THE ENFORCEMENT OF THE RIGHT OF ACCESS IN MASS PICKETING SITUATIONS

I. INTRODUCTION

During the McClellan Committee's investigation of labor problems in Philadelphia, the testimony suggested that the criminal laws are less vigorously enforced in Philadelphia labor disputes than in other local crimes. The Philadelphia law enforcement agencies have manifested particular confusion as to their role in inhibiting mass picketing activity in the labor context. In particular the Philadelphia police generally refuse to provide access through mass picket lines in labor disputes. This practice is contrary to the procedure followed by the New York and Chicago police forces and even to the procedure employed by the Philadelphia police in civil rights demonstrations.

This Note is principally the product of extensive field research into the problem of mass picketing. The program of field research consisted of interviews with labor leaders, city and police officials, company executives, civil rights leaders, industrial relations experts, civic leaders, and attorneys, all of whom have had experience in mass picketing situations. This Note attempts to coordinate information obtainable only through such research, such as the motivating forces behind mass picketing, with the existing legal rules for picketing in order to formulate the most effective police procedure for mass picketing situations.

For purposes of this Note, mass picketing denotes picketing activity which attempts by force of numbers to prevent ingress to and egress from the picketed site. A functional definition has been chosen to focus on the common characteristic of the picketing studied and the factor most likely to produce violence. This definition does not encompass picketing, irre-

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1 See Hearings Before the Senate Select Committee on Improper Activities in the Labor or Management Field, 85th Cong., 2d Sess., pt. 20, at 7965-69 (1958) [hereinafter cited as Senate Hearings]; id. pt. 27, at 10420-21, 10441-42, 10459.

2 The field research was conducted by R. David Boyer, Marvin F. Galfand, and David L. Robinson, May 1964 graduates of the University of Pennsylvania Law School, under the direction of the Law Review. The Review wishes to express its appreciation to the Institute for Legal Research for allocating funds from the Thomas Skelton Harrison Foundation so that an interview method of research could be employed in this study.

3 Because of the sensitive nature of this subject in political affairs and labor-management relations, almost all of the parties interviewed declined to be quoted by name or specific office. However, the notes of the interviews and all correspondence of the research team have been placed on file in the Biddle Law Library, University of Pennsylvania Law School, and are available for examination upon request. Since mass picketing is an activity which usually commands the attention of the press, the Editors have provided citations to the newspaper accounts of the objective events of the mass picketing situations which were selected for analysis in this Note.

4 A numerically oriented definition was rejected because the number of pickets which effectively prevented ingress and egress in the picketing instances studied varied with the size of the businesses. However, several states have included numeri-
spective of numbers, which is not calculated to deny access, such as informational picketing by labor and civil rights groups. On the other hand, there must be a sufficient number of pickets, in relation to those desiring entry, to intimidate the latter from entering. Thus, isolated acts of violence or threats of violence by a handful of strikers attempting to deny access would not constitute mass picketing.

II. The Mass Picketing Problem

A. Characteristic Examples

During a month long strike of parking lot employees in December 1955, the strikers formed human chains across the front of the lots to prevent the public from occupying them. The only police control of the pickets occurred on the fifth day of the strike when the police ordered pickets at one lot to permit a car to enter; several strikers were injured or arrested when they refused to follow the police orders. When the company petitioned for an injunction against the mass picketing, the union agreed to limit the number of pickets at each lot. When the strikers continued to exclude patrons, a preliminary injunction was issued based on the terms of the agreement. However, other outbreaks of violence, such as tire slashings, were reported until the strike was finally settled.

During a nationwide strike against the General Electric Company in October 1960, there was mass picketing and violence at the Philadelphia switchgear plant. Six policemen were injured on the first full workday of the strike while assisting a small number of workers to enter the plant; however, no arrests were made. The police discontinued all efforts to open the picket lines by the second day of the strike, when more than 400 pickets completely closed off the plant. The local union leaders, who directed the exclusion of nonstriking workers, said that the mass picketing was the result of the company’s refusal to close down the plant or to agree that supervisory personnel would not perform bargaining unit work. The
cal definitions in statutes which prohibit mass picketing. See S.D. Code § 17.112(5) (Supp. 1960) (more than 5% of the first one hundred striking employees and an additional 1% of the employees in excess of one hundred); Tex. Rev. Civ. Stat. Ann. art. 5154d (1962) (more than two pickets within either fifty feet of any entrance or within fifty feet of any other picket or pickets). See generally Kletzing, Mass Picketing and the Constitutional Guarantee of Freedom of Speech, 22 Rocky Mt. L. Rev. 28 (1949).

5 Philadelphia Inquirer, Nov. 30, 1955, p. 27, col. 4.
7 Id., Dec. 8, 1955, p. 1, col. 4.
9 Id., Dec. 17, 1955, p. 6, col. 2.
11 Id., Oct. 5, 1960, p. 12, col. 5.
mass picketing was finally ended through a series of court-supervised agreements after the company had instituted a suit for an injunction.\textsuperscript{13}

The most violent labor dispute during the period studied was the five month strike at the Yale & Towne Company plant which began in September 1961. At the beginning of the strike massed pickets threatened the nonstriking workers with violence,\textsuperscript{14} defaced automobiles,\textsuperscript{15} and caused a severe traffic delay by questioning automobile entrants at the gate.\textsuperscript{16}

The police detoured traffic around the plant, but made no arrests and did not attempt to help the nonstriking workers.\textsuperscript{17} The court enjoined the union from denying access to the plant,\textsuperscript{18} and the number of pickets was reduced. However, when the union learned that supervisors were doing production work,\textsuperscript{19} it ordered mass picketing which denied all access.\textsuperscript{20}

The police refused to open the picket lines, asserting that they could not determine whether the picketing was illegal,\textsuperscript{21} but 250 policemen were finally assigned to the plant under a court order to enforce the injunction and provide access.\textsuperscript{22}

On several occasions during the Publigger Industries strike, from July to October 1962, massed pickets blockaded the plant and prevented workers from leaving.\textsuperscript{23} The police opened the picket lines to secure the release of the workers before any court orders were obtained, but there was no attempt to provide ingress to the plant.\textsuperscript{24} Because the officers of the local union had failed to dissuade the strikers from mass picketing,\textsuperscript{25} they consented to a restraining order against denying access rather than risk a more sweeping injunction.\textsuperscript{26}

In the only instance of racial mass picketing during the period studied, police conduct differed significantly from the reluctance to act in labor disputes. The picketing began in May 1962 at an elementary school con-


\textsuperscript{15}Id. at 59-67, 75-77.

\textsuperscript{16}Id. at 17-21.

\textsuperscript{17}Id. at 17-21, 28-30.

\textsuperscript{18}See Order, Yale & Towne, Oct. 3, 1961.

\textsuperscript{19}See Transcript of Conference in Chambers, pp. 3-5, Yale & Towne, Nov. 9, 1961.

\textsuperscript{20}See, e.g., Philadelphia Inquirer, Nov. 11, 1961, p. 16, col. 3; id., Nov. 14, 1961, p. 18, col. 1 (editorial); id. at 30, col. 1.

\textsuperscript{21}See Transcript of Hearing on Petition for Police Protection, pp. 4-6, Yale & Towne, Nov. 14, 1961.

\textsuperscript{22}Philadelphia Inquirer, Nov. 15, 1961, p. 1, col. 1; id., Nov. 16, 1961, p. 4, col. 4.


\textsuperscript{24}Ibid.

