of, and owing money to, employees).

42 IND. ANN. STAT. § 10-4905 (Burns 1956).

These statutes, as well as those subsequently enacted,[43] recognized human values and were designed, at least in part, to secure their protection. It is noteworthy that many of the rights of employees and labor unions, which today are taken for granted, were codified or created by the legislature at a very early date in Indiana's industrial history[44] and during a period when understanding in other states was clouded by the traditional hostility.

A. *The Little Wagner Act*

Following congressional passage of the Wagner Act in 1935, several states passed similar legislation which became known as "little Wagner Acts."[45] Indiana did not do so. But in 1893, forty-two years earlier, its legislature had passed an act "to protect employees and guarantee their rights to belong to labor organizations."[46] The statute reads as follows:

> It shall be unlawful for any individual, or member of any firm, agent, officer, or employee of any company or corporation to prevent employees from forming, joining and belonging to any lawful labor organization, and any such individual member, agent, officer or employee that coerces or attempts to coerce employees by discharging or threatening to discharge from their employ or the employ of any firm, company or corporation because of their connection with such lawful labor organization, and any officer or employer, to exact [who exacts] a pledge from workingmen that they will not become

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43 See, *e.g.*, Ind. Laws 1915, c. 118, §§ 1-10, repealed by Ind. Laws 1937, c. 34, § 30 (arbitration of labor controversies); IND. ANN. STAT. §§ 40-2301—40-2306 (Burns 1952) (Fair Employment Practices Act, dealing with racial and other discrimination in employment); IND. ANN. STAT. §§ 40-2401—40-2415 (Burns 1952) (Arbitration of Public Utilities Disputes).

44 This early legislation is at least in part responsible for the early growth and strength of labor unions in Indiana because it not only added legal efficacy to union demands for certain conditions but lent moral support as well. Conversely, it is reasonable to assume that this same early strength and activity prompted at least some of the early legislation discussed.

45 See note 9 *supra*.

46 IND. ANN. STAT. § 10-4906 (Burns 1956).

> members of a labor organization as a consideration of employment, shall be guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall be fined in any sum not exceeding one hundred dollars [$100], or imprisoned for not more than six [6] months, or both, in the discretion of the court.

This legislation is still in effect today, but it is relatively unknown, perhaps because many feel that it has been overshadowed by the anti-injunction statute of 1933.[47] However, it cannot be overlooked that the 1893 act recognizes certain rights of individuals to organize themselves into labor organizations and to be protected against discrimination and recrimination in this respect. How different is that from the federal and state Wagner acts of 1935 and following? To be sure, these latter acts were more comprehensive and not only recognized the right of self-organization but also specifically guaranteed rights of collective bargaining.[48] The Indiana act recognized the right to organize and protected that right by providing not merely civil penalties, as in the Wagner Act, but stringent criminal penalties — and all this in 1893.[49]

III. Partial Clarification Of The Classic Doctrines.

The generation following the *Karges* decision was plagued with two legal concepts which had become firmly

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47 Ind. Ann. Stat. §§ 40-501—40-513 (Burns 1952).

48 See section seven of the Wagner Act, 49 Stat. 452 (1935), 29 U.S.C. 157 (1952), which provided:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."

49 It is also significant that this 1893 enactment prohibited "yellow dog" contracts by subjecting any employer who "exacts a pledge from workingmen that they will not become members of a labor organization as a consideration of employment" to the same penalties. A similar provision against "yellow dog" contracts is contained in section three of the anti-injunction act of 1933, Ind. Ann. Stat. § 40-503 (Burns 1952).

embedded in American jurisprudence: (1) conspiracy and (2) the application of "property law" to labor matters. True, some courts had determined that acts performed by more than one were not illegal per se, but often mere lip service was paid to this principle and conspiracy continued to be found in one form or another.

A. *The Concept of Conspiracy*

Conspiracy revolves around the presence of one of two elements: either illegal purpose or illegal means. Significantly, while perhaps without articulate deliberateness, the Indiana courts continue to follow the lead established by the *Karges* case and removed the application of the conspiracy doctrine in labor relations by holding, in effect, that the purpose of labor union activity was not the factor to be looked to, but rather that the means should be scrutinized merely to determine the presence or absence of violence. *Shaughnessey v. Jordan*[50] and *Scofes v. Helmar*[51] are illustrative of this trend. The issues involved in these cases are common to many labor cases today in all jurisdictions.

In the *Shaughnessey* case, decided in 1916, the trial court enjoined all picketing and awarded damages. The dispute involved a closed shop demand. The plaintiff in-

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50 184 Ind. 499, 111 N.E. 622 (1916).

51 205 Ind. 596, 187 N.E. 662 (1933). In this same era there were a few cases dealing with such matters as city anti-picketing ordinances, Thomas v. Indianapolis, 195 Ind. 440, 145 N.E. 550 (1924); Watters v. Indianapolis, 191 Ind. 671, 134 N.E. 482 (1922), discussed in text at 593-94, notes 80-83, *infra*, and internal affairs of labor unions, McNichols v. Int'l Typographical Union, 63 F.2d 490 (7th Cir. 1933); Howard v. Weissman, 31 F.2d 689 (7th Cir.), *cert. denied*, 280 U.S. 575 (1929); McNichols v. Int'l Typographical Union, 21 F.2d 497 (7th Cir. 1927); Abdon v. Wallace, 95 Ind. App. 604, 165 N.E. 68 (1929); Gardner v. Newbert, 74 Ind. App. 183, 128 N.E. 704 (1920). See also Davis v. State, 200 Ind. 88, 99-100, 161 N.E. 375, 379-80 (1928), *rev'd in part on other grounds* in 205 Ind. 141, 186 N.E. 293, 295 (1933), a criminal case in which the court considered the *Karges* and *Shaugnessey* cases in relation to violent conduct; Armstrong v. United States, 18 F.2d 371 (7th Cir.), *cert. denied*, 275 U.S. 534 (1927).

voked the provisions of the Sherman Anti-Trust Act,[52] as well as the 1907 Indiana Anti-Trust Act.[53] The court noted that section one of the state anti-trust act stated that the act was not intended to repeal, modify, or limit any powers, rights, or privileges which existed at the time of the passage of the act. It stated that the *Karges* case was decided in 1905, and accordingly the 1907 act did not ". . . limit or control any right of a member, or members, of a labor union, to do what was declared lawful in the Karges case."[54]

The facts of the case reveal that strangers to the dispute, hired pickets whom the courts described as "professional pickets," were being utilized in an organizational strike to compel the plaintiff to unionize its foundry. Some violence was alleged and plaintiffs claimed further that they had suffered financial damage.

The conspiracy issue was brought to the fore in full regalia because, while admitting that individuals could quit work, the plaintiff contended that when a group did this for the purpose of compelling the employer to employ only union men, then such action took on the form of a conspiracy.

In reversing the decree of the trial court, the court noted that the defendants were enjoined from:

> . . . peaceably or otherwise continuing the strike for the purpose of unionizing the shop, from peaceably persuading anyone from entering or continuing in appellees' service, and from peacefully congregating on the sidewalks and streets adjoining or adjacent to appellees' place of business, and from picketing in any manner the place or the residence of the employes.[55]

The court stated that ". . . these provisions, and possibly

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52 26 STAT. 209 (1890), 15 U.S.C. §§ 1-33 (1952).

53 IND. ANN. STAT. §§ 23-101—23-133 (Burns 1950).

54 Shaugnessey v. Jordan, 184 Ind. 499, 111 N.E. 622, 626 (1916).

55 *Ibid.*

others, are erroneous."[56]

The *Shaughnessey* case is somewhat strapped with evidentiary questions and procedural points. The important aspect is, however, that the court refused to accept any theory of conspiracy or anti-trust violation as applied to labor unions. In addition, in line with *Karges,* it stated that an injunction decree outlawing peaceable picketing around or near the premises of the employer or the residence of employees for organizational purposes to obtain a closed shop, was erroneous.

In the *Scofes* case a request was made by the defendant union to have the plaintiff restaurant owner sign a closed shop agreement. When the plaintiff refused, two of the plaintiff's employees who had joined the union struck; others remained in his employ. Picketing was commenced with signs reading, "This restaurant is Unfair to Organized Labor." The plaintiff's delivery of supplies was foreclosed and the patronage of many former customers was lost.

Although there was no violence as such, two employees who had continued to work for the plaintiff were accosted and verbally abused. In addition, customers were stopped on the street and talked with, after which they refused to enter the restaurant. On one occasion a picket "grabbed" a customer.

Thus, the case raised question of violence, intimidation, language on picket signs, refusal of customers and suppliers to cross a picket line, and generally the rights of unions to picket for organizational purposes, including a demand that all plaintiff's employees presently and in the future become members of the union. As regards the latter issue, the court, again relying on *Karges,* held that the object legally justified picketing if lawfully conducted even though the picketing causes pecuniary loss to the business.

56 *Ibid.* The court reversed because of errors in the admission of evidence, even though it believed there was evidence from which the trial court could have found violence in the picketing.

The holding and analysis of the court in the *Scofes* case set forth the proposition that the lawfulness or unlawfulness of picketing is dependent upon the conduct of the pickets themselves, not the type of signs used or whether the purpose of the picketing was to obtain a closed shop, a wage demand, or other terms or conditions of employment. In other words, the sole issue was whether the picketing was peaceable or whether violence was used. As regards violence, the court found that even in peaceable picketing "irresponsible individuals" may be guilty of misconduct in isolated instances. It stated that this conduct was likely not to recur and certainly would not benefit the union. The court concluded that, in any event, whether or not certain acts might be placed in the category of violence and whether or not they were likely to recur would depend upon the circumstances in each case. Apparently pursuant to *Karges,* only acts of violence were to be enjoined, and the picketing itself could continue if carried out in peaceable fashion.

