Indiana Labor Relations Law: The Case for a State Labor Relations Act

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The enactment of the NLRA greatly reduced the role of the states in labor relations. With certain limited exceptions, the National Labor Relations Board was granted jurisdiction over any business which “affects commerce.” It was soon clear that almost all enterprises come within this jurisdictional grant. Thus, it became necessary for the courts to delineate the scope of permissible state regulation over businesses which were also subject to the federal act. In *Hill v. Florida*, the Supreme Court held that state laws which interfered with federally-protected rights were invalid. This still left considerable scope for state authority, because the Wagner Act did not regulate union activity and it was generally understood that state competence continued in this area. With the passage of the Taft-Hartley amendments, however, the federal government undertook to regulate union activity and the role of the states was further reduced, particularly as the Court soon thereafter invalidated state regulation of activity prohibited by federal law. Moreover, if it was unclear whether the matter was subject to federal jurisdiction, the determination was for the National Labor Relations Board and not for the states. As Mr. Justice Frankfurter stated in the leading case of *San Diego Building Trades Council v. Garmon*:

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This article had its origins in a report for the legislative study committee on a labor relations act prepared by the Labor Law Seminar at the Indiana University School of Law (Bloomington) in 1966. Thus each member of the seminar in some measure aided in the preparation of this article. Richard Johnson and Thomas McCully had primary responsibility within the seminar in researching the Indiana law. Both Mr. McCully, now an attorney in Lafayette, Indiana, and Mr. Johnson, a third-year law student, did additional research to assist me in preparing this article. For their valuable aid I am extremely grateful. They are absolved of any responsibility for the suggestions contained herein.

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the Taft-Hartley Act, or constitute an unfair labor practice under §8, due regard for the federal enactment requires that state jurisdiction must yield. When activity is arguably subject to §7 or §8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.\footnote{7}

Since it is possible to argue with some plausibility that almost any labor relations conduct is either protected or outlawed under the federal act, the area of pre-emption thus marked out was very great. And the \textit{Garmon} decision also made clear that even where it could be established that conduct was neither outlawed nor protected under the federal act, state law might be pre-empted on the theory that such regulation by the state was inconsistent with the scheme of the federal act.\footnote{8}

The broad jurisdiction of the NLRA together with the strict rules on pre-emption meant that comprehensive state labor relations laws were impractical, since their operation would be so limited as to make them useless. It is true that there have always been exceptions to the doctrine of federal pre-emption, but initially these exceptions did not afford a basis for general legislation.\footnote{9}

\footnote{7} Id. at 244.
\footnote{8} Prior to the \textit{Garmon} decision the Court indicated that states could regulate activities neither protected nor prohibited by the federal act. In UAW v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949) (\textit{Briggs & Stratton}), the union used intermittent work stoppages and similar economic pressures. The Wisconsin Employment Relations Board granted an injunction and the Supreme Court affirmed its jurisdiction. The Court held that the activity, being neither protected nor outlawed under the federal act, was subject to state jurisdiction. The validity of the holding and the extent to which this case may be used as a source of state legislative power is questionable. This decision came before \textit{Garmon} and similar cases which established the full scope of federal pre-emption, and its language suggests a greater role for state law than does that of the latter decisions. Accordingly "it appears to be a doubtful basis for state competence over unprohibited and unprotected conduct." Meltzer, \textit{The Supreme Court, Congress, and State Jurisdiction Over Labor Relations}, 59 Colum. L. Rev. 6, 17 (1959). Moreover, the Court has expanded the concept of protected activity under § 7, NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962), and has also stressed the significant role under the federal scheme of economic pressure of the type involved in \textit{Briggs & Stratton}. See NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 492 (1960). Thus it is unlikely that the \textit{Briggs & Stratton} case would be decided the same way today and it would be hazardous to utilize this holding as a source of state power.

\footnote{9} Thus in UAW v. Laburnum Constr. Corp., 347 U.S. 656 (1954), state laws regulating violence were not invalidated because of the strong and traditional local concern with this matter. This precedent has recently been applied to permit the applicability of state labor law to conduct which is arguably protected by the federal act. See Linn v. United Plant Guard Workers, 383 U.S. 53 (1966). Also state regulation of internal union affairs was permitted because the NLRA did not regulate in this area. See In-
By the Taft-Hartley amendments to the Wagner Act, Congress attempted to provide a way by which state jurisdiction could be exercised generally over matters which the Board chose not to regulate. Because of the breadth of its statutory authority the Board had found it necessary to decline to exercise its jurisdiction in certain cases. In 1950 the Board established jurisdictional standards which set minimum dollar amounts which had to be met before the Board would exercise jurisdiction over certain types of cases.\(^{10}\) By virtue of subsection 10(a), added by the Taft-Hartley Act, the Board was “empowered by agreement to cede jurisdiction” to state agencies where the state statute was not inconsistent with the NLRA. The purpose of subsection 10(a) was to increase state jurisdiction over labor relations. Its impact was precisely the reverse. Because of the requirement of consistency between federal and state law the Board was “unable to consummate any such agreements.” And in *Guss v. Utah Labor Bd.*\(^{11}\) the Supreme Court held that the procedure established by subsection 10(a) was “the exclusive means whereby states may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board.”\(^{12}\) The NLRA was held to preclude state jurisdiction even where the Board declined to act. Thus, employers and employees in businesses affecting commerce which did not meet the Board’s jurisdictional standards were left totally without protection.

To correct this problem, Congress in 1959 added subsection 14(c), which authorized the Board to continue to decline jurisdiction over cases in industries where the impact on commerce was not sufficiently substantial. Subsection 14(c)(2) provided that the states could assume jurisdiction in such cases. Thus since 1959 the area of permissible state jurisdiction was limited to situations where the Board could not exercise jurisdiction due to the low volume of business. Similarly limited state regulation is permitted by § 14(b) of the Taft-Hartley Act which authorizes states to prohibit union security agreements otherwise authorized by § 8(a)(3) of the NLRA.


12. *Id.* at 9.
regulation has been considerably enlarged.

The enactment of subsection 14(c)(2) is one of the major reasons for the resurgence of interest in state labor laws. The other major reason is the growing concern with collective bargaining in public service employment. Public employees have been excluded from the coverage of the NLRA since its inception, and it has been understood that states could legislate with respect to state and local public employees. But until recently it was generally thought that labor relations statutes were inappropriate for public employees. This assumption is being subjected to increasingly critical analysis today.

Indeed, the applicability of collective bargaining in the public service has become the most discussed issue in labor relations law. There are many reasons for this sudden burst of interest. The number of public employees, particularly at the state and local levels, has grown dramatically and at a pace much faster than that of employees in private industry. This dramatic growth, together with the fact that the labor movement has already organized or tried to organize most significant employee groups in private industry, has made public employees an inviting target for union organization. Salaries for public employees have not kept pace with those in private industry. Job dissatisfaction has risen, and public employees have become more responsive to the arguments of union organizers. As a result, during recent years, while union membership in private industry has declined slightly, union membership among public employees has increased rapidly.

The growth in union organization was accompanied by a change in public and professional attitudes toward the concept of collective bargaining in public service. The assumption that collective bargaining was inappropriate in the public sector was based partly on the peculiar nature of government service. It became more difficult to accept as government service expanded and the nature of the work done by government em-

15. Weisenfeld, supra note 14, at 687-88.
17. Smith & Clark, supra note 13, at 422-23.
ployees became more like that done by employees in private industry. Moreover, concepts about the nature of collective bargaining also changed. At one time collective bargaining was thought of as a process concerned almost entirely with raising wages and shortening hours. Since these matters were set by law in the public service, there was nothing about which public employees and management could bargain. But in recent years we have become increasingly aware of the importance of collective bargaining in providing orderly procedures for resolving industrial disputes and protecting employees from arbitrary exercises of power by their superiors, functions which collective negotiation in the public service can perform. Thus scholars began increasingly to dispute the notion that collective bargaining was inappropriate in the public service at the same time that union organization and employee dissatisfaction were growing. Considerable agitation developed for the recognition by the law of the appropriateness of collective negotiation in public service.