\textsuperscript{25}Id. at 1, col. 7.

struction site as a protest against alleged hiring discrimination in the building trades. At the inception of the demonstrations 200 police were assigned to the site; they made several attempts to secure access to the project for the workers and arrested the demonstrators who refused to obey their orders. The police finally secured access by the use of human wedges and barricades, thus obviating the need to resort to court injunction.

B. Motivational Analysis of Mass Picketing Conduct

A knowledge of the economic and social forces behind mass picketing behavior and of the emotional intensity which these forces generate in the pickets will enable the law-making and law enforcement agencies to determine the proper approach to the problems it creates. The legislators must determine whether mass picketing should be free of governmental interference; the police must be able to predict how the pickets will react to their regulatory efforts. Several basic facts about mass picketing activity were established from the interviews conducted and from observation of mass picketing instances.

1. Labor Strikes

a. As a Union Strike Tactic

The union leaders who have initiated mass picketing believe that by forcing the cessation of plant operations it can be used to exert economic pressure on the company to agree to the union's bargaining demands. This pressure increases as the strike continues because the company may lose orders that would have been placed if operations had been able to continue. Mass picketing also illustrates the strikers' support for the union's bargaining demands, and thus discourages the company from believing that it could settle the strike quickly by a direct appeal to the workers. Moreover, the publicity generated by mass picketing causes the intervention of the city officials, who the union feels will be more favorable to its position. Finally, participation in mass picketing strengthens the individual striker's resistance to company proposals or return-to-work movements. The union may thus be able to prolong the strike to gain the strongest bargaining position from closing off the plant.

However, union leadership does not unanimously accept the idea that mass picketing is a legitimate strike tactic. Many union leaders discourage mass picketing because it is subject to injunction by the courts,

32 See text accompanying note 25 supra.
Mass picketing and some fear that it may result in outbreaks of violence. These leaders indicated that mass picketing by their unions is "enthusiastic picketing," which occurs when the rank and file are provoked by the employer's bargaining or antistrike tactics. One experienced attorney explained such spontaneous activity by the fact that many union men rarely attend meetings, where the proper picketing conduct is explained. He had often advised union leadership that mass picketing was illegal but found his advice ignored by the strikers.

b. Aims of the Individual Strikers

Mass picketing lessens the financial and job insecurities of the individual strikers. The denial of access to the plant alleviates the strikers' primary fear that replacements would be hired during the strike who would permanently take their jobs. Even if there is no attempt to hire replacements, the inability to continue operations with supervisory personnel and office help may force the employer to capitulate more quickly—thus mitigating the strikers' financial hardship.

The emotional intensity of strikers engaged in mass picketing is primarily a function of the stimulus which brought them to the picket lines, although there seems to be some reinforcement from participation in the mass activity. The union leaders interviewed suggested that the desire to prevent the hiring of replacements, the desire to exclude nonstriking employees to hasten the end of a long strike, and the desire to show solidarity to the employer rank in descending order of importance as motives of the individual strikers. The accounts of the strikes during the period studied indicate that the pickets react more violently when the police attempt to repress a more highly valued motive. Since attendance on the picket lines forces the strikers to forego opportunities to maintain their incomes, these motivational factors also seem to control the timing and duration of mass picketing outbreaks. Mass picketing appears to ebb and flow during a strike, rather than continue at an uninterrupted peak; and the outbreaks of mass picketing seem to coincide with aroused striker emotion.

Mass picketing activity during the Yale & Towne strike illustrates many of these phenomena. Mass picketing continued from the start of the strike until it was enjoined. Although it was resumed when the union learned that other company employees were performing bargaining unit work, the pickets obeyed the police when they began to enforce the injunction. However, when the company began hiring replacements for the striking workers, the largest outbreak of mass picketing developed.

and the pickets surged into the police lines to block the replacements. A daily peak in mass picketing was always observed at the hours of ingress and egress, which substantiates the theory that the primary objective was to close off the plant.

c. Effect of Police Inaction

One factor which facilitates both planned and spontaneous mass picketing is the belief that the denial of access to the plant is not illegal until a court issues an injunction based on the facts of the particular case. One illustration of this belief is the comment of a union leader whose announced policy is to have mass picketing and total exclusion at the beginning of every strike. When asked if this was not breaking the law, he replied, "As long as we're not in jail, we're not breaking the law. If we broke the law, we would be arrested." This idea has been fostered by the general failure of the police to open the picket lines before the employers have obtained an injunction. Since almost all the cases have arisen out of injunction proceedings, it is natural for the public to believe that the only way that the law can be administered is by injunction. Belief in the legality of mass picketing also impedes negotiations on the real issues in the strike while the parties argue over such matters as the denial of access and the hiring of replacements. For example, in both the parking lot and Yale & Towne strikes, negotiations were broken off because of hostile attitudes created by the picketing disputes.  

2. Civil Rights

The use of picketing to protest discriminatory hiring practices has recently become an important tactic of the civil rights movement. How-

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39 Compare the statement of M. H. Goldstein, a union attorney, when asked whether there had been an agreement to end mass picketing at the General Electric plant: "What is mass picketing? Picketing is a constitutional right." Philadelphia Evening Bulletin, Oct. 5, 1960, p. 9, col. 3.
40 During the General Electric strike the Philadelphia Evening Bulletin reported the following incident:

One of the management workers told Inspector Denis Gealer that he and the others wanted to get through the gate.

Gealer walked up to Joseph Egan, president of IUE Local 119, and said, "You have mass picketing here."

"You see it," Egan replied.

"Are you going to let these people in?" Gealer asked.

"There will be mass picketing until there is an injunction," Egan said.

Gealer turned to the management workers and said, "You can try to go in, but somebody is going to get hurt if you try." The management workers made no attempt to push through.

Id. at 9, col. 2.
41 See Philadelphia Inquirer, Dec. 14, 1955, p. 38, col. 3 (parking lot); id., Jan. 6, 1962, p. 5, col. 7 (Yale & Towne).
ever, conventional picketing can serve only an informational purpose in this context because the movement lacks the cohesive advantage of "union solidarity," which impels one union man to honor even a token picket line in another labor dispute. Consequently, when the civil rights leaders desire to exert economic pressure on an employer, they have had to resort to the coercive power of mass picketing. Even if the mass picketing does not gain redress directly from the picketed employer, it assures a public consideration of the demonstrators' grievances because of the wide publicity and community fear of violence.\(^4\)

The members of the civil rights mass picketing group would appear to lack the individual economic interest in denying access to the picketed premises that is present in the labor context. This would suggest that the civil rights pickets would be less likely to offer violent resistance to police efforts to open the picket lines. However, the method of recruiting pickets and the leaders' inability to maintain discipline render racial mass picketing potentially more dangerous than the same activity in a labor dispute.\(^4\) In the Philadelphia school site picketing recruits were gathered from the onlooking crowd by requests from the pickets. There was no effort to determine who a volunteer was or why he volunteered, and only perfunctory instructions as to proper picket line activity were given. Another restraint on violence which is present in labor picketing, but generally lacking in civil rights demonstrations, is the moderating effect of the expectation of resumed contact with those against whom picketing is directed. The fact of association by employment is not usually present in the racial picketing context.

\(C.\) The Laws Applicable to Mass Picketing

1. Pennsylvania

Pennsylvania has no statutes which limit the number of pickets\(^4\) or prohibit picketing which denies access.\(^4\) However, the provisions of the Pennsylvania Penal Code enable the police to protect the community from any violence or disturbances arising out of mass picketing.\(^4\) Most of the provisions are directed against specific acts of violence, such as assaults and batteries,\(^4\) littering,\(^4\) malicious mischief,\(^4\) and resisting arrest,\(^5\) which most commonly occur in the course of nonconcerted activity. Other

\(^{42}\) See id., June 1, 1963, p. 1, col. 1.