The *Shaughnessey* and *Scofes* cases are indeed interesting. Cases which would have supported and strengthened the propositions announced by the courts were overlooked. For example, the case of *Clemitt v. Watson*[57] could have been relied upon by the court in *Scofes.* In the *Clemitt* case, the court upheld a refusal to work in an effort to secure what was, in effect, a closed shop. The *Scofes* case involved that very issue. Similarly, *Shaughnessey,* although involved in procedural and evidentiary points, is in accord with *Karges* and *Scofes.* Yet while *Scofes* cites *Karges,* it completely overlooks *Shaughnessey,* and neither case makes any reference to the "little Wagner Act" of 1893 which would have at least been helpful in indicating the legislative intent. Moreover, indicative of the independent development of the judicial and legislative approach, one finds that while *Scofes* was decided on November 21, 1933,

[57] 14 Ind. App. 38, 42 N.E. 367 (1895). See note 18 *supra.*

it makes no reference to the Indiana Anti-Injunction Act which became effective May 22, 1933. Interestingly, however, both bodies arrived at the same conclusions, one by interpreting and determining the common law and the other by legislative enactment.

Thus, this period in the development of Indiana labor law, while perhaps not articulate in legal theory, achieved results which were enlightened and clearly in advance of the times. *Shaughnessey* and *Scofes* denied the conspiracy rationale even though both cases involved closed shop demands, one of the most extreme of union aims. This "purpose" was singularly attacked as being illegal, particularly where accompanied by picketing by nonemployees. The courts in *Shaughnessey* and *Scofes* were not disturbed by these factors, however, since they viewed labor disputes as a form of economic rivalry, with each side attempting to benefit its position. The victor could legally prevail, unless the legislature decreed otherwise or lest an ordinary tort such as violence — which was always protected against long before the advent of labor unions — was committed.

B. *Property Concepts*

The courts could not have arrived at the stated results without an awareness that they were dealing with "economic relations" and not "property" concepts. This is perhaps best portrayed during this period in *Gasaway v. Borderland Coal Corp.*,[58] decided in 1921 [59] by the United States

[58] 278 Fed. 56 (7th Cir. 1921).

[59] It should be noted that the *Gasaway* case was decided before the doctrine of *Erie v. Tompkins* [Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)] was established. The general effect of this doctrine is, of course, that federal courts must utilize state law in deciding matters of substance but may use federal law in resolving procedural issues. Since the federal courts were not compelled to apply state law at the time of *Gasaway*, it is not clear whether and to what extent *Gasaway*, or any federal decisions prior to 1938, are controlling authority within a given state.

Court of Appeals for the Seventh Circuit. The Indiana district court had granted an injunction prohibiting not only all types of picketing, but also the utilization of the dues check-off system under the theory that the funds collected were being used to organize the plaintiff's coal mines.

The case involved a strike by the United Mine Workers in an attempt to organize certain coal producers. The major portion of the industry was organized and the union had an agreement with the already organized producers which provided for the check-off of union dues. The plaintiff contended that this money was being used to organize its own mines, and accordingly, that a conspiracy existed between the organized employers and the mine workers' union, which violated the Sherman Anti-Trust Act. The court of appeals held that the district court had improvidently exercised its discretion. It noted that the suit was not an indictment to punish conspirators for their crimes, nor was it a bill in the public interest to enjoin or dissolve an unlawful conspiracy or combination in restraint of trade; rather it was stated to be a familiar action to protect property from injury due to continuing direct trespasses. The court noted then that any decree which restrained the unionization or attempted unionization of the non-union miners, or the use of lawful union argument, speeches, appeals to labor personnel, and peaceable persuasion was generally invalid. Recognizing that each side had conflicting interests and, in effect, that each could attempt to secure the prevalence of its opinion by "publications, speeches and personal persuasion," it also observed that laborers may bargain for a closed union shop and employers may bargain for a closed non-union shop. The court said that the plaintiff had no greater right to a decree suppressing lawful action of the union than the union would have to a decree suppressing similar lawful action in support of the employer's position for a non-union

shop. The case was reversed with direction to modify the decree and to limit it to direct acts of trespass, *i.e.*, violence, use of firearms and attempted physical seizure of the mines. The union dues check-off procedure was allowed to stand. Thus *Gasaway* touches upon the difficulty and confusion which exists in the application of basic principles of law in labor-management relations.

The "property" concept was well established in American jurisprudence from its very inception, and, as a result, where a court saw fit to condemn certain activity, acting upon prevailing sociological concepts, it would utilize a theory of protection of the "property" rights of the complainant. Running through the earlier cases is the extension of this "property" concept to all types of labor activities. This, coupled with the conspiracy doctrine, was all that a court needed to rationalize its decision. In other words, an employer undoubtedly suffers injury by a reason of a strike or picketing. Absent any contractual relationship, this injury would fall in the general category of a tort. Obviously, a strike not involving violence could not be a physical tort or wrong, and, therefore, the courts would hasten to the conclusion that this was a wrong to the complainant's "property" rights, because for every wrong there must be a remedy.

The broad utilization of "property" concepts overlooked any application of *damnum absque injuria* and failed to recognize the scope of the relative duties of the parties. Only if this legal expression is viewed in terms of injuries to a relationship, can the duty be defined with its various privileges and exceptions. In the early period the relational interest and the relative duties and rights had not been developed. The field of defamation was new and the right or interest of an individual to privacy was unknown. These are also relational rights and interests, and labor law falls into the field of economic relations, except when actual

trespass, such as a sit-down strike or seizure, is involved. The "property" concept should have no application whatsoever. Without express enunciation, the court in the *Gasaway* case so held. It noted that both sides had a right to compete through the exercise of economic pressure and thereby attempt to obtain what they believe appropriate. The court could have articulated further and said in this vein that the only applicable doctrines are those revolving around the economic relations of the parties and the duty to each in such respect. Thus, absent statutes defining the allowable area of economic conflict, there is no duty on the part of a labor union not to interfere with an employer, anymore than there is a duty on the part of the employer not to resist a labor union when each is peaceably seeking to accomplish something which will benefit its respective economic position. Certainly economic injury may well result. But to the extent that there is no duty, then there is no actionable wrong and any harm is *damnum absque injuria.*

IV. The Anti-Injunction Statute

Indiana passed its anti-injunction act on May 22, 1933.[60] It was not only similar to, but, in fact, identical to the federal Norris-LaGuardia Act.[61] Indiana was not unique in this respect, for many states had passed or were passing little Norris-LaGuardia Acts.[62]

What was the purpose of the Norris-LaGuardia Act? Perhaps it could be assumed that everyone interested in labor relations today knows the purpose and that such a question would be superfluous. However, an examination of decisions in some jurisdictions indicates that oftentimes

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60 Ind. Ann. Stat. § 40-501—40-513 (Burns 1952).

61 47 Stat. 70 (1932), 29 U.S.C. § 101 (1952).

62 See note 12 *supra.*

it is helpful to look back to the original referent to analyze underlying policy and motivation behind a legislative enactment.

In 1898 the Erdman Act was passed,[63] designed to outlaw black-listing and "yellow dog" contracts, and to curtail discrimination by railroads against union members. Congress, however, was not successful, because in 1908 in the case of *Adair v. United States*,[64] the act was held unconstitutional as a deprivation of property without due process of law.

The Erdman Act did not deal with abuse of the injunctive process. Congress attempted to resolve that problem as well as the application of the Sherman Anti-Trust Act to labor organizations, when it passed the Clayton Act[65] in 1914. Section 20 of that act seemed to deprive the federal courts of power to grant injunctions in labor disputes. However, in 1921 the Supreme Court, in *Duplex Printing Press Co. v. Deering*,[66] held that a strike and a sympathetic refusal to handle goods could not be lawful unless made so by the Clayton Act. Thus, to the extent that the Clayton Act supplemented the Sherman Act, it was merely restating the judicial interpretation of what acts of labor were legal. The activity involved was held to be an illegal combination. The union activities, although peaceful and inuring to the benefit of the union members, were found to be violations of the Sherman Act, even as amended by the Clayton Act. The Court stated that the Clayton Act failed to authorize this type of secondary activity, and similarly, that it did not take labor out of the field of "conspiracy." A direct relationship of employer and employee was held to be contemplated by section 20 of the Clayton Act so that the restrictive provisions of that section concerning in-

63 30 STAT. 424 (1898).

64 208 U.S. 161 (1908).

65 38 STAT. 730 (1914), 15 U.S.C. § 12 (1952).

66 254 U.S. 443 (1921).

junctions applied only ". . . to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present or prospective."[67]

This case, together with other highly publicized decisions on the federal level, and the consistent and growing use of injunctions granted by the federal courts,[68] led to the passage of the Norris-LaGuardia Act. To the extent that the federal act and the Indiana act were identical when passed, and in so far as there were no Indiana common law decisions which condoned the abuses which the statute meant to correct, the purpose of an anti-injunction statute can best be determined by examining what the federal act intended to accomplish.

Initially, both acts set forth certain procedural restrictions to be followed. These include findings of facts and the posting of bond before an injunction can be granted. The balance of the statutes deal with substantive protections. The fourth section outlines nine types of activity which cannot be enjoined,[69] while section five of the act conclusively removes the conspiracy theory from the field of labor relations by stating that no court shall issue an injunction upon the ground that those participating in a labor dispute are engaged "in an unlawful combination or conspiracy because of the doing in concert" what they might be able to do singly.[70] Section six [71] removes the blanket responsibility of members or officers of the union, or the union itself, for unlawful acts of the officers, mem-

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67 *Id.* at 472.

68 See FRANKFURTER AND GREENE, THE LABOR INJUNCTION 148, 165-169. See also Armstrong v. U.S., 18 F.2d 371 (7th Cir. 1927), where the defendant was found guilty of contempt for violation of an injunction against persuading employees to violate "yellow dog" agreements, the court finding that non-employees were not within the scope of the Clayton Act.

69 See IND. ANN. STAT. § 40-504 (Burns 1952).

70 IND. ANN. STAT. § 40-505 (Burns 1952).

71 IND. ANN. STAT. § 40-506 (Burns 1952).

bers or agents, ". . . except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."[72] Section 13 of the act defines a "labor dispute," and to overcome the result of the *Duplex* case, elaborately sets forth relationships between parties who might have a "direct or indirect" interest in disputes irrespective of whether the parties stand in the proximate relation of employer and employee.