This agitation was first manifested on the federal level, where there existed a long tradition of organization among postal employees. The agitation bore fruit in the promulgation of Executive Order 10988. This order, issued by President John F. Kennedy and reaffirmed by President Lyndon B. Johnson, provided for a system of union recognition and collective negotiation in the federal service. It was inevitable that acceptance of the principle of collective negotiation on the federal level would lead to increased demands for such recognition on the state and local level, and such agitation has in fact occurred.

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20. "A major achievement of collective bargaining, perhaps its most important contribution to the American workplace, is the creation of a system of industrial jurisprudence, a system under which employer and employee rights are set forth in contractual form and disputes over the meaning of the contract are settled through a rational grievance process... The gains from this system are especially noteworthy because of their effect on the recognition and dignity of the individual worker." Independent Study Group, The Public Interest in National Labor Policy 32 (1961). See generally President's Task Force on Employee-Management Relations in the Federal Service (U.S. Gov't Printing Office 1961).
21. Weisenfeld, supra note 14, at 688; Smith & Clark, supra note 13, at 421-36.
24. By virtue of § 6(b) of Executive Order No. 10988 an employee organization "designated or selected by a majority of the employees" is entitled to "exclusive recognition" which gives it the right inter alia to act for and negotiate agreements covering all employees in the unit. These agreements are, however, limited to personnel policies. They do not deal with wages or hours and they are required to include an extremely broad management prerogative clause. See § 7 of the order. The order was further supplemented by "Standards of Conduct for Employees Organizations" and "Code of Fair Labor Practices," 28 Fed. Reg. 5127-32 (1963).
25. See Weisenfeld, supra note 14, at 693.
II. RECENT EFFORTS TO ENACT LABOR LEGISLATION IN INDIANA

In Indiana, as elsewhere, agitation for collective bargaining rights in the public sector, together with the increased jurisdiction of states in the private sector has led organized labor to seek passage of a comprehensive labor relations statute. Indeed the matter has been given top priority by the state AFL-CIO.26 In 1965 a state labor relations bill was introduced in the legislature but was not finally acted upon.27 Instead the legislature appointed a committee that was instructed "to conduct a study concerning a State Labor Relations Act and to prepare recommendations to be submitted to the 95th Session of the Indiana General Assembly in order to give all workers in Indiana the right of due process through collective bargaining and representative elections."28 The committee, chaired by Professor D. W. Murphy of Indiana University, was composed of ten members representing labor, management, and the public.29

After holding numerous meetings and hearings throughout the State, the committee issued majority and minority reports. The majority report concluded that "there is need for legislation in the State of Indiana to provide all workers in Indiana the right of due process through collective bargaining and representative elections."29 It recommended that a bill similar to the original Wagner Act be drafted covering almost all employees in the State, including those employed by the State. The majority report did not deal with questions of language or organization, and it did not describe the legislation which it recommended except in the most general terms. A strong dissenting report was issued by the management representatives on the committee.30 They concluded that the "need for a state labor relations act has not been demonstrably proven by sufficient evidence. . . ."31 The minority report, while unfavorable to any labor

27. Because of the speed with which it was drafted, the bill contained many technical errors. The author and the Labor Law Seminar of the Indiana University Law School (Bloomington) were involved in trying to correct these errors but adequate time was not available. The bill never reached the level of draftsmanship worthy of passage. Its rejection was, in part at least, attributable to this fact.
29. The committee members, in addition to the chairman, were Cliff Arden, Paul Boyle, Representatives Dawson and MacDonald, Frank McAllister, Senators Rybolt and Yeagley, Louis Tiedge, and Max Wright.
31. Members Rybolt, McAllister, MacDonald, and Tiedge.
relations act, was particularly critical of the recommendation that the proposed act be extended to public employees. While the minority report was a highly partisan document, it did at least offer some reasons to support its conclusions. The majority report did not. It announced conclusions without supporting evidence or reasons. Further, the majority avoided dealing with difficult issues about the nature of the bill proposed.

The need for a labor relations act may largely be demonstrated by an analysis of existing state law. As will be shown below there is no effective machinery for implementing the announced public policy of the State favoring free employee choice. Indiana labor law as it currently operates does not effectively promote the peaceful settlement of industrial disputes. As a result the arguments against a state act are unpersuasive so long as the act in question is a fair one recognizing equally the legitimate interests of labor, management, and the public.

III. INDIANA LABOR LAW TODAY

The Rights of Employees in the Private Sector

Union activity has been declared legal in Indiana since 1905. In Karges Furniture Co. v. Amalgamated Woodworkers, Mr. Justice Hadley speaking for the court affirmed the legality of union organization and strike activity. Although the legality of the right to strike has not been challenged since 1905, its free exercise was severely hampered during the early part of the twentieth century by the trial courts' promiscuous granting of anti-strike injunctions. In Indiana, as elsewhere, it was not uncommon for temporary restraining orders to issue against strike action which was legal under state law. The ultimate vindication of the right to strike in such situations did not undo the damage caused by the initial injunction. This and other abuses led to a national campaign to limit the use of injunctions in labor disputes which after years of effort was finally successful. In 1932 Congress passed the Norris-LaGuardia Act, which became the prototype for anti-injunction statutes in many states. In 1933 Indiana passed a statute which is an exact copy of the federal statute.

33. 165 Ind. 421, 75 N.E. 877 (1905).
34. See, e.g., Shaughnessy v. Jordan, 184 Ind. 499, 111 N.E. 622 (1916); National Bhd. of Operative Potters v. City of Kokomo, 211 Ind. 27, 5 N.E.2d 634 (1937). On the uses and abuses of the labor injunction in labor litigation see Frankfurter & Greene, The Labor Injunction (1930).
The purpose of the Norris-LaGuardia Act and its Indiana counterpart was to promote free employee choice by limiting the role of the courts in labor disputes. The Indiana anti-injunction statute:

(1) reaffirmed that the public policy of the State was to permit free choice by employees with respect to union activity, 38
(2) made illegal the enforcement of so-called "yellow dog contracts," whereby an employee agreed not to join a union, 39
(3) forbade the issuance of ex parte injunctions in labor disputes, 40
(4) established rigid substantive and procedural requirements which had to be met before an injunction could be issued in a labor dispute, 41 and
(5) limited the scope of injunctions which could be issued after these requirements were met. 42

The impact of the statute has been somewhat minimized by the Indiana courts' conclusion that strikes for an unlawful purpose may be enjoined. 43 The question of what constitutes an unlawful purpose has continued to raise difficulties. In general the Indiana courts have taken the position that attempts by a union to interfere with the statutory policy of free employee choice are unlawful. Thus attempts to compel an employer

38. IND. ANN. STAT. § 40-502 (Burns 1965 Repl.).
39. IND. ANN. STAT. § 40-503 (Burns 1965 Repl.).
40. IND. ANN. STAT. § 40-508 (Burns 1965 Repl.).
41. IND. ANN. STAT. §§ 40-504 to -510 (Burns 1965 Repl.). Indiana courts have tended on occasion to overlook some of the procedural requirements when injunctions were otherwise appropriate. See, e.g., Murrin v. Cook Bros. Dairy, 127 Ind. App. 23, 138 N.E.2d 907 (1956).
42. IND. ANN. STAT. § 40-504 (Burns 1965 Repl.).
43. Roth v. Local 1460, Retail Clerks Union, 216 Ind. 363, 24 N.E.2d 280 (1939); Fair Share Organization v. Metnick, 134 Ind. App. 675, 188 N.E.2d 840 (1963). In the Roth case the court did not seek to justify its conclusion that strikes of this type are enjoinable under the statute. The court simply concluded without analysis that since the strike was contrary to the policy of free choice outlined in the statute it was enjoinable.