\(^{43}\) In addition to earlier acts of violence, see text accompanying notes 110-11 infra, twenty-three persons, including eleven policemen, were injured during the last working day encompassed by the mass picketing at the school construction site. Philadelphia Inquirer, June 1, 1963, p. 1, col. 1.


less narrowly defined offenses, such as breach of the peace and disorderly conduct, permit the police to arrest any picket who is boisterous or whose conduct is likely to produce violence. For example, a picket was convicted of disorderly conduct for shouting "scab" and "damned scab" at nonunion workers during a particularly violent strike.

The prohibitions against riots, routs, unlawful assemblies, and affrays are directed against group conduct and avoid the difficult problem of identification of the violator in mass picketing because the offense runs to all participants in the assembly. In the context of mass picketing the characteristics of riot have been held to be, "intimidation of employees desirous of remaining at work through the use of offensive personal epithets, threats of, and attempts to inflict, physical injuries." Actual violence need not be proved if the rioters have accomplished their purpose through threats of violence or other fear-inducing conduct.

Finally, there is a particular statutory authority granted to the Philadelphia police to order the dispersal of riotous assemblies of twelve or more persons. The police are authorized to compel the assistance of citizens if the regular forces are inadequate, and the statute provides immunity from liability for the death or injury of any rioter. Moreover, the police officials are guilty of a misdemeanor if they neglect the duty to disperse the rioters.

Although these laws adequately protect the community from violence arising from mass picketing, they do not provide a practical remedy for the nonstriking worker or customer who fears to cross the picket lines. Isolated arrests may still leave many threatening pickets at the plant. Wholesale arrests or an order to disperse may be unacceptable solutions because of the possibility of violence against the police, and in any event they give the appearance of indiscriminate law enforcement.

However, the Pennsylvania judicial decisions provide a strong rationale for police action to assist someone who desires to cross the picket

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61 Breach of the peace has not been codified by the Penal Code. The offense remains in force and retains its common law definition by virtue of the Code's saving clause. See PA. STAT. ANN. tit. 18, § 5101 (1963).
64 PA. STAT. ANN. tit. 18, § 4401 (1963).

During the 1955 Westinghouse strike in Lester, Pennsylvania, a writ of assistance was issued because the sheriff was unable to enforce an injunction against the mass picketing. See Philadelphia Inquirer, Dec. 13, 1955, p. 39, col. 1; id., Dec. 21, 1955, p. 4, col. 5. Although 200 men volunteered to assist the sheriff, they were not able to control the strikers; and the judge asked the governor to send state police. Id., Dec. 24, 1955, p. 1, col. 1.
lines. The Pennsylvania Supreme Court has consistently sustained the issuance of injunctions to prohibit mass picketing on the grounds that the denial of access violates the public policy of the state. The law recognizes both the employer's right to continue operations during a strike and a worker's right to continue his employment. The denial of access by massed pickets, on the other hand, is an attempt "to usurp governmental functions" which, if not effectively restrained, "leads to lawlessness, disorder and anarchy, which is the very negation of all government." After the civil rights mass picketing, the Philadelphia City Solicitor relied on these decisions to issue a memorandum on the illegality of the denial of access:

Insofar as the recent demonstrations ... prevented personnel and vehicles from entering or leaving the school site, they were illegal. The legal rights and duties of various parties involved in picketing and mass demonstrations are clear; no judicial clarification is required. The right of individuals to exercise their right of free speech by way of protest must be respected. At the same time if picketers and demonstrators, by virtue of an excess of zeal, commit unlawful acts, it is the duty of the police to take appropriate action.

Pursuant to this opinion the police commissioner issued orders to the police to provide access in any future civil rights demonstrations.

2. Federal Preemption

The Supreme Court has recently narrowed the scope of state jurisdiction over picketing activity because of the possibility of conflict with

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The Pennsylvania Labor Anti-Injunction Act, PA. STAT. ANN. tit. 43, §§ 206a-r (1952), has been held not to apply, because union seizure of the plant was expressly excepted from the act's protection, PA. STAT. ANN. tit. 43, § 206d(d) (1952). Thus, an injunction can be obtained on ex parte affidavits without a showing of actual violence. See, e.g., Philadelphia Minit-Man Car Wash, Inc. v. Building Trades Council, 411 Pa. 585, 192 A.2d 378 (1963); Westinghouse Elec. Corp. v. UEW, 383 Pa. 297, 118 A.2d 180 (1955).


64 PA. STAT. ANN. tit. 43, § 200 (1952).


66 See text accompanying note 115 infra.
the federal scheme of regulation.\textsuperscript{68} Since the enactment of the Labor Management Relations Act,\textsuperscript{69} the National Labor Relations Board has had the jurisdiction to define and enjoin picketing activities which constitute unfair labor practices \textsuperscript{70} when the employer is engaged in interstate commerce. The Board has held that picketing calculated \textsuperscript{71} to prevent non-striking workers from entering the plant is a union unfair labor practice because it interferes with the nonstrikers' right to refrain from concerted action.\textsuperscript{72} However, the delay in the Board's processing of cases \textsuperscript{73} has forced employers to seek injunctive relief in state courts when their non-striking employees are denied entry by the striking union.\textsuperscript{74}

In spite of the existence of the federal remedies for exclusionary picketing, the Supreme Court has consistently held that the preemption doctrine does not take from the states the "power to prevent mass picketing, violence, and overt threats of violence";\textsuperscript{75} the broadest language used by the Court affirms the states' powers "over such traditionally local matters


\textsuperscript{70} In the General Electric strike studied for this project there was an NLRB order prohibiting mass picketing. Local 761, UEW, 126 N.L.R.B. 123, 125-26 (1960).

\textsuperscript{71} Compare Local 761, UEW, 126 N.L.R.B. 123 (1960), with Local 2772, United Steelworkers, 137 N.L.R.B. 95 (1962), and Local 5895, United Steelworkers, 132 N.L.R.B. 127 (1961).

\textsuperscript{72} See, e.g., Local 2772, United Steelworkers (Vulcan-Cincinnati, Inc.), 137 N.L.R.B. 95 (1962); Local 5895, United Steelworkers (Carrier Corp.), 132 N.L.R.B. 127 (1961); Local 3887, United Steelworkers (Stephenson Brick and Tile Co.), 129 N.L.R.B. 6 (1960); Local 1150, UEW (Cory Corp.), 84 N.L.R.B. 972 (1949).

Section 8(b)(1)(A) of the National Labor Relations Act, added by 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958), states that it is an unfair labor practice to restrain or coerce employees in the exercise of their section 7 rights. The Board reasons that since section 7 of the act spells out the rights of employees to refrain from collective activities and concerted action, it is a violation for a union to coerce employees from refusing to join in the strike through its use of mass picketing.

\textsuperscript{73} In none of the cases cited at notes 70-72 \textit{supra} was the time between the initial filing and the issuance of the Board's cease and desist order less than one year; in General Electric, 126 N.L.R.B. 123 (1960), and Cory Corp., \textit{supra} note 72, for example, the delay approached two years. In recent years the NLRB has cut down materially on its case backlog and the delay from filing to decision. However, in 1963 the median number of days from filing of charge to issuance of complaint after investigation, was still forty-nine days. 28 NLRB \textit{ANN. REP.} 13 (1963). In a contested case the delay from complaint through trial examiner's decision to Board decision and cease and desist order is, naturally much longer.