In 1938 the United States Supreme Court passed upon the definition of a labor dispute in *Lauf v. E. G. Shinner & Co.*[73] In that case, which arose in Wisconsin, the union requested that the employer require its employees to become members of the union as a condition of continued employment. The union had no members working for the employer and although the employer notified the employees that they were free to join the union, they declined to do so. Picketing began and the district court issued an injunction, finding no labor dispute. This finding was affirmed on appeal, but the Supreme Court reversed, finding that the district court was restrained from issuing an injunction by reason of both the Wisconsin labor laws and section 13(c) of the Norris-LaGuardia Act. The court specifically pointed out that "stranger" picketing was permissible because by statutory definition a labor dispute existed ". . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."[74]

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[72] This was designed to overcome the cases of Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); Lawlor v. Loewe, 235 U.S. 522 (1915); and Loewe v. Lawlor, 208 U.S. 274 (1908).

[73] 303 U.S. 323 (1938).

[74] *Ibid.* at 329. One of the best discussions of the underlying purpose and intent of the Norris-LaGuardia Act is found in Milkwagon Drivers' Union, AFL v. Lake Valley Farm Products, Inc., 311 U.S. 91, 102 (1940). There, the Supreme Court, speaking through Mr. Justice Black, stated:

"The Norris-LaGuardia Act, passed in 1932, is the culmination of

One year previous to the *Lauf* decision, the Supreme Court had considered the Wisconsin Anti-Injunction Act in *Senn v. Tile Layers Protective Union.*[75] As in the *Lauf* case, the union was engaged in stranger picketing, and in addition, the purpose of the picketing was to cause Senn, a tile-laying contractor, to cease doing the work himself and to hire union employees. The issue was whether or not the fourteenth amendment required that a state protect against such picketing, and the court held that the means which the statute authorizes — picketing and publicity — clearly are not prohibited by the fourteenth amendment. Equally significant is the fact that the *Senn* case is basically the forerunner of the Supreme Court cases dealing with free speech, because the Court observed that union members ". . . might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the federal Constitution."[76]

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a bitter political, social and economic controversy extending over half a century. Hostility to 'government by injunction' had become the rallying slogan of many and varied groups. Indeed, as early as 1914 Congress had responded to a widespread public demand that the Sherman Act be amended, and had passed the Clayton Act, itself designed to limit the jurisdiction of federal courts to issue injunctions in cases involving labor disputes. But the proponents of the Norris-LaGuardia Act felt that the jurisdictional limitations of the Clayton Act had been largely nullified by judicial decision. . . . As an example of the judicial interpretation of the Clayton Act which the Committee said was 'responsible in part for this agitation for further legislation,' the Committee referred to the cases of *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association,* 274 U.S. 37. . . .

"Whether or not one agrees with the committees that the cited cases constituted an unduly restricted interpretation of the Clayton Act, one must agree that the committees and the Congress made abundantly clear their intention that what they regarded as the misinterpretation of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act. . . ." 311 U.S. at 102-103.

75 301 U.S. 468 (1937).

76 *Id.* at 478.

A. *Codification — Not Innovation*

The last quoted provision of the *Senn* case is equally applicable to the effect of the Indiana Anti-Injunction Act on Indiana common law. No statutory authorization was necessary to permit the activities described by the statute, for, from a substantive standpoint, *Karges, Clemitt, Shaughnessey,* and *Scofes* covered most of the situations described in the anti-injunction act. Moreover, the Indiana act of 1893 expressed the legislative policy of the state: the individual had the right to organize and to form labor unions. To be sure, the 1893 act was not as elaborate as the anti-injunction act, but when read in the light of the Indiana cases discussed herein, it becomes very clear that with or without the anti-injunction act, workmen in Indiana have the right to organize, strike, and picket. To the extent that they use peaceful means, and so long as they act in their own self-interest, the purpose of the picketing, the language on the signs, and the fact that the pickets are "strangers" are all immaterial. While the Norris-LaGuardia Act was necessary to curb federal abuses and hence was intended to reverse a trend, the Indiana act merely codified its own common law, which was distinctly different from the federal treatment and that of most states.

The *Kokomo* case[77] upheld the constitutionality of the Indiana Anti-Injunction Act. In that case the union instituted a declaratory judgment action, attacking the validity of the city's anti-picketing ordinance. The ordinance outlawed peaceful acts as well as those connected with violence and the court held the ordinance irreconcilable and inconsistent with the provisions of the anti-injunction statute. In reaching its decision, the court discussed the

[77] Local 26, Nat'l Bros. of Operative Potters v. Kokomo, 211 Ind. 72, 5 N.E.2d 624 (1937).

Norris-LaGuardia Act and similar Illinois legislation[78] and then concluded: "The 1933 act, the same as the Illinois statute does not attempt to legalize that which would otherwise be illegal."[79]

B. *The State Preempts The Cities*

To a large extent, the present inquiry into state law was prompted by ramifications of federal supremacy. However, supremacy takes forms other than federalism — the states too have a sphere of supremacy. But whether federal or state, the clarification process apparently cannot be accomplished in one step. In 1924, in *Thomas v. Indianapolis,*[80] the Indiana Supreme Court upheld an Indianapolis ordinance which prohibited peaceful as well as violent picketing.[81] The *Thomas* case followed the *Karges* case, but it pointed out that *Karges* was "speaking of what was lawful in the absence of any legislation upon the subject, and no legislative action upon the subject was considered."[82] The court in *Thomas* apparently viewed the Indianapolis ordinance as the "legislative action" contemplated, and hence not subject to *Karges,* for it stated:

> This ordinance does not prevent employees from striking nor does it prevent them from presenting their side of the controversy with their employer to others. It

78 The court noted that while most courts had formerly disapproved picketing, striking and other collective activity, ". . . [T]he past few years have witnessed a decided change in public opinion, legislative enactments, and judicial construction." *Id.* at 628. The court went on to illustrate its point by reference to the Norris-LaGuardia Act and the Indiana anti-injunction act, noting that, "There is nothing in the [Indiana anti-injunction] act to abridge the freedom of speech, the right to assemble in a peaceable manner and to consult for their common good, nor does it grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens." *Id.* at 629.

79 Local 26, Nat'l Bros. of Operative Potters v. Kokomo, 211 Ind. 72, 5 N.E.2d 624, 628 (1937).

80 195 Ind. 440, 145 N.E. 550 (1924).

81 It would appear that a prohibition against unpeaceful or violent picketing would be unnecessary, for there have always been remedies, both criminal and civil, for violence.

82 Thomas v. Indianapolis, 195 Ind. 440, 145 N.E. 550, 551 (1924).

> prohibits some acts that are inherently wrong, [*i.e.*, violence] and other acts which are not wrong within themselves, are regulated and only prohibited from being committed under such circumstances and in such places as may result in public disorder and cause breaches of the peace.[83]

The *Kokomo* case distinguished the *Thomas* case, observing that the city of Kokomo had the right to legislate but since ". . . the Indiana Legislature has spoken upon the subject, the [*Thomas*] case is no longer controlling, and it must be held that the ordinance in question is in conflict with the expressed policy of the state upon that subject."[84]

Thus the *Karges* to *Thomas* to *Kokomo* tandem is indeed filled with irony. *Karges* announced the common law of Indiana in the absence of legislation. *Thomas* found that municipal ordinances were included within the type of legislation contemplated. It took state legislation, however, to establish that the content of such municipal ordinances was not in keeping with the announced policy of the legislature. Thus one legislative enactment of a larger political body obviated the effects of a smaller one. It was perhaps in this area — the subordination of municipal legislation — that the anti-injunction act, irrespective of federal questions,[85] made affirmative changes. The state

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[83] *Id.* at 551. The court relied upon Watters v. Indianapolis, 191 Ind. 671, 134 N.E. 482 (1922), which involved an ordinance that banned the carrying of "any banner, placard, advertisement or handbill" upon "any public street, sidewalk, alley or other public place." The defendant conceded that the city could pass such an ordinance and attacked the constitutionality of the exercise of this power, claiming the exercise to be arbitrary and unreasonable. The court held that there was no unreasonable classification and that the defendant was not denied "the right of 'free interchange of thought and opinion,' or 'the right to speak, write or think freely.'" However, in view of the *Kokomo* case, *Watters*, like *Thomas*, has no vitality today.

[84] Local 26, Nat'l Bros. of Operative Potters v. Kokomo, 211 Ind. at 81, 5 N.E.2d 627 (1937).

[85] Compare the attitude expressed by the United States Supreme Court toward municipal ordinances during this period. In 1940, in Carlson v. California, 310 U.S. 106 (1940), the Supreme Court held invalid on its face a California municipal ordinance which made it unlawful "to loiter . . . or to

having preempted the field, municipalities could no longer restrict peaceful picketing. The state, though nationally subordinate, was locally supreme.

V. Parallel Lines: The Judiciary And Legislature

It has previously been noted that judicial development was independent of that of the legislature. This observation is illustrated by *Vonderschmitt v. McGuire*,[86] which makes no reference to the anti-injunction statute which had been enacted two years earlier. The Indiana Appellate Court found that peaceful picketing in front of a theatre proclaiming with a sign that the theatre was "unfair to organized labor" was not enjoinable. The complainant alleged that he owned the property to the center line of the street and apparently claimed that the picketing constituted a trespass. The court rejected this contention, holding that the public had the right to travel upon the street and citing the *Scofes* case as authority for the lawfulness of peaceful picketing. The *Vonderschmitt* case, like *Scofes*, was decided subsequent to the passage of the anti-injunction statute, yet the statute was not mentioned even though the activity in question was as permissible under the statute as under common law.

Glover v. Parson[87] is similarly illustrative of the prevailing dichotomy. There, non-striking employees obtained an injunction against "threats and acts of violence and intimidation, and abusive language" on the part of the striking employees. While it seems clear that the findings of the

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picket . . . or to carry, show or display any banner, transparency, badge or sign . . . in the vicinity of any works, or factory, or any place of business or employment for the purpose of inducing . . . any person to refrain from entering. . . ." The court held that the ordinance abridged the free speech guarantees of the Constitution and was not a proper exercise of the police power.

86 100 Ind. App. 632, 195 N.E. 585 (1935).