The language of § 504 and § 507 of the Indiana anti-injunction statute indicates that peaceful picketing even for an unlawful purpose cannot be enjoined. Strikes of this type come within the definition of "labor dispute" in § 513, and § 504 forbids the issuance of any injunction prohibiting, e.g., "Giving publicity to the existence of, or the facts involved in, any labor dispute . . . ." or of "Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute . . . ." Section 507 requires that certain findings be made before an injunction may be issued on any labor dispute, e.g., "That the public officer charged with the duty to protect complainant's property are [is] unable or unwilling to furnish adequate protection." These findings are irrelevant if injunctions may be issued against peaceful picketing. Thus the Indiana courts permit injunctions for the type of activity protected by § 504 without regard to the findings required by § 507. So long as individual judges in advance of a final determination may prohibit picketing on the basis of their independent evaluation of its legality, the dangers of the type of abuses which lead to enactment of the statute still exist. See FRANKFURTER & GREENE, op. cit. supra note 34, at 47-81; see also WITNEY, op. cit. supra note 37, at 27.
The significance of this conclusion depends on how the courts characterize the ambiguous situation of stranger picketing for organizational purposes. Such conduct may be described as an effort to coerce the employees through the employer, or it may be described as an effort to persuade the employees to join the union. Since it is legal for employees to join a union, picketing for the purpose of persuading them to join is presumably legal. It is not clear from the decided cases which way the Indiana courts are likely to characterize organizational picketing, because there is authority for either characterization.

When picketing is for a lawful purpose, the statute permits the grant of an injunction to prevent violence or similar illegal conduct. Indiana courts also grant injunctions when picketing involves false or misleading statements, although it is not clear exactly how far the courts will go in policing the accuracy of picket signs.

There is one appellate court decision, *Local No. 135 v. Merchandise Warehouse,* which contains language implying that picketing may be enjoined if it is “unjustified” in the circumstances. Such a doctrine would be invidious because it would permit judges to grant or deny injunctions on the basis of their subjective evaluation of the parties’ behavior. But although the opinion in *Local 135* can be read broadly, the actual holding is much more limited. The defendant union picketed an employer for recognition after first organizing the employees but having failed to ask for recognition. At the time of the picketing new employees were on the job but the union did not try to organize them. The court held that an injunction could issue because the facts showed no “labor dispute” and the anti-injunction act applies only to labor disputes. While the court’s conclusion that no labor dispute existed is questionable, such a finding limits the scope of the holding. For it was only after that conclusion was reached that the court undertook to determine whether the picketing was justified. Since the Indiana courts have generally construed “labor dis-

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46. *IND. ANN. STAT.* §§ 40-504, -507 (Burns 1965 Repl.).
50. Id. at 61, 132 N.E.2d at 717-18.
pute" fairly broadly in accordance with the broad statutory language, the significance of this decision is likely to be limited.

The law dealing with union organization and strikes may be summarized as follows. Union organization is lawful and the State’s public policy favors free choice by employees in deciding whether or not to be represented. Once organized, employees have the right to strike. Strikes to obtain better working conditions may not be enjoined unless violence erupts or false or misleading picket signs are used. Even where violence or deception is involved, certain procedures must be followed before an injunction can be issued. The scope of the injunction permitted in such cases is limited. Where picketing by outsiders is involved, the employer’s right to an injunction is not clear. Under certain circumstances he may obtain one on the theory that no labor dispute exists, or on the theory that the object of the picketing is unlawful. Under other circumstances organizational picketing is permitted. Thus, the main features of Indiana labor relations law in the private sector are freedom to organize and use economic pressure with reliance on the privately-obtained injunction as the primary method of limiting the use of economic pressure in labor disputes. There are no formal or required substitutes for economic pressure, although the Commissioner of Labor is empowered to “promote the voluntary arbitration, mediation, and conciliation of disputes . . . ”

In addition to the anti-injunction statute and the common law, which provide the main body of Indiana labor relations law, the statute books contain special regulatory statutes—a fairly random collection of primarily criminal statutes which do not conform to a coherent plan of regulation.

The most comprehensive of the criminal statutes is the one enacted in 1893, which provides:

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 members of a labor

52. IND. ANN. STAT. § 40-2137 (Burns 1965 Repl.).
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 $100, or imprisoned for not more than six months, or both, in the discretion of the court.\

Despite the breadth of its language, the statute is largely unknown and, as far as can be determined, unenforced.\(^4\)

Another statute that appears to be an effort to regulate labor relations is entitled "Local Unions," and it provides:

No worker or group of workers who have a legal residence in the State of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association to exist within and pursuant to the laws of the state of Indiana: Provided, that this act shall in no way be deemed to amend or repeal any of the provisions of the National Labor Relations Act.\(^5\)

At first reading this appears to be a significant statute. The right of employees to select a bargaining representative seems to imply that management is required to recognize and bargain with a properly chosen union. But careful reading of the statute indicates that it was not meant to impose a duty on employers to bargain collectively. The title and language of the statute suggest that its primary purpose was to permit the formation of local unions and that the legislature intended to prevent undue control by national unions over local members. This interpretation is supported by such unofficial legislative history as can be found,\(^6\) and by the absence of a remedy for violation or provision for determining questions of majority choice. Even the unnecessary reference to the NLRA suggests an attempt to regulate union internal organization rather than collective bargaining.

Other criminal statutes cover the following topics.

(1) **Blacklisting.** It is a misdemeanor, after discharging an employee, to hinder his obtaining other employment by other than a truthful

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54. The prosecutors' offices in Indianapolis, South Bend, Fort Wayne, Hammond, and Terre Haute were contacted on October 15, 1966. None of the officials spoken to could recall a single instance in which the criminal statutes referred to in this article were used.
55. *Ind. Ann. Stat.* § 40-2802 (Burns 1965 Repl.).
56. I am informed by Professor Witney of the Indiana University Economics Department, author of *Indiana Labor Relations Law*, *op. cit. supra* note 37, that the statute grew out of an attempt by a national union to force Indiana employees to join a Louisville local union.
statement of the reason for discharge to a person to whom the employee has applied for employment. An offender may also be liable for compensatory and exemplary damages in a civil suit by the employee.

(2) Service Letters. It is a misdemeanor for an employer who requires either letters of recommendation or written application to refuse, on request, to furnish an employee with a letter stating the nature of his service and the reason for his discharge or voluntary severance of employment.

(3) Notice of Strike. It is unlawful for an employment agency to refer an applicant for a position at a place where a strike or lockout exists without first notifying the applicant of such situation.

(4) Strikebreaking. By virtue of an Indiana statute which sets residence requirements for special police, prohibits authorization of imports, and prohibits holding oneself out as a special policeman without proper authorization, it is a misdemeanor to import professional strikebreakers.

(5) General Discrimination. It is unlawful for employers in mercantile establishments, mines or quarries, laundries, renovating works, bakeries, or printing offices, to discriminate against any person seeking work. The precise meaning of this statute is unclear. It appears however to be a general provision covering discrimination in regard to hiring, which would include discrimination because of union affiliation.

Not only do these statutes suggest an overall lack of planning, but the lack of an effective remedy renders them largely nugatory. Investigation has failed to discover evidence of enforcement of any of the criminal statutes referred to.