\textsuperscript{74} Section 10(j) of the Labor Management Relations Act, 61 Stat. 149 (1947), 29 U.S.C. § 160(j) (1958), gives the NLRB the authority to petition for a temporary injunction or restraining order in a district court when a complaint alleging an unfair labor practice has been filed with it. However, in fiscal 1963 only seven 10(j) suits for injunctions were instituted against unions or employers, of which only three were granted by district courts, and the remaining four settled voluntarily. Of the seven petitions filed, none were grounded on section 8(b)(1)(A). 28 NLRB \textit{ANN. REP.} 104, 105 (1963).

as public safety and order and the use of streets and highways.”
Since all the recent cases holding in favor of state jurisdiction in mass picketing situations have involved actual violence, or at least an imminent danger of violence, the Supreme Court has not reached the question whether the states may prohibit or regulate picketing activity by large numbers of strikers unaccompanied by such conditions.

Although the Supreme Court has defined the states' interest in very broad terms, the policies behind the preemption doctrine indicate that the states must premise their assertion of jurisdiction on a finding of a substantial threat to the public peace or order. The Court seems primarily concerned with the maintenance of a single, national scheme of regulation of labor disputes. Since the NLRB has jurisdiction to impose sanctions

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78 In Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957), the Supreme Court upheld in part a state injunction based on a finding of an imminent threat of violence, although nonstriking workers were permitted to enter the plant. The principal complaint against the pickets was that they used abusive and insulting language against the nonstriking workers.

The issue here is whether or not the conduct and language of the strikers were likely to cause physical violence. . . . Words can readily be so coupled with conduct as to provoke violence. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72. Petitioners contend that the words used, principally "scab" and variations thereon, are within a protected terminology. But if a sufficient number yell any word sufficiently loudly showing an intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasion and become intimidation and incitement to violence.

Id. at 138-39.

79 The mass picketing instances examined for this study revealed a great likelihood of violence when strikers organize for the purpose of excluding other workers. However, large numbers of pickets can demonstrate without inconveniencing or endangering the public and without denying access. Moreover, even if there is an intent to exclude other workers from the plant, massed pickets can accomplish this purpose without violence if their great numbers alone discourage any attempt to cross the picket lines. See generally Kletzing, Mass Picketing and the Constitutional Guarantee of Freedom of Speech, 22 Rocky Mt. L. Rev. 28 (1949).


When the preemption question was first raised, the Supreme Court phrased the issue as whether the striker's activity was federally protected under the National Labor Relations Act; state police power was assumed to be unaffected except where specifically limited by the act. See, e.g., Allen-Bradley Local 1111, UEW v. Wisconsin Employment Relations Bd., 315 U.S. 740, 750-51 (1942); cf. UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949). However, when the NLRB was given jurisdiction over union unfair labor practices, the Court reasoned that Congress had brought all picketing conduct under federal regulation, and the question became whether the states should be permitted to exercise concurrent jurisdiction. See Garner v. Teamsters Union, 346 U.S. 485, 489 (1953). The conduct of the strikers is now examined to determine whether there is an important state interest, see San Diego Bldg. Trades Council v. Garmon, supra at 247, rather than the status of the picketing under the act, see id. at 246-47. But see id. at 249-51 (concurring opinion). Compare United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-64 (1954), with San Diego Bldg. Trades Council v. Garmon, supra at 247-48.
against exclusionary picketing, irrespective of the number of pickets or
the existence of violence, it is desirable that the Board define the permis-
sible limits of picketing activity. Moreover, even if the picketing unques-
tionably constitutes an unfair labor practice, there is a strong federal inter-
est in having the case submitted to the NLRB for the application of the
federally prescribed remedies.81 Unless state regulation is confined to
situations where there is an immediate threat to the public peace,82 and
the state remedies are directed solely to the alleviation of that threat;83 the
states could produce varying regulations of picketing activity in cases where
no compelling public interest would be sacrificed by any NLRB delay.84

An example of this potential conflict is the Pennsylvania Supreme
Court's decision in *Westinghouse Elec. Corp. v. UEW.*85 In that case
more than 300 pickets stood shoulder to shoulder, many rows deep in front
of the only gate to the plant. The lower court dissolved a preliminary in-
junction on the grounds that there could be no "seizure" of the plant, within
the meaning of the statute prescribing the standards for granting an in-
junction, unless there had been a sincere attempt by nonstrikers to enter the
plant which had been thwarted by the pickets.86 The supreme court re-
versed and directed the lower court to issue an injunction, apparently on
the grounds that the presence of so many pickets constituted a denial of
free access. The court recognized the limitations imposed upon the states
by the preemption doctrine, but determined that the regulation of "mass
picketing" is within the states' power whether or not there is evidence of
violence or a threat of violence.87

If "mass picketing," in the context of federal preemption cases, can be
defined without reference to the existence of a threat to the public order,
then the presence of 300 pickets at a single gate would certainly be en-

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83 See Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957); cf. Amalgamated
84 Since this Note is primarily concerned with the responsibilities of the police
in controlling mass picketing, the textual discussion has been cast in terms of analogous
situations in which immediate state action by injunction is necessary to prevent an
outbreak of violence. However, the Supreme Court has also permitted state courts
to award tort damages, such as loss of wages and profits, from picketing conduct
marked by violence and threats of violence. See UAW v. Russell, 356 U.S. 634
The policy reason underlying these decisions seems to be that when the state's inter-
est in preventing violent picketing conduct outweighs the need for uniform federal
regulation, the imposition of the economic deterrent of financial responsibility is no
greater interference with federal regulation than would be an injunction, provided
that the state award does not duplicate any federally ordered compensation. See
UAW v. Russell, *supra* at 645-46. A corollary to the Supreme Court's position that
the type of conduct sought to be regulated, rather than the sanction sought to be
imposed against the conduct, is the important jurisdictional question is the holding
in UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956), that the
states are not restricted to the general criminal laws when enjoining violent picketing,
but may act through labor boards enforcing labor relations codes.
86 Id. at 299, 118 A.2d at 181.
87 Id. at 301, 118 A.2d at 182.
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joinable. However, an analysis of the Westinghouse case illustrates that such a premise conflicts with the basic policy underlying the preemption doctrine. If the case had been presented to the NLRB, the question before the Board would have been whether the picketing coerced nonstriking workers to join in the union’s striking activity—the same issue that was litigated in the Pennsylvania courts in Westinghouse to determine whether there had been a seizure of the plant. Whenever the Supreme Court has permitted the states to decide the same issue over which the NLRB has jurisdiction, there has been evidence of a situation calling for prompt local action. Since it is not clear that an attempt had been made to enter the plant, nothing in the Westinghouse opinion suggests a need for the intervention of local authorities.

III. Official Response to Mass Picketing

A. Police and Executive

1. Philadelphia

In Philadelphia police conduct in labor mass picketing situations conforms to a policy, established by the mayor and the police officials, of preventing physical injury to persons and property. However, the official policy also has been that enforcement of access rights would be taking sides in the labor dispute. Before the General Electric strike the mayor and the police commissioner agreed that

it would be virtually impossible to keep the gates open so that 1,500 non-Union and supervisory employees, plus their automobiles, could make their way into the plant. It was, therefore, decided that we should concentrate on maintaining order, preventing violence and any property damage to the plant, or vehicles attempting to enter the plant . . . . Our Police Commissioner made it clear to the company officials that if they wanted more than that, they should go into Court and seek an injunction.