87 103 Ind. App. 561, 9 N.E.2d 109 (1937).

trial court were framed within the requirements of the anti-injunction act, the court made no reference to the act in affirming the granting of the injunction. Parenthetically, however, it stated that: ". . . this case is not a dispute between the employer and employees. The employer is not a party herein. The dispute is solely between two groups of employees . . . ."[88]

The *Glover* decision is not treated by the reporting systems as a labor case. Perhaps this is because no reference is made to the anti-injunction act. Nevertheless, the court was constrained to note that:

> There is no question whatever presented in this appeal as to the right to strike, or the right to picket peacefully, or the right to bargain collectively. The plain and simple question first presented is whether or not there is some competent evidence to sustain the trial court in its finding. We think there was.[89]

Glover involved violence and nothing more. This of course, always was enjoinable. However, the confusion of the court and perhaps the parties is worthy of note. The court accepted the principles of *Karges* without saying so or without citing any authority. The trial court framed an injunction decree within the necessary requirements of the anti-injunction act, but the appellate court did not refer to the statute; it merely pointed out that the dispute was between employees alone and did not involve an employer. Perhaps the appellate court believed that this statement was necessary, but if it had considered the anti-injunction act, such a statement would be meaningless because the act expressly includes within the definition of a labor dispute, matters involving "employees of the same employer . . . whether (or not) such dispute is . . . between . . . employees . . . and employees . . . ."[90] In any event, the

88 *Id.* at 110.

89 *Ibid.*

90 IND. ANN. STAT. § 40-513(a) (Burns 1952).

violence in the *Glover* case was sufficiently clear to cause the trial court to restrain such conduct. Beyond that, the decision, except from a standpoint of recognizing the right to strike and picket, is relatively unimportant.

Finally, the *Muncie Building Trades Council* case[91] deserves mention with those cases where the anti-injunction act and the common law were operating on a mutually exclusive basis. The case involved property owners who obtained an injunction against a union which had "blockaded the streets of entrance . . . overrun . . . the real estate of plaintiffs" and stopped "all automobiles . . . and all pedestrians" who attempted to enter the subdivision. The union had a dispute with certain non-union contractors who bore no relationship to the plaintiffs and who were apparently not doing work for the plaintiffs. The court, in affirming the injunction, stated that there was ". . . no evidence that [plaintiffs] are acting for any one but themselves [and] no evidence whatever that they are acting for . . . employers with whom the [union has] a dispute or controversy."[92]

The result is perhaps in keeping with the *Karges* line of cases and the codification of the common law by the anti-injunction act, even if the procedural mandates and finding requirements of that act were not necessarily followed. The decree did not enjoin peaceful picketing; it enjoined violence, obstruction of ingress and egress and trespass upon plaintiffs' property. The result is not unusual in view of the facts of the case. Violence and trespass are enjoinable and it does not matter whether a union, a corporation or an individual is involved. Conversely, absent any restrictive legislation defining the limits of peaceful advertising, *i.e.*, patrolling or picketing, peaceful activity is permissible, whether carried on by a union, an individual

91 Muncie Bldg. Trades Council v. Umbarger, 215 Ind. 13, 17 N.E.2d 828 (1938).

92 *Id.* at 829.

or a corporation.

Violence and the physical trespass should have been the decisive issue in the case. However, the court, noting that third parties with no apparent interest in the dispute were involved, based its decision on this point and then stated: "the statute in question . . . affords a remedy that was not available to common law, and those seeking the benefit of it must bring themselves clearly within its terms."

This statement is clearly erroneous. The anti-injunction statutes did not "afford a remedy." As previously noted, though the Norris-LaGuardia Act did create federal rights where none had previously existed, in Indiana the statute merely codified the common law. The court completely ignored this point and significantly made no reference to any of the other Indiana decisions.

VI. The Grass Is Greener

The common law of Indiana and the Indiana Anti-Injunction Act provided all the tools necessary to arrive at equitable decisions in matters of labor relations. Sometimes the tools were used and sometimes they were not. The latter instances perhaps were due to oversight or the failure of the practitioner to muster the tools for the court's use. Whatever the reason, while some confusion resulted, little harm was done.

It is perhaps as true in judicial motivation as in other facets of life, however, that the grass often looks greener on the other side of the fence. Thus, when the United States Supreme Court handed down the *Swing*[93] and *Meadowmoor*[94] decisions in 1941, applying "free speech" to picketing, the Indiana Supreme Court followed the same path. Both *Swing* and *Meadowmoor* arose in Illinois, and

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93 AFL v. Swing, 312 U.S. 321 (1941).

94 Milkwagon Drivers' Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).

this adjacency, together with the fact that the cases were Supreme Court pronouncements, probably accounts for their addition to the Indiana labor law complex. To the extent that this addition reflected a willingness to follow the mandates of the United States Supreme Court, it is undoubtedly commendable. Moreover, it provided another tool in arriving at a desired result. However, the new approach began to be used to the complete exclusion of the common law of the state and of its legislative enactments.

A. *Influence of Swing and Meadowmoor — Free Speech in Indiana*

This new approach is illustrated by *Davis v. Yates*,[95] decided within one month following the *Swing* and *Meadowmoor* decisions. The union had engaged in picketing a coal mine to procure employment at union rates. No violence was involved and the pickets varied in number from two to twenty. Truckers coming to purchase the coal were turned away by the persuasion of the pickets and their signs which read: "Unfair to Organized Labor"; "Be Fair"; "We Want Fairness." The Indiana court noted that the *Swing* case involved picketing by non-employees, as did *Meadowmoor*, and that the question of the truthfulness of the placards did not affect the decision. In discussing the *Meadowmoor* case, the Indiana court stated that the Illinois judgment enjoining the picketing was affirmed solely because of the violence involved. Consequently, the Indiana court reversed the granting of the injunction in reliance on *Meadowmoor* and *Swing*, concluding that:

> . . . [T]he court (U.S. Supreme) has clearly and definitely declared that the right to picket involves the right of free speech guaranteed by the Federal Constitution, and that in cases involving picketing state courts must act in subordination to the jurisdiction of the Su-

[95] 218 Ind. 364, 32 N.E.2d 86 (1941).

> preme Court of the United States to enforce constitutional liberties. The decisions of the Supreme Court of the United States are controlling, and we construe the opinions in the cases cited as clearly in point.[96]

Two years later, in *Local 1460, Retail Clerks Union v. Peaker*,[97] the Indiana Supreme Court upheld stranger picketing to obtain a closed shop where the signs read: "This store does not employ members of Retail Clerks Union Local 1040, affiliated with the AFL." The court again relied upon *Swing* as well as the *Angelos*[98] case which had been decided just fifteen days earlier.

Overlooking their own backyard, both the *Davis* and *Peaker* cases failed to treat Indiana's common law and anti-injunction act. To be sure, in free speech matters, the United States Supreme Court decisions are controlling but only when the common law or statutes of a state have denied federal constitutional protection. Such was not the case in Indiana. Indiana labor law development — both decisional and statutory — consistently had recognized those rights which the Supreme Court stated must not be denied by state action. The Illinois courts had been found to violate federal constitutional guarantees, but from its inception, Illinois common law[99] differed substantially from that of Indiana. Moreover, Illinois had passed an anti-injunction statute[100] not to codify existing rights, but to create them.

Even if the court in the *Peaker* case did not desire to re-

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96 32 N.E.2d at 87.

97 222 Ind. 209, 51 N.E.2d 628 (1943).

98 Local 302, Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943). In this case the union picketed a restaurant which had no employees, all waiters being partners. The picket signs, which contained the word "unfair," were held to be mere expressions of opinion and the picketing protected under the fourteenth amendment.

99 See A. R. Barnes & Co. v. Chicago Typographical Union No. 16, 232 Ill. 424, 83 N.E. 940 (1908) (peaceful picketing enjoined because purpose was to injure plaintiff's business in order to compel acceptance of demands); Mears Slayton Lumber Co. v. District Council of Chicago of United Brotherhood of Carpenters & Joiners, 156 Ill. App. 327 (1910) (enjoining conspiracy to ruin business of employer by picketing and boycott).

100 ILL. REV. STAT. c. 48, § 2(a) (1955).

view the entire decisional history of the state, it could merely have looked to a case decided earlier in the same year by the Appellate Court—*Spickelmier v. Chambers.*[101] The facts in the *Spickelmier* case are significant. The union had picketed a business engaged in the manufacture and sale of concrete products and other building materials to "put your men in the Union." This was stranger picketing; none of the company's employees were members of the union. Several unsuccessful organizational attempts had been made and conferences had taken place between the company and the union wherein the union attempted to have the company pay the union scale to the company drivers. The record reflects no dispute between the employees and their employer. *Spickelmier* is important from at least two standpoints:

In the *first* instance, it stated: "The act declares the public policy of this state, defines a labor dispute and forbids the issuance of any injuctions in a case involving or growing out of a labor dispute except in strict conformity with the provisions thereof."[102] It is to be noted that this declaration concisely describes the purpose of the state anti-injunction act. In setting forth public policy, it actually forbids the use of injunctions, except when the conditions permitting their granting have been met and the procedural requirements have been followed. This becomes particularly significant when contrasted with the opinion of the court in the *Muncie Building Trades* case, where it was stated that the statute provided a remedy but required the union to bring itself squarely within the terms of the remedy.

The second element in the *Spickelmier* case is of even greater import. While it holds — citing the *Swing* and *Meadowmoor* decisions and relying on the earlier decision

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101 113 Ind. App. 470, 47 N.E.2d 189 (1943).

102 *Id.* at 190.

of the Indiana Supreme Court in *Davis v. Yates* — that ". . . the right to picket involves the right of free speech guaranteed by the Federal Constitution, and . . . in cases involving picketing state courts must act in subordination to the jurisdiction of the Supreme Court of the United States to enforce constitutional liberties,"[103] the court then proceeds to analyze its own anti-injunction statute and finds that a labor dispute exists as defined in the act, ". . . irrespective of any question of constitutional guarantees."[104]

The *Spickelmier* case also involved another problem which has been considered in conjunction with "free speech" and anti-injunction guarantees, this being the truth or falsity of the statements on the placards carried by picketers. In interpreting the Indiana anti-injunction act, the court held that the basic purpose of the picketing was to obtain the union scale; therefore, the carrying of placards bearing the legend "This place is unfair to organized labor," did not constitute picketing accompanied by false statements or misrepresentation of the facts. In describing the term "unfair to organized labor," the court said that this term has a well understood meaning, and that:

> It neither says nor implies that the one picketed is unfair to *all* organized labor. It advertises, and in our opinion is now generally understood to advertise the existence of a controversy between the one being picketed and organized labor in some one or more of its several branches, but not necessarily *all* organized labor.[105]

This same issue, from the standpoint of whether or not loose picket sign language constitutes "fraud," was also treated in *Davis v. Yates*. While there the court relied en-

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103 *Id.* at 190, a citation from the *Davis* case, 32 N.E.2d at 87.