The only clear effort at comprehensive labor regulation by the State of Indiana was the Public Utility Labor Dispute Act of 1947. This act established elaborate procedures in lieu of strikes and lockouts for settling disputes between public utility employees and their employers. But public utilities are also subject to the provisions of the NLRA, hence

57. IND. ANN. STAT. § 40-301 (Burns 1965 Repl.).
58. IND. ANN. STAT. § 40-302 (Burns 1965 Repl.).
59. IND. ANN. STAT. § 40-122 (Burns 1965 Repl.).
60. IND. ANN. STAT. § 40-712 (Burns 1965 Repl.).
61. IND. ANN. STAT. § 10-4905 (Burns 1956 Repl.).
62. IND. ANN. STAT. §§ 40-1014, -2308 (Burns 1965 Repl.).
63. Criminal statutes are a poor way to regulate labor relations. They do not remedy the harm caused and their utilization is generally thought to be too harsh for the offenses committed. Professor Bok of Harvard has commented "there has been a marked reluctance even to utilize criminal proceedings. . . ." Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38, 126 (1964).
64. See note 54 supra.
65. IND. ANN. STAT. § 40-2401 (Burns 1965 Repl.).
state action in this area is of highly doubtful validity under the rules of federal pre-emption. The Supreme Court held a similar Wisconsin statute invalid as attempted state interference with federally-created rights. 66 Subsequently the Indiana statute was declared invalid by the Circuit Court of Vanderburgh County. 67 The State did not appeal this decision and has not since attempted to enforce the law, although it has allowed it to remain on the books. 68 Since that decision however, state power over public utilities has been increased. By virtue of NLRA subsection 14(c)(2) Indiana law can be applied to those utilities which do not meet the National Labor Relations Board's jurisdictional standards. 69 If there is a new attempt to enforce the law, the Indiana courts may hold the statute a valid regulation of utilities now subject to state regulation. It is also possible that the courts will hold the entire statute invalid, because the legislative purpose to deal with public utilities generally cannot be effectuated. Thus, the statute is invalid as applied to most public utilities and is of doubtful validity in the limited area of permissible state jurisdiction.

The Rights of Public Employees

In Indiana, as elsewhere, significant numbers of public employees have sought to claim collective bargaining rights similar to those enjoyed by employees in the private sector. Such claims have been made to the courts, to the legislature, and to executive officials. Public employees have simultaneously sought to establish by judicial or other official pronouncement the authority of public officials to enter into collective negotiations with them and to secure legislation requiring collective bargaining where a majority of employees request it.

The rights of public employee organizations under existing state laws are unclear. The Indiana labor relations statutes referred to above do not specifically include or exclude public employees, and no judicial authority has been found dealing with the question. It is likely, however, that if the question should arise at the present time, the courts would hold the statutes do not apply to public officials or public employees. As noted, the Indiana anti-injunction law is a literal adaptation of the Norris-

68. "The Board asserts jurisdiction over all public utilities which do a gross volume of business of at least $250,000 per annum or which have an outflow or inflow of goods, materials, or services, whether directly or indirectly across State lines, of $50,000 or more per annum." DIVISION OF INFORMATION, op. cit. supra note 10, at 6.
LaGuardia Act, substituting only "state of Indiana" where "United States" appears in the federal statute. The Supreme Court has held that the Norris-LaGuardia Act did not apply to strikes against the United States. 70 In so doing, the Court referred to the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." 71 State courts have reached similar results under state law. 72

It would be proper for Indiana courts to follow this precedent. The language of the anti-injunction statute seems to require that the statute be applied to all public employees or none. There is no basis for distinguishing strikes by public employees performing essential services from those by public employees performing nonessential services. Moreover, the state anti-injunction law was passed at a time when the concept of collective bargaining in the public service was unrecognized. Application of the statute makes sense only as part of the policy of permitting use of economic pressure as a part of collective bargaining. Since collective bargaining was deemed inappropriate it is fair to conclude that the statute was not meant to apply. That this was the understanding of the framers is underscored by the references in section 2 to "owners of property" and "ownership association." 73 The other statutes referred to would probably be held inapplicable to public employees on similar grounds. In any case their impact on the rights of public employees would not be great.

The significant question therefore is what right to organize and bargain collectively public employees have under the common law. This question has not been dealt with by the courts, but it has been the subject of two fairly lengthy Attorney General opinions. 74 The first opinion was issued in 1944. The Attorney General concluded that it was beyond the power of public officials to enter into collective bargaining contracts. The opinion rested on the conclusion that a collective bargaining agreement has the legal status of a contract or a continuing offer by the employer. The Attorney General assumed without discussion that under

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71. Id. at 272.
73. IND. ANN. STAT. § 40-502 (Burns 1965 Repl.). This language was referred to by the Supreme Court in United States v. UMW, 330 U.S. 258, 273 n.24 (1946).
74. 1944 Ops. ATT’Y GEN. IND. 224, No. 55; 1966 Ops. ATT’Y GEN. IND. No. 22. Both opinions seemed to assume that general labor legislation is applicable to public employees. Neither opinion really discussed the issue. For the reason indicated above, it is unlikely that the courts would accept these conclusions.
Indiana law public officials do not have the right to enter into such contracts or to make such offers. He did not explain how such contracts differ from the myriad of contracts, including employment contracts, which public officials enter into in the course of their official duty. The only ground on which the Attorney General sought to support this conclusion was that salaries or wages in public employment are often fixed by statute and hence would not be a proper subject for contract. Indeed, the assumption which seems to underlie the Attorney General's opinion is that the negotiation of wages is so central to collective bargaining that it would be foolish to think of the one without the other. As indicated earlier, this is an outdated view of the function of collective negotiations. The establishment of satisfactory personnel policies and grievance procedures has been recognized as a central function of collective bargaining.

The 1944 opinion did recognize the right of public employees to join unions and the authority of public officials to meet with them to discuss problems. The Attorney General did not consider the implications of this conclusion. For example, did the right to meet and discuss mutual problems carry with it the authority to enter into informal agreements and memoranda of understanding? This question was raised by the adoption of Executive Order 10988 for the federal service. The system of collective negotiation established in the federal service contemplates agreements which would probably not be enforceable in court against the agency. Public employee unions in Indiana have argued that a system similar to that of 10988 could be adopted consistently with the Attorney General's opinion. While some public officials took the position that the Attorney General's opinion precluded any formal dealings with labor organizations, many conscientious public officials were uncertain as to what relations with unions would be proper. It was inevitable that further clarification would be sought.

In July of 1966 the Trustees of Indiana University, faced with union organization and demands for recognition, sought to work out a system of collective negotiation modeled after Executive Order 10988. They issued a ruling entitled "Conditions for Cooperation between Employee Organization and the Administration of Indiana University." The "Conditions" permitted a union which could establish majority support to negotiate in a limited area with university officials in order to arrive at "joint written recommendations to the trustees." No formal agree-

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75. After negotiations, agreements must still be approved by the agency head and are always subject to changes in agency procedure. Exec. Order No. 10988, § 7, supra note 23. Any arbitration is made subject to the approval of the agency head. See § 7 of the order.

76. See 1966 Ops. ATT'Y GEN. IND. app. A.
ment was contemplated. It was the opinion of those involved that the system did not conflict with the 1944 Attorney General opinion. Nevertheless, the legality of the system was not absolutely clear and a new Attorney General opinion was sought by State Senator Chavis. On October 6, 1966 an opinion was issued by Attorney General John Dillon. It affirmed the right of the Trustees of Indiana University and of other public officials who are expressly or impliedly authorized to hire employees to set up procedures similar to the conditions for cooperation adopted by the Trustees of Indiana University. The Attorney General found that the procedures established were permissible under the 1944 opinion. He declined to specifically overrule the 1944 opinion, and he reached no conclusion on the question of whether a formal written agreement binding both sides could be negotiated between a public employer and the representative of its employees. Much of his discussion, however, suggested that were the issue presented to him, the Attorney General would conclude that such an agreement is permissible. The new opinion was critical of the analysis of the 1944 opinion, and several times pointed out that the earlier opinion proceeded from an outdated view of collective bargaining. “The current attitude is not that collective bargaining has an uncertain status unless it is specifically authorized, but that the right to bargain collectively is an attribute of every citizen to whom it is not denied by statute.”