When nonstriking employees at the plant asked policemen on duty whether they knew that the picketing was unlawful, the police said that they had “no instructions as to what was lawful or unlawful.” In response to one

89 Dilworth Letter 1.
90 Ibid.
91 Id. at 3.
request for help in crossing the picket line, the police replied, "We can't take sides in this thing." 93

All labor strikes and picketing are policed by a special plainclothes detachment known as the Police Labor Squad—composed of volunteer regular policemen—who are selected to perform this one function. The squad was organized at the request of the labor movement because of the fear that a regular patrolman would be too quick to use force against the pickets. The specialized function of the labor squad has enabled it to become well-known by both labor and management, and it often serves as a calming influence which prevents violent outbreaks. However, even the members of the labor squad have appeared unaware that mass picketing may be unlawful prior to an injunction. 94 Moreover, during the Yale & Towne strike, the police commissioner expressed his belief that the police are not empowered to determine whether or not the picketing is legal. He stated: "We have policed this thing per se, but we will not make an adjudication of what legal picketing is, of what is proper or improper, or who has the right to be in the same position at the same time. I don't think you could expect us to do that." 95

In serious picketing situations, such as the General Electric and Yale & Towne strikes, the police welcome and even request the company to obtain an injunction. 96 Since massed strikers generally do not respond to police commands, 97 the police view the injunction process as a more satisfactory and permanent way of handling the large number of pickets. The injunction supposedly provides more tangible evidence to the strikers of an actual violation of the law.

However, the police have not always been willing to enforce access rights even after the pickets have been enjoined from interfering with nonstriking workers. In the Yale & Towne strike an outbreak of mass picketing developed about one month after the first injunction. 98 The mass picketing continued for ten days while the police, on the advice of the city solicitor's office, refused to enforce the injunction unless ordered by the court.99

The Philadelphia police policy engenders so much evasion of responsibility that the mayor is often forced to reenter the dispute when all control of the picketing is lost. When the Yale & Towne Company began hiring replacements for the strikers, the entire AFL-CIO Council in Philadelphia

95 Transcript of Conference in Chambers, p. 12, Yale & Towne, Nov. 9, 1961.
96 Compare text accompanying note 91 supra.
97 See text accompanying notes 10-11 supra.
MASS PICKETING

voted to violate the injunction and mass picket the plant. The danger of mob violence was so great that the mayor was urged to close down the plant. The mayor appointed a study committee of three prominent citizens which obtained an agreement from management to end the hiring of replacements and from the unions to cease mass picketing. The strike was finally settled on terms suggested by the committee.

By accepting the initial and ultimate responsibility for the police action in major strikes, the mayor also exposes himself and the city to public criticism if violence occurs. The General Electric strike was marked by the company’s accusation that the mayor would not enforce the law. The mayor responded in kind by charging that the company wanted to use the police as strikebreakers and tried to blackmail the city with threats of moving.

In the civil rights demonstration, on the other hand, the police secured access rights without waiting for a court injunction. The mass picketing demonstration began on Friday, after work at the school construction site had begun. The police detoured traffic around the area but made no arrests. Over the weekend the police commissioner announced that he would station 100 policemen at the site. On Monday most of the workers arrived before the picket lines had formed; however, six policemen were injured when they came to the aid of a worker who was being beaten by the demonstrators. Two of the pickets were arrested and held over by the magistrate for assault and battery, disorderly conduct, and resisting arrest. On Tuesday the police commissioner ordered the police to form wedges to escort the workers through the lines, and the police also cordoned off the main entrance so trucks could enter the site.

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101 Ibid.
106 See id., Oct. 25, 1960, p. 1, col. 2; Dilworth Letter 4. Mayor Dilworth considered this “threat to municipal government” so serious that he sent a copy of his letter to every mayor in the nation. Ibid.
111 Ibid. But see Commonwealth v. Millhouse, No. 3838, Dec. Term 1963, Philadelphia C.P. No. 4, July 29, 1964, in Philadelphia Legal Intelligencer, Aug. 3, 1964, p. 1, col. 3. In this case habeas corpus was granted to discharge defendants charged with breach of the peace arising out of a mass picketing demonstration which attempted to prevent children from attending classes in an allegedly segregated school.
Throughout the rest of the week, the police used wooden barricades and human chains of 200 policemen to prevent the demonstrators from interfering with the workers.\textsuperscript{113}

In addition to the policy of immediately securing access in civil rights demonstrations, city officials have announced the law applicable to mass picketing in advance of further racial disturbances. The city solicitor's memorandum issued after the school site picketing specifically declared that picketing which blocks access is illegal.\textsuperscript{114} Moreover, the police commissioner issued rules to the police department entitled " Arrest Procedures for Civil Disobedience Demonstrators." The rules provide that arrests are not to be made without orders from a captain or higher officer. The important sections of the rules are devoted to the proper methods of addressing demonstrators:

You are interfering with the free movement of vehicular and pedestrian traffic. Please move.

(In the event of refusal or noncompliance) Your act prohibits the safe and peaceful movement of persons and vehicles in the public streets and prevents access to buildings. This is a violation of Section 406 of the Pennsylvania Penal Code and amounts to disorderly conduct.

(After another pause) Will you move?

(When there is refusal or noncompliance) You are now under arrest and charged with disorderly conduct. Will you walk to the emergency patrol wagon?

The demonstrator is then told that he would be guilty of resisting arrest if he had to be carried away.\textsuperscript{115} The rules attempt to establish a standard procedure for "civil disobedience" demonstrations, but, as the title indicates, they do not purport to establish procedures for labor disputes.

2. New York and Chicago

In contrast to the Philadelphia practice, the New York City and Chicago Police Departments have announced that they will immediately prevent massed pickets from denying access to an employer's operation.\textsuperscript{116} Neither New York nor Illinois have statutory prohibitions against mass picketing or picketing which denies access. However, the courts of both states have enjoined mass picketing on the grounds that it violates the

\textsuperscript{113} Id., May 30, 1963, p. 1, col. 3.
\textsuperscript{114} City Solicitor's Memorandum 5-6.
\textsuperscript{116} See, e.g., New York City Police Department, Press Release No. 60, June 20, 1963; Chicago Police Star, March 1, 1963, p. 3.
public policy of the state,\textsuperscript{117} or that it tends toward a breach of the peace.\textsuperscript{118} The police departments, in formulating their policy, rely on these decisions and on a framework of statutory crimes—such as disorderly conduct,\textsuperscript{119} rioting,\textsuperscript{120} unlawful assemblies,\textsuperscript{121} and public nuisances\textsuperscript{122}—similar to the provisions of the Pennsylvania Penal Code.\textsuperscript{123} During the period studied neither New York City nor Chicago experienced labor disputes which resulted in mass picketing or violence connected with picketing. The police officials of those cities attributed this to their policy of enforcing access rights at the inception of picketing.