104 47 N.E.2d at 190.

105 *Id.* at 191-92.

tirely upon the "free speech" decisions of the United States Supreme Court, it nevertheless discussed the signs used by the pickets, the language of which was almost identical to that used in the *Spickelmier* case. In answer to the plaintiff's contention that the signs were not true, the court in *Davis* stated:

> . . . [T]his contention ignores the actualities. There was a labor dispute between the [defendants] and the owner of the mine . . . and it seems that the union considers the operation of the mine by workmen eligible to become members of the union [they were not members] . . . to be in itself unfair and inimical to the best interests of union labor.[106]

While the *Davis* case is perhaps more realistic than *Spickelmier* in its treatment of picket sign language, from an overall standpoint the court in *Spickelmier* is particularly articulate because its decision treats and significantly recognizes its own state law and finds that as regards the state of Indiana there is nothing requiring the intervention of federal doctrines, since the law of Indiana is not contrary to the protections contained in the federal Constitution.

The *Spickelmier* case, however, seems to be plagued by two previous developments, *Wiest v. Dirks*,[107] decided by the Indiana Supreme Court in 1939, and the *Roth* trilogy[108] which extended from 1939 to 1942. In the *Wiest* case a grocery store owner who had purchased milk from an allegedly unfair dairy was being picketed by the union with signs which read: "Please buy Union Dairy Products

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106 32 N.E.2d at 88. To complete the discussion of the *Spickelmier* case, note should be taken of the employer's contention that if a labor dispute existed, it had ceased or been abandoned by the passage of time. The court rejected this theory on a factual basis.

107 215 Ind. 568, 20 N.E.2d 969 (1939).

108 Roth v. Local 1460, Retail Clerks Union, 216 Ind. 363, 24 N.E.2d 280 (1939); Local 1460, Retail Clerks Union v. Roth, 218 Ind. 275, 31 N.E.2d 986 (1941); Local 1460, Retail Clerks Union v. Roth, 219 Ind. 642, 39 N.E.2d 775 (1942).

Only. This store sells milk produced in an unfair Dairy. East End Dairy is unfair to organized labor." The court found that the signs contained false statements and a misrepresentation of the facts. It stated that the signs necessarily led to the inference that the products of the dairy were non-union and that there were union goods available. The court stated that all dairy products available in the community were produced at plants which employed both non-union and union employees, or "at least none was produced in shops employing union labor exculsively." Thus, the court stated that the language on the signs constituted an attempt to persuade the public that union products could be purchased at stores which were not being picketed, and this, the court felt, was misrepresentation. It concluded by stating:

> . . . [T]he evidence justifies the conslusion that the facts advertised by the banners of the pickets were calculated to produce a false impression upon the public. Regardless of the intention of the pickets, the statements have the effect of misrepresenting the facts in controversy. Since this is true, it supports the conclusion that the picketing as conducted was unlawful and the temporary injunction justified.[109]

B. *The Roth Trilogy*

Wiest was followed approximately seven months later by the first *Roth* case. Although contradicted in later decisions, the initial determination of the *Roth* facts found that the plaintiff, a retail grocery store operator, was picketed to induce his three employees to reinstate their union membership. The employees had joined the union when threatened with loss of their jobs, but upon being ordered to strike at the risk of incurring fines if they refused, the employees refused to strike and resigned from the union.

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109 20 N.E.2d at 972.

Picketing was commenced with signs, which stated that the employer was unfair to organized labor.

The Indiana Supreme Court reasoned that the plaintiff had performed all of the obligations imposed upon him by law; that he was at peace with his employees; that none belonged or wanted to belong to the picketing union; and, finally, that the object of the picketing was to have the grocer sign a closed shop agreement which would compel his employees to join the union against their will.[110] In its decision, the court made a slight reference to *Karges, Thomas,* and *Kokomo,* but it failed to treat any of the facts in these cases which were decided both prior and subsequent to the passage of the anti-injunction act. It concluded that the purpose of the picketing was unlawful, irrespective of the signs used, and quoted from the preamble of the anti-injunction act.

If the court was attempting to ascertain the purpose of the anti-injunction act, it would appear that it could and should have looked to what was said in *Kokomo*[111] — the first case in the state dealing with this statute. Instead it went outside the state of authority, looking first to a decision of the District Court of Appeals of California, *McKay v. Retail Automobile Salesmen's Local 1067,*[112] which, in the opinion of the Indiana court, had reached the "same conclusion" under a statute "substantially like" the Indiana act. But was the California statute substan-

110 The trial court decision is interesting. It found that a labor dispute existed within the terms of the anti-injunction act. Evidently, the trial court was disturbed only by the signs, for it authorized further picketing but merely decreed that the signs conform to certain size restrictions and specified that they bear the following legend: "The Object of this picketing is to compel the store owner to sign a closed shop contract with Retail Clerks Union Local No. 1460, A.F. of L. . . . " 24 N.E.2d at 281.

The Indiana Supreme Court went well beyond the trial court's finding, holding that the picketing was unlawful, irrespective of the picket sign language. It also criticized the trial court's attempt to specify the picket sign language, relying at least in part on the free speech doctrine.

111 See text at 592.

112 89 P.2d 426 (Cal. App. 1939).

tially like that of Indiana and did the *McKay* case reach the same conclusion? The court in *Roth* was wrong on both counts.

The California statute differed substantially from the Indiana anti-injunction act. It dealt exclusively with "yellow dog" contracts, prohibiting such agreements,[113] and was not an anti-injunction statute in any respect. Thus, in the *McKay* case, the California District Court of Appeals attempted to utilize a statute for a purpose other than that for which it was intended. The *Roth* case compounded the error by applying the resultant decision to a case arising under an entirely different, yet equally inappropriate, statute. Subsequently, however, the Supreme Court of California rectified the initial error upon review of the District Court of Appeals decision[114] as well as in a companion case, *Shafer v. Registered Pharmacists,* decided on the same day as *McKay.*[115]

Nor did the *McKay* case result in the same holding as *Roth,* for, as stated above, the District Court of Appeals was promptly reversed by the Supreme Court of California, and certiorari to the United States Supreme Court was denied.[116] The facts in *McKay* were quite similar to those in *Roth* because in the California case stranger picketing was being conducted for the purpose of compelling a closed shop agreement. The trial court held that peaceful picketing utilized to unionize a plant must be found unlawful for some other reason than the mere fact that it is picketing. The court felt that the factual situation must have been such that it violated legal rights of the picketed employer or his employees. The District Court of Appeals of California reversed the trial court, stating

113 CAL. LAB. CODE ANN. §§ 920-923 (West 1955).

114 McKay v. Retail Automobile Salesmen's Local 1067, 16 Cal. 2d 311, 106 P.2d 373 (1940), *cert. denied,* 313 U.S. 566 (1941).

115 16 Cal. 2d 379, 106 P.2d 403 (1940).

116 McKay v. Retail Automobile Salesmen's Local 1067, 16 Cal. 2d 311, 106 P.2d 373 (1940), *cert. denied,* 313 U.S. 566 (1941).

that section 923 of the California statute made such picketing illegal.[117] But, as indicated, the Supreme Court of California then reversed and upheld the trial court's reasoning that the statute did not prohibit stranger picketing to obtain a closed shop, stating:

> The interest of the defendant unions in the present controversy is direct and obvious. The closed union shop is an important means of maintaining the combined bargaining power of the workers. Moreover, advantages secured through collective action redound to the benefit of all employees whether they are members of the union or not, and members may resent non-members sharing in the benefits without liability for the obligations. Hence a closed shop policy is of vital importance in maintaining not only the bargaining power but also the membership of trade unions. . . .
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> Of course, the employer and its salesmen argue that . . . [unions] have no right to interfere with relations which are entirely satisfactory to them. This position ignores the broader rights of labor in seeking to advance the interests of the worker by more thorough and complete organization.[118]

Finally, the court made a significant comment in relation to the power of the judiciary in the event it believes certain corrections are necessary in labor-management affairs. It stated:

> The public ultimately pays the full cost of every labor dispute and better labor relations must be established. But if they cannot be brought about by enlightened self-interest the remedy lies with the legislature — not in the courts — in so far as contests peaceably conducted for a purpose legitimately connected with the welfare of labor as a whole is concerned.[119]

Thus, although the *Roth* decision relied upon the Cali-

[117] McKay v. Retail Automobile Salesman's Local 1067, 89 P.2d 426 (Cal. App. 1939).

[118] McKay v. Retail Automobile Salesman's Local 1067, 16 Cal. 2d 311, 106 P.2d 373, 381-84 (1940).

[119] *Id.* at 384.

fornia case, the ultimate California decision is directly contrary to the *Roth* holding; moreover, the statute in the California case not only fails to prohibit the type of activity complained of in *Roth,* but actually is nothing more than a limitation upon employers as regards "yellow dog" contracts.

The first *Roth* case also made reference to a 1939 Washington decision, *Fornili v. Auto Mechanics' Local 297.*[120] Here again, one salient fact was overlooked. The state of Washington in *Blanchard v. Golden Age Brewing Co.,*[121] held sections seven, eight, and nine of its anti-injunction act unconstitutional. These sections had limited a court's power in granting injunctions to those specific acts alleged in the complaint which were proved to be unlawful. Thus, a goodly portion of the effectiveness of the Washington act had been removed three years before the first *Roth* decision.

Perhaps the Indiana court in the *Roth* case cannot be blamed for failing to analyze the California and Washington law; nor can it be charged with undue reliance upon the Illinois decisions in *Swing* and *Meadowmoor* which were subsequently reversed by the United States Supreme Court. However, this much can be said: the *Roth* case should have looked first to those Indiana decisions which had interpreted the common law and had made it convincingly clear that the anti-injunction act merely codified the common law. Moreover, as previously indicated, there were decisions subsequent to the act, outside of Indiana, which illustrated the underlying purpose of anti-injunction statutes. If the court in the *Roth* case intended to look beyond its own territorial limits, why did it not look to the Supreme Court in *Senn v. Tile Layers Union,*[122] which

120 200 Wash. 283, 93 P.2d 422 (1939).