The conclusion reached by the Attorney General on the question presented to him was sound. As the opinion stated, one would assume “that there could be no serious question concerning the right of public officials to agree to listen to their employees. . . .” And the implication that more formal collective agreements would be valid also seems sound. However, although the opinion represents a step forward, many unanswered questions remain. For one thing, the opinion did not clarify the problem of whether existing statutes apply to public employees. Although the opinion does not really analyze the question, it strongly implies at one point that the anti-injunction statute does apply in the public sector. However, later the opinion pointed out that “there are some differences between the rights of public and private employees” particularly with respect to the right to strike which has generally been denied public

77. The author was one of those who so advised the University.
79. Id. at 14 (all page references to 1966 Ops. Att'y Gen. Ind. No. 22 are to the original, unpublished opinion).
80. Id. at 13.
81. Id. at 5.
employees. The conclusion that public employees do not have the right to strike suggests that they are not covered by the anti-injunction statute because illegal strikes are not protected by the statute. On the other hand, the view that public employees do not have the right to strike was not clearly adopted. The opinion referred to the fundamental rights which public employees share with all citizens of the United States and the State of Indiana. It cited for this point the *Karges Furniture* case, which first affirmed existence of a right to strike in Indiana. The opinion suggested that the "Local Union" statute applies to public employees and gives them the right to select a bargaining representative. The language suggested a duty on the part of public officials to bargain with a union chosen by a majority of their employees. The suggestion is questionable, both in holding that the statute applies to public employees and, as noted above, in indicating that it creates a substantive right to bargain collectively. Thus the Attorney General's opinion suggested conflicting answers to three basic questions:

1. Is there a duty on the part of public officials to meet with unions selected by a majority of their employees?
2. Do public employees have a right to strike?
3. Does the anti-injunction statute apply to public employees?

It would be surprising, in view of the growing militancy of public employee unions, if they did not take an expansive view of the Attorney General's opinion and assume favorable answers to these questions. Unless clarifying legislation is adopted, these issues will be presented to the Indiana courts.

**Conclusions: The Need for a Bill**

*Private Law Area.* Analysis of the Indiana law of labor relations in the private sector indicates the need for a labor relations statute. Although the State has a strongly-announced policy of favoring free employee choice, it does not have the mechanism by which such a policy can be implemented. There are no procedures, other than informal ones, for establishing majority choice or for determining the proper bargaining unit and voter eligibility. Nor is there a procedure for remedying interference by employers or unions with that free choice. There are no remedies for discriminatory discharge, for refusal by an employer to meet with a union, or for refusal by a union to bargain with an employer in good faith. There are no guidelines for the right of striking employees to reinstatement or for the right of an employer to protect himself by

82. *Id.* at 12.
83. *Id.* at 8.
hiring replacements. There is not adequate protection against strikes by a union which has been rejected by the employees, and no protection for an established bargaining relationship against an outside union. Indeed, other than the limited possibility of an injunction, there is little limitation on union behavior. There is no substitute provided in place of economic force in the settlement of disputes, except in the Public Utilities Labor Dispute Act, which is of highly doubtful validity.\textsuperscript{84}

The absence of any other limitations on union behavior probably accounts for the courts' conclusion that strikes for unlawful purposes may be enjoined. As noted above, this conclusion conflicts with the language and scheme of the anti-injunction statute and with its primary purpose. It is unfortunate that the privately obtained injunction is the primary means of limiting strikes and picketing. Under this system an individual judge has the power to thwart a strike by declaring its purpose improper. As the complaining party, an employer may seek relief from any judge in the jurisdiction. If a judge can be found who will take a restrictive view of its legality, legitimate union activity may be enjoined. The possibility of getting the injunction set aside will generally not be an adequate remedy. Such appeals take time and with respect to the right to strike timing is often crucial. Thus the ability of employees to engage in strikes and other union activity varies from jurisdiction to jurisdiction. In some jurisdictions it may be too broad; in others too limited. With the enactment of a state labor act other techniques would be available for limiting the use of economic pressure. Questions of injunctive relief would generally be considered first by the State Board, thus insuring some degree of uniformity with respect to the availability of injunctions.

Several criminal statutes purport to regulate labor relations, but these statutes are almost never applied. This is probably fortunate since the imposition of criminal sanctions is hardly a way to improve industrial relations. In sum, the law of Indiana, as a practical matter, encourages the use of economic pressure because it does not provide the necessary procedure for the peaceful settlement of disputes. Limitation on the use of economic pressure has resulted from grants of injunctive relief contrary to the language of the Indiana statute. Reliance on this form of relief is unfortunate for the reasons indicated above. In addition the Indiana law concerning the appropriateness of such relief is quite confusing\textsuperscript{85} thus making it difficult for parties to adjust their activity to conform to the law.

\textsuperscript{84} See notes 67-68 \textit{supra} and accompanying text.
\textsuperscript{85} See 1966 \textsc{Ops. Att'y Gen. Ind.} No. 22, at 7-11.
The Public Employee. The need for legislation is particularly apparent with respect to public employees. Not only is there no machinery for determining and protecting the wishes of employees, but the nature of the governing law is totally confused. There is no explicit statement of basic rights, and the extent to which public employees are covered by existing statutes is completely unclear. The extent to which the law grants to public employees the rights to organize, to bargain collectively, and to strike is not clearly spelled out by the statutes, and the questions have not been settled by adjudication. It is unfortunate that the most significant statements on the rights of public employees in the State of Indiana are contained in the Attorney General's opinions of 1944 and 1966, since such opinions are not a binding determination of state law, and they may be ignored by the courts, and indeed, by other public officials. Attempts to enjoin or prohibit union activity or collective bargaining by public employees are likely to occur. A series of inconsistent court opinions is not unlikely, and many years might elapse before the legal status of union organization in the public service is established. Thus, the same reasons which suggest the need for a labor relations act in the private sector apply with even greater force in the public sector. As Attorney General Dillon stated:

The General Assembly can, by statute, further delineate the powers and duties of state and local public employers to engage in collective bargaining in the classical sense with their employees. In my opinion, in view of the prevailing confusion in this field, and the changes which are sweeping aside out-moded concepts in other states, such action may well be indicated in Indiana.

IV. Arguments Against Passage of a Bill

The basic arguments in favor of a state labor relations act have been stated above. Many of the major arguments against the enactment of a bill are contained in the minority report of the Legislative Advisory Committee.

The Private Sector

The main contention of the dissenters is that: "There is no convincing evidence of need for such an act. Unions can now organize small


87. 1966 Ops. ATT'Y GEN. IND. No. 22, at 14.
employers, and do. The Indiana Division of Labor conducts consent elections at the present time and under existing state statutes.\(^8\)

The statement that "there is no convincing evidence of need" is merely a restatement of the dissenters' conclusion. Depending upon one's values, the need may be established by a close analysis of existing law. For those who value a clear and consistent law of labor relations, the need for change is found in the haphazard and confused state of Indiana labor law. For those who value the protection of employees and the establishment of peaceful procedures, the need for a state act is demonstrated by their absence. For those who think public employees should have the right to engage in collective negotiation if they choose, the need for an act is demonstrated by the fact that this right is not now established under state law and that the rules governing public employees are quite tenuous.

While it is true that small employers may now be organized, as indicated above, the ground rules under which such organization may take place are not spelled out. There is no way of insuring that the desires of the employees will be protected against coercion by employers or by unions. True, consent elections are conducted by the Division of Labor, but there is no mechanism by which an unwilling employer or union may be forced to an election. Moreover, there is no way of insuring the validity of the election, and if an election is held it does not necessarily resolve the issue of employee representation.