Police conduct in New York City labor disputes is largely within the discretion of the local precinct commander.\textsuperscript{124} Under the police department's rules, the commander is required to inform the parties of the proper conduct of the picketing and of the number of pickets to be permitted.\textsuperscript{125} Moreover, the rules express the general policy of the department that the police should prevent the assembly of crowds that tend to intimidate persons or hinder passage to or from a picketed site.\textsuperscript{126} Chicago, on the other hand, has established a specialized detachment, the Labor Relations Section, to investigate labor disputes and enforce the proper picketing conduct.\textsuperscript{127} Under the section's present rules the police do not restrict the number of pickets so long as they are orderly, and there has been no such limitation by court order. Pickets are not permitted on company property, and they must leave room on the sidewalks to allow passage of pedestrian traffic. In the event persons or vehicles seek to enter the struck premises, the police instruct the pickets to make way. If pickets refuse to comply with this request, they are informed that they are guilty of disorderly conduct or breach of the peace; their continued refusal results in arrest.\textsuperscript{128}

\textsuperscript{119} ILL. ANN. STAT. ch. 38, § 26-1 (Smith-Hurd Supp. 1963); N.Y. PEN. LAW § 722.
\textsuperscript{120} ILL. ANN. STAT. ch. 38, § 25-1 (Smith-Hurd Special Pamphlet 1961); N.Y. PEN. LAW § 2090.
\textsuperscript{121} ILL. ANN. STAT. ch. 38, § 508 (Smith-Hurd 1935); N.Y. PEN. LAW § 2092.
\textsuperscript{122} ILL. ANN. STAT. ch. 100½, § 26 (Smith-Hurd Supp. 1963); N.Y. PEN. LAW § 1530.
\textsuperscript{123} See also CHICAGO, ILL., MUNICIPAL CODE § 193-1.1 (1963); NEW YORK CITY, N.Y., CHARTER § 435 (1963). See generally Fahy, Pickets and Police, 41 ILL. B.J. 560 (1953).
\textsuperscript{124} New York City, N.Y., Police Rule 16/33.0 (1963).
\textsuperscript{125} Ibid.
\textsuperscript{126} New York City, N.Y., Police Rule 16/36.0 (1963).
\textsuperscript{127} See Letter From Capt. Thomas S. Marriner, Labor Relations Officer, Chicago Police Department, to the University of Pennsylvania Law Review, Aug. 6, 1963, on file in Biddle Law Library, University of Pennsylvania Law School.
\textsuperscript{128} Chicago, Ill., Outline of Instructions by Labor Relations Section for Police Roll-Call Training, Nov. 28, 1962.
The only instance of civil rights picketing occurred in New York in the summer of 1963, and the police regulation of the demonstrations exemplifies the careful planning with which the New York police approach anticipated mass picketing situations. If recognized leaders are available, a meeting is held with the police commissioner to establish ground rules for the demonstration. These rules are published in the newspapers through a press release. In the above instance of civil rights picketing, no leader was available, and the commissioner unilaterally issued a statement setting forth the law involved, the rights to be protected, and the procedure which the police would follow if the law was violated. The press release preceded the intense picketing by approximately one month, and the police strictly adhered to the procedures announced by the commissioner. Although over 800 arrests were made during the two months of demonstrations, there was a minimal amount of physical violence and few claims of police brutality.

The method by which the New York and Chicago police provide access through the picket lines differs significantly from the Philadelphia practice. The police first request the pickets to make way for those desiring entry, and if they refuse they are arrested. The Chicago Labor Relations Officer stated that the police would not try to open a picket line by using a “flying wedge” or any other type of escort for those seeking to cross the line. In his view such tactics give an undue impression of police partisanship and are an open invitation to violence, whereas the arrest method secures access more efficiently without such drawbacks.

B. Judiciary

1. Philadelphia

As a result of the police policy in Philadelphia, the employer must seek an injunction in order to restrain the striking union from mass picketing. In many instances it appears that an injunction should be granted, but the judges are reluctant at first to issue a formal order. A conference is held in chambers between the judges and the attorneys for both parties.

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129 The picketing developed after Negro leaders accused the building trades of discriminatory hiring practices. Picketing was instituted at several major construction sites in the same manner as the school construction site picketing in Philadelphia. See, e.g., N.Y. Times, June 13, 1963, p. 1, col. 7.


132 New York City Police Department, Press Release No. 60, June 20, 1963. Among the points stressed was that “sitdowns or other acts which prohibit the safe and peaceful movements of persons and vehicles in the public streets, and prevent access to buildings, are a violation of law and those who use these unlawful means to gain their ends are subject to arrest.”

133 See People v. Galamison, 43 Misc. 2d 72, 250 N.Y.S.2d 325 (Sup. Ct. 1964) (affirming a conviction for disorderly conduct for blocking access to a construction site during the civil rights demonstrations).

134 See, e.g., Philadelphia Inquirer, Oct. 6, 1960, p. 12, col. 2 (General Electric strike).
The union is informed of the legal rights of the employer to ingress to and egress from the plant. The meeting generally results in a gentlemen's agreement, in which the union agrees to cease mass picketing if the company does not press for an injunction. Failure to comply with the agreement usually results in another attempt to resolve the picketing problems before an injunction is issued.

In view of the established precedents for granting injunctions against mass picketing, it is difficult to explain the reluctance of the judges to issue them. Many labor relations experts attributed this attitude to the judges' fear of the political opposition of the unions—citing the instance of a sitting judge who had lost his bid for re-election because of his liberality in granting injunctions. A court-supervised agreement is more acceptable to the unions because it avoids a public pronouncement that they have been engaging in unlawful conduct. However, the gentlemen's agreement is an unsatisfactory solution for the company. In the General Electric strike the company was twice forced to renew its demand for an injunction before the union complied with its original promise and permitted unhindered access to the plant.

Even if an injunction is finally issued, the courts are reluctant to appear partisan to management. In the Yale & Towne strike an injunction was granted after the company proved that the union had violated its agree-

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135 See, e.g., Transcript of Hearing, pp. 5-9, Yale & Towne, Oct. 2, 1961. After the strike had been in progress for two weeks, Yale & Towne requested a meeting with Judge Alexander, who had mediated a previous labor dispute. Judge Alexander was reluctant to issue a formal order, but did caution the union against preventing workers from getting to the plant. He suggested that the pickets be permitted to delay automobiles at the gate for only 15 seconds to request them to respect the picket lines.

136 Judge Brown: Perhaps if you Gentlemen talked it over, it might be that if you would assure the plaintiffs and their counsel that there would be no acts contrary to law as expressed by the Supreme Court, a decree might not be necessary.

Judge Guerin: ... It would seem to me that counsel can agree that at a certain garage we will establish a picket line of so many, and at another garage so many, and you know better than we what would be a proper picket line for the particular locality. ... We must support picketing, but we must conduct mass picketing properly or not at all. That is the issue, isn't it, Gentlemen?

137 After the first agreement, on October 5, 1960, pedestrians were permitted free access to the plant, but the strikers refused to permit cars to enter. The company renewed its petition for an injunction. Arguments were held in court on October 14, and the case was continued until October 17. On that day the union requested a conference in chambers and agreed to allow cars to enter the plant. However, the automobiles were subjected to substantial delaying tactics, and the company requested another hearing. On the day scheduled for the hearing, October 19, the union again requested a conference in chambers. By October 20 both pedestrians and automobiles were allowed unhindered access to the plant. General Electric Memorandum 6-7.
ment to end mass picketing.139 Two weeks later the court modified the
injunction to permit forty pickets, rather than five, at each gate.140 As the
strike wore on, mass picketing again increased with acts of harass-
ment and violence against nonstrikers.141 The company returned to court
and sought an order to compel the police to enforce the right of ingress
and egress under the terms of the injunction.142 However, the court sug-
ggested a waiting period to see if the strikers would voluntarily obey the
injunction.143 When the mass picketing continued,144 the court finally
issued the order to the police.145 Although the court had threatened prison
sentences for those disobeying the injunction,146 it was not willing to
penalize the violators. When the police arrested twelve union men for
blocking access to the plant, the court admitted there had been a “technical
violation of the order,” but found no “serious intent or any desire to breach
the law and order.”147 The men were not charged and were dismissed
with a warning.