121 188 Wash. 396, 63 P.2d 397 (1936).

122 301 U.S. 468 (1937).

held the Wisconsin anti-injunction statute constitutional as applied to stranger picketing aimed not only at requiring the employer to hire union employees but to cease doing work himself as well.

Prior to the second *Roth* case,[123] the Supreme Court had handed down its decision in *Thornhill v. Alabama*[124] and *Carlson v. California*,[125] the former holding unconstitutional a state statute prohibiting picketing, the latter a city ordinance with a like prohibition. Even more significant, the Illinois *Swing* and *Meadowmoor* cases, upon which the court relied in *Roth* number one, were reversed by the United States Supreme Court fourteen days prior to the decision in *Roth* number two. Yet, the Indiana court made no reference to these reversals. Similarly, it remained silent on this point in *Roth* number three. Ironically, *Roth* number one did treat free speech when it criticized the trial court for attempting to dictate the size of the lettering and the language on the picket signs. It stated that if picketing had been proper in the first place, it was not the function of the court to prescribe the form, context, and character of the sign. The privilege of free speech was said to carry with it freedom of choice as to the mode of expression that may be employed.

Having a golden opportunity to become one of the first enunciators of the free speech doctrine, the court unfortunately either fumbled or passed. In *Roth* number two, and if not there, most certainly in *Roth* number three, the court could have relied on *Swing* and *Meadowmoor* and at least parenthetically noted that it had discussed free speech prior to the issuance of these Supreme Court decisions. For some reason it did not elect to do so.

Briefly to complete the *Roth* cycle, the second *Roth*

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123 218 Ind. 275, 31 N.E.2d 986 (1941).

124 310 U.S. 88 (1940).

125 310 U.S. 106 (1940).

decision came up on review of the final judgment enjoining the picketing. The first case was based upon an appeal from the temporary injunction. The court in the second case stated that it did not have the evidence, as such, before it on the first appeal but had relied on the trial court's findings. Having all of the evidence on the second appeal the court found that at the outset of the picketing and for several hours thereafter, all plaintiffs' employees belonged to the union, and that they resigned only after they had signed a letter prepared by Roth. Thus, the court held that the picketing was legal because when the picketing began, the purpose was ". . . to coerce an employer, all of whose employees were members of the picketing union, to agree that in the future he would employ only union members."[126] The court then went on to say that Roth had been unfair because he had interfered and therefore that the picketing signs and banners spoke the truth. Accordingly, the injunction was dissolved and a new trial was granted.

This resulted in the third *Roth* case. The new trial was held and the trial court again granted an injunction from which an appeal was taken. On appeal, the court made reference to the earlier *Roth* cases and then stated that the basis for the second decision was the fact that the employer interfered, aided, and encouraged his employees to leave the union. This time the contention of the plaintiff was that the employees had ceased being members of the union several hours before the employer interfered because the union agent had told the employees that it would cost them $50.00 to be reinstated in the union. The employees testified they had understood that they were no longer members and therefore regarded the letter of resignation as merely formal notification of a prior severance of their relation with the union. The court reasoned that the letter assumed the present existence of a relation-

126 31 N.E.2d at 989.

ship which it purported to dissolve. The court also noted that the employee witness who had testified in the second case relative to the facts surrounding the signing of the letter had now changed her testimony. In conclusion, the court said:

> While there may be some doubt from the evidence that she or the other clerks were in fact coerced, there is no escape from the conclusion that their employer interfered and aided and encouraged his employees to sever a connection with the union which he thought existed, and this at the time of the picketing which he sought to enjoin. We think the facts are substantially the same as related in the second opinion which therefore is the law of the case.[127]

Thus the *Roth* trilogy came to an end, except to plague and confuse practitioners as well as the courts. Obviously, the court was required to reverse its position in the first case — not by reason of the tenuous distinction drawn relative to the facts, but because the decision did not represent the law of Indiana, let alone that of California and Washington upon which reliance had been mistakenly placed. It must have been apparent to the court by the time *Roth* number three arrived that the employees were not desirous of joining the union, and irrespective of whether or not the employer interfered, the fact of the matter was that if the picketing continued, it was stranger picketing for the purpose of compelling the employees to join the union . . . and this was neither outlawed by the common law nor the anti-injunction act.

It is to be noted that while in the first *Roth* case the trial court found that a labor dispute existed and attempted to enjoin those acts which it considered to be unlawful, namely the language on the picket sign, the Supreme Court did not pass upon whether a labor dispute existed as such, but merely declared the purpose to be unlawful. While absence of interference of an employer is a prerequisite to

127 39 N.E.2d at 776.

obtaining relief under the anti-injunction act, the court did not point this out. Moreover, although the language of the picket sign was deemed unimportant in *Roth* number one, the court in *Roth* two became involved in the language used because it stated that the employer had been unfair and that the banner carried by the picket therefore spoke the truth.

It is obvious that the reversal of the *Roth* case was not based upon a re-examination of the facts. It can only be the result of the court's analysis of the earlier decisions, the policy of the statute, and the fact that the United States Supreme Court had spoken at least four times in the interim between the first and second *Roth* cases. It is indeed unfortunate that the Indiana court did not have these authorities before it when it decided the first *Roth* case and perhaps equally unfortunate that it did not attempt to clarify the situation by the time the second and third *Roth* cases had been decided.

The *Roth* trilogy represents the greatest blot on the judicial development of Indiana's labor law. It is a study of paradox and confusion. It is perhaps a truism that progress moves not in a straight line but through peaks and valleys. Each state has a *Roth* case, but none has a trilogy of *Roths*. Thus, except for the fact that they constitute a valley in what might almost be a straight line of progress, the *Roth* cases should not be too disturbing. While they have never been overruled, they are irreconcilable with and not representative of subsequent decisions.[128]

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[128] It should be noted in this regard that the *Davis* and *Peaker* cases, see text at 599-604, demonstrate that stranger picketing conducted for the purpose of obtaining a closed shop, irrespective of whether or not any of the employees involved are members of the union, is perfectly legal, not only by reason of the free speech cases, but under Indiana common law and anti-injunction act.

VII. A Contemporary Look

The Indiana cases following *Davis v. Yates* and *Local 1460, Retail Clerks Union v. Peaker*[129] were all decided by the appellate court. While the subsequent decisions overlook many of the previous cases, and while, perhaps due to inarticulation, some incorrect results have occurred, the common law and legislative policy as set out in the previous sections are generally followed.[130]

A 1955 decision[131] dissolved a temporary injunction prohibiting peaceful picketing not only because the decree did not specify the specific acts under restraint, but also because the allegations on their face did not make out a case for relief, the court stating that:

> Such an injunction, even if only temporary, is contrary to law as it has long since become the settled law of this state that picketing, in connection with a labor dispute, without resort to threats, force, intimidation, fraud or other unlawful means is a proper exercise of the right of

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129 See text at 599-604.

130 See, *e.g.*, Blue v. State, 224 Ind. 394, 67 N.E.2d 377 (1946), *cert. denied*, 330 U.S. 840 (1947) (criminal action for violence arising from labor dispute); Nelson v. Haley, 232 Ind. 314, 111 N.E.2d 812 (1953) (civil action for assault also in context of labor dispute); Faultless Castor Corp. v. United Elec. Workers, Local 813, 119 Ind. App. 330, 86 N.E.2d 703 (1949) (injunction to prohibit employer's breach of collective bargaining agreement denied because of applicability of anti-injunction act and existence of adequate remedy at law); Janalene, Inc. v. Burnett, 220 Ind. 253, 41 N.E.2d 942 (1942) (employer enjoined from farming out work in violation of collective bargaining agreement, but specific enforcement of arbitration clause to determine damages denied). As to enforceability of arbitration agreements, see Mamet, *Are Federal Labor Laws Conflicting or Complementary?*, 7 Lab. L. J. 749 (1956).

As an indication of recent diverse approaches, *compare* Local 103, Bartenders, Hotel and Restaurant Employees Union v. Clark Restaurants, Inc., 112 Ind. App. 165, 102 N.E.2d 220 (1951) (stranger picketing enjoined for absence of labor dispute) *with* Koss v. Continental Oil Co., 222 Ind. 224, 52 N.E.2d 614 (1944) (stranger picketing to compel owner-operator of gasoline station to comply with union conditions held lawful in the absence of fraud or violence).

131 Teamsters v. Stewart's Bakery of Rochester, 125 Ind. App. 174, 123 N.E.2d 468 (1955).

free speech and peaceable assemblage.[132]

Fulford v. Smith Cabinet[133] presented the issue of whether the employer, in accordance with the provisions of the anti-injunction act, was prohibited from obtaining an injunction against the specific acts of mass picketing and violence because he had failed to make "every reasonable effort to settle [the] dispute." the most interesting feature of the case is neither the issue nor the holding.[134] The dissenting opinion, wholly apart from the issue in the case or the conclusion reached,[135] presents the fullest existing Indiana decisional commentary on the policy underlying and the motivation for the passage of the Norris-LaGuardia Act, which, as Justice Bowen stated, is "in all respects identical" with the Indiana act.

With a few exceptions, to be considered briefly, this concludes the analysis of all of the Indiana decisions, as of the date of this writing, dealing with the right of workers to strike, picket and engage in other activity in their self-interest designed to elevate their status, gain new members

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132 *Id.* at 469.

133 118 Ind. App. 326, 77 N.E.2d 755 (1948).

134 The factual basis of the *Fulford* case should be examined. The Union won a consent election but the employer refused to recognize the union until it was certified. The union, however, refused to file the affidavits and reports required by sections 9 (f), (g) and (h) of the Taft-Hartley Act and hence was not certified. The union then engaged in mass picketing, trespass, forceful entry and other violent activity to force recognition. The appellate court affirmed the trial court's decision enjoining unlawful acts in connection with the picketing activities. The court examined the filing requirements of the Taft-Hartley Act and concluded that if a union had not complied with same, it could not compel recognition. On this reasoning, the court concluded that the employer had not failed "to comply with an obligation imposed by law" under the terms of the anti-injunction act. While this conclusion is interesting, the United States Supreme Court has found it to be wrong. Failure to comply with the filing requirements only deprives the union of the right to use the machinery of the National Labor Relations Board. It does not relieve the union of its rights to be recognized or to any other rights or liabilities. United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956).