Additionally, the dissenters argue that: "Enactment of a law of this type could be construed as an anti-small business action. . . . Ordinarily the relationship between the employer and the employee is close and friendly. It is believed the small employer is better off without a state act in the labor relations field."\(^8\)

It is not clear whether the dissenters are talking about the impression that will be created by passing such a bill, whether they are saying that the bill suggested in the majority report is unfair, or whether their argument is that any bill would be unfair to small business.

It is true that the bill outlined by the majority is unnecessarily favorable to unions, and to this extent the point is well taken. A fair labor relations law, however, is not likely to be viewed as anti-small business.\(^9\) To the extent the minority contends that even a fair bill should not be passed because of the possible reaction of small businessmen, this position is much less persuasive. The dissenters suggest that a labor rela-

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\(^8\) Minority Report, supra note 32, at 3.

\(^9\) Ibid.

\(^9\) See notes 91-93 infra and accompanying text.
tions act will intrude on the "close and friendly" relations which now exist between small businessmen and their employees. But this is most unlikely. Where relations are close and friendly, organization pressure is unlikely to arise spontaneously and union organizers are not likely to mount an organizing campaign. In general, unions are unwilling to spend the time and money necessary for an organizing campaign unless there is some hope of victory, and it is a commonplace of union organization that an organizing drive will only succeed when there exists considerable discontent over wages and working conditions. This is particularly true of small businesses precisely because employer-employee relations are likely to be closer. From the union's viewpoint, the possible gain in terms of increased organization is by definition small. Attempts to organize small business are generally restricted to situations where the existence of employee dissatisfaction is brought to the organizer's attention. Moreover, the law now permits organizational efforts and strikes. All that a labor relations act would add is protection for the employees and an orderly procedure for determining the wishes of the majority. In a fairly drawn act the wishes of the employees once expressed would be binding for at least a year so that an employer would not be subject to consistent harassment. Thus, it is not completely self-evident that the "small employer is better off without a state act in the labor relations field." But even if it is accepted that employers are better off under the present arrangement, it is hard to see that their legitimate interests are sufficiently imperilled to warrant rejection of procedures which will protect the choice of their employees with respect to union organization. The announced policy of the State is in favor of such free choice. Unless one can demonstrate that employees in small businesses are not entitled to the same degree of self-determination that other employees are, a legitimate state act protecting such choice is warranted.

A somewhat similar argument is that: "Enactment of a state labor relations act can be a strong factor in gaining for Indiana the dubious reputation of being 'union dominated.' It would adversely affect the state's business climate and the state's efforts to attract new business and industry and it would discourage expansions of existing business and industry."91

A state labor law which adequately recognizes the legitimate interests of employers and which protects employees against coercion by unions is unlikely to give Indiana such a reputation. Our neighbor state, Wisconsin, which has one of the oldest and most comprehensive labor relations statutes has never acquired such a reputation. Indeed, in Wisconsin,

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management and labor as well as both political parties have expressed their satisfaction with the operation of their labor relations act, which is similar to the one herein suggested. In any case a state labor act is unlikely to affect the decisions of large firms to locate in Indiana because such businesses are covered by the federal act and would not be affected by state law. The experience of other states does not indicate that an exodus of small business is likely to follow enactment of a state labor relations statute. Even if it could be demonstrated that business could be attracted or kept more easily in the absence of a state labor act, this gain would have to be balanced against the state's interest in protecting the wishes of its employees and in promoting industrial peace.

The dissenters also attacked the need for a bill on economic grounds: "Enactment of a state labor relations act would create another agency or bureau. Conservative estimates place the annual cost to taxpayers for such an agency and its large staff between $250,000 and $400,000." It is difficult to determine the basis for these estimates but even assuming their validity they do not disprove the need for an act. The cost would be high only if there is much need for the agency's services. If there is a considerable need it means that the agency will have a significant impact in protecting the rights of employees, unions, and employers. Moreover, as noted above, in many situations the act should serve to substitute orderly procedures for economic warfare. The cost to the public of not having an act (in needless strikes, lost production, and wages) is probably greater than the cost of the act, even accepting the dissenters' figures.

The Public Employee

With respect to public employees the dissenters raise the spectre of strikes in essential services. They begin with a rhetorical question: "Should such employees of Government have the authority to strike and curtail vital and essential services relating to public health, safety and sanitation and orderly conduct of the affairs of taxpayers generally?"

92. Information on the operation of the Wisconsin act was obtained through telephone conversations with Board member Anderson and Mr. Sundal of the Wisconsin State Board of Resources and Development.
93. Mr. Sundal stated that to his knowledge Wisconsin has not faced such a problem and that if it had he would certainly have been aware of it.
94. Minority Report, supra note 32, at 3.
95. The Wisconsin Board which has jurisdiction over both public and private employees in addition to arbitration and mediation services has operated at an annual cost of approximately $250,000. Letter from Michael Harder, Wisconsin Department of Administration, Oct. 26, 1966, on file at the Indiana Law Journal office. In Indiana the cost figures should be less than those of Wisconsin since mediation, arbitration, and conciliation services are already provided by the State Labor Commission. See note 52 supra.
Should employees of government (state, county and city) be granted the authority to bargain collectively and sign binding agreements with a unit of government? It is important to recognize that two separate questions are presented. The first is whether machinery should be established to grant and protect the right of public employees to organize and bargain collectively. The second is whether they should be permitted to strike. In order to answer the first question affirmatively, it is not necessary to grant the right to strike. Indeed, establishing legitimate and workable procedures for collective negotiations may be the only way to prevent strikes. The minority report argues that “public employee unionization in Indiana has resulted in strikes” but to the extent that this is true, it argues in favor, not against, including public employees in a comprehensive bill. The statement recognizes that unionization has taken place in the absence of authorizing legislation. Unionization will not cease or diminish if a bill is not passed. The increased number of public employees, their unhappiness with their wages and working conditions, and the new high priority which their organization has acquired in the labor movement, all insure that organization will increase. If orderly procedures are not established for obtaining recognition and bargaining collectively, inevitably the unions will resort to strikes. This result is almost self-evident, and experience has shown it to be true even where the law has expressly denied public employees the right to strike. And as has been shown above, in Indiana the law is not nearly so explicit.

The minority report also argues that “a union contract can bind a new administration to another’s personnel policies and practices.” It is not shown, however, that such a result is undesirable and the conclusion is far from self-evident. On the contrary, public employees should feel secure in the fact that their working conditions will not change radically with each change in administration. This is the theory behind civil service legislation. In fact changes of administration in Indiana have not resulted in wholesale changes in personnel policy. Moreover, to the extent that flexibility is required, it can be achieved by one of two simple expedients. The law can specify that collective agreements in public

97. Ibid.
98. As stated in A.B.A., supra note 19, at 89, “Legislation attempting to authorize strikes of public employees has proved ill-advised and unworkable. Solution of the problem rests on sound administrative policies and procedures.”
100. See IND. ANN. STAT. § 60-1501 to -1506 (Burns 1965 Repl.), which makes it difficult to change personnel policies. Mr. R. Hoff, Personnel Superintendent of Indiana, indicated in a telephone conversation that such policies rarely change with each new administration.
service cannot extend beyond the life of the administration in which they are negotiated. This can also be accomplished by synchronizing the term of agreements with terms of political offices.

Finally the minority report argues that wages and presumably other issues are inappropriate for collective bargaining in the public service. "Labor unions in the private sector of the economy can bargain over 'labor's share' of the profits. In government there are no profits. Union participation in this procedure [establishing budgets] could lead to union interference or domination of areas of government delegated to elected public officials."101 This is not an argument against inclusion of public employees in a bill, it is an argument in favor of limiting the areas for collective negotiation. Executive Order 10988 limits the scope of collective negotiation and requires that a clause be inserted in all collective agreements recognizing certain basic management prerogatives. A similar limitation and a similar clause could be required by the state labor relations act.