As the strike progressed, the company sought to bypass the nego-
tiations by hiring replacements, and the picketing became more intense.148
The union attorneys sought to have the injunction modified to permit mass
picketing on the ground that the original order had been founded on the
company’s desire to continue office work.149 The court refused the union’s
request,150 but it also refused to enjoin sympathizing nonstriking unions
from picketing the Yale & Towne plant.151

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141 See text accompanying notes 19-20 *supra*.
142 See Transcript of Conference in Chambers, pp. 11-13, *Yale & Towne*, Nov. 9,
1961.
143 *Id.* at 23.
144 See Transcript of Hearing on Petition To Compel Compliance With Order
145 And now, to wit, this 14th day of November, 1961, it is Ordered that the
Commissioner of the Police Department of the City of Philadelphia be, and
hereby is directed to take such police measures as are necessary to enforce,
and to continue to enforce until otherwise ordered by this Honorable Court,
the terms of the Decree heretofore entered in the above entitled matter on
October 16, 1961, copy of which Order is attached hereto; and is specifically
directed to remove persons picketing in the intersections identified as Roose-
velt Boulevard and Haldeman Avenue entrances to Plaintiff’s plant or in any
manner blocking or attempting to block ingress to and egress from Plaintiff’s
plant in violation of said Decree.

146 See Transcript of Conference in Chambers, pp. 17, 34, *Yale & Towne*, Nov.
9, 1961.
147 Transcript of Hearing on Violation of Court Order of Oct. 16, pp. 15-16,
148 See text accompanying notes 36-37 *supra*.
151 See Transcript of Hearing, pp. 35-37, Yale & Towne Mfg. Co. v. Blumberg,
Because Philadelphia police practice results in few arrests, it is difficult to establish the magistrates' policies toward offenses connected with labor disputes.\textsuperscript{152} The interviews suggested that the magistrates are very sensitive to political pressure and are reluctant to convict.\textsuperscript{153} Often there is no complaining witness, or diametrically opposed stories facilitate a finding of not guilty. Moreover, some of those interviewed suggested that when the Philadelphia police finally resort to arrests, the situation is generally so embroiled that it is impossible to do so in an orderly manner and still obtain witnesses.

2. New York and Chicago

Police officials in New York and Chicago said that they noticed no tendency on the part of the courts to treat an arrest for improper picketing conduct any differently than a nonlabor-connected offense. The arresting officers act as witnesses, and the majority of the cases result in convictions. In cases involving civil rights picketing, the judges often express sympathy for the pickets' cause but do not hesitate to apply the law.\textsuperscript{154} Research did not disclose any injunctions issued by the New York or Chicago courts for the purpose of controlling illegal picketing. The police officials attributed this to the prompt police action, which prevents the establishment of mass picketing situations, and relieves the employers of any need to resort to the courts.

C. An Evaluation of Philadelphia's Present Policy

The principal justification for the official policy that the police must wait until an injunction is issued before enforcing access through labor mass picketing is that the police must remain neutral.\textsuperscript{155} However, the act of maintaining the existing situation is itself an act of partisanship because it furthers the purpose of the strikers in closing off the plant. In light of the Pennsylvania Supreme Court decisions denouncing the denial of access as an unlawful act,\textsuperscript{156} the choice of aiding the picketers seems unjustifiable and an abdication of public responsibility.

In addition to denying an employer and his nonstriking employees the legally recognized right to continue operating the plant during a strike, the Philadelphia police practice in labor strikes is more serious in its effect upon the respect for the law and law enforcement among the members of
the public. This effect has been recognized in other contexts and was an important concern of those interviewed.

Among those who were aware of the law and felt that it should be enforced, irrespective of their own feelings toward the employer's right to continue operations, the policy of nonenforcement promoted disrespect for the police and the courts. These people were willing to explain the nonenforcement as being a consequence of the political power of the unions, and they believed there was no prospect for a change in policy. The attitude of those who advocated disobeying the law, because of its believed injustice to the workers, was reinforced by the refusal of the police and the courts to enforce the right of access. More importantly, the success of mass picketing in preventing the right to continue the business obviated the need for them to resort to the legislative process to change the law to conform to their views. Moreover, it is reasonable to assume that a like effect would be evident among those who did not realize that an employer had a right to continue operations. If these people view the process of nonenforcement from the layman's concept that every violation of the law is punished, they may conclude that the employer is trying to gain favored treatment from the law—a belief that would be reinforced by official pronouncements of neutrality in labor disputes.

The adverse consequences of the Philadelphia nonenforcement policy upon the employer are self-evident. However, since it forces the employer to obtain an injunction, the policy is also detrimental to the union to the extent that the court limits the number of pickets and the hours of picketing and subjects the strikers to more serious penalties for contempt of court.

By waiting for an injunction, the police make their duties more difficult, because the pattern of mass picketing has been established and delayed.

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159 Compare p. 116 supra.

160 See text accompanying note 39 supra.


163 The union attorneys interviewed suggested that the fear of contempt penalties was the reason that the union consented to a restraining order in the Publicker strike. See text accompanying note 26 supra. The union officers were not able to control the strikers, and they felt that they would be able to quiet them with the restraining order yet not subject the strikers and themselves to possible contempt citations.

The procedure of restraining individual union officers in a court order brings the most severe criticism from the union. In the Yale & Towne strike the original order enjoined two union agents from being near the plant area during the strike. See Order, Yale & Towne, Oct. 3, 1961. Pressure from the union caused the court to amend the injunction and remove the restraints on individuals. See Order, Yale & Towne, Oct. 16, 1961.

intervention by the police is regarded as strike-breaking.165 The courts are also hamstrung by granting an injunction, because many minor offenses arising from the picketing do not merit punishment as contempt of court, but would be more properly disposed of in the magistrates’ courts.166 Finally, the city administration, which initially decided on the policy of police nonenforcement, is forced to defend itself against accusations of being “anti-company” because of their effect on the city’s program of attracting new industries.167

IV. A PROPOSED POLICY OF POLICE ENFORCEMENT

A. Suggested Police Procedures

Philadelphia police enforcement of the right of access in the civil rights mass picketing provides a starting point for sound law enforcement in all mass picketing situations. However, the experience of the New York and Chicago police should also be integrated into an optimum police procedure. The first and perhaps the most important step is the public announcement that the police will not permit pickets to violate the law by denying the right of access. A sufficient number of uniformed policemen should be stationed at the site at the very beginning of the picketing to deter any assaults against the police.168 Those desiring to cross the picket lines should first be permitted to state their intention to the pickets and should request the assistance of the police if refused entry. The police should then follow the practice of the New York and Chicago police and request the pickets to make way, rather than try to push through the picket lines. If the pickets persist in their refusal, they should be arrested and removed from the scene.

As the experience in New York and Chicago indicates, an established policy of law enforcement of this type should serve to eliminate any violence on the picket lines. If violence does occur, the police should cordon off and barricade the entrance to the site as was done in the Philadelphia civil rights demonstrations. However, this type of precaution should be removed once it appears that the pickets are willing to recognize the right of access.

166 This may explain why the court dismissed the charges against the strikers in the Yale & Towne strike. See notes 146-47 supra and accompanying text. The court recognized that there had been a violation of the injunction and a breach of the peace, but the court’s only sanction would have been for contempt of court.
167 See notes 104-06 supra and accompanying text. After several days of angry exchanges between Mayor Dilworth and the General Electric management, the mayor softened the tone of his accusations and said that the company only impliedly threatened to move from the city. Philadelphia Inquirer, Oct. 27, 1960, p. 8, col. 6.

The courts are also aware of the damaging effect of violent labor strikes on the city’s efforts to attract new business: “I am deeply grieved over the fact that it will affect and does affect the bringing of industry to the city, and the labor-management relationship. I think it hurts generally and I regret ever so much that this whole matter has gone to this extent.” Transcript of Hearing, p. 23, Yale & Towne, Jan. 10, 1962 (statement of Judge Alexander).