135 In the opinion of the writer the dissenting Justice was correct not only by reason of the *Arkansas Oak Flooring* case, *supra* note 134, but in the application of the state anti-injunction act.

and protect the wages and conditions which they have secured. The latest pronouncements, *Murrin v. Cook Bros. Dairy,*[136] decided November 9, 1956, and *Blackburn v. Koehler,*[137] decided March 12, 1957, are not helpful in interpreting common law or statutory law, nor are they useful for illustrative purposes.

On the other hand, the *Merchandise Warehouse Company* case,[138] decided on March 13, 1956, serves to highlight the basic problems and misunderstandings common to most states. There, the question framed by the court was whether a labor dispute existed under the anti-injunction act. A teamster's local had originally organized the employer's employees; those who became members of the

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136 138 N.E.2d 907 (Ind. App. 1956). *Murrin* involved an action for an injunction against picketing of an employer's premises in order to obtain a union shop agreement. The defendants admitted the purpose of the picketing was unlawful, the appellate court stating, 138 N.E.2d at 911: "Thus it is apparent that the purpose of the conduct of appellants as found by the Court is contrary to the express public policy of this state and unlawful, and was conduct which should have been enjoined, if other conditions precedent to the issuance of an injunction existed. *Appellants do not contend otherwise. . . .*" (Emphasis added.) While there does not appear to be any basis for such admission, the sole issue then became whether the employer had made "every reasonable effort to settle such dispute" as required by section eight of the anti-injunction act. The court, Justice Bowen dissenting, affirmed the trial court which had granted a temporary injunction, concluding at 912 that, "The law did not require appellee to further negotiate, mediate or arbitrate as to whether or not it would be required to commit an unlawful act." *Cf.* Fulford v. Smith Cabinet Mfg. Co., 118 Ind. App. 326, 77 N.E.2d 755 (1948).

In as much as the *Murrin* decision is limited to this narrow statutory point, it is not particularly significant. However, had the defendants not admitted that the picketing was unlawful, the case necessarily would have been decided differently. As early as 1895 in the *Clemitt* case and as recently as the last supreme court pronouncement in the *Peaker* case, Indiana courts consistently have upheld picketing, stranger or otherwise, to obtain not only union shop, but closed shop conditions. It is interesting that the appellate court mentioned neither of these cases, nor did it cite the recent *Merchandise Warehouse* case (see note 138 *infra*), decided by the same court and virtually the same judges as decided *Murrin.*

137 140 N.E.2d 763 (Ind. App. 1957). *Blackburn* reversed the trial court's temporary injunction in a labor dispute because of the court's failure to make specific findings, and because the trial court exceeded its power in directing that a representation election be held.

138 Local 135, Int'l Brotherhood of Teamsters v. Merchandise Warehouse Corp., 132 N.E.2d 715 (Ind. App. 1956).

union quit the employ of the company to work elsewhere. New employees were hired and no further attempt was made at organization. Some time later, however, a picket line was established with placards noting that the company failed to employ "members" of the union. At the outset, the court announced that: ". . . a union's attempt to organize a group of employees and the unwillingness of such employees of such employers to be organized constitutes a labor dispute."[139]

This statement is obviously an enlightened one because it reflects a realization that disputes between "employees" and those attempting to organize, *i.e.,* strangers, are protected under the anti-injunction act. The court proceeded, however, to find that the picketing was unlawful because there was no resistance to the union's organizing activity, and that the only effort was completely successful without the aid of a picket line. The court stated that ". . . for some reason not disclosed by the evidence they [the union] slept on their rights until those employees whom they had 'signed up' left the appellee's employ and went elsewhere to work."[140] It then noted that no effort was made to negotiate with the company or its existing employees but picketing was started approximately one year following the successful organizing campaign.

It is apparent that the only justification for the holding of the majority is that it believed that the union was not acting in its *own self-interest.* In other words, if the union was not interested in organizing the existing employees and if it had no desire to negotiate for those who were 100 percent organized before they quit, what then was the basis of the dispute? To be sure, a demand could have been made for a closed shop to have the company hire and use only existing union members. This would have been legal; the court noted, however, that ". . . to this day the matter

139 *Id.* at 717.
140 *Ibid.*

of hiring members of said local has never been discussed. . . ."[141] The answer as to the union's interest, as the court indicated, was "not disclosed by the evidence."

If the holding of the majority [142] can be interpreted in this vein *alone, i.e.,* that the union was not picketing in its own self-interest, then while the reasoning of the majority may not conform to the common law and a proper interpretation of the anti-injunction act, the result may not be too far astray. However, other considerations — procedural, substantive and evidentiary — were involved in the case and these considerations necessarily direct a conclusion opposite from that reached by the majority.

Initially, it must be noted that even assuming that the union was not acting in its own self-interest, this issue does not depend upon whether a "labor dispute" existed, but the query is whether the case falls within the exceptions to the anti-injunction act, *i.e.,* "fraud" or "violence." It is to be emphasized that the anti-injunction act does not state that matters involving fraud or violence take the case outside the definition of a "labor dispute." It merely recites that the prohibition against issuing injunctions in labor disputes shall be inapplicable if fraud or violence is involved. The *Merchandise Warehouse* case, then, revolved not around the definition of a labor dispute, because a labor dispute was unquestionably involved. The issue properly was whether the union's failure to act in its self-interest — if such was the case — permits the granting of an injunction. This requires an analysis of the exceptions.

A. *Exceptions: Fraud and Violence*

As regards the two exceptions — fraud and violence — the latter appears clear in itself, and if violence has occurred, then the specific wrongful act will be enjoined but

[141] *Id.* at 718.

[142] Chief Judge Royse wrote a concurring opinion in which he suggested a restrictive interpretation of the anti-injunction act.

peaceful picketing may continue. But what is meant by "fraud"? Those Indiana courts interpreting the word have made it synonymous with "misrepresentation" and have used it in connection with the language on the picket signs. It has been shown[143] that words such as "unfair" and related general expressions of opinion rightfully are not categorized as misrepresentation or "fraud." What words then would constitute sufficient misrepresentation to fall into this category? As noted in *Davis v. Yates*,[144] the court utilized a subjective test where it said the *"union considers"* the activities of the employer to be unfair to the best interest of union labor. This attitude has prevailed in most decisions[145] except where a court apparently desired to enjoin picketing and then rationalized the decision in terms of "misrepresentation" because of the language on the picket signs.[146] The court in the *Merchandise Warehouse* case, having decided to affirm the issuance of an injunction, felt constrained to bolster its position by stating that the language on the signs constituted "misrepresentation."

Based, however, upon the definition in the *Davis* case, at what point does the subjective test of what the union believes disappear as an expression of its opinion, and when does "fraud" take its place? Can picket sign language amount to fraud? It is submitted that this issue is indeed minor. If the sign goes too far then, under the act, the specific wrongful conduct, *i.e.*, the misrepresentation con-

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143 On the question of picket sign language see: Local No. 1460, Retail Clerks Union v. Peaker, 222 Ind. 209, 51 N.E.2d 628 (1943); Scofes v. Helmar, 205 Ind. 596, 187 N.E. 662 (1933); Spickelmier v. Chambers, 113 Ind. App. 470, 47 N.E.2d 189 (1943); Davis v. Yates, 218 Ind. 364, 32 N.E.2d 86 (1941); Vonderschmitt v. McGuire, 100 Ind. App. 632, 195 N.E. 585 (1935).

144 218 Ind. 364, 32 N.E.2d 86 (1941).

145 See note 143 *supra*.

146 Roth v. Local 1460, Retail Clerks Union, 216 Ind. 363, 24 N.E.2d 280 (1940) (*Roth* number one); Weist v. Dirks, 215 Ind. 568, 20 N.E.2d 969 (1939).

tained on the picket signs[147] can be enjoined, but the injunction's scope cannot exceed this limited prohibition.

These verbal gymnastics relative to picket signs serve no purpose.[148] They either beg the question or are used as a device to enjoin, in order to circumvent the clear mandates of the act. What if a sign merely stated the name of the union or contained an innocuous statement such as "The XYZ Company is Being Picketed"? This would be merely a statement of an existing circumstance as reflected by the actual presence of the picket and certainly would not constitute misrepresentation. One wonders what would have been the result if such a picket sign had been used in those few cases involving questions of misrepresentation. Speculation aside, however, it appears patent that the real question as regards "fraud" should have little concern with picket sign language.

What then is "fraud"? It is the failure to act in one's self-interest. It must be borne in mind, however, that the term "self-interest" is a broad one, for it includes not only organizing and attempting to enforce collective bargaining demands, but it is equally applicable to picketing to enforce union conditions, including a demand for the use of union labor and meeting union rates.

It will be remembered that in the tavern keeper example[149] in the *Karges* case, the person objecting to taverns thought that his neighborhood would be improved if there were no taverns. Thus, even though he might succeed in closing the tavern keeper's business, this action would be permitted and the injury would be *damnum absque injuria*. But what if once monthly he traveled to a strange

147 While the trial court in *Roth* number one may have erred in seeking to define the size and the language of the signs, it was correct in so far as it was aware that it could not enjoin all picketing merely because a sign was deemed inaccurate.

148 In actual practice the language of the sign means little, if anything. It is the presence of the picket which lends effectiveness to picketing.

149 See text at 571-72.

city and for no personal reason, but out of sheer malice, attempted to force a tavern keeper there out of business? Would he not then be acting outside of the scope of his legitimate self-interest? If in the *Merchandise Warehouse* case the union was not picketing to attempt to have union conditions prevail, either by the employment of its own members or by unionizing the company's employees, then it may not have been acting in its own self-interest, and no purpose beneficial to the union and its members could have been served by the picketing. If this is underlying the majority holding, the result is perhaps explainable. However, it is to be emphasized that in view of the encompassing nature of the term "self-interest," a court must define the scope of this term with non-confining eyes. In *Merchandise Warehouse,* the two dissenting judges believed that the union *was* interested in organizing. To this extent, however slim the majority may have believed the evidence to be, the picketing should not have been enjoined. It is not for a court to pass upon the organizational zeal or efficiency of a union. Any evidence indicating self-interest should be sufficient, and certainly the burden of proof should not be upon the union when a "labor dispute" exists, but rather upon the complainant who alleges the "fraud."