It is now recognized that the significance of collective bargaining extends beyond wages and hours. Some of the main benefits which employees desire are the fixing of fair procedures and the right to protest arbitrary policies and actions. These benefits, which typically culminate in a grievance procedure, should be available to public employees. The announced public policy of the State of Indiana favors free choice by employees of their bargaining representative, and there is no reason why that policy should not be extended to embrace public employees. As stated in the 1955 report of the Labor Law Committee of the American Bar Association, "a government which imposes upon other employers certain obligations in dealing with their employees may not in good faith refuse to deal with its own public servants on a reasonably similar, favorable basis, modified, of course, to meet the exigencies of the public service."102

V. THE NATURE OF A DESIRABLE LABOR ACT

The main features of a desirable act have already been indicated. In the private section it should generally parallel existing federal legislation. This means establishing an agency with power to conduct and supervise elections and to rule in the first instance on unfair labor practice charges. Employees should be granted the right to participate or refrain from participation in union activities and to be represented or not as they

choose. Actions by employers and by unions which interfere with these rights should be prohibited as unfair labor practices. In general the language of the federal act should be adopted with respect to unfair labor practices and election procedure. The Indiana Board in construing state law should have the benefit of whatever guidance can be derived from discussion of the same language by the NLRB and courts in construing the federal act. With respect to public employees the same general rights of organization should be extended, but the right to engage in collective bargaining should be limited to those matters within the statutory discretion of public officials. However, acceptance of the basic structure outlined above still leaves open a number of significant questions concerning the nature of a desirable act. Some of these questions are discussed below.

Unfair Labor Practices

The sections defining employer unfair labor practices provided in the federal statute have given adequate protection to employees against abuses and interference with their rights. These provisions should be included in the Indiana statute. Their adoption will provide the State Board with language whose basic meaning has already been established and whose outer limits have often been dealt with by courts and scholars.

The same is generally true of the provisions defining union unfair labor practices, except subsection 8(e) and subsection 8(b)(7), the two provisions added by the Landrum-Griffin Act. A fixed meaning has not been established for either subsection and they are both so poorly drafted that an effort should be made to improve them. Subsection 8(e) was intended to outlaw hot cargo clauses, whereby one employer agrees not to deal with another because the latter does not deal with a union. It is questionable whether such clauses should be outlawed at all, but subsection 8(e) goes well beyond this simple purpose and prohibits any arrangement whereby one employer agrees to cease doing business with another, even if the purpose of the clause is to create work for the first employer's employees. If it is thought desirable to outlaw hot cargo clauses, much more limited language should be used.

Subsection 8(b)(7) limits the right of unions to picket for recognition and organizational purposes under certain circumstances. It seems proper to prohibit such picketing after an election expressing employee choice and therefore subsections 8(b)(7)(A) and (B) should be enacted, possibly with some tightening of the language. Subsection

103. National Labor Relations Act §§ 8(b)(7), (e).
104. See, e.g., Hickey, Subcontracting Clauses Under Section 8(e) of the NLRA, 40 Notre Dame Law. 377 (1965).
8(b)(7)(C) is far more controversial because it bans the use of organizational picketing even before an election. In many situations it prevents unions from using the allegiance of their supporters as a basis for organizing undecided employees. If it is decided that the need for such picketing is obviated by the new rights granted under the act, a clause should be drafted avoiding the verbal quagmires faced by anyone seeking to make sense of subsection 8(b)(7)(C).

Subsection 8(b)(4) of the federal act, primarily aimed at preventing secondary boycotts, is another section which is exceptionally difficult to understand. Its meaning baffles experts in the field. An attempt should be made at redrafting this subsection, although its importance in a state act is minimal because almost all secondary disputes come within the NLRB's jurisdiction.

In order to resolve a perplexing question under the NLRA it should be made an unfair labor practice for a union to violate its duty to represent all employees in the unit fairly. Furthermore, it should be made clear that a recognized union violates its duty of fair representation if it denies membership on invidious grounds such as race, color, or creed.

Striking or urging a strike should be an unfair labor practice for a union representing public employees, unless the right to strike has been specifically granted under the procedures outlined below.

The Right of Public Employees to Strike

Until recently there has been little discussion of this issue. Officials who commented on the issue seemed to assume that the reasons against permitting strikes in the public service were too apparent to need stat-

105. It would require a separate article to indicate the nature of the problems involved in interpreting § 8(b)(7)(c). They are well indicated in Meltzer, Organizational Picketing and the NLRB: Five on a Seesaw, 30 U. CHI L. REV. 78 (1962). One possible solution is contained in a model act prepared by the Harvard Student Legislature, 3 HARV. J. LEG. 415, 422 (1966). Under this approach organizational and recognitional picketing is outlawed where such picketing has been conducted without a petition under § 8 (for an election) being filed within a reasonable time not to exceed thirty days.

106. Jurisdiction will be asserted in secondary boycott cases if the direct outflow of the primary employer plus the indirect outflow of the secondary employer exceeds $100,000. Teamsters Union, 121 N.L.R.B. 221, 222 (1958). Jurisdiction will also be asserted in secondary boycott cases if the dollar volume of the primary employer's business plus the entire business of the secondary employer at the location affected by the boycott meets jurisdictional standards. Madison Bldg. & Constr. Trades Council, 134 N.L.R.B. 517, 518 (1961).

107. A question which should be carefully studied is the makeup of the board. In the first years, when basic rules are being established, a competent board is particularly desirable. It may be, however, that the state cannot afford the salaries necessary to attract able people on a full time basis. The answer might be in a part-time board paid on a per diem basis. The initial workload is unlikely to be so heavy as to preclude this approach, which would have the advantage of keeping down the cost of enforcing the act.
The feeling that it is undesirable to permit such strikes is probably still held by the majority of voters and public officials. But recently the assumption has increasingly been attacked by scholars, labor leaders, and lawyers. As government operations expand to include non-essential services, the reasons for a blanket denial of the right to strike lose their force, and appeals based on theoretical concepts such as sovereignty become less convincing. A survey of recent literature on the subject indicates that the majority of the writers favor granting some public employees the right to strike.

Opponents of granting public employees the right to strike often base their argument on the need to maintain essential services such as police and fire protection and sanitation services. The assumption that permitting strikes in such services will involve a greater cost to society than should be tolerated in the interest of free collective bargaining is an easy one to accept and will not be challenged here. But there are government services and agencies whose relation to the public health, safety, and general welfare is much less obvious. In terms of possible impact on the public it is impossible to defend a rule which prohibits employees in a state parking lot from striking, although the right is granted to teamsters responsible for deliveries of milk, food, and drugs.

Theoretical arguments against strikes in the public service are premised primarily on notions of sovereignty. Strikes against government are deemed inconsistent with its sovereignty. Such arguments are difficult to meet because they are difficult to understand. The concept of rights against the government is basic to our society. Its roots go back to Bracton and beyond. The courts regularly enforce rights limiting government in dealing with its citizens. In general they insist that government abide by its contracts, pay for its debts, and make restitution for the wrongs committed by its servants. Since the existence of these rights does not deprive the state of sovereignty, it is difficult to see why the existence of a limited right to strike would.