168 Chicago Police Star, March 1, 1963, p. 3.
B. The Advantages of Immediate Police Action

The proposed procedure of law enforcement would alleviate almost all the objections to the present system. A public announcement by the police concerning the rights to be protected would resolve many doubts about the existing law.\footnote{Cf. Letter From Capt. Paul Glasser, Community Relations Department of the New York City Police Department, to the University of Pennsylvania Law Review, July 29, 1963, on file in Biddle Law Library, University of Pennsylvania Law School: Prior consultation with leaders of groups intending to picket both in demonstrations and labor disputes has resulted in the setting up of ground rules for such matters, which have undoubtedly produced a better and more peaceful climate. Thus, they have facilitated police action where improper picketing occurs since all those participating know in advance what constitutes unlawful picketing and those picketing know that immediate police action will be forthcoming should such violations occur. This is probably true in the case of the present demonstrations which, up to now, have not produced any case of violence or allegations of police use of unnecessary force or arbitrary conduct.} Those who still desire to prevent an employer from continuing operations during a strike would then resort to the proper forum—Congress and the state legislatures—, rather than the streets, for a change in the law. The rights of the striking workers would not be compromised, because they would still be permitted to confront nonstriking workers and use their picket lines as a means of communication.\footnote{This would remedy the union's objection to the injunction in the Yale & Towne strike, which prevented the strikers from talking with the workers and asking them to respect the picket lines. The union attorney argued that the strikers did not desire forcibly to prevent anyone from working, but that they should be given the opportunity to explain their grievances to the nonstriking workers. See Transcript of Hearing, pp. 6-7, Yale & Towne, Jan. 10, 1962.} The proposed procedure would provide greater protection for the patrolmen stationed at picketing sites, because the police would begin to enforce access rights at the inception of the strike before the strikers have established a pattern of exclusion. Moreover, if the strikers knew that they would be able to effectuate their purpose of denying access only by resisting the police, many of them would be less likely to join in the picketing. This deterrent to mass activity would alleviate the difficulty of controlling traffic and protecting property in the picketing area.

Finally, the proposed procedure may cause the police department and the city officials to gain rather than lose the esteem of the unions. An announced policy of police action at the beginning of every strike would avoid uneven and delayed enforcement of the law which the unions associate with strike breaking. The Chicago Labor Relations Officer said that: "Management has voiced their approbation of this regulatory policy exercise. . . . [L]abor unions, too, indicated their appreciation for the manner in which their rights have been defended. Most all agree that the primary police purpose of maintaining law and order has been accomplished without undue incident."\footnote{Letter From Capt. Thomas S. Marriner to the University of Pennsylvania Law Review, p. 3, Aug. 6, 1963, on file in Biddle Law Library, University of Pennsylvania Law School.} Furthermore, the president of the Philadelphia Chapter of the NAACP commended the police commissioner.
and the police for their fair and impartial handling of the school site picketing.\textsuperscript{172}

A change in police policy could not directly effectuate a reversal of the courts' attitude toward labor disputes, and a continued failure by the magistrates to penalize strikers who do not obey the police regulations would emasculate the policy. However, if the police enforce access rights without waiting for an injunction, the courts will not be drawn into the dispute at a time when the strikers' emotions are aroused. When illegal picketing activities come to the courts after the picketing has ended, in the context of violations of the criminal law, the judges may be less disposed to treat the offenses differently because they occurred in a labor dispute.

\textbf{C. Federal Preemption}

It may be argued that an announced police policy of enforcing the right of access at the inception of labor mass picketing would disregard the preemption doctrine. Those who take this position would reason that since there has been evidence of at least threats of violence or an imminent danger of violence whenever the Supreme Court has upheld state action, these situations constitute the minimum threshold of the recognized state interest. Thus, if the announcement and enforcement of the policy is successful in extinguishing these dangers, it will have eliminated the factual situation upon which the right of state action could have been grounded; continued announcement and enforcement would, in effect, constitute an unwarranted state injunction against the denial of access.

However, this argument may place too narrow a construction on the state interest. Mass picketing is, in some respects, a safeguard against violence because the pickets rely on the coercive force of their numbers to deter any attempt to enter. Threats of violence are necessary only when a would be entrant is not thereby deterred; violent exclusion need be resorted to only when the threats have failed. However, the element of intimidation is present from the beginning. If a worker or customer is told by the massed pickets that he may not enter the plant, he is forced to weigh his desire to enter against the possibility of sustaining injury in the attempt to cross the picket line. The likelihood of violence or overt threats of violence from the pickets primarily depends on this individual's estimate of his chances for safety. If the states may protect their citizens from coarser forms of intimidation, it would be an anomalous rule of law which would deny them the right to dispel the fear of the mob.

Even if the danger of physical violence is seen as the inflexible criterion for state action, it is satisfied by the potential for violence arising whenever a person is denied entry by the pickets. If the police are to be effective in preventing violence, they cannot wait until the individual determines his own chances for safety; they must disengage the confrontation between entrant and pickets. Once the police have rightly interfered to this extent

\textsuperscript{172} Philadelphia Inquirer, June 1, 1963, p. 1, col. 1.
in the controversy over the right of access, they have two methods of preventing violence—either remove the entrant or force the pickets to desist from their purpose. A decision to send the worker away is unacceptable in principle because it would make the police the agent of the mob. A decision to enforce the right of access, on the other hand, would seem to be more consistent with the policies behind the federal labor acts, because exclusionary picketing has been held to be a union unfair labor practice. Moreover, in view of the limited scope of the suggested police action, there would be a minimal risk of unjustified interference with uniform federal regulation—the underlying policy of the preemption doctrine.\textsuperscript{173}

This justification for police action does not mitigate the arguments against the soundness of the \textit{Westinghouse} decision. When no one requests the pickets to make way, the police are not the proper forum to determine whether there has been intimidation; this conclusion must be made by a court. If the determination must await the judicial process and if the issue in the state court is similar to the one which would be decided by the NLRB, then the case should be submitted to the Board because of its responsibility to effectuate the uniform policy of the federal regulation.

V. Conclusion

The field research for this Note revealed that labor mass picketing is primarily the result of the economic pressures upon the employees which are generated by a strike. A balancing of the right of employees to protect these economic interests against the desirability of permitting an employer to continue operations may someday result in a change in the law. However, as long as the law continues to balance these interests in favor of the employer's right to continue operations, the failure of the police and the courts to enforce this right by refusing to provide access through mass picketing is a serious abdication of their duties.

\textsuperscript{173} See Genesco, Inc. v. Joint Council 13, United Shoe Workers, 230 F. Supp. 923 (S.D.N.Y. 1964): "The allegation of mass picketing at plaintiff's premises must also be deemed arguably protected activity incident to the strike since mass picketing stands on the same footing with other picketing as long as it does not block access to and from the struck premises or does not threaten physical violence." \textit{Id}. at 931.

The narrow limitations of the recommended police procedures would also seem to remove any possibility that the local authorities could effectuate antunion policies through the announced enforcement of the right of access. The announcement of the policy would not activate those who were in sympathy with the union's position, but it would bring to the plant only those who were themselves unwilling to respect the picket lines but had theretofore feared that they would be assaulted by the strikers. The recommended procedures can be readily distinguished from a policy of enforcement of access accompanied by direct appeals from local officials to cross the picket lines as a matter of public responsibility or official statements against the propriety of the union's demands.