Finally, the majority in *Merchandise Warehouse* appears to have avoided the issue of the scope of the injunction. The dissent pointed out that there were "no specific unlawful acts enjoined."[150] It would appear, however, that even under the majority reasoning the union could picket again if it first made attempts to negotiate with the company, or attempted to organize its employees or made a demand that the company hire union members. The majority apparently believed that a settlement could have been reached without picketing. This criterion, however,

150 132 N.E.2d at 724.

as a bare determinant in justifying or condemning picketing is found in neither the common law nor the anti-injunction act. But, here again, the court undoubtedly was motivated by its belief that the union was not acting to protect its own self-interest — that it had no desire to reach a settlement because its probable aim was to put the company out of business.

The foregoing constitutes the only rationale of the *Merchandise Warehouse* case compatible with Indiana law. But this compatibility falls short of perfection because wholly apart from any other consideration, the anti-injunction act clearly directs that the scope of the injunction be limited to enjoining the specific unlawful acts, which in this case could only have involved picketing not in the union's self-interest.[151]

VIII. The Right To Work Law

Will the Indiana Right to Work Act affect the prior Indiana decisions?[152] Perhaps not — and this may be so irrespective of the fact that many of the cases involved

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151 *Merchandise Warehouse* also treated the question of federal pre-emption. The court made its own findings that the jurisdictional yardsticks of the NLRB proved that the company was not engaged in interstate commerce and therefore the state court could act. *Compare* the recent United States Supreme Court decisions, notes 4-6 *supra*. Irrespective of compliance with federal preemption, the rationale of *Merchandise Warehouse* comes dangerously close to violating "free speech" concepts. It will be recalled that the court found that the picket sign language constituted misrepresentation. The United States Supreme Court treated this exact point in Cafeteria Employees v. Angelos, 320 U.S. 293 (1943), where in a situation involving stranger picketing, it reversed the state court injunction, stating that: ". . . to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies . . . is not to falsify facts." 320 U.S. at 295.

152 Indiana Senate Bill No. 306, which would have required a vote by secret ballot by a majority of the employees before a strike could occur if the employer requested same, was defeated in the legislature. Had this passed, there would have been a serious question as to the state's authority. See United Automobile Workers, CIO v. O'Brien, 339 U.S. 454 (1950).

a closed shop demand.[153] This query, of course, permits no hindsight evaluation in Indiana and any inquiry into the future would be pure speculation.[154] This much must be emphasized, however. The sole grant to the states to pass right to work acts is contained in section 14(b) of the Taft-Hartley Act.[155] This permits only the prohibiting of agreements conditioning continued employment upon compulsory membership in a union.[156] The recent Supreme Court pronouncements relative to preemption[157] may well raise interesting questions as to (1) whether the states'

153 The only United States Supreme Court case containing a full decision dealing with the status of picketing under right to work laws is Local 10, Plumbers Union v. Graham, 345 U.S. 192 (1953). There it was held that Virginia state courts could enjoin picketing where the purpose of the picketing was to force the employer to eliminate all non-union employees and hence was in violation of the policy of the Virginia Right to Work Act. The Supreme Court took note of another Virginia case, Painters & Paperhangers Local 1018 v. Rountree Corp., 194 Va. 148, 72 S.E.2d 402 (1952), where the Virginia act was construed not to prohibit peaceful picketing for a lawful purpose. Thus, the Supreme Court in effect held that the Virginia courts were attempting to apply the Virginia act reasonably and in accordance with constitutional principles. It should be noted, of course, that the *Graham* case was decided prior to the *Garner* case and the formulation of the federal preemption doctrine. Accordingly, the *Graham* case is of limited authority to the extent that the activity complained of would be held to be protected or prohibited activity under the Taft-Hartley Act. In this connection see Local 429, Int'l Brotherhood of Elec. Workers, AFL v. Farnsworth & Chambers Co., 25 U.S.L. WEEK 3351 (U.S. May 27, 1957), where the Supreme Court, in a per curiam order, reversed a decision of the Supreme Court of Tennessee which had sustained the enjoining of picketing designed to secure a union security arrangement in violation of the state right to work law. For a fuller treatment of this question, see Mamet, *Federal Preemption, Free Speech and Right to Work Statutes,* 51 NW. U. L. REV.____(1957).

154 On June 20, 1957, the Appellate Court of Indiana, in Smith v. General Motors Corp., 32 CCH LAB. CAS. ¶ 70,787 upheld the denial of an injunction which had been sought to restrain the application of a union shop contract. The court held that the state Anti-Injunction Act did not prohibit union shop contracts.

155 See note 11 *supra.*

156 See the concurring opinion of Justice Rutledge in AFL v. American Sash & Door Co., 335 U.S. 538, 557-59 (1949). In addition to noting that the right to "prohibit" union shop contracts is quite a different matter than forcing "union members to work with nonunion workers," Justice Rutledge suggested that if a case involving a strike arose under these acts, serious thirteenth amendment questions would be presented. It should be noted that Justice Rutledge retired prior to the *Graham* case, *supra* note 149, which presented these issues in part.

157 See notes 4-6 *supra.*

exercise of this limited grant under section 14(b) must strictly conform to the language of the statute, *i.e.*, prohibiting agreements dealing with employment and compulsory union membership; (2) whether union activity not involving the execution of such prohibited agreements would be either prohibited or protected by federal law and thus outside the scope of state regulation. Similarly, will the state anti-injunction act have any bearing upon attempts to enjoin picketing involving right to work issues? What if stranger picketing occurs, not in support of a closed shop demand, but to advertise the employer's failure to pay prevailing wages?[158] An injunction in this area might present serious free speech issues even though the ultimate effect of the picketing may accomplish the same result, *i.e.*, unionization of the employees, irrespective of the announced purpose. Other such inquiries could be raised but they would be beyond the scope and space limitations of this article. Suffice it to say that this type of legislation, designed in its barest sense, first by statute and then judicial decision, to weaken unionism and the financial benefits derived therefrom by its members may not necessarily satisfy its designers. Federal preemption, free speech, and state statutes and decisions will play an important role in future interpretations and applications of the right to work acts.

IX. Conclusion

Some fifty odd years have elapsed since *Karges*. Nationally, and in most states, a major sociological metamorphosis has occurred. In the main, the old conspiracy cry has

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158 See, *e.g.*, the recent Tennessee case, Flatt v. Barbers' Union, 31 CCH Lab. Cas. ¶ 70,486 (Tenn. Feb. 8, 1957), *rev'd on rehearing*, 32 CCH Lab. Cas. ¶ 70,698 (Tenn. May 3, 1957). *Cf.* Pruitt v. Lambert,____ Tenn.____, 298 S.W.2d 795 (1957).

disappeared and the "ends" of labor organizations have grown to be accepted as legitimate. But for a natural time lag, labor's emancipation and recognition have by and large conformed to the industrial development and growth of the country. In Indiana, however, neither the courts nor the legislature found industrial development and growth to be a prerequisite to recognition of individual and group rights. From the beginning, and with concentrated continuity, Indiana recognized the right of an individual to belong to a labor organization and the right of such organization to engage in activities designed to enhance and protect its legitimate objectives and accomplishments. The Indiana anti-injunction act was not passed to correct governmental injunction abuses, but rather merely to codify existing law. While early Indiana legislation and decisional law appear to ignore each other, the results and purposes are compatible. Each case and each statute decries exploitation and echoes *Karges:* "Whatever one man may do, all men may do, and what all may do singly they may do in concert."[159]

To be sure, some confusion has existed and still prevails. This is due principally to the fact that state courts have felt constrained to look to other states, while neglecting to consider the differences between their law and the law in such other states. Occasional decisions seem to conflict with the purpose and policy underlying state statutory enactments. As has been seen in Indiana, the reason lies solely in reliance on decisions outside the confines of the state. This is the nub of the problem. This is perhaps also one reason for the passage of a right to work act, *i.e.,* the legislature may have been unduly influenced by the passage of similar statutes in other states. As to the effects of such a statute, one must wait and see. Retrospectively, justification or necessity for such a statute is not dis-

159 175 N.E. at 880.

cernible. It holds no apparent benefits for legitimate industry or for employees.

In the final analysis, the question of permitted and prohibited activity revolves around the duty of one participant to the other. This duty cannot be determined by applying "property" concepts; it can only be found in the field of economic relationships. It is not necessary to determine whether the duty of one to another is of decisional or statutory origin. Irrespective of the method of creation, certain activity is privileged while other activity bears no such privilege. Permissible or prohibited limits are man-made and the extent of the activity will be commensurate with the maturity of the makers. Contemporary labor relations dictate recognition of the fact that the views of labor and management are not necessarily diametrically opposed.[160] The sooner both parties realize that they must deal with each other in good faith and that the courts or legislatures cannot be used as an avenue for obtaining economic advantage or to avoid unionization, the sooner tranquillity and stability will prevail.

In labor-management affairs dynamic human relations are constantly at play; the problems cannot be looked at in a vacuum, nor can a pure utopia be reached. Solutions must be viewed in relative concepts and results can only be measured by retrospective application. This then, in the first instance, is the task of the Supreme Court and then Congress. Undoubtedly, Congress will make the delineation between federal and state jurisdiction. Perhaps it will also more clearly define the federal scope of economic conflict. But square pegs do not fit round holes, and outlines and delineations unless shaped around the basis

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[160] See Mamet, *The Role of The Labor Lawyer in Labor Relations.* 46 ILL. L. REV. 575 (1951); 3 LAB. L. J. 200 (1952).

of need and knowledge will soon crumble. Thus, any federal answer which ignores the occurrences in the state labor law complex cannot be comprehensive. Only if the state law is analyzed can there be coordination instead of confusion, because for smoothness of operation federal law must be complemented by state law; it is a necessary counterpart in the labor equation.

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