Nor is there anything about the state as an employer which requires

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108. See, e.g., statements by Presidents Roosevelt and Coolidge and by Virginia Governor Trich cited in Weisenfeld, supra note 14, at 685-87.
109. INDEPENDENT STUDY GROUP, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 76 (1961). This work was the report of an independent study group composed of the leading labor relations scholars in the country including Clark Kerr, President of the University of California, Philip Taft of Brown University, David Cole, Albert Rees of the University of Chicago, and John Dunlop of Harvard. See also A.B.A., supra note 100, at 89; Note, 40 NOTRE DAME LAW. 606, 647-48 (1965).
110. This argument is still heard today. See, e.g., Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951). But it is being increasingly challenged even in the courts. See Board of Educ. v. Public School Employees Union, 233 Minn. 144, 45 N.W.2d 797 (1951).
limiting the right to strike even when the cost of the strike in terms of possible hardship to the public is not very great. It has been urged that it is inconsistent with the dignity of the state for it to be forced to yield to economic pressure.\textsuperscript{111} Such an argument is obviously related to the notion of sovereignty discussed above, and in large part the answer to one answers the other. It should also be pointed out that large corporations often yield to strike pressure with no discernible loss of dignity and state governments regularly respond to all kinds of direct and indirect pressure.

Possibly it is feared that public officials are more likely to yield to a strike than private businessmen, either because their own money is not involved or because they fear that a tough or intransigent position will be politically damaging. So long as bargaining cannot concern wages, strikes for higher wages would not be protected and the absence of personal financial concern would be unimportant. Legal strikes could only be undertaken to support legitimate demands. In the public service demands would largely be concerned with employment procedures and practices. Thus, disputes would concern matters with which agency officials are deeply concerned. Nor is it likely to be politically dangerous to resist a strike. Public opinion in most strikes ranges between indifference and hostility.

The most troublesome effect of permitting strikes by public employees providing nonessential government services is the difficulty in identifying the employees who should be granted the right. It would be dangerous for the legislature alone to undertake this task. An attempt to enumerate agencies performing nonessential services would be time consuming and would lead to controversy which could defeat the entire act. Moreover, the possibility of changes in the name or function of existing agencies and the creation of new agencies would mean that any such enumeration could only be valid for a short period. An attempt by the legislature to cope with this problem by distinguishing in general language between fundamental and nonessential governmental operations would leave considerable doubt as to its meaning; doubt which could only be resolved by strikes or by involved lawsuits, with a substantial risk that either because of a faulty description or an overly-liberal interpretation strikes in the public service would be permitted to a greater extent than is desirable. The question should be dealt with by the board in the first instance. The board should be given authority to determine after a hearing that employees in certain governmental bargaining units would not substantially endanger public health, safety, or welfare by striking. This determination should be subject to judicial review and should not be

\textsuperscript{111} Norwalk Teachers Ass'n v. Board of Educ., \textit{supra} note 110.
binding until after the next meeting of the legislature. Thus, the legislature would have a chance to reverse the board's decision at its next session by amending the act. In cases where the board makes such a determination and it is not overruled, the employees in the unit will have the same right to engage in concerted activity, including strikes, that is granted to employees in the private sector. In all other cases involving public employees the right to strike should be prohibited.112

Inclusion of Teachers

One of the most troublesome questions to be faced is whether to exclude public school teachers from the coverage of the act. It has been argued that collective bargaining and union organization are inconsistent with the professional image of teachers, and therefore they should not be included. But the act would provide for collective bargaining only if teachers themselves so elected. If teachers should feel that collective bargaining is consistent with their professional standing, why should the law say no? There is no indication that organization has hindered the professional development of other groups such as sea pilots. And the brief experience in other states suggests that the professional standing of teachers may be enhanced rather than reduced through collective negotiation.113

This is not to say that the special status of teachers should go unrecognized. Certainly teachers should not be joined together with non-professionals for unit purposes unless they choose to be so joined. Moreover teachers may favor a form of organization which includes supervisory personnel together with rank and file teachers. The act should make clear that such an organization is permissible. The act should maximize the ability of teachers to choose their own form of negotiation, but they should not be arbitrarily excluded from its benefits.

112. An act should contain a clause similar to the following:

The Board may upon petition by a union which represents public employees hold hearings for the purpose of determining whether such employees could be granted the right to strike without severely interfering with necessary governmental functions. If after a hearing and upon appropriate findings the Board determines that granting the right to strike to a governmental bargaining unit would not endanger the public health, safety, or welfare it may determine that the bargaining unit constitutes a non-essential governmental bargaining unit. If such a determination is made, the employees in the unit have the right to strike and engage in concerted activity to the same extent as nongovernmental employees covered by this act.

113. See generally Moskow, Teachers and Unions (1966). In New York City CORE and SNCC picketed outside a newly-constructed school in a Negro neighborhood to force selection of a Negro in place of the already-designated white principal. The teachers' union played a significant role in resisting this pressure on behalf of the policy of selecting school principals on the basis of merit without regard to race. See New Yorker, 44-45 (Oct. 1, 1966).
The Resolution of Bargaining Impasses in the Public Service

Since most public employees would not be permitted to strike under the proposed bill an alternative to economic pressure must be found for resolving bargaining impasses. While no completely satisfactory substitute exists, several possibilities can be considered.

In the federal service, Executive Order 10988 does not deal with this issue. But the subsequent implementation of the order in the postal service provides that if the original negotiators cannot agree, the matter is forwarded to high level union and management officials with final resolution left to the agency head. This method of resolving bargaining impasses has been the least satisfactory aspect of the implementation of Executive Order 10988.114 Most states which prohibit strikes but permit bargaining either do not deal with the matter or provide for elaborate mediation and fact-finding procedures.115 These provisions and recommendations by fact-finding committees do not say what is to be done if this mediation is unsuccessful or if the fact-finding committee's recommendations are unacceptable. While resort to mediation and non-compulsory recommendations in private industry has been less than completely successful, there is reason to believe that a recommended settlement in public service will have much more impact. The agency head who rejects the recommendation of a fact-finding commission is much more vulnerable to public censure than is a private businessman. A union official who rejects the proposal has no legal alternative, and illegal strikes are much less likely when engaging in them jeopardizes the established bargaining rights and relationship. It is likely that providing a procedure leading first to mediation and finally to the appointment of a fact-finding committee with powers of recommendation would be adequate to resolve bargaining impasses in the public service.116 If

116. It is recommended that a clause such as the following be included in a state labor relations act:

In the event that a government agency and the labor organization which represents its employees are not able to reach an agreement during bargaining negotiations either party may certify this fact to the State Commissioner of Labor. Upon receipt of such notification the Commissioner shall assign a mediator to work with the parties to assist them in reaching an agreement. If after twenty days, the mediator decides that further negotiation is likely to be fruitless he may certify to the Commissioner that an impasse exists. The Commissioner shall then appoint a fact-finding panel of three persons. The panel shall have the power to hold hearings, receive evidence, and compel attendance by the parties. Within 90 days, the panel shall issue a recommendation of settlement with respect to all matters in dispute, copies of which shall
this approach subsequently appears to be unsuccessful, it might be desir-
able to provide for compulsory arbitration. In most cases the governor
will have the power to accept or reject the recommendation of the fact-
finding panel. Thus, if the recommendation is unacceptable to the agency
head, there still exists the possibility that the governor may implement
them.

VI. CONCLUSION

The survey of Indiana law illustrates the need for a labor relations
act embracing public and private employees. The function of such an
act would be to assure free choice by employees and to substitute orderly
procedures for economic combat as the way of solving disputes concern-
ing representation. The type of act suggested would not be entirely satis-
factory to either labor or management but it would protect the basic in-
terests of both. On the other hand, the public, which has a strong inter-
est in industrial peace and in the fair treatment of employees, should be
well served by the establishment of procedures to safeguard employees' 
free choice and to resolve disputes fairly. The most difficult question is
not whether Indiana should have a labor relations law but whether the
divergent personalities and groups which are represented in the Indiana
General Assembly are capable of reaching a consensus with respect to
such an act.

be sent to the parties and to the Governor. The settlement recommendation
shall be a matter of public record.
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